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Niamh Reilly *Editor*

International Human Rights of Women

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International Human Rights

Series Editor

Stephen Hoadley

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Auckland, New Zealand

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Niamh Reilly
Editor

International Human Rights of Women

With 4 Figures and 3 Tables

 Springer

Editor

Niamh Reilly
School of Political Science and Sociology
National University of Ireland
Galway, Ireland

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Series Preface

Welcome to the latest volume in this Springer Nature series of reference handbooks on International Human Rights. This series arose from the conviction by the series editor, shared by chapter contributors and the Springer Nature editorial staff, that protection of human rights not only is but increasingly ought to be an essential element in the policies of all governments, international organizations, and civil society associations. Therefore Springer Nature has sponsored this series of reference handbooks under the title International Human Rights and has successfully solicited the participation of handbook editors and contributors who share a central conviction: that human rights are important and their protection and enhancement should be given high priority.

Why “international”? While it is true that human rights protection is primarily the responsibility of governments, it is also true that governments take their cues from human rights standards that are set out in international treaties, declarations, and initiatives. Even governments that fail, deliberately or inadvertently, to achieve high standards of human rights protection for their citizens are aware, through participation in the Human Rights Council and other UN and regional bodies, and international conferences and courts, of those standards. Through education, emulation, and response to public opinion, it is to be hoped that governments’ behavior will gradually converge with international standards.

It is fitting that the rights of the most vulnerable of human beings, children, is the focus of the volume *International Human Rights of Children*. It is fitting also that the volume *International Human Rights of Women* is devoted to the largest category of human beings, women. The editors are well aware of the linkage that the denial of children’s human rights can follow directly from the denial of rights to the women who care for children. Their contributors explore these linkages, although from the perspective of children’s rights on the one hand and women’s rights on the other. Two premier treaties, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women are the recognized beacons of the two volumes. But the contributors’ analyses of children’s and women’s rights, and their enhancement in the face of persistent violations, go beyond legal treaty obligations to encompass political, economic, social, and moral nuances. To both volumes the dedicated editors have attracted a world-class

set of chapter authors, many of whom bring to their contributions practical experience as well as skills of academic analysis and official policy formulation.

The timely volume *International Human Rights and Counter-Terrorism* in the Springer Nature series analyzes the increasingly troubled policy realm of counter-terrorism, troubled because the policies that governments so often feel obliged to carry out under pressure of time and outrage can intrude into and disrupt the legitimate activities of their citizens. Invasion of privacy is but one violation, albeit the most widespread one. More serious are curtailment of civil liberties, arbitrary arrest and prolonged detention, and targeted killings. Violation of the rights of alleged terrorists until guilt is proven is also a concern. The contributors to this volume, drawn from experts around the globe, delineate the interface between counter-terrorism and human rights and suggest guidelines and limits.

Agreement on high standards of human rights is a necessary first step but is not sufficient without effective action. While governments are expected to apply high standards, it is often international institutions that give them voice and energy. The volume *International Human Rights Institutions, Tribunals, and Courts* in this series provides not only an anatomy of institutions but also information, analysis, and assessment of their initiatives, processes, and achievements. The volume editor, a senior academic and frequent advisor to governments and international institutions, has assembled contributions traversing the institutional landscape from UN treaty and Charter bodies through international and regional courts and tribunals.

Upholding standards and practices of human rights during armed conflict is the focus of the volume *International Human Rights and War*. While the Geneva Conventions provide valuable guidance on the protection of fallen combatants, prisoners of war, and civilians, the principle of “military necessity” often leads governments or commanders in the field to commit violations, whether deliberately or accidentally. This volume aims to clarify what is permissible, and not permissible, in conventional interstate wars as well as in “non-international conflicts” such as civil and secessionist wars and violent sectarian uprisings.

As series editor, and on behalf of the volume editors and the Springer Nature editorial staff, let me commend these reference handbooks to you and to your colleagues, students, and libraries. Our aim is to provide the most current thinking and information on the issues surrounding the human rights of children and women, the international institutions that set and implement standards, and the dilemmas endemic on counter-terrorism and war.

University of Auckland
Auckland, New Zealand
October 2019

Stephen Hoadley
Series Editor

Volume Preface

During the 1990s, a global campaign for women's human rights mobilized around the second World Conference on Human Rights (WCHR) (Vienna 1993). It succeeded in ending the invisibility of abuses in the private sphere and challenging the failure of the international community to address different forms of gender-based violence (GBV) as violations of human rights. Moreover, the broad movement for women's human rights is underpinned by a critical gender analysis that encompasses recognition of LGBTIQI human rights. The chapters in this volume explore the array of human rights norms, mechanisms, and practices that resulted, aimed at combating or ending impunity for GBV and mainstreaming a gender perspective across all human rights systems. This includes, for example, the creation of the UN special rapporteur on violence against women and adoption of an optional protocol to CEDAW to enable individual cases of violence against women to be brought to the committee, as well as efforts to introduce a gender perspective into implementation of other UN treaties, such as the Convention on the Rights of Persons with Disabilities. There have also been major developments at the regional level including the Inter-American Convention of Belém do Pará on Violence Against Women, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), and the Association of South-East Asian Nations Declaration on the Elimination of Violence Against Women and Children (2013) and Regional Plan of Action on the Elimination of Violence Against Women (2015). While recognition of GBV as a human rights issue was a pivotal achievement of the 1990s, the period also put a spotlight more generally on different forms of GBV. For example, the human rights dimensions of the nexus of GBV and trafficking and the prevalence of conflict-related sexual violence have emerged as prominent concerns of the last two decades.

The Vienna WCHR was also significant for formally establishing the indivisibility of all human rights. The idea of the indivisibility of rights is not always immediately associated with efforts to advance the human rights of women and LGBTIQI people. However, a recurring theme in the chapters of this volume is that the realization of human rights, especially of groups that are marginalized in societies in different ways – whether politically, socially, economically, and/or culturally – requires systematic implementation of the principle of indivisibility.

Implementing the human rights of women and LGBTQI people, therefore, involves pressing for greater acceptance of the three-part obligation on States Parties to respect, protect, and fulfill their rights obligations. That is, the role of the state in ensuring access to safe and affordable reproductive and sexual healthcare and food and shelter, as well as to decent work and a livable income, is no less important in achieving the human rights of women and LGBTQI people than ensuring these groups' rights to freedom of expression, association, and belief, and to due process and equal protection of the law. While the civil and political rights of women have received less attention in recent decades, many forms of direct and indirect discrimination persist in this domain. Chapters in this volume address a range of timely issues in this regard including the under representation of women in parliamentary democracies worldwide and persistent gender discrimination in nationality laws in about one quarter of the world's countries.

Questions about what is meant by the universality of human rights and claims that human rights are simply a reflection of Western dominance in the world are a major part of contemporary human rights discourse, especially as it relates to women and gender. Typically, strong culturally relativist positions are deemed incompatible with achieving the human rights of women and LGBTQI people. At the same time, top-down notions of the universality of human rights that misconstrue cultural difference as inherently inimical to human rights (e.g., Muslim women's head covering) are open to criticism on the basis of the very human rights standards being defended. The chapters in this volume dealing with culture reject the standard "universal rights versus culture" binary. A common theme espoused by authors is that static or stereotyped conceptions of culture are both false and counterproductive in efforts to advance the human rights of women. Rather, a gendered, context-specific analysis of culture is advanced as essential to understanding the nature of human rights issues facing women in any given context and to devising the remedial actions required, informed by those directly affected.

A transformative approach to achieving the human rights of women entails recognition of differences between women. It is now well established that any contemporary feminist project cannot assume that women are a monolithic group with a "natural" common agenda. Yet, gender power relations remain dominant in most societies and operate with other aspects of experience and identity – including class, "race," ethnicity, sexuality, religion, ability, age, among others – to distribute power and resources in ways that confer advantage or disadvantage unfairly. This understanding is what most people mean by an intersectional approach – a perspective that recognizes that different women experience gender-based disadvantage or oppression differently. A commitment to using an intersectional approach is evident throughout this volume. In the wider literature, however, there is a tendency to view intersectionality mainly as a lens to name and describe myriad forms of increased or exceptional vulnerability to human rights abuses and harms. While it is necessary to examine the relationship between intersectionality and vulnerability to violations of rights, there are dangers that the concepts of "intersectionality" and "vulnerability" will serve mainly to amplify narratives of victimization and helpless "vulnerable groups" in counterproductive ways. In contrast, a transformative approach to human

rights, exemplified by the chapters in this volume, focuses on what is required to create conditions of empowerment, informed by an awareness of how intersectionality and vulnerability operate in complex ways in different people's lives.

Finally, a strong recurring theme in many of the chapters in this volume is the urgency of attending to root causes of violations of human rights. The transformation of entrenched forms of structural inequality and disadvantage – along lines of gender, “race,” ethnicity, class, ability, legal status, and other configurations of unequal power relations – must be at the center of efforts to translate human rights laws and norms into concrete positive change on the ground. The creation of international laws and norms that take the human rights of women seriously is an indispensable step, but it is not an end in itself. In order for human rights laws and norms to be transformative, they must be linked to comprehensive initiatives that tackle the root causes of the violations they address, from the ground up.

September 2019

Niamh Reilly

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About the Series Editor



Stephen Hoadley

University of Auckland
Auckland, New Zealand

Stephen Hoadley teaches international security policies and human rights at the University of Auckland, New Zealand, where he is Associate Professor of Politics and International Relations and a contributor to the master's degree on Conflict and Terrorism Studies. In the 1990s, he served on the Ministerial Advisory Committee for the Intelligence and Security Agencies Amendment Act. In 2000 Stephen inaugurated a master's degree program in International Relations and Human Rights, which included a module on human rights issues arising from counter-terrorism policies in the USA, Europe, and New Zealand. Subsequently, he conducted a comparative research project on counter-terrorism policies in the USA and Europe and transatlantic security cooperation. Assuming the role of Series Editor of the International Human Rights handbooks for Springer Nature in 2014, he drafted the format for the current volume on *International Human Rights of Women* and made preliminary contacts with the editor and prospective chapter contributors. Stephen Hoadley is a graduate of the University of California at Santa Barbara and a former US Navy intelligence officer. He has taught international security relations also at Washington University at St Louis, USA; Kobe Gakuin University, Japan; and Chinese University of Hong Kong.

About the Editor



Niamh Reilly is Established Professor of Political Science and Sociology at the National University of Ireland, Galway. Her research interests focus on the relationship between theory and practice and the role of ideas in emancipatory projects. Niamh has published widely on issues of human rights and gender; feminist political and social theory; religion in the public sphere; transnational movements and the United Nations; and women, peace, and security. Her book, *Women's Human Rights: Seeking Gender Justice in a Globalizing Age* (Polity Press, 2009), was selected as an "Outstanding Academic Title for 2010" by the American Library Association/CHOICE. Niamh is coauthor of *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights* (UNIFEM 1994). Her edited collections include *Religion, Gender, and the Public Sphere* (Routledge 2014) (lead editor) and *International Human Rights of Women* (Springer, Major Reference Works, 2019).

Contributors

Zahra Albarazi Eindhoven, The Netherlands

S. Bawa Department of Sociology, Faculty of Liberal Arts and Professional Studies, York University, Toronto, ON, Canada

Josephine A. Beoku-Betts Center for Women, Gender, and Sexuality Studies, Florida Atlantic University, Boca Raton, FL, USA

Deirdre Brennan Melbourne University, Melbourne, Australia

Charlotte Bunch Department of Women's and Gender Studies, Rutgers, The State University of New Jersey, Rutgers, NJ, USA

Sheila Daur Institute for the Study of Human Rights, Columbia University, New York, NY, USA

Danielle DerOhannessian Philadelphia, PA, USA

Heather Douglas TC Beirne School of Law, University of Queensland, Brisbane, QLD, Australia

Ebenezer Durojaye Dullah Omar Institute, University of the Western Cape, Cape Town, South Africa

Diane Elson Department of Sociology, University of Essex, Colchester, UK

Andrea Espinoza-Kim Global Health Justice Partnership, Yale University, New Haven, CT, USA

Sandra Fredman Rhodes Professor of the Laws of the British Commonwealth and the USA, Oxford University, Oxford, UK

Marsha A. Freeman University of Minnesota Human Rights Center, Mondale Hall, University of Minnesota Law School, Minneapolis, MN, USA

Susana T. Fried Global Health Justice Partnership, Yale University, New Haven, CT, USA

Marsha A. Freeman has retired.

Ruth Gaffney-Rhys University of South Wales, Pontypridd, Wales, UK

Silvia Gagliardi Irish Centre for Human Rights, NUI Galway, Galway, Ireland

Judith Gardam Law School, University of Adelaide, Adelaide, SA, Australia

Aisha K. Gill Department of Social Sciences, University of Roehampton, London, UK

Savitri W. E. Goonesekere Emeritus Professor of Law University of Colombo, Colombo, Sri Lanka

Paul Harpur TC Beirne School of Law, University of Queensland, Brisbane, QLD, Australia

The Burton Blatt Institute, Syracuse University, Syracuse, NY, USA

Amie Lajoie School of Sociology and Political Science, National University of Ireland – Galway, Galway, Ireland

Claire McGing Social Sciences Institute and Department of Geography, Maynooth University, Maynooth, Ireland

Ciara O’Connell Centre for Human Rights, Faculty of Law, University of Pretoria, Pretoria, South Africa

Attilio Pisanò Department of Juridical Sciences, University of Salento, Lecce, Italy

Jaya Ramji-Nogales Temple University, Beasley School of Law, Philadelphia, PA, USA

Niamh Reilly School of Political Science and Sociology, National University of Ireland, Galway, Ireland

Heather Smith-Cannoy Lewis & Clark College, Portland, USA

K. Steiner Law School, La Trobe University, Melbourne, VIC, Australia

Laura van Waas Department of European and International Law, Tilburg University, Tilburg, The Netherlands

Valorie K. Vojdik University of Tennessee College of Law, Knoxville, TN, USA



Women, Gender, and International Human Rights: Overview

Niamh Reilly

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Abstract

This chapter reviews the many achievements of the last 25 years – expressed in the proliferation of laws, norms, and mechanisms – to advance the human rights of women and LGBTQI people and considers in five subsections what is required to achieve their implementation. First, it appraises the major achievement of ending the invisibility of myriad forms of gender-based violence (GBV) and expanding the contexts in which GBV is understood as a complex violation of human rights and, in some situations, a war crime and crime against humanity. Second, it traces a growing consensus that implementation of the human rights of women is inextricable from putting into practice recognition of the indivisibility of human rights. Third, it considers fresh discussions of the supposed binary of “universal human rights” versus and “culture,” concluding that the construct denies the gender harms perpetuated by patriarchal cultures across “the West” and distracts attention from the imperative that human rights implementation must be context-specific in every part of the world. Fourth, it is argued, any twenty-first-

N. Reilly (✉)
School of Political Science and Sociology, National University of Ireland, Galway, Ireland
e-mail: niamh.reilly@nuigalway.ie

century agenda for the human rights of women must proceed from a critical, intersectional perspective – one that recognizes that different women and LGBTQI people experience gender-based disadvantage or oppression differently. Moreover, the concepts of intersectionality and vulnerability deployed in this endeavor must focus on the state and non-state actions required to create conditions that ameliorate vulnerability, and under which differently situated women can access and enjoy their human rights. Finally, implementation of commitments to the human rights of women must address root causes – that is, seek to transform the institutions and structural conditions that perpetuate the disadvantages and unequal power relations that foster vulnerability to abuses of human rights in the first place.

Keywords

Gender-based violence · Human rights of women · Indivisibility · Intersectionality · Vulnerability

Introduction

Advocacy for the human rights of women has been a feature of the United Nations (UN) since its foundation in 1945. The UN Decade for Women (1976–1985) and the post-Cold War revival of interest in more comprehensive visions of human rights provided added impetus to these efforts. In the 1990s, momentum gathered as growing numbers of feminist activists, networks, and nongovernmental organizations (NGOs) engaged with the different institutions of the UN involved in defining global agendas (Reilly 2009). Effective campaigns targeted the Second World Conference on Human Rights (Vienna 1993), the Fourth World Conference on Women (Beijing 1995), and a series of other UN world conferences over the same decade, addressing policy challenges relating to the environment, population and development, sustainable development, and anti-racism, as well as the establishment of the International Criminal Court in 1999.

This volume is a showcase of the tremendous achievements of the last 25 years expressed in the proliferation of laws, norms, and mechanisms to advance the human rights of women and LGBTQI people, and a reminder of the importance of continuing to develop and apply critical, intersectional gender analyses to contemporary human rights thinking and practice. The latter is not a straightforward undertaking. The gains secured through various campaigns in recent decades continue to meet with political resistance (Bunch and Reilly, chapter ► [“Women’s Rights as Human Rights: Twenty-Five Years On,”](#) this volume). Arguments are still frequently made that UN norms vis-à-vis gender equality and human rights reflect the imposition of “Western” values, are individualistic, anti-family, and/or contrary to religious or cultural values of communities, or a threat to national sovereignty. Further, the “war on terror” and a string of devastating conflicts and related migrant crises have eroded the credibility of international human rights and humanitarian paradigms in the early twenty-first century. These developments, especially under conditions of persistent

global inequalities, the seemingly cynical use or flouting of international law by dominant powers, and democratic deficits throughout the UN, can make it difficult for progressive voices to defend and promote the emancipatory potential of international human rights. Against this, it can be argued that highly visible failures in human rights protection and implementation only underline the imperative of retaining and re-energizing global political commitment to upholding the principle of “all human rights for all” and of the international community providing the necessary resources to back that commitment.

The chapters in this volume highlight the many gains achieved, as well as what is required to realize more concretely the international human rights of women in all of their diversity, and to challenge all gender-based forms of human rights violations. Since the inception of current human rights systems, this has entailed questioning various established ways of defining and doing human rights that have thwarted recognition and realization of the human rights of women. The unfolding story of the achievement of such recognition, therefore, is a story of multiple contestations over definition and meaning and struggles to secure the political will and resources necessary to translate rhetorical recognition into meaningful change on the ground. The following sections set out the main arenas of contestation that the chapters in this volume address as they explicate various efforts to advance the human rights of women and to combat gender-based violations of human rights more generally.

- The public–private divide and gender-based violence
- Indivisibility of rights – a gender issue
- Universality, culture, and context
- Difference, intersectionality, and vulnerability
- Law, implementation, and root causes

The Public–Private Divide and Gender-Based Violence

The role of the liberal public–private divide in perpetuating gender inequalities and thwarting the human rights of women has been widely discussed. In defining the “private sphere” as beyond public accountability, abuses of human rights in private life often go unrecognized and perpetrators are not held accountable for their actions. Moreover, the usual invisibility of gender-specific abuses in the private sphere is accentuated by a bias in traditional human rights discourse that focuses primarily on state-sponsored violations. As Susan Okin notes:

The Universal Declaration of Human Rights . . . is frequently referred to as being addressed exclusively to governments as potential violators of human rights, and not at all to individual persons. . . . [But] the Declaration by no means [has as] its sole intent to warn governments against their own potential for violation. To the contrary, besides hardly mentioning governments at all, it suggests strongly that at least some of the obligations correlative to the rights it pronounces fall on individuals as well as on states. (Okin 1981, p. 239)

The global campaign for women's human rights mobilized around the Second World Conference on Human Rights (WCHR) (Vienna 1993). It successfully challenged the invisibility of abuses in private contexts of family and intimate relationships, and the failure of the international human rights community to recognize different forms of gender-based violence (GBV) as violations of human rights (Bunch 1990; Bunch and Reilly 1994). As documented in this volume by Sheila Dauer, this spurred the adoption of many new global human rights norms aimed at combating or ending impunity for GBV. A UN special rapporteur on violence against women was established; an optional protocol to CEDAW was adopted (UNGA 1999), which enabled individual cases of violence against women to be brought to the committee; and a commitment to mainstreaming gender in the work of all treaty bodies included a broader understanding of GBV (ibid.). There have also been important developments at the regional level including groundbreaking decisions at the Inter-American Commission and Court of Human Rights and the adoption of the Inter-American Convention of Belém do Pará on Violence against Women (for a detailed discussion see O'Connell, chapter ► [“Women's Rights and the Inter-American System,”](#) this volume). In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) has added very significantly to the repertoire of global standards for women's rights (for a detailed discussion see chapters ► [“Human Rights Responses to Violence Against Women”](#) and ► [“Women and the Human Rights Paradigm in the African Context”](#) by Dauer and Bawa respectively, this volume). More recently, adoption of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) represented a significant leap forward (Dauer, chapter ► [“Human Rights Responses to Violence against Women,”](#) this volume). Attilio Pisanò (chapter ► [“The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children,”](#) this volume) charts the long road from the Vienna WCHR to the adoption by the Association of Southeast Asian Nations (ASEAN) of its Declaration on the Elimination of Violence Against Women and Children (2013) and Regional Plan of Action on the Elimination of Violence Against Women (2015).

Notwithstanding the recognition of GBV as a human rights issue evident in the array of norms, mechanisms, and decisions noted above, gender-based violence in myriad forms continues to be prevalent. Recent UN data (UNSD 2015) estimate that one in three women worldwide have “experienced physical/sexual violence at some point in their lives” while less than 10% sought help from the police and less than 40% sought help from anyone. Further, two of three victims of intimate partner/family-related homicide are women (ibid.). While aggregate statistics are helpful in pointing to persistent underlying patterns of unequal gender power relations, it is also essential to deepen understanding of how different groups experience GBV in different ways. For example, writing about the role of national courts in recognizing the sexual and reproductive health and rights of adolescents in Africa, Durojaye (chapter ► [“Advancing Sexual and Reproductive Health and Rights of Adolescents in Africa: The Role of the Courts,”](#) this volume) notes “high incidences of sexual violence among adolescents especially in South Africa, where it is almost becoming an

epidemic.” Harpur and Douglas (chapter ► [“Disability, Domestic Violence, and Human Rights,”](#) this volume) discuss how “people with disabilities experience domestic and family violence both more often and differently to those who do not have a disability.” For example, survivors of domestic and family violence “who rely upon mobility aids, medication, or medical technologies are extremely vulnerable to [abusive] partners who restrict access to such items” (ibid.).

While recognition of violence against women in private contexts by private actors as a human rights issue was a pivotal achievement of 1990s campaigns for women’s human rights, it also served to highlight different forms of GBV as abuses of human rights and to challenge the adequacy of other branches of international law in addressing them. For example, in relation to sex trafficking, Smith-Cannoy (chapter ► [“Sex Trafficking and International Law,”](#) this volume) comments: “modern slaves – be they Albanian women sold into prostitution in Italy, children working in the agricultural industry as bonded laborers in India, or Burmese women working in Thai brothels – are all subject to brutality and violence, forced to work, and paid little to nothing for their servitude” (p. 5). Gardam (chapter ► [“Women’s Human Rights and the Law of Armed Conflict,”](#) this volume) observes that, in 1993, the new focus on GBV as a human rights issue, “led to consideration of these activities in armed conflict as so much of the violence against women occurs during such times.” Ramji-Nogales and DerOhanessian (chapter ► [“Female Forced Migrants: Accountability Gaps in International Criminal Law,”](#) this volume) outline the many gendered harms experienced by forced female migrants in situations of violent conflict, which fall outside the protection of international criminal law. Vojdik (chapter ► [“Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence,”](#) this volume) addresses another dimension of the nexus of GBV and conflict situations. She discusses how for decades “military and civilian peacekeepers across the globe have engaged in rape, sexual assault, forced prostitution, trafficking, and sexual exploitation of women and children” and provides a comprehensive critique of the inadequacy of existing “mechanisms for policing and punishing peacekeeper [sexual exploitation and abuse] ... creating a culture of impunity.” Staying with this theme, Rhys-Gaffney (chapter ► [“International Law and Child Marriage,”](#) this volume) notes how GBV in conflict situations drives child marriage. Finally, Bunch underlines the problem of “internet violence where the amount of harassment of women, bullying and sexual violence is shocking” (Bunch and Reilly, chapter ► [“Women’s Rights as Human Rights: Twenty-Five Years On,”](#) this volume).

Indivisibility of Rights: A Gender Issue

Traditionally in western human rights discourse, civil and political rights have trumped economic, social, and cultural rights. Feminist human rights scholars have argued that this hierarchy of rights is gendered because it defines human rights priorities according to the criterion of “what men fear will happen to them” in their relationship with the state, society, and other men (Charlesworth 1994, p. 71).

Of course, it remains vitally important to challenge all state-sponsored abuses of civil and political rights such as denials of freedom of expression and association, or arbitrary detention or torture by state authorities. A problem of structural gender bias arises, however, when a negative understanding of civil and political rights (i.e., non-interference of the state, which protects the interests of the privileged) is systematically prioritized over positive economic, social, and cultural rights that are essential to transforming the inequalities and social exclusion affecting the less privileged.

In addition to recognizing “women’s rights as human rights” and GBV as a violation of human rights, the Vienna WCHR is historically significant for formally establishing the indivisibility of all human rights. Goonesekere (chapter ► [“The Indivisibility of Rights and Substantive Equality for Women,”](#) this volume) argues persuasively this was a pivotal turning point in generating a more robust approach to holding both state and non-state actors accountable for ensuring the conditions of enjoyment of economic and social rights. Goonesekere traces how the notion of the indivisibility and interdependence of rights has developed since 1993, through the work of the UN treaty body system, as well as in national litigation and regional human rights cases. In doing so, she demonstrates the possibility of transformative understandings of substantive equality – in which the imperative of providing the structural conditions necessary to enable realization of economic and social rights is recognized, e.g., access to education, housing, healthcare, and livelihoods. For Goonesekere, this transformative potential derives from growing acceptance of the three-part obligation on states parties to respect rights (i.e., to refrain from violating rights directly); protect rights (i.e., to hold third parties accountable when they violate human rights); and fulfill rights (i.e., to provide the resources necessary to meet core obligations in the domain of social and economic rights).

Diane Elson (chapter ► [“Securing the Social and Economic Rights of Women in Economic Policy Making,”](#) this volume) expands upon the third part of states’ obligations to fulfill their human rights commitments, specifically in the formulation of economic policy. Drawing on the Women’s Convention (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and outputs of their respective committees, Elson delineates a comprehensive framework for monitoring compliance with human rights in different branches of policy (e.g., public expenditure, taxation, overseas development, government borrowing, and monetary policy). The main parameters of the framework she presents are non-discrimination and equality, progressive realization of social and economic rights, use of maximum available resources, avoidance of retrogression, satisfaction of minimum essential levels of rights, and participation, transparency, and accountability. Taking a global view on indivisibility, Bawa (chapter ► [“Women and the Human Rights Paradigm in the African Context,”](#) this volume) underlines the “intricate interconnection of global policies and women’s rights.” She observes that neoliberalism has generated “extreme poverty and powerlessness for women in low income countries” and this requires comprehensive “empowerment mechanisms” to address both “global economic inequities” and “local patriarchal traditions” (ibid.). According to Bawa, however, too often there is a failure to address indivisibility on this global, structural level and instead to focus narrowly on contesting “local cultural traditions that privilege men.”

Writing on evolving interpretations of Article 14 (equality guarantee) of the European Convention on Human Rights, Sandra Fredman in this volume further theorizes substantive equality as comprising four interdependent dimensions. These are redistribution to redress material disadvantage; amelioration of harms caused by stigma, stereotyping, and violence to enact recognition and dignity; facilitation of participation to ensure decision makers hear and heed the voices of excluded groups, including the least vocal within those groups; and accommodation and celebration of difference through the transformation of social structures and institutions to ensure social inclusion. Very significantly, all three accounts of substantive equality elaborated in this volume by Goonesekere, Elson, and Fredman view the practical implementation of indivisible rights as a prerequisite for the realization of the human rights of women and, expressly in Fredman's chapter, the human rights of LGBTQI people.

Since the International Conference on Population and Development (Cairo 1994), efforts to achieve reproductive and sexual rights have become a major part of global advocacy for the human rights of women and LGBTQI people. Challenges in this area illustrate particularly well the indivisibility and interdependence of the full spectrum of human rights. Bunch notes the significant progress made in relation to maternal mortality in this regard "which brings together the civil and political right to life with the socio-economic right to healthcare . . . incorporated into the UN's . . . Sustainable Development Goals (SDGs)" (Bunch and Reilly, chapter ► ["Women's Rights as Human Rights: Twenty-Five Years On,"](#) this volume). Analyzing national court decisions that uphold the reproductive and sexual rights of adolescents in Africa, Durojaye (chapter ► ["Advancing Sexual and Reproductive Health and Rights of Adolescents in Africa: The Role of the Courts,"](#) this volume) demonstrates the impossibility of respecting the civil and political rights of young adolescent women to bodily integrity and autonomy without also affirming rights to access affordable healthcare and contraception. Fried and Espinoza-Kim (chapter ► ["Sexual Health and Sexual Rights,"](#) this volume) build on similar themes. They posit a three-part framework for advancing sexual rights, including drawing on public health evidence to challenge criminalization and support sexuality-related rights, affirming rights related to bodily autonomy, and promoting positive sexuality, particularly through access to information and the power it gives to make decisions. Like Durojaye, Fried and Espinoza-Kim foreground the interdependence of negative *and* positive rights – such as the right not to be criminalized because of your gender or sexual identity and the right to make "free and informed choices about sexuality regardless of sex characteristics, physical or other challenges, sexual orientation, gender identity, procreative intention, etc." (ibid.).

Although the civil and political rights of women have received less attention in global campaigns in recent decades, many forms of direct and indirect discrimination persist in this domain. As McGing notes, while the overall trajectory is in a positive direction, currently women comprise only about one quarter of members of parliaments worldwide (McGing, chapter ► ["Electoral Quotas and Women's Rights,"](#) this volume). One impediment to progress is a pervasive failure to fully appreciate the interdependence of all human rights. Exercising political rights, such as running for election, is deeply reliant on a range of structural social, economic, and cultural conditions that, typically, are more available to privileged men than to women

or marginalized groups, including in better-off, democratic societies. Conversely, denials of political and civil rights, inexorably, have adverse implications for economic, social, and cultural rights. On the issue of gender discrimination in nationality laws, Van Waas, Albarazi, and Brennan (chapter ► [“Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality,”](#) this volume) report that more than 50 countries continue to deny female citizens the same rights as their male counterparts to confer nationality to non-national spouses, which “impacts women’s rights, engenders statelessness [of family members] and affects children.” Further, underlining the indivisibility of rights, the authors stress, “[g]iven the role that nationality plays in unlocking access to socio-economic rights and services, addressing problematic nationality policies is critical to the achievement of many of the development Goals and Targets” (Van Waas et al., chapter ► [“Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality,”](#) this volume). Moreover, there are also worrying intersectional aspects to this matter. Van Waas, Albarazi, and Brennan flag that gender discrimination in nationality laws is not only an expression of formal patriarchy – increasingly, such laws are instrumentalized in states’ management of migration to control the “the confessional balance of the country” (ibid.).

McGing provides an overview of the factors that inhibit and support greater participation of women in politics worldwide. The former includes the necessity to navigate successfully male-dominated political space and culture, as well as a still pervasive gendered division of labor, wherein women continue to carry more responsibility for caring and family responsibilities than do their male peers. Amie Lajoie (chapter ► [“Women Human Rights Defenders,”](#) this volume) finds similar constraints facing women human rights defenders, both in relation to family life and in pervasive perceptions among human rights activists that women defenders are “more vulnerable” than male defenders because of their gender. Regarding supporting factors, McGing draws on global comparative data to show that “electoral gender quotas have significantly advanced women’s access to parliamentary politics” (McGing, chapter ► [“Electoral Quotas and Women’s Rights,”](#) this volume). Moreover, the legitimization of quotas as a sanctioned human rights strategy of CEDAW – i.e., temporary special measures – has contributed significantly to their success and to countering some of the widespread opposition to the use of quotas. Furthermore, McGing confirms that increased numbers of women representatives are associated with a higher priority given to policies relating to education, health, and social welfare. Hence, it can be said, more women exercising their political rights fosters conditions more conducive to realizing visions of substantive equality and indivisible rights more generally.

Universality, Culture, and Context

Questions about the meaning of the universality of human rights – and whether human rights simply express “western hegemony” and, therefore, are fundamentally at odds with respect for cultural diversity – are a major part of contemporary human

rights discourse, especially as it relates to women and gender. Typically, strong culturally relativist positions are deemed incompatible with achieving the human rights of women and LGBTQI people. At the same time, any defense of the universality of human rights that endorses forms of top-down or imposed universalism and which construes cultural difference as inherently inimical to human rights (e.g., Muslim women's head covering) stands open to criticism on the basis of the very human rights standards it purports to uphold. The work of Abdullahi A. An-Na'im is a well-regarded example of moderate cultural relativism. He holds that an "insufficiency of cultural legitimacy of human rights standards" is a primary cause of violations of human rights around the world (An-Na'im 1992, p. 19). An-Na'im unequivocally affirms existing international human rights standards, but argues the need to enhance their cultural legitimacy — in the context in which human rights advocates wish to see them take hold — through internal dialogue aimed at developing interpretations of human rights in light of local norms and values. On the face of it, An-Na'im's "cultural legitimacy thesis" (CLT) has much appeal as a dialogic framework that eschews both traditionalist cultural relativism and rejects the external imposition of the human rights agendas of dominant powers. However, it also poses threats to the human rights of women and non-conforming members of wider groups based on cultural-religious identity. The cross-cultural dialogue element of An-Na'im's account, for example, relies on a scenario wherein the understanding of what is or is not a human rights concern in a given context, is brokered by the elites in that culture. In summary, the human rights of certain individuals or subgroups within a community may not be respected and protected in a communitarian dialogue that is dominated by privileged, usually male, elites. This is especially a concern for women, who invariably constitute the primary locus of enforcement of cultural mores and identity, especially with regard to sexuality, marriage, and reproduction (Yuval-Davis 1997).

At the other end of the spectrum, Jack Donnelly's work best captures a mainstream universalist stance on human rights. He rejects strong cultural relativism, which holds that "culture is the sole source of the validity of a moral right," and strong universalism on the other side, which asserts that "culture is irrelevant to the validity of moral rights" (Donnelly 1989, pp. 110–112). However, like most mainstream proponents of universalism, Donnelly gives too little space to local agency and context in determining the meaning and content of human rights. This flows primarily from an analytical framework that is embedded in an uncritical modernization narrative. Most notably, Donnelly explicitly equates what he sees as a growing *de facto* acceptance of human rights standards around the world with a linear process of western modernization. This narrative relies on notions of a dynamic West, holding the key to transcendent truth and justice, while the "backward" developing world is mired down in the particularities of culture and tradition, until globalization whittles away the distinctions to create a homogenized, westernized "global culture." As Arati Rao notes, this construal of events is deeply flawed because it fails to recognize that the "concept of human rights itself is a historically circumscribed and context-bound phenomenon" (Rao 1995, p. 168). This failure, Rao argues, generates an "overly simple notion of the relationship

between culture and human rights in our world of differences . . . with universalists falling on one side and relativists on the other" (p. 168).

In this volume, Silvia Gagliardi presents a new, comprehensive survey of "universality vs. relativity" debates with a focus on the human rights of indigenous and minority women. Her review traverses literatures on feminist international law, Islam and women's human rights, and postcolonial and gender critiques of human, women's, and minority group rights. She recognizes the importance of group rights in struggles against threats of "extinction, assimilation [and] exclusion" of minority groups. However, echoing Yuval-Davis, Gagliardi cautions against processes in the name of human rights that could in practice serve to dilute, co-opt, or subvert agency, and against an exclusive reliance on appeals to group rights that obscure the "relations and structures of power [that traverse] minority and indigenous groups themselves."

Bawa also offers a fresh reappraisal of these debates that decenters culture in a chapter in this volume on women and the human rights paradigm in Africa. Bawa argues, "the highly privileged position of culture (as static) in discourses of women's rights in Africa and other non-Western settings, is rather moot." Citing the current wave of global social media "hash-tag" campaigns against sexism, like Arati Rao, Bawa rebuts the "oversimplified idea that the West is a homogenous society where women's individual rights [are fully observed]" and pervasive misrepresentations of the West as "a-cultural" and "a shining example of a human rights habitus." Bawa succinctly observes, "culture does play a role in women's rights concerns everywhere . . . [but] highlighting it as a particular culprit in the case of African countries/societies only serves the purpose of *othering* African societies as unprogressively different" (Bawa, chapter ► ["Women and the Human Rights Paradigm in the African Context,"](#) this volume). In an examination of the social and cultural implications of "honor-based violence," Gill (chapter ► ["Social and Cultural Implications of 'Honor'-Based Violence,"](#) this volume) further develops a nuanced discussion of the role played by "culture" in representing and responding to certain violations of human rights affecting women who belong to minority or migrant families or communities in contemporary Britain. Gill recounts the case of the "honor killing" in 2003 of British teenager Shafiea Ahmed by her parents, after she refused to enter into an arranged marriage. Ultimately, Gill concludes: "The patriarchal gender system in which Shafiea was ensnared did not derive from the Ahmeds' 'backward' rural roots in opposition to enlightened British culture. Instead Shafiea lived under the constraints imposed by both the British patriarchal values to which all British women are subject, and the patriarchal values of her parents' rural Pakistani upbringing" (Gill, chapter ► ["Social and Cultural Implications of 'Honor'-Based Violence,"](#) this volume).

The entwinement of culture and religion in politics and state institutions is a recurring motif in discussions about obstacles to the human rights of women. In this volume, Steiner examines this nexus in the context of legal pluralism in Malaysia, with a particular focus on efforts of the CEDAW committee to challenge religious influence in law and policy that is detrimental to women's equality and rights. Steiner's chapter reveals the complex and conflicted interrelation among actors of the different branches of government, religious leaders, and civil society, including the organization Sisters in Islam (SIS). Inspired by An-Na'im's cultural

legitimacy thesis, SIS has a long record of engagement with religious and state authorities to advance constitutional, pro-democratic and pro-gender equality interpretations of Islamic law in public life and family policy (Reilly 2017). Steiner discusses various impediments to the implementation of progressive interpretations of religious law that are advocated by SIS and others in Malaysia. Nonetheless, her chapter provides a valuable window on the dynamics of an important interface of engagement between locally rooted, context-specific advocacy for the human rights of women and global monitoring of human rights implementation.

A common theme across the chapters of this volume that address questions of culture is that static, essentialist, or stereotyped conceptions of culture are both false and counterproductive in efforts to advance the human rights of women. As Bawa describes it: “culture is another way of referring to the social, political, economic and religious make up and dynamics of society . . . [and] cultural excuses, legitimations and discourses in rights concerns . . . are ultimately about prevailing power dynamics” (Bawa, chapter ► “[Women and the Human Rights Paradigm in the African Context](#),” this volume). This is true everywhere and not only in so-called developing countries. It follows that a gendered, context-specific analysis of culture in this wider sense is essential to understanding the nature of human rights issues facing women in any given context and to devising the remedial actions required from the bottom up. This means dispensing with the artificial binary of universality versus culture and considering instead universality in context: what, according to the women affected, are the conditions that support realization of their human rights in relevant, context-specific ways?

Difference, Intersectionality, and Vulnerability

A transformative approach to achieving the human rights of women begins with the recognition of difference. Successive waves of feminist critique have established the message that any contemporary feminist project – whether activist or academic – cannot assume that women are a monolithic group with a “natural” common agenda. To the extent that feminist projects do have a common point of departure, it is that gender power relations remain dominant in most societies and operate with other dimensions of experience and identity – including class, “race,” ethnicity, sexuality, religion, ability – to distribute power and resources in various, context-specific ways that confer advantage or disadvantage. Broadly speaking, this understanding is what most people mean by an intersectional approach – a perspective that recognizes that different women experience gender-based disadvantage or oppression differently. Within the human rights paradigm, recognition of the intersectionality of women’s locations, experiences, and identities (Crenshaw 1997, 2000; Collins 2000) calls attention to a complex reality of shifting forms of “multiple discrimination.” Regarding the challenges of addressing the interplay of gender, race, and ethnicity within a women’s human rights framework, intersectionality theorist Kimberle Crenshaw argues that:

Ensuring that all women will be served by the expanded scope of gender-based human rights protections requires attention to the various ways that gender intersects with a range of other identities, and the way these intersections contribute to the unique vulnerability of different groups of women. Because the specific experiences of ethnically or racially defined women are often obscured within broader categories of race or gender, the full scope of their intersectional vulnerability cannot be known and must, in the final analysis, be built from the ground up. (Crenshaw 2000)

A commitment to an intersectional approach is increasingly evident in various domains of human rights practice, especially relating to gender and the human rights of women. For example, Harpur and Douglas (chapter ► [“Disability, Domestic Violence, and Human Rights,”](#) this volume) note that the intersection of gender and disability has been recognized, “either expressly or implicitly as compounding vulnerability,” in most country reports submitted to the Committee on the Rights of People with Disabilities. In a close analysis of the provisions of the Convention of Belém do Pará (OAS 1994) in this volume, O’Connell highlights how it takes into account “the intersectional and compound nature of violence as it disproportionately impacts marginalized and disenfranchised communities.” Specifically, Article 9 requires States Parties to “take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons . . .” (ibid., art 9). In Freeman’s comprehensive account of four decades’ of the work of the UN CEDAW Committee, she observes that the committee “consistently notes the existence of intersectional discrimination – in which women’s ethnicity, class, or religion, for example, are also bases of discrimination” (Freeman, chapter ► [“Women and the Human Rights Paradigm in the African Context,”](#) this volume) in its monitoring of states’ compliance with the treaty.

As Bunch notes in this volume, however, there are difficulties in implementing an intersectional approach to the human rights of women. She elaborates:

Intersectionality is not just adding up boxes of different types of oppression and checking them off . . . [it] requires understanding how these factors often shape each other and produce a gendered expression of racism or a classist version of sexism, for example. Policy makers and implementers need to be trained in the values and changes being sought, as well as in how to identify different factors at play. Seeking to combine basic principles with flexibility in understanding a situation is an ongoing challenge, but finding a way to implement an intersectional gendered approach is crucial to progress . . . (Bunch and Reilly, chapter ► [“Women’s Rights as Human Rights: Twenty-Five Years On,”](#) this volume)

In addition to implementation challenges, there is a tendency in human rights circles, demonstrated by the examples noted above, to view intersectionality only as a lens to name and describe myriad forms of increased or exceptional vulnerability to human rights abuses and harms. While consideration of the relationship between intersectionality and vulnerability to violations of rights is necessary, there are dangers that the concepts of “intersectionality” and “vulnerability” will serve mainly to amplify narratives of victimization and helpless “vulnerable groups” in counter-productive ways. Goonesekere in this volume is highly critical of the how

“vulnerability” figures in contemporary human rights discourse to “encourage the exercise of state discretion in denying women’s rights as part of a ‘protectionist’ approach, when what women really need is protection of their human rights as human beings.” In contrast, a transformative approach to human rights pays attention to what is required to create conditions of empowerment, informed by awareness of how intersectionality operates. Moreover, it focuses on creating environments that ameliorate different forms of vulnerability, rather than on forms of protection that potentially diminish the agency and autonomy of the target “vulnerable groups,” which are also important resources in navigating vulnerability (Kohn 2014).

In this volume, Dauer’s survey of human rights responses to violence against women highlights an important example of a more comprehensive account of intersectionality in a recent report by Special Rapporteur on extrajudicial, summary or arbitrary killings, Agnes Callamard (UNHRC 2017). The latter refers to intersectionality in four distinct ways. First, there is a broad definition of the term, to mean the “interaction between various forms and sources of systems of power and discrimination” (ibid., para 21). Second, the term is used to name “certain groups of women (for example, girl-children, women from ethnic, racial and minority groups and disabled women) as being at particular risk of violence owing to the multiple forms of discrimination they face” (ibid., para 54). Callamard also includes LGBTQI persons among such at-risk groups that states must recognize as such in their policymaking. Significantly, Callamard stresses discrimination as the source of vulnerability rather than intrinsic characteristics of groups. Third, Callamard expands established usage further by calling for “measures to prevent and respond to the multiple intersectional discriminations that perpetuate gender-based killings” as part of “due diligence requirements” and a “focus on prevention and on root causes” (ibid., para 64). The latter makes a clear link between the recognition of intersectional discriminations and the obligation on states to prevent them and address their “root causes.” This redirects the focus away from “vulnerable” individuals and groups to social structures and the structural changes necessary to prevent intersectional forms of discrimination. Finally, Callamard underlines the links between intersectionality and the indivisibility of rights. “A gender-based intersectional analysis” she insists “calls for a greater conceptual and policy based integration between the protection of the right to life and the realization of economic, social and cultural rights” (ibid., para 79). Taken together, the four dimensions of Callamard’s use of the concept of intersectionality (and vulnerability) are indicative of a transformative approach to intersectionality in the implementation of the human rights of women.

Law, Implementation, and Root Causes

Many chapters in this volume tell a decidedly positive story of new laws and norms since the Second World Conference on Human Rights (Vienna 1993), aimed at advancing the human rights of women. In addition to the raft of UN and regional treaty instruments targeting violence against women noted earlier, this includes many new CEDAW general recommendations, e.g., on the rights of migrant and

refugee women or access to justice (chapters ► [“Women and the Human Rights Paradigm in the African Context”](#) and ► [“Human Rights Responses to Violence Against Women”](#) by Freeman and Dauer, this volume). It also encompasses numerous UN Security Council resolutions and national action plans on women, peace, and security (chapters ► [“UN Security Council Resolution 1325: The Example of Sierra Leone”](#) and ► [“Women’s Human Rights and the Law of Armed Conflict”](#) by Beoku-Betts and Gardam respectively, this volume), new policies to combat sexual exploitation and abuse (SEA) by peacekeepers (Vojdik, chapter ► [“Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence,”](#) this volume), and unprecedented enforcement of customary and treaty norms in the Law of Armed Conflict (LOAC), especially regarding conflict-related sexual violence (Gardam, chapter ► [“Women’s Human Rights and the Law of Armed Conflict,”](#) this volume). In addition, the last two decades have seen transformative developments in International Criminal Law, including recognition of many forms of gender-based violence as crimes against humanity and war crimes, and the inclusion of progressive gender-sensitive provisions in the statute of the International Criminal Court (chapters ► [“Women’s Human Rights and the Law of Armed Conflict”](#) and ► [“Female Forced Migrants: Accountability Gaps in International Criminal Law”](#) by Gardam and Ramji-Ngoles and DerOhanessian respectively, this volume). The adoption in 2000 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women, prompted a wave of national action plans and new national legislation in “virtually every corner of the globe” (Smith Cannoy, chapter ► [“Sex Trafficking and International Law,”](#) this volume). In recent years, the UN General Assembly has also passed multiple resolutions on the prevention and elimination of “child, early and forced marriage” (Gaffney-Rhys, chapter ► [“International Law and Child Marriage,”](#) this volume). A number of chapters in this volume provide further discussion of developments in regional human rights standards and mechanisms in Africa (Bawa, Dauer), the Americas (O’Connell, Dauer), Asia (Pisanò), and Europe (Fredman). Other chapters examine the interrelation between domestic and international law vis-à-vis efforts to advance the human rights of women, for example, in Malaysia (Steiner) or Sierra Leone (Beoku-Betts).

While most contributors to this volume welcome the many new laws and norms they discuss, they all also express major concerns about implementation gaps of different types. Harpur and Douglas, for example, recognize the vital role played by the Committee on the Rights of People with Disabilities (CRPD) in raising awareness of disability domestic and family violence, but they are doubtful of the CRPD’s capacity to ensure that states meet their obligations to provide and enforce adequate legislative responses (Harpur and Douglas, chapter ► [“Disability, Domestic Violence, and Human Rights,”](#) this volume). Regarding the elimination of child marriage, Gaffney-Rhys identifies failures to establish proper systems for registering births and marriages, and to set appropriate minimum age limits for marriage, as chronic implementation gaps that must be resolved to address this urgent human rights issue (Rhys-Gaffney, chapter ► [“International Law and Child Marriage,”](#) this volume). On the shortcomings of the Inter-American Human Rights system in this volume, O’Connell criticizes, in particular, the failure to

apply to women's cases the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador). O'Connell argues "only when women's rights violations are investigated using such a multifaceted lens will it be possible to . . . dissect and challenge" underlying gender power imbalances and practices of subordination that target women (O'Connell, chapter ► ["Women's Rights and the Inter-American System,"](#) this volume).

In relation to conflict-affected situations, Gardam commends the "quite radical reinterpretations of existing provisions of LOAC in the statutes and jurisprudence of international criminal tribunals so as to more accurately reflect the ways in which women experience conflict" (Gardam, chapter ► ["Women's Human Rights and the Law of Armed Conflict,"](#) this volume). However, she insists that much more has yet to be done to incorporate into International Humanitarian Law and practice a human rights-based understanding of the effects of indirect gender discrimination in conflicts. Staying with conflict-related gender issues, Beoku-Betts notes that implementation of UN Security Council resolution 1325 often unhelpfully takes the form of "technocratic and institutional solutions" that limit "the extent to which local concerns and initiatives can effectively shape implementation of . . . 1325 NAPs" (Beoku-Betts, chapter ► ["UN Security Council Resolution 1325: The Example of Sierra Leone,"](#) this volume). Moreover, she argues "structural inequalities of poverty . . . and a persistent culture of patriarchy and patronage . . . fuel violence against women and militate against the capacity of women's organizations to confront the state to effectively address their . . . interests" (ibid.). In a similar vein, on the challenges of tackling peacekeeper sexual exploitation and abuse, Vojdik calls on the international community to "prioritize and fund programs to eliminate the social, economic, legal, and political inequalities, [thereby] empowering women to overcome . . . the disadvantages caused by conflict" (Vojdik, chapter ► ["Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence,"](#) this volume). Other contributors to this volume problematize particular laws on a more fundamental level and question whether or not they are appropriate or adequate to address the human rights and needs of women. Ramj-Nogales and DerOhannesian, for example, conclude that the ICC "is an inappropriate mechanism to account for violence against forced migrant women that is private, opportunistic, committed by non-state actors, and/or perpetrated outside a conflict setting" (Ramj-Nogales and DerOhannesian, chapter ► ["Female Forced Migrants: Accountability Gaps in International Criminal Law,"](#) this volume). Smith-Cannoy also raises questions about the criminal justice approach to sex trafficking; she observes "there are often moments during the criminal prosecution of traffickers that necessitate that victims' rights be trampled in the name of securing a conviction" (Smith-Cannoy, chapter ► ["Sex Trafficking and International Law,"](#) this volume).

Overall, a strong recurring theme in many of the chapters in this volume is the urgency of attending to root causes of violations of human rights. The transformation of entrenched forms of structural inequality and disadvantage – along lines of gender, "race," ethnicity, class, ability, legal status, and other configurations of unequal power relations – must be at the center of efforts to translate

human rights laws and norms into concrete positive change on the ground. The creation of international laws and norms that take the human rights of women seriously is an indispensable step, but is not an end in itself. In order for human rights laws and norms to be transformative, they must be linked to comprehensive initiatives that tackle the root causes of the violations they address, from the bottom up.

Conclusion

The Second World Conference on Human Rights (Vienna 1993) was a historic turning point. The resulting Vienna Declaration and Programme of Action recognized for the first time that women's rights are "an integral and indivisible part of universal human rights" (rather than a lesser category of rights) and that violence against women is a violation of human rights. This hard-fought recognition propelled waves of reform aimed at including women and gender issues, in one form or another, across the world's human rights regimes, as well as in other domains of public international law – humanitarian, criminal, and refugee, among others. This chapter provides an overview of many of the main developments in relation to the human rights of women that have taken place since 1993.

First, this includes the major achievement of ending the invisibility of myriad forms of gender-based violence and expanding the contexts in which GBV is understood as a complex violation of human rights and, in some situations, a war crime and crime against humanity. Second, the tremendous efforts since 1993 to implement the new laws and norms relating to the human rights of women reveal that doing so is inextricable from putting into practice recognition of the indivisibility of human rights. These are not separate strands of the Vienna legacy: they are coterminous projects. Third, pitting the idea of universal human rights against "culture," and aligning this dichotomy with a notion of "the West versus the rest," is a false and counterproductive construction. It denies the gender harms perpetuated by patriarchal cultures across "the West" (no less than other regions of the world) and the imperative for every project of human rights implementation to be context-specific and built from the bottom up, with the participation of those whose human rights are being violated or at risk of violation. Fourth, any twenty-first-century agenda for the human rights of women must proceed from a critical, intersectional perspective – one that recognizes that different women and LGBTQI people experience gender-based disadvantage or oppression differently. However, the concepts of intersectionality and vulnerability that are deployed must direct attention to the state and non-state actions required to ensure conditions that ameliorate vulnerability, and under which differently situated women can access and enjoy their human rights. Finally, as noted in the preceding section, implementation of commitments to the human rights of women must address root causes – that is, seek to transform the institutions and structural conditions that perpetuate the disadvantages and unequal power relations that foster vulnerability to abuses of human rights in the first place.

Cross-References

- [Advancing Sexual and Reproductive Health and Rights of Adolescents in Africa: The Role of the Courts](#)
- [Disability, Domestic Violence, and Human Rights](#)
- [Electoral Quotas and Women's Rights](#)
- [Female Forced Migrants: Accountability Gaps in International Criminal Law](#)
- [Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality](#)
- [Gender Equality and the European Convention on Human Rights](#)
- [Human Rights Responses to Violence Against Women](#)
- [International Law and Child Marriage](#)
- [Islam, Law, and Human Rights of Women in Malaysia](#)
- [Social and Cultural Implications of "Honor"-Based Violence](#)
- [Securing the Social and Economic Rights of Women in Economic Policy Making](#)
- [Sex Trafficking and International Law](#)
- [Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence](#)
- [Sexual Health and Sexual Rights](#)
- [The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children](#)
- [The Convention on the Elimination of All Forms of Discrimination Against Women](#)
- [The Indivisibility of Rights and Substantive Equality for Women](#)
- [UN Security Council Resolution 1325: The Example of Sierra Leone](#)
- [Women's Human Rights and the Law of Armed Conflict](#)
- [Women and the Human Rights Paradigm in the African Context](#)
- [Women Human Rights Defenders](#)
- [Women's Rights and the Inter-American System](#)
- [Women's Rights as Human Rights: Twenty-Five Years On](#)

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Part I

Theoretical Approaches and Debates



Women's Rights as Human Rights: Twenty-Five Years On

Charlotte Bunch and Niamh Reilly

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C. Bunch (✉)

Department of Women's and Gender Studies, Rutgers, The State University of New Jersey,
Rutgers, NJ, USA

e-mail: cbunch@igc.org

N. Reilly

School of Political Science and Sociology, National University of Ireland, Galway, Ireland

e-mail: niamh.reilly@nuigalway.ie

Abstract

“Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights,” by Charlotte Bunch (published in *Human Rights Quarterly* in 1990), is considered a classic text in the field of women’s human rights. In it, Bunch sets out her arguments about the importance of connecting women’s rights to human rights in theory and practice and what prevented recognition of women’s rights as human rights. This chapter revisits Bunch’s 1990 article to explore continuity and change in how gender and women’s human rights are viewed 25 years after the UN World Conference on Human Rights (Vienna 1993) declared that “the human rights of women ... are an inalienable, integral and indivisible part of universal human rights.” The chapter is organized around the responses given by Bunch to a series of questions about the continued relevance of the ideas developed in “Women’s Rights as Human Rights” regarding, for example, the current status of human rights as a global ethical and political vision compared to 1990; the nature of the excuses given for inaction on the human rights of women, then and now; and the extent to which the international human rights community has fulfilled its promise in 1993 to prioritize the human rights of women, especially by addressing gender-based violence.

Keywords

Vienna conference · Women’s human rights · Violence against women · Reproductive rights · Social and economic rights · LGBTQI rights · Intersectionality · Culture · Populism · Sovereignty

Introduction

“Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights,” by Charlotte Bunch (1990) (hereinafter, “Women’s Rights as Human Rights”), is considered a classic text in the field of women’s human rights. A central aim of the article was to debunk the then pervasive perception that women’s rights and human rights were two totally separate fields. In “Women’s Rights as Human Rights,” Bunch sets out her arguments about the importance of connecting women’s rights to human rights in theory and in practice. The article illuminates the many impediments that militated against the recognition of women’s rights as human rights and the integration of women’s rights issues into core human rights work. In particular, Bunch names and criticizes the excuses that governments and human rights organizations had traditionally given for not acting on women’s rights, including that they are “not as important [as] ... larger issues that require more serious attention”; although significant, “women’s rights are not human rights per se”; women’s rights are a “cultural, private, or individual matter”; and, finally, to recognize “the abuse of women” would simply “overwhelm other human rights questions” (Bunch 1990, 488).

"Women's Rights as Human Rights" was one of the first articles published in an influential human rights journal to argue that sex-based discrimination is unequivocally an urgent human rights issue because it "kills women daily ... [and] when combined with other forms of oppression ... constitutes a deadly denial of women's right to life and liberty on a large scale" (Bunch 1990, 489). As such the article has played an important role in achieving recognition that violence against women violates human rights. Regarding actions that have been, or could be, taken to remedy the exclusion of gender-based violations from human rights agendas, the article identifies "four basic approaches to linking women's rights to human rights," namely, women's rights as political and civil rights, women's rights as socio-economic rights, women's rights and the law, and feminist transformation of human rights (Bunch 1990, 493–497).

This chapter revisits "Women's Rights as Human Rights" to explore points of continuity and change in how gender and women's human rights are addressed in international human rights thinking and practice 25 years after the 1993 UN World Conference on Human Rights in Vienna formally recognized that "the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights" (WCHR 1993, para 18). The chapter is organized around the responses given by Charlotte Bunch to a series of questions about the continued relevance, or otherwise, of the main ideas developed in "Women's Rights as Human Rights." For example, taking into account criticisms in recent years about the misuse of human rights, does the international human rights framework still have the potential to be a moral vision with global resonance compared to 1990? Further, what are the limits as well as the possibilities of transnational human rights activism as an approach to achieving feminist goals today? Bunch also considers whether the excuses typically given for not acting on women's rights a quarter of a century ago have changed and if the typology of approaches to women's human rights advocacy outlined in the 1990 article remains pertinent.

A few years after the publication of "Women's Rights as Human Rights," the international community finally recognized that "Gender-based violence [is] ... incompatible with the dignity and worth of the human person, and must be eliminated" (ibid.). Given this, Bunch reflects on whether or not gender-based violence is being addressed adequately as a human rights issue 25 years on. She further discusses if the underlying feminist analysis of the political nature of violence against women presented in "Women's Rights as Human Rights" – that is, as a form of domination that reflects patriarchal power relations – has been accepted in human rights circles.

Also addressed here are timely questions for women's human rights advocacy such as: do women's human rights encompass the rights of all woman-identified people, and has an intersectional approach to advancing women's rights been taken up as it needs to be? (With thanks to Jill Adamore for input on these topics.) Bunch also offers a feminist perspective on the wider challenges for human rights advocacy, for instance, transcending the traditional prioritization of civil and

political rights over social and economic rights or responding to arguments about the rights of sovereign states to legislate on issues in line with national “values” where such “values” reject the equal rights of women and/or of sexual or other minorities.

The rest of the chapter is presented under three thematic headings, which address different forms and levels of challenges for women’s human rights advocacy, and a conclusion. The thematic headings are engaging with human rights, integration of women’s rights into human rights, and bringing a feminist perspective to wider human rights issues. There are a number of subsections in each section that map onto questions posed to Charlotte Bunch about her ideas presented in “Women’s Rights as Human Rights.” Each subsection begins with a statement of the context and the questions posed by Niamh Reilly (NR) followed by a response by Charlotte Bunch (CB).

Engaging with Human Rights

International Human Rights: Still a Moral and Ethical Vision with Global Resonance

NR: The “post-9/11” global environment is very different from the post-Cold War context in which the movement for women’s human rights emerged some 25 years ago. Since then there has been tremendous growth in human rights standards and mechanisms and in the diffusion of global norms aimed at realizing women’s human rights. Yet, this is also a time when the credibility of human rights has been strained in the face of increased militarization and security policies of dominant powers that threaten human rights, often while appealing to human rights values. In response to sceptics who question fundamentally the human rights project, Charlotte Bunch argues that, on the contrary, international human rights remains a vitally important global moral and ethical framework in the twenty-first century.

CB: Human rights as a moral vision not only has the potential to provide a way forward, but also it is utilized as a rallying point and framework more than ever by activists today. For example, when women organized the first anti-Trump “Women’s March” at the time of his inauguration in the USA in 2017, they took “Women’s Rights are Human Rights” as their slogan, even though they did not have a prior history of being involved in the “women’s human rights movement.” When they were searching for a broad nonviolent vision for opposing Trump in particular and the right-wing agenda more generally, they turned to the concept of human rights (for discussion of the march, see Women’s March Organizers/Condé Nast [2018](#)). Human rights then is still a visionary goal that conveys the aspiration of people for something that goes beyond just the dictates of power (for an extended positive appraisal of the impact and role of human rights today, see also Sikkink [2017](#)). One of the aspirations of human rights is to put a limit on how state power and domination are exercised and to defend what basic rights people have just by virtue of being human. Human rights also puts limits on intolerant and populist expressions of

democracy and the absolute power of the majority, while the majority may agree with something, that does not necessarily make it “right.” This is still not only a moral framework with global resonance, but an even more important ethical vision for today, when ruthless autocratic power and other authoritarian forces are at work in many settings around the globe (see, e.g., Mayer et al. 2014; El-Goussi 2016; Sunstein 2018).

The “buy-in” to accountability for human rights on the part of state authorities is, however, another matter (see generally Risse et al. 2013). Many governments do not accept human rights obligations now (see, e.g., Kinzelbach 2013) – even at the level that they did in the 1990s. That decade was a high point of international cooperation post-Cold War, with talk of a “peace dividend” as many thought less money and attention would be expended on war and militaries. As such, it was a period of opening up when human rights was gaining credence as a global vision and expanding in scope. The wars and cultural conflicts of the 2000s have vastly altered that atmosphere. Further, as activists have used the human rights framework more assertively in the past two decades to call for accountability on a larger number of issues, many governments give even less lip service to the rhetoric and resist taking on human rights obligations. Further, Some poorer states feel their capacities to meet many rights obligations are diminished in the global economy, and they use this as a convenient excuse for inaction.

Insofar as human rights calls for the accountability of state power as exercised by governments, its implementation relies on various mechanisms and tools for legal and social pressure – like UN conventions and treaty bodies, special rapporteurs, and regional or national machinery. As activists use those tools, human rights gains more resonance, but also governments may resist them more. Development of the potential of human rights is tied to making those tools more effective, as well as to how human rights evolve, especially in facing new challenges, such as increasing violations by non-state actors in an era of privatization of many functions previously carried out by governments. The value of human rights as a nonviolent framework for social change depends also on how much it is seen as a powerful tool for social groups to advance their goals, as well as on whether it works as a way to protect minorities from abuse.

The importance of human rights as a way of resisting majoritarianism and protecting minority rights has increased in the past two decades as governments have grown more militaristic and reactionary nationalist movements have resurfaced in many parts of the world. Anti-discrimination – whether on the basis of race, ethnicity, religion, nationality, sex, or other status – is a core human rights principle, regardless of the majority’s point of view. Human rights thus provides a counterpoint to many contemporary forms of populism, which may claim to represent the majority but often are based on intolerance and the violation of the rights of others. Much debate today centers on which categories of identity – for example, indigenous peoples, sexual orientation, refugee, or migrant status – should be protected from discrimination and persecution by which groups (state and non-state) and in what contexts/countries (including what are the limits to national sovereignty).

The Possibilities and Limits of Transnational Human Rights Activism in Achieving Feminist Goals

NR: Some critics of human rights, including many who identify broadly speaking as “progressive,” view the paradigm only in terms of its misuses and as a veneer of neoliberalism and neo-imperialism. From this perspective, “women’s human rights” and the transnational activism it engenders are viewed as expressions of the dominance of “Western feminism” and Northern NGOs (see, e.g., Grewal 1999). In this subsection Bunch explains why transnational feminist activism is both difficult, because of the complex political dynamics that must be negotiated to advance human rights causes of all kinds, and “absolutely necessary,” given the forces aligned against them.

CB: Transnational activism is not only valuable today, but also it is absolutely necessary. In any area of rights activism, whether you are talking about women’s and sexual rights or labor or environmental rights, people are up against transnational powers – the powers of conservative religious institutions, of corporations, and of government blocs. Responses to this must also be transnational. But effective transnational activism is not possible if there is not also strong national-level activism. Transnational action is a dimension of achieving feminist goals, because of the globalization of the world; but it is not more or less important than local, national, and regional organizing – all of them are needed and interrelated. For example, when governments manipulate the North-South divide to justify women’s oppression, it must be countered through transnational work. Of course, North-South power dynamics of who has the most access to resources, where, and for what ends must be considered in making strategies. But the problems are more complex than just North-South as they also involve national, class and patriarchal elites and questions about who has the power in local settings as well. We must listen carefully to local voices – as they should drive the agenda – but there are usually conflicting local women’s (and men’s) perspectives, too. Therefore one must decide which local/national voices to support and where to make common cause. (For discussion of universal human rights and local action, see Coomaraswamy 2002.)

It is complicated to figure out which local voices to work with when it comes to human rights issues. There are always some forces, even local women, who argue against advancing human rights in the name of culture whether in New Mexico, in Peru, in South Africa, or in New York City. I grew up in the South and Southwest of the USA, with fairly conservative local cultures that often defended race-based segregation as “our culture.” This way of thinking can be seen again today in the USA with debates over retaining the Confederate flag and statues that represent Southern secessionist leaders. While the flags and statues do represent a part of US history and aspects of the culture today, that does not make them the symbols that society wants to honor now or exempt from change.

In many places around the world, there is a growing gap between people who have benefitted from the advances made in human rights of the past few decades around race, sex, and gender and those who have been marginalized economically and/or socially. Reactionary forces that do not support these changes are trying to

hold back the rest of the women, such that there is intense pressure in many local communities to remain “traditional.” Of course, feminists and human rights advocates are targets of backlash from reactionary conservative forces, but these forces are also trying to hold back local women (and men) from even considering feminist perspectives and changes in their lives.

Conceptualizing Approaches to Women's Human Rights Advocacy: Then and Now

NR: “Women's Rights as Human Rights” presents a typology of four basic approaches to women's human rights advocacy, namely, women's rights as political and civil rights, women's rights as socioeconomic rights, women's rights and the law, and feminist transformation of human rights (Bunch 1990, 493–497). In the following paragraphs, Charlotte Bunch reflects on the relevance of this typology today and suggests a revised, dual typology for describing and analyzing contemporary women's human rights projects.

CB: I do not use this four-part categorization much anymore, except in trying to get people to see what integrating gender into human rights looks like, by illustrating it in terms of civil/political rights, or socioeconomic rights, or in the law. (Now, it is more a typology of how the work on women's human rights emerged historically within existing divisions of so-called first- and second-generation rights and then evolved.) So it is still useful in teaching the history of the movement and the evolution of its thinking and practice.

I think about women's human rights work now in two main categories: one is the integration of gender into already accepted human rights issues, such as the right to be free of torture or the right to food or health. This builds on the first two of the original four approaches but does not make a distinction between civil and political rights and economic and social rights. The second category of women's human rights advocacy builds on the old fourth transformative approach but relates it to the other three: that is, naming (and interpreting) rights issues that were not previously recognized and were brought onto the agenda by the women's movement. This work relies on a feminist critique of the public-private divide and primarily focuses on bodily integrity and sexual rights – including many of what are usually called “women's issues.”

What are the characteristics of a feminist perspective on human rights? In addition to including women in the picture, it is also about examining gender power relations. For example, if in discussing indigenous peoples' rights, somebody presents a viewpoint as “the position of indigenous leaders,” one has to ask about the gender power dynamics of the group. Are women included and really able to articulate their issues in this context, and if so, how? A feminist perspective also means asking if there are different roles and expectations for men and women that affect the exercise of their human rights. In a context of working on issues affecting women's human rights defenders, for example, I heard that a representative of one human rights organization had said, “We can't deal with families and children.”

This group was putting women defenders at a disadvantage because, unlike their male counterparts, they are expected to take care of families and often do not have the freedom that male defenders have to leave the country and go into exile.

Failing to Take Women's Rights Seriously: The Excuses Revisited

NR: "Women's Rights as Human Rights" identifies four categories of excuse for not taking action on women's rights, which Charlotte Bunch observed were frequently expressed or implied by governments and human rights organizations. In this section, she reflects on continuity and change in the kinds of excuses that are made for not prioritizing women's rights issues, explicitly or implicitly.

CB: The excuse that is least relevant today, as compared to the 1990s, is the argument that women's rights are not really human rights per se. We have advanced in defining women's rights as human rights, but the battle to make the human rights of women seen to be just as important as other human rights is not yet won. Now, not many people will say that women's rights are only private or individual. But there are still arguments that the status of women and gender issues are cultural or local matters and, therefore, should not be seen as universal human rights. It is necessary to challenge this logic when it is used to keep any group in society subordinate to another (for related discussions in this volume, see Bawa, Gill, Rhys-Gaffney, and Steiner).

So, what has changed? Much of the separation between public and private that kept women out of human rights discourse has broken down. For example, violence against women is recognized now as real and pervasive (see, e.g., in this volume Bawa, Beoku-Betts, Dauer, DerOhanessian and Ramji-Nogales, Douglas and Harpur, O'Connell, Pisanó and Vojdik). But it is not necessarily seen as important enough to expend significant state resources on ending it. The priority of most nations today is their state security and defense against "terrorism," which often boils down to maintaining or reasserting their own power. That is another form of the old argument that women's rights are not as important as other "more serious" issues. Anti-terrorism trumps everything, including most human rights issues in too many places today, which tends to push women and women's rights back to the margins (Kassem 2013).

What may have changed the least is the fourth excuse – that the abuse of women is so pervasive it will "overwhelm" other human rights issues. No matter how much people talk about violence against women, it is still not a priority for resources from public or private sources. The argument of its "overwhelmingness" is subtly operative; violence against women is being "addressed," but the talk is not followed up with serious action or resources. This may be changing with the "Me Too" movement, but it is still too early to tell if this will lead to systemic institutional change.

The old excuses have shifted somewhat but they have not gone away. Some are less important; some have taken on new dimensions. Moreover, the excuse of lack of resources is also a reflection of the pervasiveness of the neoliberal trend toward privatization and a minimalist view of the state today. Especially in poorer nations, this ideal of smaller government combined with structural adjustment policies has reduced the resources that states have for such work. Thus, lack of resources for women's rights work is connected to the dismantling of the foundational human

rights idea that states have responsibility for the development of society and people's social welfare. (For related discussions, see Gooneskere and Elson in this volume.)

Integrating Women's Rights into Human Rights

Violence Against Women: A Persistent Form of Domination and Intimidation

In "Women's Rights as Human Rights," on the issue of violence against women, Charlotte Bunch said: "Victims are chosen because of their gender. The message is domination: stay in your place or be afraid" (Bunch 1990, 491). In the following comment, she considers how much this assessment holds true today, including in the context of the Internet and social media.

CB: Unfortunately, the message that women should stay in their place or fear violence continues to be relevant in many arenas. In 1990, when I made this point, I was thinking primarily of domestic violence or what is now called interpersonal violence. However, this message reaches beyond domestic violence into many other spaces where women speak out as well. For example, women's human rights defenders, especially indigenous women protesting extractive industries, face intensifying violence, including murder, because they are viewed as people who should not be causing trouble; they are seen as stepping out of their place both as women and as indigenous people (AWID/WHRDIC 2017).

This message has also fueled Internet violence where the amount of harassment of women, bullying, and sexual violence is shocking. Women have exposed sexual assaults on campuses in the USA by young men of this generation, who many thought would be more feminist and progressive but who still too often reflect a strong male sense of sexual entitlement to women's bodies. At the Commission on the Status of Women during Beijing Plus Five in 2000, a staff member of the Center for Women's Global Leadership who was Catholic was surrounded by robed men, "praying" over her soul; that was intimidation in the halls of the UN not too many years ago.

What is said and done to women in many places is a form of violence and intimidation to drive them out of the public space. Whatever the arena, clearly the message still is, "Stay in your place or be afraid." The problem is not the technology per se, but the underlying societal attitudes to women that emerge, and can be enhanced, through it.

The Adequacy of the International Human Rights Community's Response to Gender-Based Violence

NR: It is well-documented that one of the most striking achievements of the global campaign for women's human rights of the 1990s was to secure UN recognition that violence against women is a violation of human rights (Antrobus 2004; Bunch and Carrillo 2016; Joachim 2007; Keck and Sikkink 1998; Merry 2006). This prompted the development of an extensive and expanding body of law and policy responses, at

global, regional, and national levels, aimed at stopping or remedying different forms of violence against women and gender-based violence. Here, Charlotte Bunch reflects on the adequacy of the response of the international human rights community to gender-based violence since its formal recognition as a human rights issue at the second World Conference on Human Rights in Vienna in 1993.

CB: As noted, gender-based violence issues are in the process of being integrated into a lot of human rights work internationally, and there is real progress on this. But it would be hard to call it adequate given how much impunity for violence against women (VAW) still prevails in the world. The fact that Amnesty International and Human Rights Watch and many other NGOs now regularly include aspects of VAW in their reports is an important step. Further, national human rights institutions, the Inter-American and European human rights bodies, the African Commission, and the UN Human Rights Council now regularly include VAW in their deliberations. The recognition that the Convention on the Elimination of All Forms of Discrimination Against Women is a human rights convention has led to greater attention to VAW and to collaboration between the Committee on the Elimination of Discrimination against Women (CEDAW) and other human rights treaty bodies. But too often attention to VAW remains in under-resourced silos and is not fully incorporated into work on other human rights issues.

While awareness of VAW has increased enormously, the feminist analysis that has underpinned the women's movement and frames VAW as political – that is, as a reflection of differentials in power and resources between men and women and a tool of domination – has not been fully understood or accepted. Different forms of gender-based violence are seen as a critical part of the oppression of women, and yet, there is still discomfort with expressing the political nature of such violence as systemic or naming it as a patriarchal system. The tendency is to sympathize with the victims of gender-based violence, as victims, but not to fully comprehend and address the structural reasons for that violence. (For an overview of violence against women and the UN in the past 20 years, see Ertürk 2016.)

For example, women's human rights defenders are often attacked and targeted not only for their human rights work but also for stepping outside their traditional roles as women and being visible as leaders in public arenas (see Lajoie in this volume). Human rights defender groups have begun to take up such cases, but they are often more comfortable defending women who work on traditional human rights issues, for example, around torture or disappearances. Some express discomfort defending “uppity women” who are fighting for sexual and reproductive rights and autonomy. It is also sometimes hard to get traditional human rights defender groups to see the complexities of women defenders' lives, such as the need to address their responsibilities for children and families as well.

Women's Human Rights Advocacy and the Rights of Woman-Identified People

NR: In the last decade, LGBTQI movements have achieved new levels of recognition for gender identity issues in human rights and equality agendas around the

world. In the academic domain, gender and queer theory, which challenges fundamentally the conventional female-male binary, has both enriched feminist theory and been a source of disagreement among some feminists who are concerned that women's rights and equality claims could be eclipsed. In this subsection, Charlotte Bunch reflects on evolving gender terminology and whether "women's human rights" includes the rights of all "woman-identified people."

CB: When considering questions about the relation between women's human rights and movements for the rights of LGBTQI people, including woman-identified people, it is important to remember that human rights encompass the rights of all people regardless of how they define their gender. Therefore, any defender of human rights should defend all such rights, including the rights of all transgender or other woman-identified people. The term "women's human rights defenders" has been used as an inclusive term that is meant to incorporate gender-related abuses, even when that abuse is not only of ciswomen (i.e., women whose gender identity corresponds with their sex/gender at birth). It is less important what it is called, but it is vital that woman-identified people who claim gender as an aspect of the abuse they suffer be defended.

Gender/queer theory has evolved in the last two decades in identifying new constituencies and important issues around sexuality, sexual orientation, and gender identity. Nevertheless, most women still experience oppression "as women" seen through a gender binary; therefore some feminists are concerned that we should not ignore this reality while exploring new terrain. We are currently in a transition and a learning stage about the various issues that intersex, transgender, and nonbinary identities raise in relation to feminism and women's rights, from which new approaches and terms need to evolve that incorporate new identities but do not ignore how old structures and attitudes still oppress women.

In the 1990s, some argued for using the phrase "human rights of women" rather than "women's human rights," because "women's human rights" sounds like women have a separate set of human rights based on being identified as women. In retrospect, that argument has merit and might clarify some of today's debates. Women's human rights in principle are not different from men's human rights. Rather what was urgent, in 1990, was clarifying that human rights violations often take gender-specific forms, like rape in war and forced pregnancy, and that there are gender-specific ways that women's lives are violated, for example, by domestic violence, which had been left out of human rights discourse.

When I said before that many violations are distinctly connected to being female (Bunch 1990, 486), I was making the point that some things happen because one is defined as a woman in a given society and that being female means concretely that there are expectations and restrictions regarding what you can and cannot do and what others can do to you; this is not the same as talking about being "female" or being a "woman" in the abstract or "essentialist" sense that is criticized in some recent feminist/gender theory. We are evolving, and it is not clear yet what will be the best language to use, especially globally as women's realities differ nationally. For example, do we give up the specificity of naming "women" and "women's" in the titles of our organizations, or do we make a longer list of all the different ways that women (and men) identify? Whichever way these questions are answered, we must

strive to be inclusive of the varieties of ways that identities are shaped and how gender affects that, without minimizing or making invisible (again) the specific abuses that many women around the world still endure as biological females.

Bringing a Feminist Perspective to Wider Human Rights Issues

Beyond the Prioritization of Civil and Political Rights over Social and Economic Rights

NR: The traditional approach to human rights has tended to equate “human rights” with liberal “civil and political rights” and to normalize the idea that the attainment of social and economic rights is “unrealistic.” This standpoint typically fails to challenge the human rights impact of neoliberal policies of deregulation, privatization, and the shrinking state. Below, Charlotte Bunch considers the extent to which the prioritization of civil and political rights over social and economic rights in mainstream human rights has changed in the last 25 years and what this means for efforts to achieve women’s rights.

CB: At the level of the state and of some established mainstream human rights organizations, the defense of civil and political rights in the face of post-9/11 and current attacks on them is still paramount. But within human rights NGO organizing overall, this has changed quite a lot since the 1990s. There is greater acceptance that social and economic rights are vital to human rights and that they are indivisible from civil and political rights (for a review of developments in this area, see Gooneskere in this volume). Those divisions are not used as much anymore, rhetorically at least. Many appointments of human rights special rapporteurs at the Human Rights Council since the mid-1990s relate to social and economic rights, for example, rapporteurs on water and on debt and on the right to health and to housing. Social and economic rights issues are on the agenda of the Human Rights Council and get support from the mainstream human rights world more than they did before – although they are still not “realized rights.”

Most women’s human rights advocates were always aware that the civil and political rights of women are deeply interconnected with their social and economic status (Bunch and Reilly 1994) and, thus, promote an indivisible approach to these rights. A recent example of this can be seen in the extensive human rights work within the UN and in the private sector on maternal mortality over the past two decades. This issue brings together the civil and political right to life with the socioeconomic right to healthcare and has been incorporated into the UN’s primary agenda toward 2030 – the Sustainable Development Goals (SDGs) (UNGA 2015, para 26 and goal 3.1). Reducing maternal mortality has advanced more quickly on the agenda than reproductive rights because it is more easily seen as a stark matter of life and death and not of women’s choices and control. It makes clear the links between governmental commitment (or the lack of it) and ensuring the human rights of women to life and to health, especially women who are less well-off and rely on public healthcare systems.

Bridging the gap between recognition of obligations in this area and providing the resources necessary to implement them, however, is a major challenge. In Peru, for example, the family of María Mestanza, an indigenous woman who died in 1996 as the result of forced sterilization, brought a complaint to the Inter-American Commission on Human Rights (*María Mamérita Mestanza Chávez v. Peru*). In 2003 the Commission found that the government had committed sterilization abuse and ordered Peru to pay reparations to the family. Peru acknowledged its international human rights obligations, and, in addition to paying the reparations, it agreed to implement reforms to strengthen protection of patients' rights and to conduct a full investigation of the rights violated in the case (Langford et al. 2017, 408). This case raised public awareness of sterilization abuse, mostly affecting indigenous women, and prompted calls for justice. However, the state still failed to complete the thorough criminal investigation it promised or to pay reparations to the large numbers of women and their families affected. Further, no significant resources have been committed to improving public healthcare systems.

The issue of governmental responsibility for the right to health has also been a key debate in the USA over the last decade. President Barak Obama talked in his first campaign about the "right to health" (Wilson and Wiggins 2013), but once elected president, even though he worked hard for healthcare legislation, he stopped using the human rights language in arguing for it. Ultimately, Obamacare – the health insurance scheme that was finally adopted in the USA – was so complex and tied up with the existing US healthcare and insurance industries that the concept that it was about human rights and what governments should do to realize them often got lost. Congress was unable to even talk about "single-payer health insurance" – a form of national insurance closer to the human rights concept – but rather had to keep framing legislation in neoliberal, capitalist-friendly forms. This reflects the continuing lack of recognition of socio-economic human rights in the USA domestically, especially beyond the rights guaranteed in the US Constitution, which is focused on political and civil rights. This situation is of course even worse under Trump who has not accepted any government responsibility for the right to health.

The world today needs a strong, global, modernized vision of how to achieve social justice and human rights ideals. The human rights framework is an important element of that because it expresses people's instinctive feeling about what they need and want as part of being human. It is a global vision that is still useful to the idea that society and governments, in whatever forms that takes, have a basic responsibility for the socioeconomic and political infrastructure that provides for the needs and protects the lives of people.

Applying an Intersectional Women's Human Rights Lens

NR: The feminist concept of "intersectionality" aims to take account of the differences between women and the complex and contradictory forces that shape their

identities and experience, in addition to sex and gender – from “race,” ethnicity, “disability,” and sexuality to socioeconomic status and geolocation (Brah and Phoenix 2004; Crenshaw 1991; Yuval-Davis 2006). In the following paragraphs, Charlotte Bunch discusses the significance of the concept in the field of women’s human rights advocacy.

CB: An intersectional approach to women’s rights has been accepted by most people working in the field, at least rhetorically. But I think many are still confused about what it means in practice. Anti-discrimination laws and human rights treaties tend to address one social factor at a time – race or sex or age, for example. This was at the core of Kimberle Crenshaw’s original essay coining the term “intersectionality” by showing how black women workers in the USA could be left out of mainstream legal approaches to race and sex discrimination in the workplace because their experiences did not happen to all women or to all black people (Crenshaw 1989, 1991). Efforts are underway by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) and other human rights treaty bodies to ensure no categories of women are excluded by addressing how gender and other factors intersect when they interpret whether governments are meeting their treaty obligations.

Intersectionality as an idea is being taken up, but at the level of implementation in policy terms, it is often quite difficult to achieve. When advocating for this at the 2001 World Conference against Racism in Durban and critically reviewing documents coming from the UN, activists had no difficulty articulating intersectionality as a theory of what should be taken into account (Bakan and Abu-Laban 2017). But when it comes to devising concrete policy and guidelines in an area like domestic violence, describing all the possible intersections and how they should be handled becomes more challenging. For example, there is no single answer about whether to require mandatory arrest in a situation of domestic violence. The response to this question can be complicated by the power dynamics of race, class, or culture in some jurisdictions – where women could have good reasons not to trust the police because of experiences of discrimination against their community by the authorities. Yet, one cannot assume, necessarily, that because a victim is a woman of color, she does not want the police to be called, because sometimes she does. In order to ensure that authorities do not discriminate, policies need to be written in specific ways, but to be intersectional, they may need to take multiple factors into account, which requires a degree of flexibility and discretion – yet without resulting in discrimination.

Intersectionality is not just adding up boxes of different types of oppression and checking them off – sexuality, age, race, class, and so on. It requires understanding how these factors often shape each other and produce a gendered expression of racism or a classist version of sexism, for example. Policy makers and implementers need to be trained in the values and changes being sought, as well as in how to identify different factors at play. Seeking to combine basic principles with flexibility in understanding a situation is an ongoing challenge, but finding a way to implement an intersectional gendered approach is crucial to progress because most people live intersectional lives shaped by many factors.

Responding to the "Rights of Sovereign States"

NR: Arguments about the rights of sovereign states (i.e., to self-determination and noninterference by other states or external bodies) have always been integral to the narratives of governments that object to obligations perceived to be "imposed" by international law and organizations, including human rights. In recent years, strong rhetorical reassertions of the sovereignty of states have become more prominent, for example, in the discourse of new populist nationalist movements or in instances of unilateralism in international relations. The presumed "rights of states" often underpins the idea that states should be able to legislate on issues in line with "national mores" or cultural values, including "values" that entail rejection of the equality and rights of women and sexual minorities or other groups. In this subsection, Charlotte Bunch explains how she responds to this type of argument.

CB: I usually respond to issues of "national mores" or "cultural relativism" from my own experience of racial segregation in the South of the USA, which many justified as "cultural." Labeling it cultural or national does not indicate anything about whether something is good or bad or a sound basis for denying human rights. Sovereignty is a legitimate, self-governing principle in relation to domination by other powers, but it should not be used to justify the abuse of human rights of individuals within a state. The question is: sovereignty according to whom and which voices are deciding for others?

Some people say that concepts of control over one's body and sexual autonomy are individualistic or "Western" arguments and, therefore, not relevant in the Global South. But from my experience working with feminists globally, most women want and need us to defend the bodily rights of all women everywhere. It is important to see why a woman's control of her body and bodily integrity around sexuality embody key human rights concepts. In talking about torture, arbitrary detainment, and not being allowed to speak or assemble – these are all infringements on people's bodies, which are recognized as involving serious harm and denials of control and expression of one's being. At the intimate level, what you do with your body sexually (as long as no one else's rights are violated) and whether you can be forced to become or remain pregnant are no less profound matters of bodily integrity. We have to frame clearly the violations of the body that these issues involve. For example, even when it is not outright rape, the lack of access to birth control, and/or to setting the terms of sexual activity, forces unwanted pregnancy on countless women. In situations where access to safe and legal termination of pregnancy is prohibited and prenatal care is absent or inadequate, the violations of women's rights to life, bodily integrity, and health are compounded.

This focuses on the individual's human right to bodily integrity and sexual autonomy, but there is also a larger socioeconomic picture for framing reproductive rights. Put simply, there cannot be economic justice for women without reproductive rights; the lack of reproductive control of their bodies often prevents women from enjoying economic opportunities and can keep them trapped in violent and/or dependency relationships.

Human rights is a powerful vision, because in any society – North, South, East, or West – there have to be some principles beyond which sovereignty and majoritarianism or populism cannot go. It is important to question these arguments within our own countries; for example, in the USA, claims of “exceptionalism” are used as an excuse to ignore international agreements. In engaging with arguments of sovereignty from another country, feminists should depend first of all on what feminists and/or human rights advocates within those cultures are saying. This links back to the importance of transnational movements, which make it possible to speak in support of others because we are connected – both in listening and in dialogue with each other.

Conclusion

The Gender Transformation of Mainstream Human Rights: An Unfinished Agenda

NR: In “Women’s Rights as Human Rights,” Charlotte Bunch argues for “transforming the human rights concept from a feminist perspective so that it will take greater account of women’s lives” and continues that “the human community need not abandon other issues but should incorporate gender perspectives into them and see how these expand the terms of their work” (Bunch 1990, 497). By way of conclusion, below, Bunch reflects on the extent to which the called-for transformation has been achieved and what remains to be done.

CB: We are in the midst of a significant transformation, but it is uneven and incomplete. For example, the complete separation of public and private spheres in human rights discourse has shifted based both on feminist critique and on the need to pay more attention to non-state actors as abusers of human rights. Further, human rights groups are putting greater emphasis on women and issues like gender-based violence than they did 25 years ago. Amnesty International, for example, ran a big violence against women campaign – less than 20 years after the organization had told organizers of the global campaign for women’s human rights that domestic violence was “terrible, but not a human rights issue.” Many mainstream human rights groups address violence against women and do women-specific work; that is a big transformation.

More and more young women and men who go into human rights work take for granted that women’s rights are human rights. In gender and human rights classes that I teach, there are only a few men (which is a problem of what men think is important), but they are as surprised as the women that violence against women was not always on that agenda. On a rhetorical level, we have a transformation.

But it is not adequate because work on women’s human rights still suffers from a lack of resources and not being seen as an urgent priority. There is often a failure to “get it” at a deeper level, and those failures show up frequently. For example, the Ford Foundation, a major US funder of human rights work, still has meetings with human rights organizations where no women’s groups are at the table. So, the gender

transformation has not gone far enough – the glass is still half empty. But looking at the last 25 years from a longer historical perspective, the glass is also half full. We have seen significant advances that will – if we survive the current existential threats to our globe – have a profound impact in making human rights a more inclusive, universal, and powerful paradigm and movement for change.

Cross-References

- ▶ [Disability, Domestic Violence, and Human Rights](#)
- ▶ [Female Forced Migrants: Accountability Gaps in International Criminal Law](#)
- ▶ [Human Rights Responses to Violence Against Women](#)
- ▶ [International Law and Child Marriage](#)
- ▶ [Islam, Law, and Human Rights of Women in Malaysia](#)
- ▶ [Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence](#)
- ▶ [Social and Cultural Implications of “Honor”-Based Violence](#)
- ▶ [The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children](#)
- ▶ [UN Security Council Resolution 1325: The Example of Sierra Leone](#)
- ▶ [Women and the Human Rights Paradigm in the African Context](#)
- ▶ [Women's Rights and the Inter-American System](#)

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The Indivisibility of Rights and Substantive Equality for Women

Savitri W. E. Goonesekere

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Abstract

This chapter discusses the manner in which gender equality and elimination of discrimination against women have been conceptualized in the decades after the WCHR (Vienna declaration and programme of action 1993. World Conference on Human Rights. UN Doc A/CONF.157/23. United Nations, 1993b). It suggests that the recognition of women's rights as human rights, and the indivisibility and interdependence of civil and political rights and economic and social rights, at the conference, helped change accepted norms and analysis on the meaning of gender equality. It is argued that these changes helped develop a concept of substantive equality that addresses the reality and diversity of women's lived experience of discrimination in their communities. This change has also helped to expand the

S. W. E. Goonesekere (✉)
Emeritus Professor of Law University of Colombo, Colombo, Sri Lanka
e-mail: savitriweg@gmail.com

meaning of state obligation to address and eliminate gender-based discrimination and the liability of both state and non-state actors for violations of women's rights. The chapter discusses international and regional treaties and global policies and national experience on the enforcement of women's rights that reflect these post-Vienna developments. It concludes with a discussion of current challenges in sustaining positive developments to ensure future progress on the gender equality agenda.

Keywords

Indivisibility · Civil and political rights · Economic and social rights · Discrimination · De jure equality · Substantive equality · Equity · Due diligence · State obligation · Non state actors · Sustainable development · Human rights and business

Introduction

International human rights instruments and global policy documents recognized the norm of achieving equality for women without discrimination on the basis of sex before the 1993 Vienna World Conference on Human Rights (WCHR 1993b). Regional human rights instruments, and national constitutions in many countries, also recognized women's right to equality without discrimination on the ground of their sex (Freeman et al. 2012). However, previously, women's right to equality was perceived only as a core civil liberty, derived from a historically Western, liberal legal tradition on civil and political rights, associated with what is described as "the Enlightenment."

Feminist jurisprudence has questioned this concept of equality as androcentric and not reflecting women's experience of discrimination and exclusion in diverse communities. They critiqued human rights as a legalistic alien discourse that could not advance women's integration in development and gender equality (Cook 1994; Forer 1991; Rhode 1989). In this environment the recognition of the concept that "women's rights are human rights" and of the indivisibility and interdependence of civil and political rights and economic and social rights at the Vienna conference proved to be path-breaking.

The new ideas contributed to a reconceptualization of human rights. This provided space for interpreting equality to reflect women's experience of disadvantage and discrimination. Human rights could now be understood holistically to encompass a range of violations that women experienced. The goal of securing women's human rights required securing not merely the traditional civil liberties, but interventions that would give them access to economic and social needs, as legitimate claims on the state. When the interdependence and indivisibility of rights was conceded, inevitably actors besides the state became responsible for securing rights. The WCHR therefore helped to develop the concept of liability of non-state actors in relation to the human rights project. The two pillars of the indivisibility of human rights and women's human rights, incorporated in the Vienna Declaration and

Programme for Action (WCHR 1993b), reinforced each other and contributed to new international, regional, and national responses to gender equality. They also created a context for integrating a women's human rights approach in economic growth and development agendas.

This chapter reflects on how these trends have been developed in the years after the Vienna conference. The extraordinary changes could not have been contemplated 25 years ago. Developing them further is a challenge that must be addressed if the ultimate goal of addressing discrimination against women in their communities and countries is to be achieved. If accountability for human rights violations and their realization fails to encompass state and non-state actors, and the Vienna vision on the indivisibility of economic and social human rights is undermined, the positive changes that have taken place on gender equality globally will be weakened and eventually eliminated.

From Welfare Policy to the Recognition of Economic and Social Human Rights

When the Vienna Declaration and Programme of Action (WCHR 1993b) was adopted, it captured a wider meaning of human rights. Human rights had not only been influenced by natural law ideologies on individual civil liberties. Ideas on distributive justice and the rights of individuals and disadvantaged groups of people to fulfillment of core economic and social needs – such as access to livelihoods, health and education, food, security, and shelter – were also considered essential to live in freedom and with human dignity (Symonides 2002, part II; Steiner and Alston 2000, ch 3). It is these later developments that are reflected in the UN Charter (UN 1945, arts 1 (3), 55, 56) and, more specifically, the Universal Declaration of Human Rights (UDHR), which incorporates individual civil liberties and the right to own property (UNGA 1948, arts 3–15, 17–21), as well as economic and social rights to social security, work, standard of living, and access to health, food, shelter, and education (*ibid.*, arts 22–26).

This broadening interpretation of rights in legal philosophy also signaled a recognition of the economic and social history of deprivation and exploitation of sectors of the population, during the industrial economic revolutions in Europe and in the USA, in the late nineteenth to early twentieth century. These trends had continued as economic and social realities. As early as 1941 and before the UDHR was drafted, President Franklin D. Roosevelt had identified the need of people everywhere in the world for freedom from want, as a core aspect of what he described as “four freedoms” – along with freedom from fear and freedom of speech and religion (for further discussion, see Eide 2001; Symonides 2002, 109; Shestak 2000, 31, 36–53).

The dominance of civil and political rights was seen in postcolonial constitutions, modelled on the 1948 Constitution of India, which referred to justiciable fundamental rights in contrast to nonenforceable “Directive Principles of State Policy” in economic and social areas of life. The constitutions of Pakistan, Bangladesh, Sri

Lanka, and Nepal, in South Asia, and Nigeria in Africa included similar provisions (Pylee 2006). Regional human rights instruments also reflected this difference between the two sets of rights. The European Convention on Human Rights (1950) dealt with civil and political rights, while its first Protocol of 1952 refers only to the right to education. A European Social Charter was adopted much later in 1961. The Inter-American Convention on Human Rights (1969) also focused on civil and political rights, while an additional protocol adopted in 1988 dealt with economic and social rights.

The UN International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), though both adopted in the 1966, reflected the political realities of the Cold War and dealt separately with the subjects of civil and political rights and economic, social, and cultural rights. The difference and lower status was made clear by provisions in ICESCR that only required implementation of economic and social rights subject to “maximum available resources” and “progressive realization” (UN 1966b, art 2 (1)).

The link between the two sets of rights and their interdependence or indivisibility was first incorporated in international treaties addressing discrimination. The Convention on Elimination of All Forms of Racial Discrimination (1965) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) adopted this approach. The Convention on the Rights of the Child (1989) (CRC) incorporated economic and social rights and also moved beyond the idea that implementation was subject to the limitations of “available resources” and “progressive realisation,” originally asserted in the International Covenant (ICESR). It defined a child’s right to life survival and development and linked them to the rights to health and education. The CRC also incorporated the idea of indivisibility, in linking these rights to violations of personal security and liberty, with reference to economic exploitation in child labor. The commitments it contains on health are to achieve “the highest available standard of health” (UNGA 1989, art 24). A specific article refers to the socioeconomic rights in the CRC as requiring State Parties to “undertake such measures to the maximum extent of their available resources” (*ibid.*, art 4). These are significant shifts of emphasis in the conceptualization of economic and social rights in international standard setting, undermining the idea that they are “inferior” or “soft” rights and only policy-based principles in the human rights framework. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted a year later in 1990 also sets out civil rights and enumerates economic and social rights in specific areas, such as conditions of work and employment, social security, medical care, and children’s access to education (see UNGA 1990, arts 25, 27, 28, 30, respectively).

Meanwhile the ICESCR treaty-monitoring committee (CESCR), in its own work of reviewing progress reports of countries that had ratified the covenant, adopted General Comment No. 3 in 1990. This stated very clearly that while full implementation of economic and social rights could be progressive, there was a state obligation to take measures “within a reasonably short time” (CESCR 1990, para 2) and that such measures should be “deliberate, concrete and targeted as clearly as possible” (*ibid.*). General Comment No. 3 also introduced the concept of

“a minimum core obligation [of States Parties] to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” set out in the ICESCR (*ibid.*, para 10).

The main argument against recognizing economic and social rights as enforceable human rights was that they were vague and aspirational needs that could not be enforced in courts, and should, therefore, be dealt with at a government’s discretion, in social policies. The challenge to this traditional approach in General Comment No. 3 did not contribute to a significant shift of emphasis in the UN human rights system. However, the first human rights instrument from a developing region, the African Charter on Human and People’s Rights (1981), recognized the equal status and indivisibility of civil and political rights and economic social and cultural rights. The African Children’s Rights Charter adopted in 1990 also reflected the indivisibility concept, expressed in the CRC.

These emerging trends contradicted the Western Anglo-American liberal approach to law, justice, and rights, enforced through judicial tribunals. They were also in conflict with a model of governance that resisted state regulation as an intrusion on economic growth through private investment and individual endeavors. The idea of state sovereignty, articulated as the sovereignty of the legislative arm of government, also led to resistance to the judiciary scrutinizing violations and giving remedies. How could “unelected” judges inhibit the role and responsibility of the legislature to give leadership and discretion in formulating economic and social policies? The fact that the latter argument in particular was contradicting the Anglo-American common law experience of judicial activism – in extending the frontiers of people’s rights under law in areas pertinent to social economic policy, such as employment, education, and consumer protection – was largely ignored.

Challenging the secondary importance of economic and social rights was, therefore, a significant dimension of the human rights discourse in 1993. In making their contribution to the Vienna World Conference on Human Rights, the CESR remarked that “the international community [...] continues to often tolerate breaches of economic and social [...] rights, which if they occurred in relation to civil and political rights [...] would lead to concerted calls for action [...] [whereas the latter] continue to be treated as far more serious [...] and more patently intolerable, than massive and direct denials of economic and social rights” (cited in Eide 2001, 112).

The Vienna Declaration and Programme of Action

The 1993 World Conference on Human Rights in Vienna achieved a consensus regarding the indivisibility and interdependence of both sets of rights and that “women’s rights are human rights.” The Vienna conference agenda did not initially refer to women or their human rights. A global campaign launched by feminist scholars, activists, and women’s movements contributed to including this topic in the conference agenda (Bunch 1999, vi). A critique from emerging economies in Asia, crystallized at preconference meetings in Bangkok (WCHR 1993a), prioritized the satisfaction of economic and social needs of the community and the postponement of

individual civil and political rights as an aspect of human resource development (Steiner and Alston 2000, 538–548; WCHR 1993a: Preamble, para 11). These diverse lobbies converged in regard to the relevance of economic and social rights.

The Vienna Declaration and Programme of Action (WCHR 1993b) considers all human rights to be “universal, indivisible and interdependent and interrelated” and calls on the international community to “treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis” (WCHR 1993b, para 5). It reaffirms the obligation of ensuring the “non-selectivity of the consideration of human rights issues” (ibid., part I, para 32). The UDHR (1948) is recognized as “a common standard of achievement” that gave rise to both the ICESCR and ICCPR (1966) (ibid., preamble). The document makes it very clear that a balanced link is required between individual rights and group or communitarian values and interests, recognizing that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” (ibid., part I, para 8). In so doing it puts forward a concept of “human rights-based” development. The status of nongovernmental organizations in ensuring the state’s obligation to implement human rights is also recognized.

The document “reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms” (WCHR 1993b, part I, para 1). It also stresses the importance of ensuring the human rights of civilians in armed conflict (ibid., part I, para 29). The elimination of gender-based violence (GBV) is addressed as a priority area of concern, reinforcing the new norms on the indivisibility of human rights (ibid., part I, para 18).

The women’s groups at the NGO forum in Vienna did not take up the issue of children’s rights included in the document, due to the ambivalence in regard to linking a new agenda on women’s rights and empowerment, with children. The document however reflects the intergenerational approach to women’s rights that some African and Asian women’s groups had highlighted, and a ground-breaking general paragraph recognizes that women and girls’ rights are human rights (WCHR 1993b, para 18).

Some Important Changes in the Post-Vienna Decades

The status given to NGOs including women’s groups in Vienna generated a dynamism in the human rights agenda, internationally, regionally, and nationally. Gender activists and women’s groups made their own contribution through advocacy and lobbying with governments and intergovernmental and treaty-monitoring bodies. International law is premised on the concept of state sovereignty, derived from times when governance was the responsibility of kings and princes. The engagement of civil society, through the status acquired in 1993, helped to reinterpret state sovereignty as governance with accountability to the people. These changes are reflected in international and regional standard setting in treaties and in some global policies

on economic and social rights and a new model of gender equality. The changes have also impacted at the national levels.

International Treaties and Global Policy

When the two sets of rights – civil and political and economic and social – are not considered indivisible, international treaties focus only on the state's obligation to “respect” norms and standards, that is, the negative obligation not to violate rights and ensure that they are “protected.” The Vienna document contained this language too, even as it recognized the norm of “indivisibility” and “interrelated” connectivity of all human rights. The strong association of civil and political rights with the human rights agenda was clear.

The whole concept of state obligations, however, is being transformed with the inclusion of economic and social rights into the normative framework on human rights. Scholars who supported the need to recognize these rights had argued for another level of state obligation – that states had a positive obligation to “fulfill” these rights, with positive measures of law, policy, resource allocation, and programs (Eide 2001, 124–128; Steiner and Alston 2000, ch 4). Focusing on this dimension of state obligation demonstrates that the traditional state obligation to respect human rights and to protect people from violations of civil and political rights through effective law enforcement and judicial remedies also requires supportive social policies, resource allocation, and programs.

Asbjørne Eide, a member of the UN Sub-Commission on Human Rights in the 1980s, conceptualized state obligation regarding human rights as a duty to “respect, protect, and fulfill” rights (Eide 2001). This analysis was later incorporated into international human rights law as a definition of state obligation, reinforcing the Vienna concept of indivisibility of rights. In principle, state discretion in welfare policy formulation has been replaced by the concept of mandatory obligation to allocate resources and take positive, specific, and time-bound measures to “fulfill” rights. The concept of a dichotomy between more important and enforceable “first-generation” civil and political rights and “second-generation” economic and social rights that are the subject of “progressive realization” and not immediate compliance has been rejected.

This significant change is captured in human rights treaties adopted later and in the concluding observations and quasi-jurisprudence of treaty bodies interpreting the treaty commitments of State Parties. For example, the UN Convention on the Rights of Persons with Disabilities (CRPD) (UNGA 2007) recognizes the indivisibility of rights and implementation through a broad spectrum of measures. It states: “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights . . .” (UNGA 2007, art 1) and also that State Parties undertake “to ensure and promote the full realization of all human rights. . .” (ibid., art 4). These phrases echo language also used by the CESCR and as such can be interpreted as including the obligation to “fulfill” these rights. General Comment No. 16 of the CESCR clarifies that “The equal right of men and women to the

enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties – the obligation to respect, to protect and to fulfill” (UNCESCR 2005, para 17). These are mandatory and immediate obligations and not merely discretionary initiatives of social policy to be adopted over an indefinite length of time (*ibid.*, paras 16, 21; UNCESCR 1990, para 10). Regional instruments adopted after the Vienna conference also incorporate this concept of indivisibility and positive state obligation, as seen in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereinafter, Women’s Protocol) (AU 2003, arts 12–16, 25) and the Inter-American Convention on Violence against Women (Convention of Belém do Pará) (OAS 1994, arts 2–5; see also ► [Women’s Rights and the Inter-American System](#) in this volume). Both instruments recognize women’s claims to enforce these rights and to relief and remedy. Neither treaty uses the phrase “respect, protect, and fulfill,” but the scope of state obligations they define conforms to this concept.

The other significant change in the post-Vienna period in standard setting is the breakdown of the public-private divide in relation to implementation of human rights. The state obligation of “protection” now includes interventions to protect from violations carried out by third parties and non-state actors and to monitor and regulate them. Non-state actor accountability is incorporated in regional treaties in Africa and Latin America. General Comment No. 16 of CESCR absorbed the concept of state accountability to protect from violations by non-state actors of gender equality and economic and social rights (see OAS 1994, arts 1, 2; AU 1993, art 1; CESCR 2005, paras 17, 19, 20). More recently, General Comment No. 35 (UNCEDAW 2017) now incorporates the concept of a state obligation to prevent gender-based violence in the form of economic harm caused in globalized economic activities, whether “acting territorially or extraterritorially” (para 20).

Major global policy documents on human rights after the Vienna conference also reflect these changes clearly. The United Nations Declaration on the Elimination of the Violence against Women incorporates the concept of indivisibility and non-state actor liability (UNGA 1993, arts 2–4). The Programme of Action of the International Conference in Cairo on Population and Development (ICPD 1994) also interprets indivisibility and women’s human rights in the context of a right to health, including reproductive health (see Cook and Unduragga 2012, 311). It was significant in shifting the approach from the obligation to satisfy basic health needs to women’s individual right to personal security, as well as choice in regard to reproductive health, and group or communitarian rights of women relating to health. The Beijing Declaration and Platform for Action of the Fourth World Conference on Women (FWCW 1995) reiterates these norms on women’s health including reproductive health rights, and recognizes the centrality of economic and social rights in advancing gender equality (see especially ch IV Section C (women and health); Section D (violence against women) paras 113, 124 (a)–(b); Section F (women and economy); Section I (human rights) para 213). The positive and negative dimensions of the state’s obligation to respect, protect, and fulfill and the obligation of due diligence in relation to the conduct of non-state actors are also endorsed. These global policy documents, therefore, have strengthened and entrenched into the area of

international and regional human rights norms, the concepts and ideas inherent in the Vienna document.

These developments on the indivisibility of rights and the enforcement of economic and social rights were carried forward further by the adoption of optional protocols to CEDAW (UNGA 1999) and ICESCR (UNGA 2009) (for a discussion, see Connors 2012). The protocols permit individuals and groups to bring complaints of violations before the relevant treaty bodies (UNGA 1999, arts 1, 8; 2009, preamble, arts 1–2). The older ideas that economic and social rights were “policy matters” rather than the subject of viable claims and that relief became possible only on the “exhaustion of local remedies” were rejected (UNGA 1999, art 4; 2009 art 3). Instead, remedies in the new normative framework for enforcement of human rights included a range of measures, not excluding judicial remedies. Consequently the legitimacy of seeking relief and remedy for violation of economic and social rights, including through judicial mechanisms, was recognized and reinforced in these protocol procedures.

Redefining Equality for Women

Redefining traditional concepts on gender equality has been an outcome of the development of the notion of indivisibility and the relevance of economic and social rights for women. When economic and social rights, already recognized in CEDAW, acquired status as something more than discretionary policy, it became clear that the norm of *de jure* or formal legal equality had to be broadened. The evolving state obligation to “respect, protect, and fulfill” rights means that *de jure* equality is not enough. The state has to take broader measures of policy, resource allocation, and programming, to ensure that women actually enjoyed these rights.

Feminist scholars writing both before and after the Vienna conference have demonstrated that the traditional civil and political rights concept of formal or *de jure* equality could not address gender-based discrimination (for further discussion, see Cook 1994; Forer 1991; Rhode 1989; Freeman et al. 2012). Their analysis indicated that principles of Anglo-American law derived from the common law were male centered and that the entrenched nature of discrimination against women in common law-based legal systems could not be eliminated by a formal model of *de jure* equality. CEDAW itself recognized economic and social rights of women but enumerated these rights in terms of acquiring equal status with men. Betty Freidan had critiqued this perspective in 1963, arguing that this comparison reinforced an exclusively “male image or vision of a full and free human being” (Freidan 1963). Her early vision of gender equality – one that would enable women to realize their full potential and capabilities as female human beings – materialized when the Vienna conference recognized women’s rights as human rights (WCHR 1993b). In-depth feminist analysis of the reality of gender-based discrimination and indivisibility generated new thinking on the concept of equality in the post-Vienna decades.

The transformed human rights framework endorsed in Vienna became a rallying point for women’s group and gender activists seeking to integrate the broader norms

on state obligation, and the accountability of non-state actors, into the meaning of equality and nondiscrimination. The status given to civil society in the Vienna document (WCHR 1993b) encouraged the participation of NGOs in the work of treaty bodies, who, through their interaction with the committees, gave legitimacy to “alternative” or “shadow reports” in progress reviews of State Parties to treaties. Many succeeded in reflecting the reality of women’s experience of violation of economic and social rights and violence against women. This was notable, for example, in the CEDAW Committee’s work for the adoption of the UN Declaration on the Elimination of Violence against Women (UNGA 1993), in formulations for CEDAW general recommendations, and in the Optional Protocol to CEDAW (UNGA 1999) (Schöpp-Schilling and Flinterman 2007; UNCEDAW 2017, introduction).

The issue of violence against women was recognized in later global policies and internalized in a range of regional and national initiatives. These highlighted the relevance of state obligations on economic and social rights in addressing violence against women and non-state actor liability. When feminist scholarship and activism helped transform international criminal justice, violation of reproductive health rights in that context was also recognized (Copelan 2000). Activists and feminist scholars also formulated the comprehensive Montréal Principles on Women’s Economic, Social and Cultural Rights (Montréal Principles) (Sneh et al. 2004) and contributed to broader regional treaty norms in the African Women’s Protocol.

By the beginning of this millennium, important quasi-jurisprudence of the CEDAW Committee incorporated the definition of state obligation as a duty to “respect, protect, and fulfill” (UNCEDAW 2004, para 4; 2010, paras 9, 10). When state obligation is interpreted in this manner, direct discrimination in law, as well as indirect or unintended discrimination in result and outcome as envisaged in CEDAW Article 2, has to be addressed by the state. This model of equality connects easily with the concept of state obligation and the indivisibility of rights, the enforcement of economic and social rights, and the accountability of non-state actors.

The quasi-jurisprudence of the CEDAW Committee and the CESCRC now interprets the equality norm as not merely *de jure* or formal equality but as “substantive equality.” This expanded definition of discrimination in CEDAW Article 2 (UNCEDAW 2004 paras 8, 9; 2010 para 20) has also been incorporated in the CRPD (UNGA 2007, art 2) and General Comment No. 16 of the CESCRC Committee (UNCESCR 2005, paras 7, 8, 11). The previously limited concept of “due diligence” in relation to violence against women has been transformed into a norm that creates state responsibility to regulate and protect women from violations by non-state actors in the family and community, in all areas that impact on women’s lives. The concept of state obligation regarding gender-based discrimination and violence against women was clearly interpreted to include economic harm by non-state actors in General Recommendation No. 35 (UNCEDAW 2017) though direct obligations of non-state actors for such harm were not specified (paras 20, 24). The concept of substantive equality incorporates the idea that incremental and delayed realization of economic and social rights is not acceptable. Rather, state obligations in this domain are immediate, as in civil and political rights violations.

This definition of substantive equality has been developed to take account of the reality of disadvantage and the many nuances of gender-based discrimination. Consequently the CEDAW Committee has discouraged the use of the phrase “gender equity,” which encourages cultural relativist approaches, and the exercise of state discretion in defining women’s rights (UNCEDAW 2010, para 22; see also Facio and Morgan 2009). Addressing the dynamics and realities of women’s lives in regard to violence, access to economic opportunities and care responsibilities in the family can now be addressed through the lens of substantive equality. Furthermore, intersecting forms of discrimination resulting in greater or disproportionate violations because of factors such as ethnic or religious identity, sexual orientation, gender identity, or disability, can also be incorporated and interpreted within the concept of substantive equality.

Despite these significant changes and the clarity of conceptual thinking on the meaning of substantive equality, there is a continued reference to women as a “vulnerable sector” of the population. This approach reinforces the focus on granting the same privileges of a male comparator in the norm of substantive equality. Concepts of “vulnerability” and “male comparator” conflict with the idea that women’s rights are linked to their status as “different but equal human persons” within their families, communities, and the state. The new developments in international law, recognizing women’s personhood, are undermined, however, by the continued use of a “male comparator” and the reference to women’s “vulnerability.” These ideas encourage the exercise of state discretion in denying women’s rights as part of a “protectionist” approach, when what women really need is protection of their human rights as human beings.

The current definition of substantive equality in the quasi-jurisprudence of treaty bodies describes it as addressing “de facto” discrimination (UNCEDAW 2004, paras 4, 9; 2010, para 20; UNCESCR 2005, para 7). However, the achievement of substantive equality requires legal measures of law reform and justiciability in addressing and preventing discrimination. De jure equality is also essential as the foundation of an enabling environment for the exercise of women’s rights. A welcome development will be the interpretation of substantive equality as a concept incorporating de jure equality. This is especially important for developing countries where the formal law and enforcement institutions may not be in place and de jure equality has not been achieved. Incorporating the ideas of both de jure and de facto equality in substantive equality is essential to create a model of nondiscrimination and equality advocated by Sandra Fredman that can also transform institutions and values in communities (Fredman 2011).

Substantive equality must also be interpreted as a norm that is to be achieved as a recognition of women’s personhood rather than to achieve their “empowerment.” Power in many societies is associated also with abuse of power by the empowered person or authority. The concept of rights creating an enabling environment for the realization of maximum human potential lies at the foundation of human rights. The term “empowerment,” therefore, is one that does not harmonize with the purpose and objective of achieving gender justice in a community, through gender equality.

Enforcement of State Obligation in National Contexts

Constitution and law reform initiatives and rights enforcement within countries become an important way to integrate international norms and standards. Most countries do not recognize immediate reception of international law, since domestic and national legal regimes are often parallel systems. Domesticating international law and its harmonization has been a challenge, but the activism of human rights and women's groups has achieved some significant progress. The CEDAW and CESCER treaty bodies, in concluding comments in progress reviews, endorse the need for constitutional and legal reform (see Byrnes 2012, 79; UNCEDAW 1992, 2004, 2010; UNCESCER 1990, paras 12–14, 16; UNCESCER 2017, Section C, paras 7–10). These measures are considered essential for the enforcement of rights in judicial and public administrative procedures.

Constitutional reform processes have offered opportunities for women's and human rights organization and activists to ensure that economic and social rights, and new formulations of the right to gender equality, are incorporated in a Bill of Rights and are enforceable in courts. Constitutional developments in Brazil (1988), South Africa (1996), Uganda (1995), Ghana (1996), and Kenya (2010) and the Interim Constitution of Nepal (2007) reflect this trend. When significant political changes take place, as in Indonesia (1999–2002) and Sri Lanka (2015), constitutional reform affords an opportunity for incorporating these changes (for further discussion and analysis of these developments, see Schuler (1995); Freeman et al. (2012); Landsberg-Lewis (1998); Pylee (2006); Berger (2008); Hoffmann and Bentes (2008); Susanti (2008, 233–240); Pradhan Malla (2000); Byrnes (2012, 79); Currie et al. 2001).

The integration of a human rights-based approach in responding to violence against women and girls, including domestic violence and violations of reproductive health, has contributed to a transformation of law policy and programs and undermined an exclusive focus on health provision, personal security, and criminal justice. The reality of infringement of economic and social rights, like access to health and livelihoods, because of violence is now recognized. Gender equality laws and laws on domestic violence and sexual harassment reflect this approach. Substantive equality-based arguments provide a strong case for reforms in regard to women's unpaid care and domestic work, expanded pregnancy laws and policies, and closing gender gaps in access to economic opportunity to livelihoods and employment. Women's right to land is another area that has witnessed law reform on the basis of economic and social rights and substantive equality. Education, especially of girls, is a subject that has attracted constitutional and legislative reform (for further discussion see APWLD et al. 2003b; Chinkin 2012, 442; Cook et al. 2012; Elson and Gideon 2004; Goonesekere 2014; Interights 2004, 2011; Jaising 2011).

When constitutional guarantees on economic and social rights are in place, individual and public interest strategies have been used at the national level to develop jurisprudence on economic and social rights. Where these rights are not justiciable, the right to life has been interpreted to recognize economic and social rights, including the right to shelter and safe employment. These cases recognize

group rights, as in the case of evictions, education, and health. Litigation by women themselves tends to relate to specific issues such as land rights, reproductive health rights, and sexual harassment in the workplace (on land rights, see Gooneskere 2011; Cook 1994; Freeman et al. 2012; on sexual harassment, see *Vishaka and Others v State of Rajasthan* 1997; *Pelaketiya v Gunasekera* 2012; APWLD 2003a, 85 and 88). However, litigation by groups and male petitioners results in changes that benefit women (*Shehla Zia v WAPDA* 1994; *SPA v Victor Perera* 2007). Substantive equality and economic and social rights litigation also afford an opportunity for developing comparative jurisprudence that travels across borders, replicating a trend familiar to legal systems that experienced the impact of colonial common law. When constitutional litigation strategies have not been used, legislative reform in gender equality laws and areas like employment, land, and sexual harassment encourages claims in courts or administrative tribunals; National Plans of Action that integrate international treaty commitments have helped to influence legislative and policy reform (ADB 2006; APWLD 2003a; Gauri and Brinks 2008; Goonesekere 2011; Interights 2013).

Litigated cases can give individual relief, but may not ensure a sustained commitment to realizing economic and social rights. Cases may fail because judges are inhibited by a perception that they are intruding into legitimate areas of government policy and resource allocation. Constitutional reforms in some countries, for example, South Africa, introduced concepts such as “reasonable” and “justiciable” limitations to help courts determine the scope of economic and social rights and substantive equality (Berger 2008, 67–71; Currie et al. 2001). Brazil and Indonesia have incorporated mandatory constitutional guidelines on resourcing some rights such as health and education (Gauri and Brinks 2008, ch 3 and ch 6). In India, the Supreme Court has sometimes obtained expert reports, avoiding the criticism that they are not qualified to make judicial decisions regarding complex issues of policy (Bakshi 2001; Shankar and Mehta 2008). In countries where elected representatives or government bodies, like the legislature and executive, are irresponsible or corrupt, the courts can prevent fiscal profligacy in national policy priorities and encourage accountable use of national resources in the public interest. A clash between the courts and the legislature and executive is not inevitable, and decided cases have also become a catalyst for legislative and policy reform. Court cases also point to the need for providing women with access to justice and strengthening the capacity of women’s groups to use a litigation strategy. The CEDAW Committee has addressed these concerns in their General Recommendations and Concluding Observations on progress reviews of State Party reports (Freeman et al. 2012; UNCEDAW 2015).

Litigation in regional human rights bodies has also contributed to strengthening economic and social rights nationally. Cases from the African Commission on Human Rights on the indivisibility of both sets of rights use the phrase “respect, protect, and fulfill” in reference to state obligations. Complaints brought under the revised European Social Charter deal with violations of the right to housing and health care. These cases are general cases on economic and social rights, but they reinforce the norm of substantive equality (Chinkin 2009, 33–38; Centre on Housing Rights and Evictions 2003).

Communication and inquiry procedures under optional protocols affirm state responsibility, require national responses, and can create a context for change. The communication procedures require exhaustion of local remedies in the domestic legal system, unless access to remedies “is unreasonably prolonged or unlikely to bring effective relief” (CEDAW, art 4.1). This principle addresses the manner in which the domestic system functions in providing relief for violation of women’s rights (see also UNCESCR 2008, preamble paras 3, 4, 5; *ibid.*, arts 1–6, 8–9 (communications), arts 11–12 (inquiry procedure), art 3 (exhaustion of domestic remedies)). (For further discussion of these issues, see Connors 2012; Facio 2008; Ramaseshan 2009.) Inquiry procedures are based on the need to inquire into systemic and serious violations of women’s rights within countries. Optional protocol procedures, therefore, represent an opportunity to integrate substantive equality and the indivisibility of rights.

Some Current Challenges

Substantive Equality and the Economic and Social Rights of Women Affected by Conflict

For decades, the focus was on providing humanitarian welfare assistance to victims. The Women’s Caucus for Gender Justice – networks of women’s organizations and feminist scholars – contributed to engendering the procedures and jurisprudence on violations of women’s rights during the ad hoc tribunals of Yugoslavia (ICTY) (1992) and Rwanda (ICTR) (1995). They impacted on international criminal justice principles enumerated in the Rome Statute of the International Criminal Court (UN 1998). These were significant developments but focused on sexual violence and civil rights (Copelan 2000; Isaak 2011; Spees 2000).

The critique by feminist scholars and women’s groups regarding this gap has helped to expand the notion of the state’s human rights obligations in regard to economic and social rights, including violations by non-state actors and militant groups. National transitional justice measures in particular are reflecting the idea that ending violations of economic and social rights is essential to addressing root causes of conflict, including discrimination, and essential for reconciliation and nonrecurrence (Slye 2016; UN 2014). Reconciliation requires people-to-people responses. However, addressing root causes, prosecution, amnesty, impunity and reparation after conflict, and the responsibility to ensure nonrecurrence are clearly connected with the state obligation to respect, protect, and fulfill economic and social rights. Access to resources, services, and livelihoods may have been denied because of corruption and exploitation by non-state actors, which is indicative of state failure in the obligation to protect persons affected by armed conflict. A parallel development has been the focus on integrating a women’s rights perspective into these initiatives.

The CEDAW Committee’s Concluding Observations and quasi-jurisprudence has clarified the normative principles applicable. General Recommendation No. 30 (UNCEDAW 2013) is a detailed and comprehensive interpretation, even

though there are no specific provisions in the CEDAW Convention on women affected by armed conflict. Drafted with strong input from feminist scholars and women's groups, this quasi-jurisprudence addresses key issues that connect substantive equality and economic and social rights. General Comment No. 30 flags the obligation of State Parties to respond to the negative impact of conflict on the economic and social rights of women including access to livelihoods and income generation (UNCEDAW 2013, paras 39, 54, 57), land and shelter (*ibid.*, paras 51, 54, 57, 63, 65), education (*ibid.*, paras 48, 52, 54, 57), and reproductive health rights (*ibid.*, paras 38(g), 50, 52 (c), 54, 57(g), 81 (g)). It also addresses how women's roles as caregivers or as heads of household present particular obstacles to women affected by conflict that State Parties to CEDAW should take into account (*ibid.*, paras 48, 40, 57(b), 63).

Security Council Resolutions on women, peace, and security, beginning with 1325 (2000), do not specifically address economic and social rights (for further discussion see ► [UN Security Council Resolution 1325: The Example of Sierra Leone](#) and ► [Women, Gender, and International Human Rights: Overview](#) in this volume). However they do focus on other aspects of women's situation, including sexual and gender-based violence and to a lesser extent participation rights, on the basis of a broad agenda of legitimate rights and claims rather than "vulnerabilities." CEDAW commitments, therefore, remain the principal institutional framework for monitoring state action. National truth and reconciliation commissions in post-conflict countries either in their mandate or by interpretations are now recognizing that women's participation must be ensured and evidence of women's own experiences (not only in relation to sexual violence) must be obtained through transformed procedures on witness protection, the nature of hearings, and also a gender balance in the membership (Fokus *n.d.*; Chinkin 2009; Slye 2016). Such an approach can reinforce state obligations on responding to violations of economic and social rights and substantive equality for women, helping to address the gaps in norms and interventions, at the national level.

Development Policies and Substantive Equality for Women

Global policy documents on developments since 2000 have diluted the positive international regional and national developments witnessed over the last decades. The impact of post-Vienna changes was clear at the beginning of the millennium in the responses of the United Nations. In particular, the concept of indivisibility helped to create interest in integrating human rights and adopting a "rights-based approach" to development. Incorporating a human rights analysis in development initiatives and programs was legitimized in the "common understanding on the rights based approach to development cooperation" known as the "Stamford Consensus" (UNDG 2003). The parallel initiative of the Millennium Development Goals (UNGA 2000), however, set a different agenda for monitoring and evaluating the progress of member states. Though Goal 3 focused on women's empowerment, it set minimalist standards which did not harmonize with the changes that had taken place in the human rights agenda. Ultimately, the various efforts to

interpret MDGs and expand them in light of human rights commitments under CEDAW and international human rights law (Alston 2005; Waldorf 2004) did not prevent a parallel agenda of state obligation from emerging, which undermined human rights commitments.

The active engagement and response of women's groups, feminist scholars, and activists in critiquing the MDGs contributed to global networking on reintroducing a human rights and gender equality perspective into the most recent global policy agenda, the Sustainable Development Goals 2030 (SDGs). The SDG document – *Transforming our World: the 2030 Agenda for Sustainable Development* (UNGA 2015) – specifically refers to the fact that the agenda is grounded in respect for international law, including UDHR and international human right treaties (ibid., paras 10, 18, 23, 35; Goal 14 (14.5, 14.c)). Global policies from the UN ICPD and the Fourth World Conference on Women are also reaffirmed (ibid., paras 16, 26, Goal 3.7, Goal 5.6). However, even this important global policy document on development incorporates only some aspects of the current international human rights definition of state obligation, namely, to “respect, protect, and promote” human rights (UNGA 2015, para 19); the term “fulfill,” especially relevant to economic and social rights, has been omitted. Although the concept of partnership for development with a wide range of stakeholders, including business, the private sector, and international financial institutions, is recognized (ibid., preamble, paras 60–64), the SDGs do not specifically reaffirm the changes in international human rights law in regard to the state and non-state actors. The word “protect” used with reference to the SDGs may, however, provide an opportunity to reinforce the human rights obligation to prevent violations by non-state actors, including the business and private sector. Women's groups including from the Global South (IWRAP-Asia Pacific et al. 2016; UN Women 2016) are already working together to network and bring back a rights perspective into national initiatives on the SDGs. They point to the reality that unless development is linked with human rights, the historical experience of increasing disparities within countries will be repeated, as during the Industrial Revolution, even after they have achieved successes in economic growth.

The current gap between human rights and development agendas is a reflection of the failure to apply to transnational corporations and the business sector human rights norms on state obligation for non-state actors, the indivisibility of rights, and substantive equality. The need for state regulation of these non-state actors has been raised as a concern from the early part of the millennium. This began in 2003 with the work of the Sub-Commission on Human Rights (Oloka-Onyango and Udagama 2001; Weissbrodt 2000) and has been reiterated in General Recommendation No. 35 (UNCEDAW 2017). The United Nations Human Rights Council has since adopted the UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (hereinafter, Guiding Principles), based on the work of John Ruggie, the Special Representative of the Secretary-General on Business and Human Rights (OHCHR 2011).

It has been pointed out that these principles set a normative framework of “protect, respect, and remedy” that does not harmonize with the state obligations under CEDAW, mandatory ILO norms and standards on employment and discrimination, and interpretation of the CESC Committee in General Recommendation

No. 16 (Blitt 2012; Marston 2014, 24–27, 40–41). The Guiding Principles have recognized the state obligation to protect against third-party violations of human rights. However, the specific obligations of businesses it recognizes are self-regulatory. Businesses have a corporate responsibility of “respect,” that is, to avoid infringing rights and respond to adverse impacts. The obligation is described as one of “due diligence” and calls for providing greater access to effective remedies for victims of violation. This creates confusion with the human rights concept of state obligation of “due diligence” to provide protection against human rights violations by non-state actors, through legal liabilities and enforcement procedures in courts and other institutions. The obligation of the state to respect, protect, and fulfill economic and social rights and substantive equality means that states are liable for inaction in not preventing violations of human rights by non-state actors. This important state obligation is diluted by the new concept of “due diligence” and self-regulatory guidelines in the Guiding Principles. The guidelines do not create or facilitate recognizing a new area of extraterritorial liability of corporations and businesses for human rights abuses or their direct accountability for human rights violations.

The impact of corporations and businesses on women in neoliberal market economies is significant. Adverse working conditions in formal and informal employment, including sexual harassment, which violate the norm of indivisibility, health and reproductive rights, and access to leadership in management, can be changed by the manner in which corporations and businesses operate. The UN Working Group on Business and Human Rights (HRC 2011) has been specifically mandated to integrate gender equality concerns. Financial institutions have adopted corporate social responsibility policies and programs in line with the Guiding Principles (Lockler and Dovey 2014, 9–14; Marston 2014, 28–44). However, the gap between the human rights agenda and these principles remains, also encouraging the perception that corporate and businesses must abide by human rights norms on civil and political rights but can ignore issues relating to violation of economic and social rights and gender-based inequality.

Conclusions

The earliest multilateral human rights treaties to address discrimination recognized that responding to inequality required a focus on economic and social rights. The concept of the indivisibility of rights, and recognition of women’s rights as human rights, incorporated in the Vienna document (WCHR 1993b) has transformed, in 25 years, the scope of human rights and their implementation.

State obligation today is expressed as commitments to “respect, protect, and fulfill” all human rights. Further, protection is recognized as an obligation of “due diligence” in relation to violations by non-state actors in the family and community. This has helped to redefine and incorporate a standard that can address women’s experience of discrimination in many areas, including violence against women. These developments challenge the traditional approach to women’s rights, based on women’s “vulnerability” and the need for “empowerment” or “equitable” solutions that address their experience. Substantive equality which must combine both de

jure and de facto equality recognizes women's human rights as the entitlement of different but equal human beings in a family and community.

The Vienna consensus gave civil society including women's groups space for human rights activism nationally, regionally, and internationally. The CEDAW Committee, once described as the poor relation of the treaty bodies (Bustelo 2000, 81, 98), and the CESCRC Committee have developed a dynamic quasi-jurisprudence around substantive equality, drawing on this activism. If these gains are to be sustained, they must also impact and connect with domestic remedies for violations and new thinking in response to economic and social rights violations in armed conflict and the global development agenda. The Constitution of Sri Lanka (1978) quotes a Buddhist text:

May the rains fall in season
May there be a good harvest
May there be wellbeing in the world
May the ruler be righteous.

This philosophy, focusing on the obligations of governance, is reflected in the Vienna document. A 25th anniversary is an occasion to remember past gains, commit to sustaining them, and respond to the emerging challenges.

Cross-References

- ▶ [UN Security Council Resolution 1325: The Example of Sierra Leone](#)
- ▶ [Women, Gender, and International Human Rights: Overview](#)
- ▶ [Women's Rights and the Inter-American System](#)

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The Human Rights of Minority and Indigenous Women

Silvia Gagliardi

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Abstract

This chapter examines and critiques the human rights project through the existing literature, as it specifically focuses on women's rights and minority and indigenous peoples' rights, theories, and discourses. The sections on "Feminism and International Law" and "Islam and Women's Human Rights" question how these value systems, theories, and ideologies have been constructed and appropriated to exert power and control on different constituencies. The following section on "Feminism, Gender, and Women's Rights" then dissects the ways in which feminism critiques group rights. This section and the ensuing one on "Feminism and Group Rights" reveal how, as in many postcolonial contexts, the notion of feminism and who belongs to this category is emerging as a controversial and divisive issue. The concluding section on "Minority Rights Theories and Critiques" investigates what minority and indigenous discourses tell us about power. This section narrows in on approaches that defend group rights as a way to secure rights for specific communities and those that criticize group

S. Gagliardi (✉)

Irish Centre for Human Rights, NUI Galway, Galway, Ireland

e-mail: gagliardi.silvia@gmail.com

rights as an ineffective and detrimental way to empower some members over others within a given community.

Keywords

Women's rights · Minority groups' and indigenous peoples' rights · Feminism · Gender

Relevant international human rights instruments recognize that “persons belonging to minorities may exercise their rights [...], individually as well as in community with other members of their group, without any discrimination” (UNGA 1992). This approach to minority rights has also been adopted by scholars who argue that minority groups and indigenous peoples have a collective right to the protection of their group identity and culture (Kymlicka 1995). Yet, both the definitions of those groups, and what constitutes their identities and cultures, remain contested. Still, others argue that the position of subordination of many minority and indigenous women indicates that their rights are better preserved in an individual rather than a collective manner (Kukathas 1992). This holds especially true when the “right to exit” cannot be guaranteed for members of groups. As Thornberry (2005, 45) powerfully states, “[c]ulture loses its shape, its power to compel and sense of fit, when the masses of those ‘subject’ to it aspires only to ‘exit,’ to break away.”

Human Rights: Universality Versus Relativity

There are various arguments that challenge the idea of universality of the human rights project. Kennedy (2002) cautions us against the claims to universality that the human rights movement puts forward. In particular:

The posture of human rights as an emancipatory political project that extends and operates within a domain above or outside politics – a political project repackaged as a form of knowledge – delegitimizes other political voices and makes less visible the local, cultural, and political dimensions of the human rights movement itself. (Kennedy 2002, 115)

As Bobbio (1996, xi) suggests:

Human rights however fundamental are historical rights and therefore arise from specific conditions characterized by the embattled defense of new freedoms against old powers. They are established gradually, not all at the same time, and not for ever. [sic]

This reflection underpins some of the contestation around the human rights project. In her analysis of the universality versus relativity of human rights, Arat (2006, 42) underlines that “[w]hile the claims of state sovereignty are clearly about political power, the communitarian arguments also attempt to preserve the prevailing power relations.”

Pagden's (2003) approach posits that if one supports the idea of the universality of human rights, one should also acknowledge the origins of human rights and their initial rationale and how their narrative is still used as a justification to continue meddling in other countries' affairs. Pollis and Schwab (1979) describe the original notion of human rights as "a Western construct with limited applicability." Brown (2004) shifts the criticism of human rights from underlying Eurocentric values to being merely an extension of modern imperialism. Žižek (2005, 115) criticizes the Western appeals to human rights for resting on three main and supposedly false assumptions:

First, that such appeals function in opposition to modes of fundamentalism that would naturalize or essentialize contingent, historically conditioned traits. Second, that the two most basic rights are freedom of choice, and the right to dedicate one's life to the pursuit of pleasure (rather than to sacrifice it for some higher ideological cause). And third, that an appeal to human rights may form the basis for a defence against the 'excess of power.'

Being cognizant of the human rights project's specific temporal and geographical origins, some approaches find the universality principle useful to pursue the human rights project and its goals. Other scholars highlight how the human rights project is more than a Western-based concept and toolkit. Burke (2011) identifies the crucial role played by Arab, African, and Asian states to the notions and development of human rights. Similarly, Landy (2013) challenges the idea that human rights are a Western-imposed concept. He argues that such a view fails to consider the active role played by human rights advocates in developing and lobbying for these rights throughout the world, including in regions outside the scope of the "liberal" West. In many Arab countries, for instance, opposition leaders and prodemocracy activists adopt "foreign-born" human rights discourse to fight against authoritarian regimes that suppress the basic rights of individuals in these countries. Against this backdrop, Landy (2013, 424) argues that this disrupts the notion that human rights are a Western construct and suggests a view of:

human rights discourse as a process of localised moments of cognition and contention translated into a universal language – a language which both constrains and enables the practice of transnational solidarity.

As illustrated by Donnelly's (2007) notion of the "relative universality of human rights," while the value of human rights may be almost universally accepted, the relative – nonuniversal – enforcement remains a global struggle.

Feminism and International Law

Feminist approaches to international law are a useful "attempt to offer a different reading of the traditionally accepted notion of gender neutrality and impartiality of international law" (Charlesworth et al. 1991, 614). Several feminist scholars argue that international law was originally (and still is largely) codified based on the male

individual (Charlesworth 2002). Yet, supporters of Kant's deontological approach contest this notion and assert the validity of international law based on the autonomous and reasoning individual, regardless of gender (Teson 1992). Buchanan and Johnson (2004) criticize international law for being representative of one specific narrative, which is Western, white, and middle class. Xanthaki (2016) recalls leading postcolonial theorists who illustrated how different colonial powers have used their "moral superiority" to influence and subdue other peoples. Steans (2007, 13) explains the poststructuralist take on the human rights discourse:

[p]ost-structuralists are apt to regard rights as both historically and culturally specific; arising out of a particular notion of human dignity that arose in the West in response to political and social changes produced by the emergence of the modern state and the rise of early capitalist economies.

As regards women's rights and gender equality, it has been argued that "gender mainstreaming" (UN 1997) together with sex- and gender-specialized programs might be the best available tools to achieve equality in the long term (Otto 2006, 2013). Nevertheless, without a vernacular and an articulation of norms at a local level, gender equality will remain an aspirational and distant goal, rather than a short-term and practical objective.

In many postcolonial contexts, the notion of feminism and who belongs to this category is emerging as one of the most controversial and divisive issues (An-Na'im 1995). Across the MENA region, a deeply polarizing hostility is increasingly entrenched between secular and religious feminists, who both claim to advance women's rights, albeit in different ways. From a post-Oriental feminist perspective, secular feminists are both essentializing Islamic feminists and feeding into the Western discourse on Muslim women being passively co-opted in the male-dominated Islamist agenda (Guessous 2011). Thus, framing debates in the dichotomous logic of a male-dominated discourse (Abu-Lughod 2002) may prove detrimental to the long-term goals of feminism:

Maintaining that feminism can only be defined in secular terms or that women can only operate in the religious framework both give credibility to the opportunistic dichotomy of choice defined by politico-religious parties and other identity-based political groups. [...] The task of redefining gender simultaneously entails a redefinition of all the other markers of identity important to an individual. (Shaheed 1995, 97)

Islam and Women's Human Rights

In the debate on the compatibility and relationship between Islam and women's human rights, one can first distinguish contextual versus textual analyses of the main sources of Islam (including the *Qur'an*, the *Sunnah*, and the *Hadith*). Other approaches differ, either favoring international women's rights and solidarity movements and toolkits or discouraging them as part of hegemonic discourses that do not emancipate, but thwart local efforts and strip the latter of legitimacy and efficacy in their local contexts. Still, another scholarship shifts our gaze from religion as

a moral or value system to religion as a form of power and control by ruling authorities.

Belonging to the contextualist streak, An-Na'im (1990, 13) stresses the need to reinterpret the "scriptural imperatives of the *Koran*" to make them compatible with international human rights law. He claims that differences between secular and religious realms and discourses should be diminished in the pursuit of human rights, as both contain norms that are overlapping and interlinked. As An-Na'im (1990, 56) argues, "The asserted right to cultural self-determination and Islamic identity is itself in conflict with the claim of an exclusive monopoly to exercise that right on behalf of all Muslims." An-Na'im (1990) advises women's rights advocates to engage with and use "cultural discourse and the power relations within the culture in ways which make their own understandings of culture prevail, rather than allow others to impose their understandings" (Shaheed 1995, 97).

Mayer (2000–2001) compares racial and gender apartheid with a view to highlighting how cultural or relativist rationalizations and apologies for gender apartheid should no longer be accepted, as is the case for racial apartheid. She criticizes rationalizations of gender apartheid among Western-based Arab academics, such as Al-Hibri, who contribute to essentializing Arab women as pious and change-averse individuals. In analyzing Al-Hibri's approach to women's rights, Mayer (2000–2001, 293) concludes that:

Missing the political dynamics of the struggle over women's rights inside Middle Eastern countries, Al-Hibri portrays the situation as being one where Middle Eastern Muslims want to be left alone to follow the dictates of their religion but are being plagued by external critiques of rights violations.

Despite the contributions to the formulation and development of human rights instruments by non-Western actors and widespread ratifications of human rights treaties by countries outside the "liberal" West, critics of the universality of women's human rights contend that these rights are exogenous and foreign to these states. Speaking from a textualist perspective, Venkatraman (1994–1995, 1952) examines the necessity of maintaining reservations to CEDAW in light of Islamic law and experience. He supports this position while advocating the pursuit of the Convention's objectives "from a culturally specific perspective." In response to this proposition, prominent Middle Eastern feminists, such as Abu-Lughod, counterargue that "Condemning 'feminism' as an inauthentic Western import is just as inaccurate as celebrating it as a local or indigenous project" (Mayer 2000–2001, 292). Abu-Lughod (2013, 221) approaches feminism as a multilayered concept that is locally interpreted and contextualized. In her post-Orientalist critique of feminism, she warns that:

Feminists from the Middle East, especially those who write in English or French, are inevitably caught between the sometimes incompatible projects of representing Middle East women as complex agents (that is, not as passive victims of Islamic or 'traditional culture') mostly to the West and advocating their rights at home, which usually involves a critique of local patriarchal structures.

Abu-Lughod's (2013) suggestion to overcome this dilemma is that Middle Eastern feminists publish in regional languages and pioneer local projects both at the academic and activist levels. Peyron (2010) adopts a similar line and underlines the importance of acknowledging and analyzing academic critiques coming from the local context and published in non-European languages. Benhabib (2009) underlines how human rights contribute to a "juris-generative" dynamic. The latter takes place through consultations among women's organizations and debates over interpretation and implementation of Islamic law as well as of CEDAW. Stressing the importance of local internalization of human rights norms, Benhabib (2009, 692) highlights that:

Although democratic sovereigntists [sic] are wrong in minimizing how human rights norms improve democratic self-rule, global constitutionalists are also wrong in minimizing the extent to which cosmopolitan norms require local contextualization, interpretation, and vernacularization by self-governing peoples.

In the same vein, Moghadam (2009) stresses that international conferences and transnational networks and treaties, such as CEDAW, provided women's rights advocates with tools and concepts that they can internalize and tailor to their own contexts and needs.

Several authors examine the influence that Islam exerts on women's rights and their interpretation. Abusharaf (2006, 727), for instance, highlights:

[t]he contradiction of the state's gender ideology which sometimes treats women as productive agents, or values' guardians, or the very crux of the invention of a new Islamic citizenship, while women under state policies, national laws and the general social order cannot take advantage of full citizenship.

Cherif (2010) tackles the question of how Islamic tenets bear weight on the nature of nationality and inheritance rights and the positive role that education and labor can play in moderating the effects of religious values. Conversely, Shah (2006, 868) attempts to contextualize and reinterpret the *Koran* to overcome the unequal treatment of women and minorities stressing that "the intention of the *Koran* was to raise the status of women in society, not to relegate them to subordination as is commonly believed and practiced in much of the Muslim world today." With a view to reinterpreting Islam to advance the women's rights agenda, Arshad (2006–2007, 130) argues that:

The use of *ijtihad* [independent or original reasoning of problems not precisely covered by Islamic religious sources] [...] was a legitimate exercise of Islamic legal authority and is a sanctioned tool for substantive reforms in the area of women's rights in the larger Muslim world.

In exploring the *de jure* and *de facto* sex- and gender-based discrimination in selected Arab countries, Nazir (2005, 32) identifies an entrenched resistance to gender equality in countries in transition. As she explains:

In addition to the obstacles to change that women confront in their societies, their status is affected by national, regional, and global political developments. The emergence of extremist Islamic forces stands as a threat to gains women have achieved as well as to future possibilities of reform. Even where radical forces are not influential, the politicization of Islam seriously complicates the challenge of advocating for equal rights.

Writing on the concepts of faith and freedom in reference to women's rights in the Muslim world, Mernissi (1995, 33) approaches the debate on the compatibility between women's rights and Islamic law from a different perspective. As she notes, "The first step is to compare what is logically comparable: liberal democracy and the Muslim state as forms of government, rather than liberal democracy and Islam as culture or religion." Mernissi (1995) claims that in their attempt to exert authority using different means (including through religious vernaculars), Muslim rulers assert their power through the elimination of pluralism and crushing of opposition and dissent. Religion is one tool through which divisions and differences can be silenced and that is why Islam is mobilized politically. Due to the discriminatory treatment of minorities and women (and, formerly, slaves) in many Muslim states, the power of Muslim leaders rests on an uncomfortable paradox that permits discrimination against certain groups while claiming Islam's principle of the equality of all human beings (Shaheed 1995). This author clarifies that:

[w]hat women in most Muslim societies share is that the cultural articulation of patriarchy (through structures, social mores, laws and political power) is increasingly justified by reference to Islam and Islamic doctrine, a process facilitated by Islam's central role in the self-definition and cultural reality of Muslims at large. (Shaheed 1995, 79)

As the interpretation and manipulation of religion are used by leaders to preserve their power:

[t]he frequency with which customs unconnected and sometimes contradictory to religious doctrine are practiced by communities as supposedly religious, is visible proof that attitudes towards and practices flowing from religion are determined as much by collective memories, existing social structures, and power relations as by doctrines. (Shaheed 1995, 80)

Shaheed (1995, 85) also stresses that the challenge for women's rights is both at the political and public level and at the domestic and personal level:

The most efficient method of control, however, is perhaps through the laws an individual internalizes in the process of socialization. [...] These unwritten laws are often greater obstacles to women's autonomy than formal legislation. [...] The interweaving of traditional customs, mores, and beliefs with religion obscures the sources of both the law and ethnically defined or geographically specific frameworks outlining the parameters of a Muslim woman's identity.

Feminism, Gender, and Women's Rights

When interrogating "the question of what constitutes gender (in)equality, and indeed in the first instance, 'human rights,' it [is] necessary to keep both of these concepts "disconcertingly open to interrogation"" (Steans 2007, 19). In line with the precepts of this "open interrogation," Butler reminds us that "if one 'is' a woman, that is surely not all one is; [...] gender is not always constituted coherently or consistently

in different historical contexts, and [...] intersects with racial, class, ethnic, sexual, and regional modalities of discursively constituted identities” (1999, 6). Butler (1999) highlights that the equation theorizing that gender is to culture as sex is to nature is flawed as “gender is also the discursive/cultural means by which ‘sexed nature’ or ‘a natural sex’ is produced and established as ‘prediscursive,’ prior to culture, a politically neutral surface *on which* culture acts” (ibid., 11). Butler challenges the hegemonic feminist construction of a unitary or complete category of women, as she proposes instead that “the definitional incompleteness of the category might then serve as a normative ideal relieved of coercive force” (ibid., 21). In her interpretation, there “is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results” (ibid., 33).

Scott (1988) adopts a poststructuralist lens to question the binary categories in which discourses have been framed such as the “equality versus difference” debate in feminism. This debate is instrumental to illustrate how a:

binary opposition has been created to offer a choice to feminists, of either endorsing ‘equality’ or its presumed antithesis ‘difference.’ In fact, the antithesis itself hides the interdependence of the two terms, for equality is not the elimination of difference, and difference does not preclude equality. (Scott 1988, 38)

In rejecting such binaries, Scott (1988) contends that these are hegemonically constructed discourses that eschew the ontology of how these terms came into being and the exclusionary parameters of discourses as set by the hegemonic forces in society. In recalling Foucault and Derrida, Scott (1988) demonstrates how “language, discourse, and difference” are all constructed in a certain dialectic way to another, subordinate term of comparison that has been essentialized and leveled so that any difference within is not spoken about but rather silenced. In addressing how poststructuralism and feminism can inform each other to achieve common goals, Scott (1988, 33) explains that:

Post-structuralism and contemporary feminism are late-twentieth-century movements that share a certain self-conscious critical relationship to established philosophical and political traditions. It thus seemed worthwhile for feminist scholars to exploit that relationship for their own ends.

In its critique of feminism, postcolonialism underscores how feminist legal theory has traditionally made a distinction between “A female subject and a victim subject of her uncivilized culture and male compatriots” (Otto 2006, 328). In this context:

The history of Western feminism in general, like that of international law, unfolded hand-in-hand with the colonial project whereby two thirds of the world’s population came to be subjugated to European domination. (Otto 2006, 328)

In this context, Kapur (2002, 37) expounds:

The challenge for feminists has been to think of ways in which to express their politics without subjugating other subjectivities through claims to the idea of a ‘true self’ or a singular truth

about all women. The re-envisioning of the subject of women's rights discourse leads to a reformulation of the notions of agency and choice. It is an agency that is neither situated exclusively in the individual nor denied because of some overarching oppression. It is situated in the structures of social relationships, the location of the subject, and the shape-shifting of culture.

Kandiyoti (1995, 20) takes this discussion further by highlighting how “[a]n affinity [...] developed between postcolonial scholarship and feminist criticism in so far as they focus on process of exclusion and domination implicit in the construction of the ‘universal’ subject.” Similarly, Steans (2007, 11) opines:

recognising the need to engage seriously and reflectively with the concept of difference and the actuality of differences – cultural, national, ethnic and so on – among women does not foreclose possibilities for forging some common ground, nor engaging in discussions on apposite strategies for gaining equality.

Under several scholarships, the notion of the universality of human rights came under scrutiny and criticism. Tellingly, in debates pitting cultural relativists against human rights universalists, the areas and issues that interest women seem to be, in general, negatively affected (Okin 1999, 13–17). Thus, “gender and family are retrograde areas of most majority cultures [...]: these are accommodations majority cultures have often been willing to make” (Okin 1999, 13–17).

Abu-Lughod (2002, 789) reiterates the need to be vigilant in owning our biases, preconceptions, and stereotypes, to avoid the saving narrative of the powerless Other, and to recognize and respect diversity. She also notes that while one acknowledges the limits and aberration of racism and classism, scholarship has still not overcome “culturalism” that is justifying certain practices because they are “cultural.” In speaking to Middle Eastern feminists in particular, Abu-Lughod (2013, 221) stresses that to avoid reorientalizing the “native subject,” scholars shall not underplay the “[p]ositionality as the social location from which one analyzes the world.”

In referring to the work of the UN Special Rapporteur on VAW, Xanthaki (2016, 830) draws attention to the concept and practice of cultural essentialism:

Essentialized interpretations of culture are used either to justify violation of women's rights in the name of culture or to categorically condemn cultures ‘out there’ as being inherently primitive and violent towards women. Both variants of cultural essentialism ignore the universal dimensions of patriarchal culture that subordinates, albeit differently, women in all societies and fails to recognize women's active agency in resisting and negotiating culture to improve their terms of existence.

Feminism and Group Rights

There are various theoretical approaches to the complex relationship between feminism and group rights. Contradictions and overlaps between the two systems of protection are considered. This analysis includes how those systems are used in UN settings, as well as in various scholarships, such as in defenses of group rights, dismissals of group rights for the protection of women's rights, intersectionality, multiculturalism, and strategic essentialism.

In the UN context, frictions and divisions between women's rights and group rights advocates have existed since the earliest days of human rights treaties and mechanisms' development. Up to 1999, the Committee on the Elimination of Racial Discrimination (CERD) failed to pay due attention to racial discrimination against women. In the past, the former referred this issue to the CEDAW Committee due to the perception that this was a "women's problem rather than a racial one" (Johnstone 2006, 171).

Premising her argument on a binary logic, Okin (1998, 664) maintains that "there is considerable likelihood of conflict between feminism and group rights for minority cultures, and that this conflict persists even when the latter are claimed on liberal grounds, and are limited to some extent by being so grounded." She supports this position by emphasizing that defenders of group rights "insufficiently differentiate among those within a group or culture – specifically, they fail to recognize that minority cultural groups are [...] gendered," and they do not pay enough attention to the private sphere in the lives of the group members. In contrast to this argument, Al-Hibri (1999, 44) depicts the conflict between feminism and multiculturalism as:

One in which feminists and human rights advocates are attempting to save the women of minority cultures from internal oppression. [...] By persisting in advocating secular feminist arguments that are intolerant of important religious values, secular feminists run the risk of turning patriarchal.

Volpp (2001, 1185) also problematizes the "liberal feminist claim of writers like Okin," who espouses the "feminism versus multiculturalism" paradigm. She deconstructs this paradigm by debating "the theoretical underpinnings of the ubiquitous claim that minority and Third World cultures are more subordinating than Western culture, tracing its roots in the history of colonialism, liberalism, depictions of the feminist subject, and binary logic." In undermining some "First World" feminists' argument that "Third World" cultures are "statics" and women belonging to them seemingly possess no agency. Volpp (2001, 1185) criticizes the hyper-mediatization of cases of "Third World Women's" "death by culture." The latter seems to be yet another attempt to essentialize "Third World" women as one culturally homogenous bloc and to explain violence against them on the mere grounds of their culture. Inviting to adopt an intersectional lens to study the relationship between feminism and multiculturalism, Volpp (2001, 1203) cautions that "[c]onstructing feminism and multiculturalism as oppositional severely constricts how we think about difference."

Whereas different authors examine the intersection between gender and language as possible sites of oppression, the latter can come from within or outside a certain value system, group, or society. In a context in which "indigenous groups struggle for recognition and rights, public acknowledgement of intragroup fractures may be political suicide" (Hoffman 2006, 144). Thus, while the state exercises power and control externally onto a group and its individuals, intracommunal pressure continues to be applied on minority and indigenous women, including through language and culture standardization.

Intersectionality mandates that one cannot separate different sites of oppression when analyzing someone's marginalization (Crenshaw 1991). However, many feminists embrace a "*strategic* use of positivist essentialism" (Spivak 1987, 205) to identify common goals and push forward the woman's brief. Nonetheless, as Amos and Parmar (2005, 61–62) highlight:

For us there is no choice. We cannot simply prioritize one aspect of our oppression to the exclusion of others, as the realities of our day to day lives make it imperative for us to consider the simultaneous nature of our oppression and exploitation. Only a synthesis of class, race, gender and sexuality can lead us forward.

Cognizant of the multiplicity of sites of oppression, Kymlicka (1999, 34) contends that feminism and multiculturalism should be allies in that they both battle against "the inadequacy of the traditional liberal conception of individual rights." In terms of individual rights, the traditional liberal conception of individual rights subsumes all rights under the will and culture of the majority; when it comes to group rights, the interests and prerogatives of the male members of the group seem to take precedence over marginalized, underrepresented others. There is a mutual interest in joining forces, Kymlicka (1999) explains, as both theories challenge the provision of equal treatment and rights as a way to restore inequalities and injustice.

In terms of gender equality values among minority women, Sawitri (2000, 226) investigates the relations between "intrapyschic and interpersonal autonomy." She maintains that "liberal" theorists only focus on the latter while ignoring that "the intraphysical – the cultural aspect of sexual scripting – better captures the struggle of many women in patriarchal, community-oriented cultures." Sawitri (2000) concludes that the right of autonomy without the ability of acting autonomously is devoid of much meaning.

Tamir (1999, 47) advises against the access to particular rights through group mechanisms, vehicles, and vernaculars as these collective tools and registers tend to reinforce "dominant subgroups within each culture and privilege conservative interpretations of culture over reformative and innovative ones." This author prioritizes individual rights over group rights and favors change from within because "[g] ranting nondemocratic communities group rights [...] amounts to siding with the privileged and the powerful against those who are powerless, oppressed and marginalized."

An-Na'im's (1999, 61) approach to tackle sex discrimination is not to ban a certain culture but to engage its members in a mutually critical and constructive language. In his view, gender equality should be pursued in a fashion sensitive and respectful to the "identity and dignity of all human beings everywhere." Ultimately, adherence to human rights standards "cannot be achieved in a principled and sustainable manner except through the internal dynamics of the culture concerned." As regards the relationship between feminism and group rights, An-Na'im (1999) does not believe that an exclusive choice ought to be made; rather, advocates of both should mediate the conflict between rights. Finally, he encourages minority cultures to promote changes from within rather than repudiating multiculturalism.

Shachar (2000, 199) examines how the multicultural approach might reinforce the patriarchal and hierarchical elements of a culture hinting at “the paradox of multicultural vulnerability.” She notes that “the real challenge facing proponents of multicultural accommodation is to acknowledge the potential tension between respecting cultural differences and protecting women’s rights – a phenomenon most evident in the family law arena” (Shachar 2000, 201). Rejecting both the “religious particularist” and the “secular absolutist” approaches, Shachar (2001) introduces a third possible option – to treat women as equal citizens of the state and as part of their “nomoi” groups: “the joint governance model” (Shachar 2000, 217). As she elucidates:

The joint governance approach suggests a new, *multicultural* separation of powers between group and state. [...] The goal of the joint governance model is to build precisely such a system of co-operation between the State’s law and the group tradition, which would result in *simultaneous* governing of group members’ family law affairs. (Shachar 2000, 218)

In this “transformative accommodation” of “privatized diversity,” Shachar (2008, 579) calls for “a more context-sensitive analysis that sees women’s freedom and equality as partly-promoted (rather than inhibited) by recognition of their ‘communal’ identity.” Although Shachar (2008, 591) applies this framework specifically to minority religious groups in a majority secular society, her proposition is still relevant since “[i]dealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of ‘authentic’ group identity.”

Concepts, Theories, and the Law

In considering the concepts, theories, and laws related to women’s rights on one hand and minority and indigenous peoples’ rights on the other, the relationship and compatibility between these concepts come under scrutiny. To begin with, approaches that defend group rights, as a way to secure special rights for specific communities, are examined. Subsequently, scholarship that criticizes group rights, as a counterproductive and blind way to empower certain individuals over others within groups, is also analyzed.

Minority Groups and Indigenous Peoples in International Law

Prior to the 1992 UN Declaration on Minorities, the most comprehensive definition of minorities was formulated by the Special Rapporteur on Prevention of Discrimination and Protection of Minorities Capotorti who defines minority as:

A group which is numerically inferior to the rest of the population in a State, and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a

sense of solidarity towards preserving their culture, traditions, religion or language. (OHCHR 2010)

Although the nationality criterion has been widely contested, Capotorti's definition crucially emphasizes most minorities' "nondominant position" in society (OHCHR 2010). The UN Human Rights Committee (UNHRC) has argued that "[t]he existence of an ethnic, religious, or linguistic minority in a given state party does not depend upon the decision by that party, but is to be established by objective criteria" (1994). Importantly, the UNHRC authoritatively interprets Article 27 to be applicable to indigenous peoples as well (Scheinin 2005).

While there is no universally accepted definition of indigenous peoples, the most commonly used working definition thereof was put forward by the former Special Rapporteur on Indigenous rights, Cobo (1981):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Cobo (1981) also underlines that individual members of "indigenous communities" belong to these groups "through self-identification as indigenous (group consciousness) and [for being] accepted by these populations as one of its members (acceptance by the group)." Notably, "the United Nations have applied the principle of self-identification with regard to indigenous peoples and minorities" (OHCHR 2010). In relation to this, Thornberry (2005, 21) cautions that "the exogamous ascription or fixing of caste attributes on to populations recalls ascriptive processes attaching to 'race,' 'color' or 'ethnicity' based allegedly on immutable characteristics or incorrigible 'otherness.'" In line with the UN Declaration on Minorities, the UN system's interpretation of minorities included only persons belonging to national or ethnic, religious, and linguistic minorities, but not persons with disabilities or vulnerable women.

From these working definitions, one can infer that the main characteristics differentiating indigenous peoples from minority groups are, first, the historical continuity on a certain territory and, second, the cultural/ethnic/sacred link with ancestral lands. While the term "community" is preferred to "group or collective rights" when it comes to minorities, "in the case of indigenous peoples the ICESCR Committee has used the right terminology, i.e., 'peoples,' in almost all references" (Stamatopoulou 2012, 1182). Furthermore:

[w]hat clearly distinguishes the minority agenda from the indigenous peoples' agenda internationally is that indigenous peoples transitioned from local struggles to international ones and created an international indigenous peoples' movement. On the other hand, there has never been an international movement of minorities.

Whereas “[i]nternational organisations can strongly influence the way state – minority relations are framed and resolved, endorsing some models of accommodation while discouraging others” (Stamatoupolou 2012, 1175), Castellino (2013, 228) supports a deinternationalization of the minority discourse:

[t]he theater for the development of minority rights has truly passed from the international to the domestic, and . . . those interested in seeking to develop mechanisms for their protection need to pay special attention to such developments, with particular focus on post-colonial countries who are forced to come up with solutions that are beyond the realm of the histories of the longer established and less artificially created Western states.

Minority groups and indigenous peoples are entitled to protection in international law under a variety of instruments, particularly in relation to their collective rights (“internal” self-determination) (Thornberry 2005) and minority-related (culture, ethnicity, language, religion, etc.) rights. These groups confront similar challenges that can include a nondominant position in society, discrimination on various grounds, underrepresentation in public policies and decision making, and social marginalization. Yet, they also differ in meaningful ways including in the relationship to the country where they reside as well as advocacy tools and instruments they use to advance their claims. Significantly, the lack of a universally accepted definition for either group signifies the theoretical *impossibility* for countries to claim that minority or indigenous groups do not exist on their territory (Sweptson 2005). In terms of which groups constitute minorities:

It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority). (OHCHR 2010)

Minority Rights Theories and Critiques

Kymlicka developed what is arguably the most prominent, modern defense of cultural minorities as units, based on three distinct characteristics: culture, language, and history. The main tenet of his theory is that, in culturally heterogeneous societies, liberalism must envisage the protection of special “group rights” in addition to regular individual rights. This special group protection would allow “minority cultures to develop their distinct cultural life, an ability insufficiently protected by ‘universal’ modes of incorporation” (Kymlicka 1989, 137). Kymlicka’s theory defends the protection of group rights only for those groups, which are internally liberal and guarantee the right to exit from the group. Despite this, Kymlicka underestimates the importance of one’s position within the group to be able to exercise the right to exit or to influence change from within. As Okin (2002) points out, the right to exit is often (explicitly or implicitly) denied to women within a given group, thereby nullifying the basic premise of the liberal theory of group

rights. In another critical reading of Kymlicka's theory, Tomasi (1995, 594) maintains that:

because the deepest guiding concern throughout Kymlicka's discussion is the access of individual people to respect-securing beliefs about value, the strategic hope on which Kymlicka's argument relies – to fix on some supposedly intermediate concept – is one that is in principle misplaced. Kymlicka has not shown the liberalism's fundamental principles require a recognition of cultural rights.

Along similar lines, Kukathas (1992, 230–234) contests Kymlicka's claim that every member of a minority group faces the same type and extent of inequalities within the group. Kukathas questions the notion that fundamental moral claims should be attached to groups. Firstly, "groups are not fixed and unchanging entities in the moral and political universe." Secondly, "groups or communities have no special moral primacy in virtue of some natural priority." Thirdly, groups are heterogeneous, so both the interests of community leaders and their members are equally important in a liberalist view. Also, the key right to protect is the freedom of association, although membership in most cultural communities is defined by birth and not by choice. Thus, the right to exit or disassociate is, often times, not substantially viable, thereby violating the key principle for liberalists who wish to protect community rights, that is, the right to associate. Kukathas (1992, 250) finally warns about "cultural tolerance" as a "cloak for oppression and injustice within the immigrant communities themselves."

Another debate raised by Kymlicka's theory of minority cultures has been on whether "ethnic communities that meet certain criteria should be considered units (corporate bodies) with moral rights, and whether legal status and rights should be accorded to them" (Van Dyke 1995, 31). This dilemma is further problematized by the fact that "often the fluidity of cultural identity renders one both part of the mainstream culture and a minority at the same time" (Eyadat 2014, 74). Van Dyke (1995) posits that ethnic communities have, in some cases, irreducible rights based on moral claims, which are intrinsic to them as units, rather than belonging individually to each member forming part of these defined groups.

Offering yet another perspective on the issue of group rights, Pholsena (2006) analyzes the complex interaction between different ways of conceptualizing diversity and citizenship. As she argues a:

seemingly liberal approach conceals an illiberal framework of state policies. [It is the state that defines the correctness of a given] language, locality and culture regardless of a group's subjective belief in its existence as a people or in the legitimacy of these state-defined cultural traditions. (Pholsena 2006, 14)

Pholsena (2006) refers to this as "politics of misrecognition" as it hinders minority groups from freely articulating their cultural identity. Pholsena (2006, 104) clarifies:

A greater effort of imagination, understanding and flexibility is therefore necessary to avoid the risk of reifying identities by imagining categories and creating fixed boundaries between those ethnic groups whose identities rest more upon subjective identification nurtured by

their interactions with others than objective features. The creative abilities of human beings should not be neglected.

Castellino (2013, 228) observes the conflict between group rights and individual rights, especially in terms of vulnerable individuals or non-elite voices and their right to exit, among other rights. In his words, “A third reason for the stunted growth of minority rights regimes at international level is the oft-debated and genuinely complex issue of how to generate systems of group rights protection that nonetheless provide room for the individual to opt out.” Castellino (2013, 209) cautions against the risk of “groups rights mechanisms that do not simply render individuals vulnerable within minority communities to the exigencies of domination by members of the group.”

Xanthaki (2016) draws attention to the misuse and misinterpretation of the concept of integration. Whereas, theoretically, this concept is based on the idea of integrating a community within a society while preserving its identity, integration has also been used to weaken the human rights of certain groups. Xanthaki (2016, 825), like Castellino, highlights that “[s]ocio-economic measures were completely ignored as part of the integration policy of the state.” She recognizes that (individual) women’s rights should trump cultural rights and diversity in case of violations of the former. In terms of access to real (transformative) equality, Xanthaki (2016, 829) stresses that:

The denial of positive protection is often based on the rhetoric of the ‘neutral state.’ It derives from the ideal of secularism, the ideal of a state that does not take a position on cultures and remains neutral. [...] [s]tate neutrality is in effect an affirmation of the way of life, the choices, and the ideas of the dominant group within the state.

This idea of “state neutrality” bears a special significance not only vis-à-vis the minority within the state but also the “minority” within the minority (women) and how they can freely express their agency.

Engle (2011) positions herself in the defense of stronger group rights while considering the effect of the strengthening of collective rights over individual rights of underrepresented and marginalized members. Engle (2011, 161) concedes that “[indigenous rights] advocates have often aided in the production of indigenous subjectivities that are limited in terms of whom they actually cover and in terms of what rights they permit.” This brings us back to the conceptual categorization of subalternity as discussed by Spivak where the subaltern has to be considered “in context of adjacent constituencies like the native elite” (Moore-Gilbert 1997, 102), without being exclusively defined by the latter. Engle’s scholarship reveals the inadequacies and contradictions inherent in the West-inspired, neoliberal-based human rights model that prevent it from delivering on promises of equality and justice, especially in terms of indigenous peoples’ rights and claims.

In conclusion, while group rights have traditionally served to guarantee the preservation of communities and peoples at risk of, *inter alia*, extinction, assimilation, and exclusion, they cannot be seen as a panacea to serve the interests and

needs of all individuals within a group and women in particular. Relations and structures of power traverse minority and indigenous groups themselves; hence group rights should not be considered as a shortcut or an easy fix in promoting subaltern agency. Specific attention needs to be paid to the processes whereby agency can be diluted, co-opted, or subverted. In light of this, one is pressed to ask: Can the human rights project deliver on its promises once we accept that they might not be as counterhegemonic and democratic as initially proposed?

Cross-References

- ▶ [International Law and Child Marriage](#)
- ▶ [Islam, Law, and Human Rights of Women in Malaysia](#)
- ▶ [The Indivisibility of Rights and Substantive Equality for Women](#)

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Part II

Human Rights Mechanisms for the Advancement of Women's Rights and Gender Equality



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

Marsha A. Freeman

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Abstract

The Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations in 1979, has been called “a bill of rights for women.” We would suggest that it is far more than that: it is a comprehensive set of guidelines for governments as to their responsibilities to protect, promote, and fulfill the human rights of half the world’s population. With 189 ratifications,

Marsha A. Freeman has retired.

M. A. Freeman (✉)

University of Minnesota Human Rights Center, Mondale Hall, University of Minnesota Law School, Minneapolis, MN, USA

e-mail: freem001@umn.edu

it is a near-universal framework for achieving equality between women and men in all aspects of family, community, civic, and economic life. Its monitoring body, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), engages ratifying governments in a continuing effort to achieve substantive equality – equality in fact as well as in law.

Keywords

Women's human rights · CEDAW · Convention on the Elimination of All Forms of Discrimination against Women · Women's Convention · Equality · Discrimination against women · Substantive equality

Introduction

Just over 50 years ago, the United Nations adopted a declaration, a formal statement of international concern and policy goals, on the “elimination of all forms of discrimination against women.” Twelve years later, in 1979, the United Nations revisited that declaration and turned most of its content into a binding human rights treaty, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW or the Convention). CEDAW describes the content of women's human rights and the obstacles to their enjoyment. By 2018, 189 governments had ratified the treaty, committing to change laws, policies, and attitudes that result in discrimination against women. During these 50 years, the global view of women's place on the planet – in the family, the community, the nation – has changed dramatically. The near-universal ratification of CEDAW attests to that change. Challenges to the premises and implementation of CEDAW remain – change is difficult, as long-standing beliefs and stereotypes are challenged and traditional power relationships are reordered. But the treaty is firmly established as the global promoter and monitor of efforts to eliminate discrimination against women.

A Human Rights Treaty Specifically Focused on Women

The understanding of women's human rights as a subject of international law arose out of the work of development theorists and politically active women in the 1960s and 1970s who determined that women's lives, and their contribution to economic development, were severely limited by their lack of economic, social, cultural, civil, and political rights (Hussein 2004; Fraser 1987). The first attempts to address these issues formally were the mid-twentieth-century international treaties on women's nationality, consent to marriage and age of marriage, and political rights of women (UN 1953, 1957; UNGA 1962). These treaties identify critical issues that shape women's lives, but they are very narrowly focused and lack any form of accountability by governments that ratify them.

The United Nations Declaration on the Elimination of All Forms of Discrimination against Women, adopted in 1967, offered a more expansive and integrated global approach to women's human rights (UNGA 1967). Despite some

limitations, such as its vague reference to reproductive rights, the Declaration is significant as the first comprehensive attempt to define and promote women's human rights in all fields. The key limitation is that a Declaration is a statement of principles that does not call for government commitments to implement or to be monitored as to implementation. The Declaration became the overarching framework upon which CEDAW was drafted.

The impetus for completing the CEDAW draft came out of the 1975 World Conference on Women, held in Mexico City. That conference drew thousands of women from nongovernmental organizations (NGOs), who took the opportunity to meet like-minded activists and to demonstrate to the government officials participating in the official UN conference the existence of a constituency that saw rights as critical to women's economic development. The conference recommended that the United Nations complete the drafting of a treaty on women's human rights, which would be opened for signature and ratification by governments at the 1980 second World Conference on Women (Shahani 2004). The treaty was produced in near record time, by United Nations standards, and was adopted by the General Assembly on December 18, 1979. Sixty governments signed the treaty at the Second World Conference on Women in Copenhagen in 1980. The treaty came into force the same year after 20 governments ratified it.

Governments that have ratified a human rights treaty, designated as States Parties, must submit periodic reports (for CEDAW, 1 year after ratification and then every 4 years) on their progress in meeting the treaty terms. The Committee on the Elimination of Discrimination against Women (CEDAW Committee), a group of 23 experts from throughout the globe who are elected by the States Parties to CEDAW, reviews the reports and issues concluding observations on the States Parties' performance as well as recommendations for specific areas of improvement. The Committee follows up on these recommendations and expects to see progress in each consecutive periodic report. The committee also adopts general recommendations, which are statements addressed to States Parties that analyze particular rights and provide guidelines for implementing them.

CEDAW conceptualizes women as individual rights holders, as well as members of family and community, with a claim to equality in all public and private relationships and all areas of life. That concept was not universally accepted when the treaty was adopted in 1979. Ten years later, ground-breaking legal scholarship articulated the many ways in which women had been excluded from the definitions and implementation machinery of the international human rights system (Charlesworth et al. 1991; Cook 1994). In the realm of practice, things were also changing: an equally ground-breaking women's presence in the organization and content of the 1993 World Conference on Human Rights (Bunch and Reilly 1994) resulted in global recognition of women's human rights as stated in the Conference Declaration and Programme of Action: "The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights" (WCHR 1993, para 18).

These developments set the scene for the Fourth World Conference on Women, held in Beijing in 1995. The Declaration and Platform for Action that was adopted by the Beijing Conference underscored the global significance and, what seemed at the time, a global acceptance of women's human rights as universal. The Platform

for Action called for universal ratification of CEDAW and for the expansion of its reach through the adoption of an Optional Protocol to CEDAW (UNGA 2000), an additional procedure that would allow individuals and organizations to submit communications directly to the CEDAW Committee for consideration and response. At the time of publication, 109 governments had ratified the optional protocol, and 51 individual communications had been registered.

Discrimination Against Women as a Cross-Cutting Human Rights Issue

The two general human rights treaties, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, include provisions prohibiting discrimination on the basis of sex and separate provisions requiring States Parties to ensure the equal right of men and women to the enjoyment of the rights contained in the respective covenant. In addition, most of the human rights treaties adopted since 1990 explicitly include reference to discrimination against women and girls. However, despite this equality language, the record of States Parties' reviews that referred to discrimination against women was thin well into the 1990s.

After the 1993 World Conference on Human Rights (WCHR), most UN human rights treaty monitoring bodies began to examine discrimination against women as an element of their mandate, to a greater or lesser extent. The Committee against Torture, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on Elimination of Racial Discrimination adopted interpretive statements in the form of general comments (discussed below), articulating the connections between sex discrimination and the treaty mandates.

While these developments expand the integration of sex discrimination into the treaty bodies' work, their examination is frequently limited to a few issues, varying according to the content of the treaty, information provided by the State Party in its report to the committee, and submissions by NGOs, United Nations agencies, and national human rights institutions. Because of time constraints, the treaty bodies are selective about topics to be addressed, and some issues remain unexamined. Sometimes sex discrimination issues are not addressed because, despite the qualifications of the treaty body members, any particular treaty body may lack members with expertise on discrimination against women. As one scholar who has examined the record points out, treaty bodies other than the CEDAW Committee frequently address results of discrimination as matters to be addressed legally or programmatically, but they rarely refer to the necessity of dealing with root causes – the gender ideologies that support discrimination, including cultural norms and stereotyped roles (Van Leeuwen 2013, 245–251).

CEDAW, in contrast, deals exclusively with discrimination against women and girls. As such, it offers a legal, intellectual, and practical framework for identifying causes of discrimination and implementing change.

Content of CEDAW

The Preamble

A treaty preamble describes the rationale for the treaty rather than obligations and has no binding effect. However, the language of every preamble is hard-fought, as every word carries implications in which the various states have a stake. The process of settling on “agreed language” is a basic diplomatic exercise at the United Nations and elsewhere. The Preamble therefore should be read as providing a globally accepted overview of what is already on record and what the Convention will add to the protection and promotion of women’s human rights.

Preamble paragraphs 1–5 cite the relevant international instruments on record as of 1979, especially the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR, International Labor Organization treaties, the single-subject treaties on women’s rights adopted from 1952 to 1962, and the nonbinding “resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women.” Paragraph 6 states that “despite these various instruments extensive discrimination against women continues to exist.” Paragraph 7 offers a summing-up of the negative impact of discrimination on women’s human rights and dignity and on participation in the development of their country.

Paragraphs 8–13 refer to broader issues, some of them products of the times: poverty, race discrimination, self-determination, neocolonialism, sovereignty, international peace and security, and nuclear disarmament. Most of these issues remain relevant, but the Convention does not cite them specifically. Paragraphs 9 and 10 refer to the Declaration on the New International Economic Order, a prescription for dealing with economic inequalities between states, which was promulgated by the newly independent states that constituted a majority of the General Assembly by 1979. This Declaration failed to gain traction at the time but is significant as a marker of postcolonial ambitions.

Paragraph 13 offers recognition of “the social significance of maternity” and the importance of men’s and women’s shared responsibility for raising children – themes that are stated clearly in the convention. Paragraph 14 notes one of the fundamental premises of the Convention that is not replicated in any other treaty: “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.”

Convention Articles 1–5: Fundamental Issues

Articles 1–5 of CEDAW cover cross-cutting issues including the definition of discrimination applied by CEDAW (art 1); structural obligations on states to implement the treaty (art 2); general obligations (art 3); provision for “temporary special measures” to be taken by Governments (art 4); and addressing custom, culture, and stereotyping as obstacles to women’s enjoyment of human rights.

Together, these articles provide the framework for implementing State Party obligations under CEDAW.

Article 1 provides the all-inclusive definition of discrimination addressed by CEDAW. The Convention prohibits “*any* distinction, exclusion, or restriction” (emphasis added) based on sex, that has a negative “effect or purpose” on women’s enjoyment and exercise of their human rights. In other words, any discriminatory law, policy, or state-regulated behavior is prohibited even if its original intent was not deliberately to discriminate.

The CEDAW Committee has adopted a broad view of equality as envisioned in the Convention. States Parties are required to adopt laws and policies that prohibit and ultimately eliminate discrimination and move toward formal or *de jure* equality – a necessary but limited approach. In addition they are required to work towards substantive or *de facto* equality, the application of laws, policies, and programs to promote equality in fact, providing a real impact on women’s and men’s lives. Some authorities offer a third type of equality, referred to as “transformational,” as a long-term goal that would result from fundamental, global, social, and cultural change. Discrimination against women takes many forms, and many women experience discrimination on the basis of more than one personal identity factor. The Committee consistently notes the existence of intersectional discrimination – in which women’s ethnicity, class, or religion, for example, are also bases of discrimination.

Article 2 describes the legal and policy framework required for meeting Convention obligations. It indicates that measures to eliminate discrimination should be taken “without delay,” which means that States Parties cannot justify a policy of gradual implementation based on economic or cultural constraints. The obligations include data gathering and mechanisms to measure implementation. States are required to take “all appropriate measures” to implement the treaty. This term is used throughout the treaty and indicates an understanding that States Parties may need to adopt a variety of policy approaches to address their particular situations. The framework laid out in Article 2 requires States to provide for equality in their constitutions; to adopt laws and sanctions against discrimination; and to provide access to justice for women who experience discrimination.

Two elements of Article 2 provide for preventive approaches to ensuring human rights and invite creative implementation: the requirement that States Parties address discrimination against women by “enterprises” (non-state actors, including business organizations); and the requirement to “modify or abolish” laws and customs that result in discrimination against women.

Regulating the behavior of non-state actors to prevent actions that discriminate against women is known as “due diligence.” The concept of due diligence has seen considerable development throughout the human rights system. The CEDAW Committee in its General Recommendation no. 19 (UNCEDAW 1992) endorsed the due diligence framework with respect to violence against women and has continued to apply it with respect to other issues.

The issue of custom and stereotyped roles is expanded upon in Article 5(a). Its inclusion in Article 2 indicates that the problem must be addressed proactively.

States Parties, therefore, have an obligation to examine the role of custom and culture in supporting discriminatory practices and to take measures to “modify or abolish” them. This obligation is one of the most complex, as it touches on questions of identity, history, and long-standing power relationships, particularly within the family. Moreover, because the CEDAW Committee considers Article 2 as a core obligation, States Parties’ reservations to any part of it are not accepted as valid. For further discussion of reservations, see below.

Article 3 is a very general statement that articulates the overarching purpose of CEDAW: “guaranteeing [women] the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.” The record of allusion to Article 3 is thin. It is cited, in conjunction with other articles, as a basis for certain general recommendations and adopted views under the optional protocol but has not been the subject of a general recommendation on its own. The CEDAW Committee has alluded to Article 3 obligations in recommending procedures and monitoring activities, such as data collection, national plans of action, gender mainstreaming, financial resource allocations, and interaction with nongovernmental organizations.

Article 4(1) provides that special measures required to “accelerate” achievement of equality are not discriminatory. This language is very clear and is necessary to properly implement CEDAW. Such measures, sometimes referred to as affirmative action or positive action, are frequently attacked as themselves discriminating against people who have enjoyed the benefits of their society, frequently without consciously intending to discriminate against others. The Convention does not dwell on blame; it points out that the benefits of a society must be attainable by all, on a basis of equality between women and men, and the exclusion of women from those benefits can no longer be deemed acceptable.

Examples of special measures supported by the Convention are allocation of increased resources to women’s and girls’ education; establishment of special training programs and credit schemes to promote women’s economic well-being; quotas or reserved seats for women in political life; and targeting increased health resources to deal with health issues that affect women’s productive and reproductive life. The objective is the establishment of *de facto* equality – beyond the token program or practice.

The definition of “temporary” as it relates to special measures is flexible. Once a problem is identified as requiring special measures, the amount of time to be devoted to resolving it is extremely variable, depending on the scale of the problem and the available resources. For example, restructuring the education system to provide for girls’ equal access (building schools, recruiting and training teachers, developing gender-inclusive curriculum) could take many years but would still be regarded as “temporary,” pending the achievement of equal access. This sort of investment must be distinguished from the usual budget allocations to maintain the educational system.

Article 4(2) focuses specifically on maternity. The effort to achieve *de facto* equality requires governments, business entities, educational institutions, and all other social and economic institutions to provide programs and services that support

families – and particularly women – in bearing and raising children. Both the biological facts of reproduction and the depth of traditional family roles seriously disadvantage women in family decision-making and in providing for their children. “Special” measures targeting role assumptions and providing financial and social support are critical to the achievement of equality in the family and in society.

Article 5 is unique among the international human rights treaties, in dealing directly with the impact of culture, customary practices, and stereotyped roles for women and men. The language is remarkably assertive: States Parties are required to take measures “to *modify* [...] social and cultural patterns [...] with a view to achieving the *elimination* of prejudices and all other practices” based on stereotyping or notions that either sex is innately superior or inferior (Art 5(a), emphasis added). In short, cultural change is mandated. Several states have entered reservations to Article 5(a), but considering its scope, and the level of change required to implement it, the number of reservations is relatively small (Holtmaat 2012, 143).

Implementing Article 5(a) requires considerable state attention to the content of public communications and curricular materials. States must balance required efforts to eliminate discrimination against women through legal and social action with rights to freedom of speech, assembly, and religion. They must be creative in dealing with culturally embedded customary and traditional practices such as life cycle events (marriage, childbirth, coming-of-age, death) and group celebrations. Ideally, states can develop approaches that minimize backlash, such as by working directly with traditional authorities and providing well-designed educational experiences in cooperation with United Nations agencies such as UNICEF. The objective of Article 5(a) is not to destroy culture and custom but to expand positive participation in them by eliminating exclusion and stereotyping. This objective is reiterated in Article 13(b).

Full implementation of Article 5(a) would address structural inequality and provide alternative opportunities for self-expression and participation in cultural development. It would be the ultimate example of transformational equality. Article 5(b) specifically addresses maternity “as a social function.” It should therefore be supported by the States Parties, by offering effective medical care and flexibility as to conditions of employment. The article also articulates the nature of non-discriminatory family arrangements, built on recognition of “the common responsibility of men and women in the upbringing and development of their children.” “Common responsibility” for children is addressed specifically in Article 16.

Convention Articles 6–16: Specific Topic Areas

Articles 6–16 provide the framework for identifying and eliminating all forms of discrimination against women in all areas of life. This section discusses the specific topic areas addressed by these articles in the order in which they appear in the treaty: trafficking in women and exploitation of prostitution (Art 6); participation in public life (Arts 7 and 8), nationality rights (Art 9); the human rights of women in relation to education (Art 10), employment (Art 11), and health and family planning

(Art 12); equality in all areas of economic and social life (Art 13); issues of rural women (Art 14); women's legal capacity and mobility (Art 15) and equality in the family (Art 16). In many respects, Articles 6–16 overlap with each other. For example, discrimination against women and girls in education (Art 10) tracks them into economic activities, whether in the formal or informal sectors (Art 11), that provide less income and fewer opportunities for advancement than those available to men coming out of the same educational system. Economic inequality cannot be addressed without addressing the failure to educate. Neglect of women's health issues, including but not limited to reproductive health (Art 12), interferes with their earning capacity and their engagement in community development and public life (Arts 7, 8, 11 and 14). And failure to implement Articles 9, 13, 15, and 16 – dealing from slightly differing angles with cultural norms and long-held stereotypes of women's legal and cultural status in family, community, and state – inhibit implementation of the entire Convention.

The language of Article 6 is remarkably brief, offering little guidance as to definitions and remedies. The CEDAW Committee approach has been generally “recommending broad, programmatic measures and providing, at times, inconsistent interpretations of the scope of Article 6” (Chuang 2012, 173). General Recommendation no. 19 (UNCEDAW 1992) refers to trafficking as a form of violence against women. General Recommendation no. 26 (UNCEDAW 2008), on migrant workers, refers to the conditions of women's migrant labor that may result in trafficking, but the Committee determined that the subject requires a separate, focused exploration and therefore does not explore the matter in detail (Chuang 2012, 174). As of 2017, the Committee has not taken up the trafficking issue specifically as the subject of a general recommendation. However, State Party reviews frequently include allusions to the conditions that result in trafficking and prostitution.

Article 7 takes up the matter of women's political participation well beyond the right to vote. It identifies women as political actors at every level, from elections to policymaking to participation in NGOs concerned with politics and public policy. The CEDAW Committee examined the content of Article 7 in depth in General Recommendation no. 23 (on women in political and public life, which includes analysis of Article 8 (women in international posts and organizations)) (UNCEDAW 1997). Article 7(a) requires States parties to ensure equality between women and men in exercising the right to vote and in opportunities to run for elective office. The obstacles to women's participation in these elemental activities must be addressed through constitutions and laws as well as temporary special measures.

Article 7(b) addresses equality in appointments to public office, which include nonelective posts in local and national governments as well as the judiciary, police, public educational institutions and other government administrative posts. It also includes the controversial topics of women in the military and women in traditional or customary leadership roles. The CEDAW Committee has indicated that governments must provide equal military career opportunities for women and that they must be included in customary mechanisms such as councils of elders and land reform councils (Wittkopp 2012, 204–205). Article 7(c) extends equality

requirements to participation in NGOs and associations. NGOs in the United Nations context generally refers to nonprofit organizations. “Associations,” however, includes many other types of entity, such as corporations, labor unions, and trade associations (Wittkopp 2012, 208–210). The CEDAW Committee has indicated that states must address the stereotypes and assumptions that prevent equal consideration of women and men in all associations, whether nonprofit or for-profit.

Article 8 expands on Article 7(a) and 7(b) in specifically addressing the significant lack of equality in women’s representation of their governments in international fora and in their participation in international organizations. The measures to address this problem are the same as those required by Article 7 – with the additional requirement that governments examine their own assumptions about women’s “suitability” and their internal processes for selecting representatives and advancing individuals’ careers.

Article 9 addresses inequality in how States permit the granting and transmission of nationality. Notably, unlike most of the other articles, it asserts the requirement of equality in this regard to be immediate and mandatory, without reference to “all appropriate measures.” This indicates the fundamental nature of the issue: attachment to and the right to protection by a sovereign state is required for functioning in contemporary society. In view of CEDAW equality standards, this protection should be available to every individual directly and on the same basis, without discrimination.

The 1957 Convention on the Nationality of Married Women offered, theoretically, protection against women’s loss of their nationality upon marriage to a national of a different country. In the many legal systems where this was common, men retained their nationality rights regardless of whom they married and upon divorce. This convention is useful as a preliminary endorsement of nationality as a human rights issue, but it lacked monitoring mechanisms and applied only to adult women, neglecting the issue of children’s nationality status and the question of varying circumstances of inequality between spouses as to their nationality rights.

Article 9(1) eliminates this fundamental inequality. According to CEDAW General Recommendation no. 21, “nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality” (UNCEDAW 1994). Article 9(2) requires states to provide for equality between spouses in transmission of citizenship to their children. Historically, in many societies children automatically held the nationality of their father, who according to cultural norms was the head of the family and the person to whom the family members belonged. This contravenes the Convention as it fails to recognize women as equal bearers of nationality. The policy is not only discriminatory against women but can result in great difficulties in traveling or changing domicile, and in tragedy if the father disappears without acknowledging the child, leaving children effectively stateless.

Elimination of discrimination in education is a pillar of any effort to achieve equality. Article 10 covers every element of the education system. It requires states to “confront the culture conundrum” (Banda 2012, 273), eliminating any “stereotyped concept of the roles of men and women [...] encouraging coeducation and other

types of education which will help to achieve this aim,” and revising curricula, textbooks, and teaching methods (Art 10(c)).

The other sub-articles provide a list of the efforts that must be made by States Parties and the arenas in which change can occur, including ensuring that women and men have:

- Equal access to education at all levels and in rural as well as urban settings, from preschool to professional degrees (Art 10(a))
- Access to the same curricula and exams, equally qualified teaching staff, and school facilities (Art 10(b))
- Equal scholarship and grant opportunities (Art 10(d))
- The same opportunity to participate in sports and physical education (Art 10(g))
- Access to health information “to ensure the health and well-being of families,” including family planning information (Art 10(h))
- Elimination of stereotyping throughout the educational system (Art 10(c))
- Access to continuing and adult education, particularly including remedial programs to eliminate the educational gap between women and men (Art 10(e))
- Reduction of female drop-out rates and provision of programs for women and girls who are early school leavers (Art 10(f))

All of these requirements must be read as complementary, with multiple actions having multiple impacts. For example, Article 10(h), requiring attention to family well-being and family planning information, should be read with Article 10(f), as early pregnancy takes girls out of school, either voluntarily or because education authorities exclude pregnant girls from school (including those who are married) and refuse reentry after the pregnancy. Similarly, Article 10(a), equal access to education, cannot be accomplished without attention to all the other requirements of Article 10, and in particular access to grants and scholarships for higher levels of education, while access to adult or remedial education (Art 10(e)) is critical to women who have been excluded or have quit school (Art 10(f)).

Article 11 deals separately with two core issues relating to women’s employment: equality between men and women in the workplace and prevention of discrimination against women on the basis of their marital and maternity status. Article 11 deals primarily with employment in the formal sector. It provides that employment is an “inalienable right,” an absolutist position that is unusual language in human rights treaties (Raday 2012, 285). Arguably, the right to equality in employment is a core practical issue, as lack of employment opportunity is a matter of survival. Article 11(1) addresses equal working conditions, including free choice of profession, equal pay for work of equal value, equal access to training and other processes leading to advancement, adequate attention to health and safety issues, and equality in social security matters.

Article 11(2) prohibits termination of employment on the basis of maternity or marriage and requires maternity leave with pay. It “encourage[s]” establishment of child care facilities and other social services that would help women maintain their employment status. Article 11 (2)(d) and Article 11(3) address workplace safety,

including any required special protections for pregnant women and periodic reviews of protective legislation in light of scientific developments.

Article 12 requires the elimination of discrimination in access to and delivery of health care. The right of access extends to all areas of health care, including family planning, maternal and post-natal health, and adequate nutrition during pregnancy and nursing. The specific emphasis on access to family planning and reproductive health is critical in view of many women's lack of power in making decisions relating to number and spacing of children and global rates of maternal mortality. However, while focusing on these matters is critical to women's well-being and equality, Article 12 must not be read as dismissing the issue of women's general health care throughout their life cycle.

General Recommendation no. 24, adopted by the CEDAW Committee in 1999 (UNCEDAW 1999), provides an analysis of the systemic requirements for non-discriminatory delivery of women's health care. Some requirements relate specifically to women's experience, such as domestic violence, genital mutilation, and maternity. General barriers such as high fees and few clinics may appear gender-neutral, but women's relative poverty and legal or cultural restrictions on their movements reduce access and are discriminatory. The committee also determined in General Recommendation no. 24 that states are obligated to change laws that criminalize medical procedures that only women need – such as abortion services. Further, it requires states to provide adequate alternative access to medications that individual providers may find objectionable, such as contraceptives.

As Beate Rudolf notes, “the potential of Article 13 is underdeveloped in the work of the Committee” (Rudolf 2012, 336). It provides an overall obligation to address discrimination against women in economic and social life and specifically addresses matters that are clearly within the ambit of the treaty. During the last stages of discussion before adoption of the Convention, matters of family benefits, financial credit, and participation in recreational activities and “all aspects of cultural life” were moved to Article 13. While this provides a bit more significance and clarity as to these rights, they are rarely invoked as explicitly applicable under Article 13.

Article 14 is the only article in CEDAW that relates to a specific group, rural women. Notably, it also addresses comprehensively the effect of intersectional discrimination on this group. Rural women experience the multiple effects of being female, frequently being poor, living in underserved or neglected communities, lacking rights to land where the primary means of livelihood is agricultural, and lacking a voice in development planning and local governance that have a direct impact on their lives. Article 14 specifically requires States Parties to ensure rights to: participate in development planning, access health care, receive social security benefits, obtain adequate education, organize self-help groups and cooperatives to help them find proper employment, participate in community activities, and access agricultural credit and the benefits of rural development plans and investments, as well as “to enjoy adequate living conditions,” including sanitation, clean water, electricity, transportation, communications, and housing (art 14(2)(h)). The right to adequate living conditions refers implicitly to the International Covenant on Economic, Social and Cultural Rights Article 11 (adequate standard of living) and

reflects the very basic needs that remain unmet in many countries. In 2016, the CEDAW Committee adopted General Recommendation no. 34 (UNCEDAW 2016), on implementation of Article 14. It invokes the rights stated in Article 14 generally and also links the language of Article 14 to other CEDAW articles. It is a comprehensive reminder of both the needs and the potential of rural women.

Article 15 is one of only two CEDAW provisions that assert obligations as a matter of immediacy, without reference to “all appropriate measures.” It declares: “States Parties shall” provide for equality before the law and equal legal capacity to make contracts, manage property, and appear in court as litigant or witness. They also “shall” provide for equality in rights to choose residence and domicile and to move about the country (Art 15(4)). The impact of this very brief statement of rights is enormous. Essentially women can no longer be treated as legal minors incapable of managing significant matters inside and outside the family. They should not be required to produce evidence of male approval in order to obtain a passport, buy a house, take a job, or obtain reproductive and other health services.

Article 15 is one subject of General Recommendation no. 21 (UNCEDAW 1994) on equality in marriage and family relations. The discussion of this provision is very brief, presuming that the issue is clear. Indeed, it is perhaps the stark clarity of the issue that has resulted in a number of reservations, particularly to Article 15(4). It appears that decisions as to where to live may be more problematic within some settings than rights to hold bank accounts or engage in litigation.

Article 16 is a comprehensive enumeration of the obligations to eliminate discrimination against women in all aspects of family law and family life. Its focus is closely related to the contents of Articles 9 and 15, both of which assert women’s rights to be treated as fully adult, without discriminatory institutional or family-based constraints on their decision-making and their access to resources. Article 16(1) refers to women’s rights to choose a spouse and to enter marriage only with her consent. Article 16(2) provides that child marriage “shall have no effect” and that states should establish a minimum age of marriage and a registration system. These rights have been long accepted as fundamental – if not always implemented – as reflected in the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

The other provisions of Article 16 have been more controversial, with a notable number of reservations entered particularly to some or all provisions of Article 16(1). Article 16(1) provides for equality in “rights and responsibilities during marriage and at its dissolution”; equal parental rights and responsibilities towards children; equal rights to decide on childbearing; equality in guardianship and similar forms of authority within the family; same rights to choose a profession and a family name; and the same rights to own, manage, administer, and dispose of property. In recent years, some States Parties have adopted major changes in family law and have withdrawn reservations. Other States Parties that did not enter reservations but have resisted change for many years have adopted new constitutions and new family laws that provide – at least theoretically – for measures to advance equality in the family.

The CEDAW Committee addressed equality in the family more than 20 years ago, adopting in 1994 General Recommendation no. 21 (UNCEDAW 1994), on Articles 9, 15, and 16, which offers an overview of these rights issues, with some specific recommendations. Among the more controversial recommendations was that polygamy “should be discouraged and abolished.” In 2013, the Committee adopted General Recommendation no. 29 (UNCEDAW 2013a), on Economic Consequences of Marriage, Divorce, and Family Relationships. It describes at length the various aspects of family situations in which women experience economic discrimination and provides suggestions for law reform and measures to change attitudes within family and community.

Violence Against Women

CEDAW does not mention violence against women largely because the subject was barely developing as a human rights issue when the Convention was finalized. To the extent that it was recognized as a phenomenon requiring government intervention, for many years violence against women was treated as a matter of crime control rather than rights to safety, with programmatic attention provided by the United Nations Committee on Crime Prevention and Control (Chuang 2012).

The First World Conference on Women, held in 1975, barely mentioned violence against women, and the CEDAW drafters did not pursue the subject in the convention. By the time of the 1980 Second World Conference on Women, however, attention was growing, and the conference adopted a resolution on “battered women and violence in the family” (Chinkin 2012, 444). For several years, the Crime Prevention Committee was the primary United Nations body paying attention to the issue. In 1985, the UN General Assembly adopted a resolution calling for research on violence against women, again as a matter of crime prevention and control. Ultimately, the Third World Conference on Women (1985) included violence against women in its concluding document, and in 1987, the United Nations Commission on the Status of Women accepted the issue as within its ambit. Finally, in 1989, the United Nations commissioned a study on violence against women that identified it as a human rights issue. At the same time, women’s groups throughout the globe had been advocating for the rights approach since the early 1980s. The latter United Nations study was released just before the publication of a widely cited article in *Human Rights Quarterly* that inarguably placed violence against women as a human rights issue (Bunch 1990). In short, the recognition of violence against women as a critical global human rights issue was a long time coming.

The CEDAW Committee extended systemic recognition of the issue in adopting its General Recommendation no. 19 in 1992. The general recommendation provided an analytical background and specific recommendations for state action. It articulated, article by article, the application of CEDAW to the subject. Since then the Committee has built a considerable jurisprudence on violence, returning to the issue again and again as states first had to be placed on notice that the issue is critical, then

to be held to account as advocates, lawyers, academics, and some governments developed measurement and programmatic tools to address the problem. In 2017, the CEDAW Committee adopted General Recommendation no. 35 (UNCEDAW 2017), a comprehensive review of state obligations and the committee's approach and a top-to-bottom update of General Recommendation no. 19.

Making CEDAW Work for Women

CEDAW can be invoked to promote women's human rights in a variety of ways. The State Party reporting and review procedures are open to participation by NGOs and other non-state advocates, whose challenges to the states accounts of implementation are taken seriously by the committee. Organizing for presentation to the CEDAW Committee is in itself a significant exercise in issue identification and working collectively to offer the most useful information to the Committee. The outcome documents, called Concluding Observations, and follow-up procedure provide a framework for further advocacy. NGOs are invited to contribute to the drafting of general recommendations by presenting position papers to the Committee early in the process. Further, the Optional Protocol (discussed below) provides an avenue for pursuing major issues and can provide increased credibility to the authors and to organizations concerned with those issues.

Articles 17–22: Procedures

Articles 17–22 describe the procedures for establishing the CEDAW Committee, including the qualifications of members, and for monitoring implementation through State Party reviews. Understanding this process is critical for civil society actors who wish to provide information to the Committee and have an impact on the review process. Keeping up to date is also crucial as practices of the Committee and servicing by the Secretariat change over even a short period of time. The Office of the High Commissioner for Human Rights web site is an essential source of information on procedures, schedules, and the record of the Committee.

The CEDAW Committee is made up of 23 members, “of high moral standing and competence in the field” (art 17(1)). The experts are nominated by their governments and are elected at a meeting of States Parties that is held every 2 years at United Nations headquarters. Experts serve without pay and in their “personal capacity,” which means that they do not have ambassadorial status and do not take instruction from their government as to their CEDAW expert roles. Article 17 also indicates that in voting for members, States Parties should take into consideration the importance of “equitable geographic distribution” (art 17(1)), which is a significant aspect of the elections. The core of the state monitoring process is examination of States Parties' reports on implementation of the treaty obligations (art 18(1)) and engagement with the Committee in a “constructive dialogue” on compliance.

Article 21: General Recommendations

Article 21 provides for the adoption of general recommendations, which have become a significant part of the Committee's work and are designed to be a major influence on policymaking to implement CEDAW. According to Article 21(1), general recommendations are "based on the examination of reports and information received from the States Parties." The Committee undertakes production of a general recommendation when it determines that States Parties' treatment of certain subjects requires clarification, or that in-depth examination of a particular issue, such as women in armed conflict and post-conflict situations (UNCEDAW 2013b) has become critical in view of global developments.

The Committee began to adopt general recommendations a few years after its inception. The first 18 general recommendations are brief, basically instructing States Parties to address issues that are implied but not directly stated in the Convention (such as General Recommendation no. 14 on female genital mutilation and General Recommendation no. 15 on women and AIDS). At its tenth (1991) session, the Committee decided to prepare comments on articles of the convention (Boerefijn 2012, 523–524).

General recommendations have become increasingly detailed as to both analysis and policy recommendations. General Recommendation no. 28, on Article 2 (UNCEDAW 2010), signals this more concentrated approach. Since 2010, the Committee has adopted several comprehensive general recommendations within a relatively short period, addressing, for example, economic consequences of marriage, divorce, and family relationships (UNCEDAW 2013a); the gender-related dimensions of refugee status, asylum, nationality, and statelessness of women (UNCEDAW 2014); and women's access to justice (UNCEDAW 2015). In 2014, the Committee adopted a Joint general comment, produced with the Committee on the Rights of the Child (UNCEDAW and CRC 2014) on harmful practices.

Role of Civil Society and Other Information Sources

While the Committee's review process places States Parties' reports front and center, it also relies on other sources to fill in information gaps, note practical applications or lack of application, and provide an account of Convention implementation from another point of view. Since the early 1990s, the Committee has accepted reports from NGOs for use in consideration of State Party reports (Freeman 2010). For many years, it has provided time during the session for brief oral presentations by NGOs, and many members attend midday NGO briefings scheduled with the help of the Secretariat. The Committee also invites national human rights institutions and United Nations agencies such as UNICEF to present country-specific information.

The Optional Protocol

An Optional Protocol is an addendum to a treaty that, generally, is available for ratification by states that are party to the treaty. An Optional Protocol may be

substantive, outlining a particular approach to rights, or procedural. The CEDAW Optional Protocol is procedural, providing for examination of issues through individual communications (informally referred to as complaints) to the CEDAW Committee or through a fact-finding “inquiry” process. The Optional Protocol allows states to ratify it for purposes of individual communications but to opt out of inquiries.

Bringing a matter to the CEDAW Committee is a somewhat technical process for which individuals usually require assistance from NGOs, including university-based legal clinics, or volunteer lawyers. For a communication to proceed, the Committee must determine its admissibility, which requires legal skills in making the application. The author must demonstrate both that the claim is a violation of the terms of CEDAW and either that she has exhausted domestic remedies or that further pursuit of domestic remedies would be useless (for example, if a domestic case has been ignored by the courts despite all efforts of the applicant). If the communication is accepted, further argument follows, also requiring legal skills for framing effectively. A communication may be brought to the CEDAW Committee by or on behalf of an individual or a group. The possibility of having an organization carry the case is significant, not only as a matter of skills but because the victim(s) may be deceased.

The inquiry procedure is somewhat different in that members of the CEDAW Committee become directly involved in investigation, including a site visit if the State Party agrees. The threshold for undertaking an inquiry is the Committee’s receipt of “reliable information indicating grave or systematic violations by a State Party of the rights set forth in the Convention” (UNGA 2000, art 8). The term “or” is critical; authors need establish only that one of these adjectives applies. Procedures under the optional protocol generally take several years, as the process requires communications between the Committee and the State Party that occur over significant intervals. The Committee issues “views” upon completion of the process and requests a follow-up submission by the State Party. The result becomes a significant element of the jurisprudence of the Committee, providing guidance on application of treaty provisions in specific situations.

Reservations

Article 28 provides for States Parties to enter reservations at the time of ratification or accession. A reservation is a statement that the State Party cannot comply with a particular provision. According to the Vienna Convention on the Law of Treaties (VCLT), a reservation that is “contrary to the object and purpose of the treaty” cannot be admitted. The determination of what is contrary to the object and purpose of the treaty rests with the respective treaty monitoring bodies. CEDAW has adopted a statement indicating that reservations to Articles 2 and 16 are impermissible according to the VCLT standard (UNGA 1998). Reservations may be modified or withdrawn at any time after ratification, but they can be entered only at the time of ratification.

States Parties have entered an unusually large number of reservations to all or parts of CEDAW. A small number of states have entered general reservations,

which are difficult to analyze because of their vagueness. Most of the general reservations relate to Islamic Sharia – the State Party indicating essentially that it cannot implement any provision that conflicts with Sharia. The greatest number of specific reservations is to Article 29(1), a procedural provision that has had little practical impact. Reservations to Articles 2 and 16 are the next in frequency. Clearly the degree of constitutional, statutory, policy, and cultural change required by Article 2 is daunting to many states. Article 16 goes to the heart of equality issues within the family, which is problematic in most countries to at least some degree and is a major issue in States that recognize multiple legal systems or apply religious or customary law as mandatory. Articles 9 (nationality) and 15(4) (legal capacity and domicile) also have been reserved by a significant number of States.

The CEDAW Committee consistently requests States Parties that have entered reservations, to provide an account of how the state plans to work towards withdrawal. This provides an opportunity to discuss the issues during the State Party review despite the reservation. Additionally, a notable number of reservations have been withdrawn in recent years, particularly those to all or part of Article 9 and Article 15. A few States Parties, such as Morocco, Thailand, and Tunisia, have undergone major social and governance changes and have withdrawn all reservations to Article 16.

Conclusion

The CEDAW Convention is a landmark accomplishment that, almost 70 years after entry into force, remains the most comprehensive global statement of women's human rights. The CEDAW Committee has compiled a significant record of State Party accountability for implementation of women's human rights as well as offering engagement with civil society actors who are most affected by its work. It should be understood as a powerful voice in the further development of women's human rights.

Cross-References

- ▶ [Advancing Sexual and Reproductive Health and Rights of Adolescents in Africa: The Role of the Courts](#)
- ▶ [Disability, Domestic Violence, and Human Rights](#)
- ▶ [Electoral Quotas and Women's Rights](#)
- ▶ [Female Forced Migrants: Accountability Gaps in International Criminal Law](#)
- ▶ [Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality](#)
- ▶ [Gender Equality and the European Convention on Human Rights](#)
- ▶ [Human Rights Responses to Violence Against Women](#)
- ▶ [International Law and Child Marriage](#)
- ▶ [Islam, Law, and Human Rights of Women in Malaysia](#)
- ▶ [Securing the Social and Economic Rights of Women in Economic Policy Making](#)
- ▶ [Sex Trafficking and International Law](#)

- ▶ Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence
- ▶ Sexual Health and Sexual Rights
- ▶ Social and Cultural Implications of “Honor”-Based Violence
- ▶ The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
- ▶ The Convention on the Elimination of All Forms of Discrimination Against Women
- ▶ The Human Rights of Minority and Indigenous Women
- ▶ The Indivisibility of Rights and Substantive Equality for Women
- ▶ UN Security Council Resolution 1325: The Example of Sierra Leone
- ▶ Women and the Human Rights Paradigm in the African Context
- ▶ Women Human Rights Defenders
- ▶ Women, Gender, and International Human Rights: Overview
- ▶ Women’s Human Rights and the Law of Armed Conflict
- ▶ Women’s Rights and the Inter-American System
- ▶ Women’s Rights as Human Rights: Twenty-Five Years On

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Women and the Human Rights Paradigm in the African Context

S. Bawa

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Abstract

Women's individual rights claims in many African countries are contentious in large part because they are considered to be a threat to societal and national cultural harmony. This is even more so when women's sexual rights come into question. Conservative groups argue that these rights claims are Western-oriented and threaten the moral fiber of their societies. To counter these arguments, women's rights activists not only have to historicize the colonial foundations of women's oppression but also strategically dialogue between universalist and essentialist cultural norms. This chapter analyzes the contexts, debates, and discourses of women's rights in African sociopolitical and cultural systems. The chapter emphasizes the need for women's rights to be situated within global economic inequities in order to highlight intricate interconnections between global neoliberalism and women's rights at the local levels. The chapter raises an argument that in the changing sociocultural landscape in Africa, African

S. Bawa (✉)

Department of Sociology, Faculty of Liberal Arts and Professional Studies, York University,
Toronto, ON, Canada

e-mail: bawa@yorku.ca

exceptionalism in women's rights discourses hinders progressive dialogue on women and minority rights. The chapter also discusses intersectionality and generational differences in rights activism.

Keywords

Women · Africa · Human rights · Culture · Neoliberalism · Intersectionality

I think people should begin to see advocacy, women's rights, not as a private issue but as a collective issue because what might be good for me may be good for my sister in my village. If something happens to my sister and then we use her as the reference point and we get a policy or a law that changes her situation for the better, it will affect your sister in your village, your mother in your hometown or your colleague in another town. Women's rights are rights everywhere on this planet. No culture, person or government can take that away from women. (Fati, women's rights activist, Ghana, 2010)

Introduction

Women's rights matters, the world over, bear striking similarities with regards to the entanglement of rights discourses and prevailing sociopolitical, cultural, and economic norms. Therefore, in order to understand the nature of rights discourses in a particular society, it is important to situate those discourses within its geopolitical, historical, and socioeconomic context. To this extent, writing about and evaluating women's rights concerns in Africa is a daunting task because of the sheer size and diversity of the continent. There are real risks of oversimplification and generalizations. Africa is an exceptionally diverse continent. While a history of European colonization provides a common general background – in terms of cultures borne out of tensions between indigenous and European domination – the impact, nature, and resistance of the colonial enterprise was varied across the continent. Germaine to this topic, the disruption of preexisting gender relations has been widely seen as setting the foundation for the nature of gender inequity today (Oyěwùmí 1997; Amadiume 2015; Maathai 2011; Nnaemeka 2005). In the post-colonial African setting, women's rights concerns emanate directly from these unequal gender relations and power distribution. Gender inequality is not only a solid basis for women's rights violations and or failure to recognize and uphold rights, it is also a human rights issue. To address the foundational issues that underlie women's rights concerns, it is important to recognize the intertwined nature of culture, gender inequality, and women's rights (Tamale 2008). To successfully contest the status quo, and constructively engage culture, African women's rights activists employ what I refer to as a strategic weaponization of universalist human rights discourses. Here, I am referring to their ability to simultaneously deconstruct and challenge universalist constructs of African Culture and women while appealing to and using the power of universal human rights as leverage to engage disadvantageous cultural norms. It is valid and proper to evaluate women's rights issues and work in Africa from the complexly interwoven tensions of universalism and African exceptionalism.

In this chapter, I advocate for a replacement of cultural relativism with African exceptionalism. This is to achieve two goals: interrupt the “culture as justification” excuse and provide a critical evaluation of imperialistic tendencies in “culture as culprit” trends in international human rights discourses. First, culture is ubiquitous and impacts women’s rights everywhere in the world. The fact that it is used mainly only in reference to non-Western “others” serves an imperial purpose of delegitimizing valid Africanist arguments and therefore reiterates colonial hierarchies that denote the West as sophisticated, modern, and master of nature and culture while Africa is subject to/enslaved by a static and so-called backward culture. This type of representation masks the history and complicity of Western states, capital, and institutions in human rights violations (through various means but mostly in the economic realm) in an attempt to lay the blame solely on African male actors. I employ African exceptionalism, therefore, in an attempt to provide some nuance to the cultural relativism debate in the context of the African continent and to historicize and critique universalist discourses of rights with particular reference to African women, using supranational instruments and documents of the African Union as a backdrop. The aim of the chapter is to situate women’s rights issues in Africa within the broader contexts of international political economy, history, and cultural evolutions.

Methodology and Chapter Organization

This chapter’s theoretical and methodological orientations are influenced by postcolonial African feminist thought, which emphasizes historicity, context-specificity, deconstructionism, and critical engagement with colonial and Eurocentric discourses of African women in knowledge production about African women. It draws from previous work and uses data from fieldwork, participant observations, secondary data analyses, primary data obtained from interviews with women’s rights activists (mostly in Ghana), and textual analyses of primary documents on human rights pertinent to women’s rights in Africa. The chapter is organized as follows: Part one outlines women’s rights issues in Africa and assesses how they are different from women’s rights issues in other parts of the world. This is in order to situate normative discourses of women’s rights within a broader global context. How do global financial flows and economic policies impact women’s rights? How does the traditional focus on rights violations on cultural grounds supersede, and or displace, a focus on larger systemic problems that reinforce local cultural traditions? Part two addresses ongoing debates regarding universalism and African exceptionalism in women’s rights claims in Africa. It places the “culture is culprit/excuse” debate within a global context and speaks to how global economic inequalities exacerbate, encourage, and impact local cultural traditions that disadvantage women. Part three addresses how activists on the ground dialogue between global and local patriarchal systems in defending and upholding women’s rights. I suggest that their strategies speak to the intersectional issues women face in patriarchal postcolonial African societies. The chapter ends

by asking how a millennial generation of African women, using the internet and other electronic means of communication, might lead a different kind of cultural revolution with regards to women's rights.

Global Political Economy and Human Rights in Africa

Women's rights concerns anywhere, but particularly Africa, cannot be discussed in isolation from the global environment within which rights claims are made, assessed, and mitigated. There is a delicate and intricate interconnection of global economic policies and women's rights. Women-friendly economic policies, embedded in international agreements and financial flows and transactions will bode well for creating and sustaining enabling environments for the realization of women's rights (if they existed). Similarly, the absence of such policies creates a toxic environment for women's rights. Starting with the devastating Structural Adjustment Programs of the 1980s and ending with current global neoliberal free trade policies, austere macroeconomic programs have entrenched gender inequality in Africa. Women have borne the brunt of such policies and programs because of normative gender role expectations for women to perform social reproductive labor (Adeniyi-Ogunyankin 2012). This has entrenched patriarchal cultural discourses that severely disadvantage women. Since most African governments do not have absolute autonomy in their financial and economic policy decision-making, they are unable to resist the neoliberal policy recommendations that come with aid, loans, and other foreign investment agreements. Numerous studies have firmly established the link between neoliberal economic policies and women's growing economic disenfranchisement in low-income countries (Kanji and Jazdowska 1993; Stromquist 1999; Boesten 2003). For instance, girls are more likely than boys to be withdrawn from school when a family is economically struggling. This ultimately increases the chances and risks of early/child marriages in communities where such a practice is culturally acceptable. Women who are struggling economically are more likely to endure spousal abuse and violence than those who have some economic leverage.

Globally, neoliberalism has contributed to extreme poverty and powerlessness for women in low income countries. These systemic disadvantages, therefore, require empowerment mechanisms that address global economic inequities in tandem with local patriarchal traditions. Unfortunately, women's empowerment campaigns often aim to address one aspect of the problem: local cultural traditions that privilege men. The focus of many NGOs on addressing local customs and or focusing on individual women empowerment, while important, leads to deepening the neoliberal habitus where individuals undertake to resolve structural problems through their "personal/individual" choices. It is therefore not surprising that women's rights empowerment campaigns, in some societies, are fiercely resisted. For instance, internationally funded and acclaimed microfinance projects that target women as beneficiaries operate on certain deeply flawed assumptions about: (a) the causes of the problem and (b) what constitutes empowerment. By assuming that "men," as a group in patriarchal societies, are the problem, little

attention is paid to how power works. In the first place, there is the assumption that all that is required to solve the problem is attitudinal changes from men. Awareness campaigns are often designed to “educate” community members about women’s rights and the legal protections for them. In doing this, societies are compared to their Western counterparts where they are found wanting and backward. This kind of approach is not only ahistorical, it also erroneously assumes that men in poor communities actually have much economic power. This approach fails to recognize that men are equally ravished by poverty in these societies. Furthermore, economic power does not automatically translate into sociocultural and political power for women. As an executive director of an NGO for women’s empowerment intimated in an interview, such a focus on women increases male fear about becoming useless and tends to harden their grip on power in various detrimental ways for women.

Subsequently, such empowerment schemes cause strife and create deep divisions among men and women in an already impoverished society. This schism deepens patriarchal power holds among the dominant male population who feel threatened by what they consider “uncultural” Western impositions. Activists have raised concerns about how particular conceptions of empowerment and Western-oriented empowerment programs exacerbated the plight of women and poisoned the minds of community members to women’s rights empowerment.

I think we still need to do a whole lot of research to understand our socioeconomic and sociocultural systems better to serve as the basis for our advocacy. So yes, there are the bottom end things to do with our women, to build the broader constituency so that it doesn’t look like it’s just us the leadership who are talking [...]. We have always advocated for change, but it doesn’t look like we have sat down to think critically about the effects of change. *I think we have made a lot of inroads, but there’s still a lot to be done.* (Activist 1 2010)

Second, the focus on increasing and improving women’s financial autonomy is one of many factors that constitute empowerment for women. This has not led to transformative changes in power dynamics in society. To understand how power works, it is important to take the social structure into consideration. It is common practice for women to move to their husband’s home and village upon marriage. Married women in these situations therefore have to build social and cultural capital in their new environment. This capital is accrued over time and through an important culturally validating mechanism of mothering. With children, a woman’s cultural capital grows, incrementally empowering her (Bawa 2012). However, she only really becomes powerful through her male children since female children will also eventually leave to their matrimonial homes. Women’s aspirations for power and voice often, therefore, inevitably also involve and revolve around male relatives in one way or the other. Furthermore, African feminist scholars caution against the reading of female bodies anywhere and everywhere as “women,” oppressed or disadvantaged (see Oyěwùmí 1997; Amadiume 1997; Nnaemeka 2005). Within this context, it is crucial for women’s rights activists not to subscribe to universalizing discourses of women and in particular, to pay attention to nuances in local sociocultural environments if they are truly to

succeed. As discussed later in this chapter, grassroots activists are able to weave between the universal and local patriarchal dynamics to defend women's rights albeit it at what may seem a glacial pace. In addition to global economic inequities, an area that has not been given much attention in women's rights discussions is the role of the environment on women's rights in Africa.

Studies show that the most vulnerable in the planet will be most affected by negative environmental changes (Denton 2002). This ranges from displacement to food insecurity. With a reliance on rain-fed Agriculture, increasingly erratic rainfall patterns will worsen the current situation of food poverty for millions in Africa and lead to displacement. The worst affected will be women – they will become even more vulnerable to abuse and rights violations in such precarious situations. For Wangari Maathai, the Nobel peace laureate, land rights, environmental protection, colonialism, and women's rights are closely linked. She explains that in Kenya,

when the British came they introduced the concept of title deeds for land, which they insisted be in the name of the head of the household. That was always the man. That undermined the traditional setting whereby land belongs to the family. This reform stopped women having legal right to the land. British rule also meant that arable land was used increasingly for cash crops (tea, coffee, sugar cane) rather than subsistence farming. When the cash came in, it went into a bank account held by the man, even though it was women and children who did the work in the fields. Women were completely disenfranchised. (Jeffries 2007)

The issues raised in this section establish a connection among imperialism, development, and women's human rights. I argue that, in Africa, women's rights cannot be sought in isolation of the national interests of the postcolonial state. It is for this reason that women's rights activists recognize the importance of working through, with, and around the African Union's regional as well as national human rights provisions and instruments. The AU, in particular, has recognized the importance of economic, social, and cultural rights to the development of African states. For this reason, the right to development, advocated by African and other third world countries, emphasizes the role of colonialism and imperialism in the impoverishment of millions on the continent (Banjul Charter 1981; UNGA 1986). Specifically, the UN Declaration on the Right to Development (UNGA 1986) states:

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind . . . [the General Assembly confirms that] the right to development is an inalienable human right and that the equality of opportunity for development is a prerogative both of nations and of individuals who make up nations. (UNGA 1986)

The next part builds on the links established in this section – among colonialism, global macroeconomic systems, poverty and women's rights – to engage the “culture” dimension in women's rights claims in Africa.

Individual Rights in Communitarian Settings

The *longue durée* of debates on universalism and cultural relativism has resulted in a bifurcation that appears to exaggerate differences between Western and non-Western cultures and cultural systems (Ibhawoh 2004). The oversimplified idea that the West is a homogenous society where women's individual rights are naturally ingrained in a libertarian culture is a highly flawed but much invoked image in human rights discourses. In particular, the West is often held as a shining example of a human rights habitus. It is a place where culture is not mentioned in the same sentence with/as women's rights; it is considered a-cultural and ultimately permissive with regards to individual rights. These assumptions are not borne out by the evidence of struggle for women's rights dating back over hundreds of years. Today while abortion (as an example of women's rights to bodily autonomy) is legal in many countries (albeit with many restrictions), it remains highly frowned upon by large segments of the society. Abortion clinics are frequently harassed and women who use abortion services are routinely shamed by those who consider such action as morally reprehensible. Among other things, gender pay gaps (even in Canada, a country whose current Prime Minister claims to be feminist), sexual harassment, and assault against women are a reality for women in Western democratic countries. Sociologists have coined the term "rape culture" to appropriately describe this state of affairs. In recent times, the #metoo campaign is evidence that, despite generations of feminist activism for women's rights and gender equality, society still has a long way to go. All around the world, reports of similar incidents of rights violations or discrimination against women are commonplace.

Against this backdrop, I argue that culture does play a role in women's rights concerns everywhere. Therefore, highlighting it as a particular culprit in the case of African countries/societies only serves the purpose of *othering* African societies as unprogressively different; thereby protracting the differences between the West and non-West (in all of its problematic generalizations). Second, culture is another way of referring to the social, political, economic, and religious make up and dynamics of society. The point here is that the highly privileged position of culture (as static) in discourses of women's rights in Africa and other non-Western settings is rather moot. Its discursive potential to hinder progressive dialogue on women's rights is especially amplified in its deification in non-Western contexts. In Africa, perhaps more so than other places, there have been tremendous cultural changes over the course of human existence. This means that cultural excuses, legitimations, and discourses in rights concerns in Africa are ultimately about prevailing power dynamics in the society. Colonially sanctioned, inherited, enhanced or not, patriarchal domination in most societies on the continent largely disadvantages women collectively. African cultural systems predominantly emphasize communitarianism. Ubuntu refers to the collective nature of being and identity formation and experience. One reflects the collective, and the collectives define and reflect the individual. This collective nature of social life is often mistaken to mean that individual aspirations are frowned upon. This is extended to the idea that individual rights ought to be suppressed for the collective good of the community. Characteristic of

how power operates, such concerns are only raised when marginalized and minority groups rights come up. The dominant cultural group is male, heterosexual, and patriarchal. Despite being the majority in terms of population, women's rights in Africa ought to be considered as minority rights because they are considered peripheral and traitorous to the male-centered agenda of nation-state building (Bawa 2017).

As the opening quotation indicates, activism that is collective will dispel the notion that women's rights advocacy caters to "a few disgruntled women" who have been unduly influenced by Western women's rights discourses. In other words, it would help to raise awareness of how powerful male actors have managed to suppress the interests of the majority of their citizens through propaganda which seeks to center *their* interests (though in the minority) as "communal and beneficial to all" (ibid., 29).

Nevertheless, these concerns around imperialism, even though they appear to oppose women's individual rights, ought to be treated seriously by human rights defenders. For a continent that is barely 60 years postcolonial rule, there are real fears about recolonization through the imposition of universally binding, Western-initiated instruments that lack the representative power of the continent. To be successful, human rights advocates and defenders must find ways to weave between the universal and the local; they cannot dismiss nor be unwaveringly loyal to either group. They are caught between two male dominated systems; local and global. These "tensions and contradictions between cultural relativism and universal women's rights debates suggest an opposition between principles of individual and collective liberties" (Bawa 2012, 94).

Continently, the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa of 2003 (hereafter the Maputo Protocol) is an instrument that exemplifies the strategy of rights activists on the continent. To date, the protocol has been signed and ratified by 36 countries. By proposing a protocol on women's rights to the African Union and, therefore, directly engaging the continent's human rights instrument, the Banjul Charter, African women convey, symbolically three main things: first, they recognize and are acutely aware of the importance of sovereignty to Africa; second, women have a right to culture and play an important role in shaping it on the continent; and third, they signal independence from, and interdependence and solidarity, with the global women's rights movement encapsulated in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). I suggest further that, the very act of resisting a blanket/patriarchal interpretation of African culture through the drafting of the Maputo Protocol encapsulates the agency of women in resisting the multiple and intersecting discriminations and oppressions that colonialism instituted (see Obiora and Whalen 2015; Banda 2006). Further to that point, I suggest that

as far as human rights advocacy is concerned, the challenge facing African women's rights advocates and feminists is their ability to advocate a specific relativism, one that leans towards individual freedoms and individual libertarian values while emphasizing a communal responsibility to protect the rights of women at community and state levels through an institutionalization of these processes, legally and socio-culturally. (Bawa 2012)

Strategies, Successes, and Challenges of Women's Rights in Africa

Today, there is hardly a consensus among women's rights activists on the continent on strategies and approaches. There are those who have achieved results by forming alliances, being gradual and patient with the system to institute legislative change. There are others who see the urgency of the matter and are less "pleasant" or gradual in their approach. In the next subsection, I draw on examples of successful and ongoing activism on women's rights by women on the continent to analyze their strategies and the challenges they still face in rights advocacy. Here, I discuss how women are adapting to the changing dynamics of rights advocacy and the generational differences in their approaches.

The Myth of the Silent and Oppressed African Woman

For any keen observer of women's rights around the world, it is unfathomable to assume that women have ever not protested their marginalization or oppression. Yet, an exception is made when it comes to women's rights and empowerment in Africa. Outsider intervention often assumes that women themselves are too powerless to challenge the system. Women's movements in Africa have never been cowed or silenced. Women have successfully campaigned against oppression and violence and fought for their rights. One of the key strategies women's rights groups use is maintaining only pro-women's interests by successfully negotiating a space for themselves that does not align them uncritically either to the West or conservative culturalists at home. Their campaigns are, nevertheless, sensitive to the sociocultural environment in order to ensure that their constituents, women, are not alienated from their communities. While women's rights activism has benefitted from funding from around the world, some of their work has also been hampered by unprogressive campaigns that tend to paint African societies with broad strokes. A popular example of a women's rights issue that has garnered global attention is female circumcision (otherwise only referred to by its more harmful form, female genital mutilation or FGM). In discussions with grassroots activists in Ghana, many stipulated that incidents of the practice are few. There are two possibilities here: either the practice is actually declining or has been driven underground by the aggressive campaigning from international rights groups. The latter is one of the main fears of grassroots activists; silencing and fear because of unintended consequences of strategies designed to improve women's lives. Subsequently, African feminist scholars, activists, and groups call for a much more critical engagement with communities where such practices still occur (Nnaemeka 2005; Obiora 1997). In addition to this, I argue that the various examples of successful grassroots campaigns to end the practice without alienating community members are the best way to solve the problem. For instance, Tharaka Women's Welfare Program (TWWP) a community women's rights group in

Kenya has found a viable alternative to circumcision. Additionally, an activist in Kenya founded Umoja, a village that serves as a refuge for women fleeing sexual violence and other forms of abuse including FGM (Bindel 2015). In addition, news reports from Kenya show that, increasingly, local male chiefs are not only supportive but also leading the revolution to end the practice (Onyulo 2015). I highlight these as examples of the leadership of grassroots women's groups in resolving rights violations. Furthermore, it is important to point out that it is problematic that instead of building on these successful initiatives and highlighting the work by these groups, the international women's rights community continue to be tone-deaf to the harm they cause when and if their campaigns are not contextually nuanced and informed. Alongside notable stalwarts like Winnie Mandikizela Mandela (South Africa), Wangara Mathai (Kenya), Unity Dow (Botswana), Leymah Gbowee (Liberia) to name a few, so many heroines work at local grassroots levels, sometimes in very unorthodox ways, to defend women's and girls' rights without compromising on national development. Their work shows that, contrary to the notion that women's individual rights harm national cohesion, it actually enhances it. Women have worked tirelessly in the interest of peace and stable governments. In Liberia, for instance, the Women's Movement for peace has been widely credited for ending the civil war and strife and for helping elect Africa's first female head of state, Sirleaf Johnson, to office. This work and strategy is captured in the documentary *Pray the Devil Back to Hell* (Reticker 2008). In terms of political representation, the latest OHCHR report indicates that women's participation in politics on the continent has been improving in numerical terms. It reports that: "female participation in African legislatures outpaces many in developed countries. Rwanda (at 63.8 percent) is ranked number one in the world, with Senegal and South Africa in the top 10. Fifteen African countries rank ahead of France and the United Kingdom, 24 rank ahead of the United States, and 42 rank ahead of Japan" (OHCHR 2017, 11). This is symbolically important and can form the bedrock for real change. However, it is important to note that women in parliament and government may not necessarily serve women's interests since they are usually representing the interests of their respective political parties (Bawa and Sanyare 2013).

Changing Landscapes, Generational Differences, and Social Media

Social media in Africa has impacted traditional activism and modes of communication. African women are active on social media in their feminist advocacy. The platform has improved and expanded the space women have to extend their influence on key national and political issues affecting women. These new platforms also create opportunities for rapid and coordinated responses to women's rights issues. Continent wide, there is a growing new crop of feminist activists and many of them are successfully using social media to do their advocacy. Initially used in an attempt to dismiss the impact of these activists, the term "Facebook, Twitter, or social media feminist" has been (re)claimed by young feminists. In addition to the usual charge

that feminist activism is un-African, the key criticism “social media feminists” face is that they are disconnected from the reality of most women on the ground. This criticism is not substantively different from those leveled against feminists for being elitist and disconnected from the concerns of ordinary women. Nevertheless, the continent-wide solidarity and networking to fight violence against women and gender oppression is crucial to advancing women’s rights in an increasingly more interconnected and digital world. An observation of some of these debates on social media show lively, if tense, debates on various issues concerning women’s rights. Activists engage different segments of the public in their campaigns. For instance, in addition to prominent individual activists, groups such as Zambia Feminists, African Feminists, and Pepperdemministries have become the go-to commentators on issues relating to women’s rights. In fact, they are sought after for comment and interviews whenever an incident on gender inequality occurs.

In 2016, the hashtag #menaretrash erupted on social media following the gruesome murder of a 21-year-old South African woman in a domestic violence incident. While many criticized the hashtag for being antimale and overgeneralizing about men’s violent tendencies, others praised it for forcing Africans to confront an ugly truth of domestic violence on social media. Following the story, it was comforting for many women’s rights activists to see that the incident was universally condemned. However, the issue of militancy in the activists’ strategy was the bone of contention. This is not uncommon in discussions around women’s rights activism in Africa. Many are uncomfortable with what they consider a militant approach where dialogue would be more productive. Indeed, as several male interviews intimated during fieldwork in Ghana, they expect women to “progressively seek for rights and not be militant about it.” Similarly, the hashtag #mydressmychoice which originated from Kenya following the undress and shaming of a young woman in Nairobi, garnered world-wide attention and solidarity. Activists and women not only took to social media to register their protests and disgust, they also demonstrated around the continent to register their concerns. Another hashtag that emanated from Nigeria, #bringbackourgirls quickly went global. People like Michelle Obama joined in this social media campaign to pressurize the Nigerian government to rescue over 200 girls captured in Chibok, Nigeria. Overall, social media has provided an unprecedented opportunity for women to democratically engage powerbrokers and governments on women’s rights issues. With the threat of international shaming, governments are no longer cavalier about discourses around women’s rights.

Intersectionality and Changing Dynamics of Women’s Rights Activism in Africa

Increasingly, LGBTQ groups in the continent are becoming visible in their activism for rights specific to their sexuality. Because women’s rights activism is often seen as Western and anti-African, the movement is also blamed for encouraging Western incursions on the cultural values of the continent. To escape these charges, many

feminist and women's rights groups go to great lengths to dissociate themselves from LGBTQ groups.

The issue of LGBTQ rights, in particular, brings the paradoxes of the global human rights debates to light in the African setting. With a focus on economic redistribution and subsistence, sexual minority rights may appear a luxury to the economically struggling African state. Similar to the rhetoric on women's rights, but with much more hostility, the rights of LGBTQ communities have been constructed as un-cultural to Ghanaian society. Therefore, rather than merely compel countries in the Global South to legislate favorably on this matter in the midst of such great hostility, it is crucial to encourage education and dialogue to provide an enabling environment for people within these communities to enjoy these rights. (Bawa 2017, 39)

In West Africa, for instance, evangelical Christianity, which is largely antigay, is on the rise. Many women are organized in groups within their church and faith communities and therefore often espouse their faith doctrines. In the majority of cases of women's rights, the problem is not the lack of progressive legislation but enforcement. In the case of LGBTQ rights, there are actually prohibitive laws against same sex rights. Nevertheless, in the face of reprisals, women's queer activism has increased and become more and more visible. For instance, the Association *sourire de femme* (Senegal), Freedom and Roam Uganda (FARUG), the Bisi Alimi Foundation (Nigeria), the Gay and Lesbian Coalition of Kenya, OutRight (South Africa), Shams (Tunisia), and the Association of Gay and Lesbians in Zimbabwe are some of the groups fighting for the inclusive intersectional rights of women and queer people in Africa.

Alliances between women's and LGBTQ activism on the continent are few. While an expanded basis for rights in Africa will benefit all marginalized groups; many activists are concerned that such alliances will alienate their constituents. The challenge facing women's rights advocates in Africa at the moment is how to operationalize intersectional identities in their activism without generalizing to all human rights concerns and therefore losing the momentum to even out the inequitable situations of women as a special category. In other words, how does the women's movement address rights claims for its queer constituents under the umbrella of women's rights? This is an area that still requires further studies.

Conclusion

Years of hard work and strategic activism from advocates has resulted in much progressive legislation, policy and attitudinal changes, and cultural shifts for women's rights in Africa. Concerted efforts of activists, albeit disparate, have broadened discourses of women's rights beyond economic empowerment to sexual rights. A key strategy that has worked in this regard is the two-pronged method of deconstructionism of local patriarchal culture and strategic deployment of universalist human rights norms. By critically engaging and historicizing "African culture" activists have provided much needed space for women's rights claims. At the global level, women's rights issues are closely intertwined with the international political

economy. By relying on their entitlement to universal human rights while critiquing international policies that violate rights to economic empowerment and exacerbate cultural norms that disadvantage them, advocates and scholars provide opportunities for critical engagement with the global human rights community on the interdependence of first and second generation rights. This also provides a unique opportunity to dialogue with global rights groups and solidarity networks (funders and NGOs) on issues of imperialism, agency, and power in women's rights work. An area that requires further study is how intersectionalism is operationalized in women's rights advocacy in Africa.

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Gender Equality and the European Convention on Human Rights

Sandra Fredman

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Abstract

The equality guarantee in Article 14 of the European Convention on Human Rights and Fundamental Freedoms has often been regarded as an insipid right. However, recent jurisprudence indicates that the European Court of Human Rights has taken a more robust stand. This chapter assesses recent developments to determine whether we can now discern a coherent conception of the right to equality. The article draws on a four-dimensional conception of substantive equality, which assesses the case law according to whether it furthers the complementary aims of redressing disadvantage (distributive dimension); addressing

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S. Fredman (✉)

Rhodes Professor of the Laws of the British Commonwealth and the USA, Oxford University, Oxford, UK

e-mail: sandra.fredman@law.ox.ac.uk

stereotypes, prejudice, humiliation, and violence (recognition dimension); facilitating participation (participative dimension); and accommodating difference, including through structural change (transformative dimension). The article concludes that the judgments have important resonances with this approach, particularly in relation to the distributive, recognition, and participative dimensions. The Court remains cautious, however, in relation to transformation. It also has a worrying tendency to revert unexpectedly to formal equality.

Keywords

Right to equality · Substantive equality · Discrimination · Gender discrimination · Sexual orientation discrimination · Transformative equality article 14 European convention on human rights

Introduction

On the face of it, the equality guarantee in Article 14 of the European Convention on Human Rights (ECHR or “the Convention”) seems relatively weak. It prohibits discrimination only in the enjoyment of other Convention rights and as such has been regarded by the European Court of Human Rights as having no independent existence. Indeed, it was this feature that led the Council of Europe to adopt a stand-alone equality guarantee in the form of Protocol 12 in 2000. A look at the jurisprudence of the European Court of Human Rights (“the Court”) in the last few years, however, reveals a very different picture. The Court has held, for example, that refusal to afford equal parental rights to fathers is a breach of Article 14; that violence against women is a form of gender discrimination; that segregation in education can constitute race discrimination; that unequal treatment on grounds of sexual orientation is unjustifiable in a growing number of contexts; and that social benefits, even if they do not constitute rights in themselves, should not be granted on a discriminatory basis. This raises the question of whether we can now discern a coherent conception of the right to equality in the application of Article 14, which incorporates the insights of substantive equality being developed in other courts and in the scholarship. This chapter addresses this question by assessing recent developments in Article 14 jurisprudence.

In the next section, I consider the structure of Article 14 and the ways in which the Court has interpreted its component parts to allow for a broader and deeper conception of equality than in its early jurisprudence. Particularly important have been the more elastic interpretation of the grounds of discrimination; the fluidity of the concept of “ambit”; and the willingness to develop the concept of “discrimination” to include more substantive conceptions such as indirect discrimination. Also significant has been the Court’s openness to absorbing conceptions of discrimination and equality that have developed in other arenas, notably the European Union (EU). In the second section, I evaluate these developments using a four-dimensional framework of substantive equality, namely, redressing disadvantage (the redistributive dimension); addressing stigma, stereotyping, prejudice, and violence

(the recognition dimension); facilitating voice and participation (the participative dimension); and accommodating difference, including through structural change (the transformative dimension). I conclude that although not explicitly articulated, the recent jurisprudence on Article 14 contains many elements of substantive equality, particularly in relation to the first three dimensions. The last transformative dimension remains the most challenging given the Court's positioning as a supra-national tribunal.

Article 14 of the European Convention on Human Rights

Article 14 of the ECHR provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

At a glance, Article 14 reveals three key characteristics. First, it is structured as a dependent right. It guarantees only that “the enjoyment of the rights in this Convention shall be secured without discrimination” on the grounds named in Article 14. This contrasts with Protocol 12, which prohibits discrimination in relation to any “right set forth by law”; as well as discrimination by a public authority, on the same grounds as are mentioned in Article 14. Secondly, the list of enumerated grounds is a reflection of the time and context of its drafting. Some seem less pressing today than they did then, whereas key contemporary issues, such as disability, sexual orientation, and age, are missing. On the other hand, the list is nonexhaustive. It is prefaced by “such as,” suggesting that they are only illustrative, and ends with “other status.” The third characteristic relates to the concept of discrimination, which is mentioned but not defined. This section considers the more expansive interpretation that the Court has given to each of these characteristics in recent years.

Widening the Scope of Article 14: From Breach to Ambit

The early case law of the Court assumed that, before Article 14 could come into play, a breach of one of the substantive rights had to be proved. Consequently, Article 14 often appeared redundant: if the right had been breached, no further energy needed to be expended on considering Article 14; but if the right had not been breached, Article 14 was not applicable in any event (for recent examples, see *Mileusnic and Mileusnic-Espenheimer v Croatia* 2015, para 74; *Oliari v Italy* 2015). However, a closer look at the wording of Article 14 reveals that the Convention requires that the “enjoyment” of Convention rights “shall be secured without discrimination” and not that there should be a breach as a precondition of the applicability of Article 14.

It was thus of critical importance for the development of Article 14 that the Court began to move its focus from a concept of “breach” to one of “ambit.”

This development started as early as *Belgian Linguistics* in 1968. The Belgian Government submitted before the Commission that a violation of Article 14 was “legally impossible” without a simultaneous violation of another Article of the Convention (Belgian Linguistic Case (No. 2) 1968). The Commission, however, suggested that a breach of the substantive right was not necessary: it was enough for the discrimination at issue to “touch the enjoyment” of a specific right or freedom (ibid.). This approach, which was accepted by the Court (ibid.), is now established law. Accordingly, “For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols” (Thlimmenos v Greece 2000). One of the most important implications of the “ambit” principle is that Article 14 can extend “beyond the enjoyment of the rights which the Convention requires each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide” (E.B. v France 2008, paras 47–48). This is epitomized in *E.B. v France*, which concerned discrimination against a gay woman who wished to adopt a child (ibid.). The Court made it clear that Article 8 did not expressly give a right to a single person to adopt a child. Nevertheless, adoption clearly fell within the ambit of Article 8. The result was that “the State, which has gone beyond its obligations under Article 8 in creating such a right cannot in the application of that right, take discriminatory measures within the meaning of Article 14” (ibid., para 49).

The result has been far reaching. While not establishing socio-economic rights as such, it has had the effect of extending existing social provisions in social democratic European States to excluded groups. Thus, in *Belgian Linguistics* itself, the Court held that the education provision in Article 2 of Protocol 1 does not give individuals the right to a particular kind of educational establishment. However, a State that does set up such an establishment cannot do so in a discriminatory manner (Belgian Linguistic Case (No. 2) 1968, supra n 7 at para 9).

Elasticity of Grounds

The list of grounds in Article 14 differs from its parallel in EU law in including language, political or other opinion, national or social origin, association with a national minority, property, and birth. The grounds of disability, sexual orientation, and age, however, are conspicuous by their absence. But the Court has frequently reiterated that the list in Article 14 is “illustrative and not exhaustive, as is shown by the words ‘any grounds such as’” (Salgueiro da Silva Mouta v Portugal 1999). In addition, the words “other status” have generally been given a wide meaning, not limited to characteristics which are innate or inherent (Kiyutin v Russia 2011, para 56; Gerards 2013). In practice, therefore, the Court has adopted an inclusive approach, regarding the Convention as a living instrument, to be interpreted in light of present day conditions (Inze v Austria 1987).

For example, in *Salgueiro da Silva Mouta*, the Court concluded that sexual orientation was “undoubtedly covered by Article 14” (*Salgueiro da Silva Mouta v Portugal* 1999; see also *SL v Austria* Application 2003 and many other cases). The inclusion of disability has been accepted with equally little fuss (*Glor v Switzerland* Application 2009, para 80); and in *Kiyutin v Russia*, the Court held that a distinction on account of an individual’s health status should be covered, either as a disability or as a form of disability. This meant that discrimination on grounds of HIV status could fall within the Article (*Kiyutin v Russia* 2011, para 58). Article 14 has also been held to cover distinctions between children born in and out of wedlock (*Inze v Austria* 1987). The Court’s openness to regarding most classifications as falling within the rubric of “other status” has, however, led it to filter claims through a varying standard of scrutiny. Contracting States enjoy significant flexibility – called a margin of appreciation – in assessing to what extent differences in otherwise similar situations justify different treatment. However, the Court requires “particularly convincing and weighty reasons” before it regards a difference of treatment based exclusively on ethnic origin (*D.H. and Others v Czech Republic* 2007), gender (*Abdulaziz, Cabales and Balkandali v United Kingdom* 1985), sexual orientation (*E.B. v France* 2008; *X v Austria* 2013), and disability (*Kiss v Hungary* 2013) as compatible with the Convention. On the other hand, the margin of appreciation tends to be wider in relation to social or economic policies; with the Court deferring to the legislature’s judgment unless it is “manifestly without reasonable foundation” (*Stec v United Kingdom* 2006; see also *Connors v United Kingdom* 2004). It also looks closely at whether there is common ground between Contracting States on the issue (*Petrovic v Austria* 1998; *Hämäläinen v Finland* 2014). For other grounds, such as religion, the margin of appreciation is still in flux. In *S.A.S. v France*, the Court gave the State a wide margin of appreciation in justifying the discriminatory effect on Muslim women of the French ban on wearing a full-face veil in public (*S.A.S. v France* 2014; see also *Arnardóttir* 2014).

Defining Discrimination

The Convention simply states that the enjoyment of the rights should be secured “without discrimination” on the grounds mentioned and does not define discrimination further. From its earliest case law, the Court began to develop an understanding which regarded discrimination in terms of distinctions which were not justifiable. For this the Court has always used a classic proportionality doctrine. In a formula that is now standard in Article 14 cases, the Court stated: “A difference in treatment in the exercise of a Convention right must not only pursue a legitimate aim. Article 14 is also violated when there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised” (*Belgian Linguistic Case* (No. 2) 1968, para 10). For many years, the Court based its decisions on a formal view of equality, namely, that likes should be treated alike. This was despite the development of a doctrine of disparate impact or indirect discrimination, which had been pioneered by the US Supreme Court (*Griggs v Duke Power Co.* 1971) and

subsequently incorporated into UK and EU antidiscrimination law. Recognizing that equal treatment can entrench disadvantage in situations of antecedent inequality, indirect discrimination, or disparate impact focuses on inequality of results rather than inequality of treatment, unless it can be justified.

More recently, however, the Court's jurisprudence has developed well beyond the equal treatment doctrine. The first real breakthrough came in *Thlimmenos* (*Thlimmenos v Greece* 2000). In this case, the applicant had been refused entry into the accountancy profession because he had a criminal conviction. This rule was applied uniformly to all candidates for accountancy. However, for *Thlimmenos*, the criminal conviction arose from his conscientious objection on religious grounds to compulsory military service. Here the Court recognized that equal treatment could be discriminatory. This important step beyond an equal treatment model was summed up in this way: "The Court has so far considered that Article 14 is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. [Article 14] is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different" (*ibid.*, para 44).

The *Thlimmenos* doctrine did not, however, amount to a fully-fledged principle of indirect discrimination. For this, we had to wait for *D.H. and Others v Czech Republic* (2007). In this case, Roma children were disproportionately allocated to "special" schools, delivering inferior education, due to the way in which educational tests were framed and administered. The Chamber held that the same educational tests were applied to all Czech pupils and therefore could not be discriminatory (*D. H. v Czech Republic* 2006). The Grand Chamber reversed this decision (*D.H. and Others v Czech Republic* 2007). Picking up on the concept of indirect discrimination in EU law, the Court held that "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group" (*D.H. and Others v Czech Republic* 2007, para 184). Particularly important was its emphasis on the fact that indirect discrimination does not necessarily require discriminatory intent. The Court's jurisprudence nevertheless continues to differ from parallel jurisdictions such as that of the EU and the UK in leaving open the possibility of a justification defense in both equal treatment (or direct discrimination) and indirect discrimination claims.

What risks, then, are associated with permitting justification for direct discrimination, and have these materialized in European Court of Human Rights jurisprudence? One argument has been that permitting direct discrimination to be excused is a central affront to individual dignity. A different concern is that employers' business costs or customer prejudice might be seen as a good reason to permit discrimination (Gill and Monaghan 2003). There is also a danger that stereotypes might be reinforced if less favorable treatment on a protected ground can be justified (*R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* 2004). On the other hand, a rigid refusal to allow justification makes it difficult to correct factual inequalities by treating different groups differently. The lack of acceptable justification is also problematic when two types of discrimination

conflict, such as religion and race, gender or sexual orientation. The knowledge that a finding of discrimination is determinative of the matter might lead courts to avoid this outcome by taking a restrictive view of earlier threshold requirements, such as whether the applicant is a “worker” (Hashwani v Jivraj 2011; see also McCrudden 2012; Freedland and Kountouris 2012). It is arguable, therefore, that instead of a rigid refusal to permit justification, it would be preferable to apply justification strictly to prevent invidious discrimination, but to permit appropriate differentiation where necessary to advance the background goal of equality.

In fact, the Court has shown itself to be capable of resisting attempts to use justification to permit invidious direct discrimination, as demonstrated by the very recent case of *Emel Boyraz v Turkey* (2014). In this case, the applicant had been denied a position as a security officer in the State-run electricity company because she was a woman. Although she had successfully completed the public service examination, she was informed that she could not be appointed as she did not fulfill the criterion of being a man. The State justified this exclusion on the grounds that the job required the incumbent to handle weapons, work day and night, and use physical force in case of an attack, for which women were not suitable. The Court took the high standard of justification for sex discrimination seriously, reiterating that since “the advancement of gender equality is today a major goal in the Member States of the Council of Europe . . . very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention” (ibid., para 51). No explanation had been given as to why women were incapable of fulfilling the requirements of the job. The Court concluded that “the mere fact that security officers had to work night shifts and in rural areas and might be required to use physical force and firearms under certain conditions could not in itself justify the difference in treatment between men and women” (ibid., para 54). The existence of a possible justification defense is not, therefore, inherently problematic. The real challenge is for it to be calibrated in a manner which can discern invidious discrimination and distinguish it from appropriate differentiation.

Article 14 and Substantive Equality

Substantive Equality: A Four-Dimensional Approach

Substantive equality is itself a contested concept. Rather than attempting to pin substantive equality to a single meaning, such as equality of opportunity, equality of results or dignity, I propose that it be understood as a multidimensional approach through which four complementary and interrelated objectives are pursued (Fredman 2011, 25–33). These are: redressing disadvantage (the redistributive dimension); addressing stigma, stereotyping, prejudice, and violence (the recognition dimension); facilitating participation (the participatory dimension); and accommodating difference, including through structural change (the transformative dimensions).

The redistributive dimension aims to redress disadvantage. The formal equality or “anticlassification” approach requires the removal of “irrelevant” classifications such as race and sex, the aim being that each individual should be treated on merit. Substantive equality, by contrast, recognizes that there is no abstract individual and merit itself might be a function of previous discrimination. Classifications are invidious when they lead to detriment or disadvantage, but they may be necessary to compensate for previous disadvantage. Substantive equality, therefore, aims to redress disadvantage, rather than to prohibit classification. This has several advantages. It incorporates the insights of indirect discrimination, recognizing that equal treatment can constitute a breach of substantive equality if there is disparate impact. It goes further and permits affirmative action or expressly differential treatment to redress previous disadvantage.

The recognition dimension of substantive equality aims to capture the familiar association of the right to equality with dignity, while avoiding its pitfalls, namely that it is vague (McCrudden 2008) and oblivious of social relations. Instead of an open-ended conception of dignity, this dimension of substantive equality specifies the wrong to be addressed as stigma, stereotyping, prejudice, and violence based on a protected characteristic. Similarly, rather than an individualized notion of dignity, this perspective draws on Nancy Fraser’s conception of “recognition wrongs,” which consist of “misrecognition” or inequality in the mutual respect and concern that people feel for one another in society (Fraser and Honneth 2003, 29). Based on the Hegelian notion that our identity is constructed (at least partially) in terms of the ways in which others regard us, recognition wrongs can be experienced regardless of relative socio-economic disadvantage or distributive wrongs. The participative dimension of substantive equality draws on Ely’s insight that the aim of judicial review is to compensate for the absence of political power of groups who are permanently marginalized and therefore “to whose needs and wishes elected officials have no apparent interest in attending” (Ely 1980, 46). Substantive equality requires decision-makers to hear and respond to the voices of groups sharing a protected characteristic, including the least vocal within such groups, rather than imposing top-down decisions.

Substantive equality also has the important effect of imposing positive duties on the state to ensure that those affected have the capacity to participate meaningfully. The transformative dimension of substantive equality arises from the recognition that equality is not necessarily about sameness. Different identities and characteristics should be respected and even celebrated. Difference should not, however, attract detriment, and nor should assimilation be required as a precondition for the right to equality. This in turn might require structures to be modified or transformed to accommodate difference. For example, rather than requiring women to conform to male norms, substantive equality requires transformation of existing male-oriented institutions and social structures. With this comes the imperative to transcend the public–private divide, recognizing the ways in which imbalances in power in the family can reinforce power imbalances in the public sphere and vice versa. This in turn entails the requirement of positive duties to achieve equality as well as negative duties to prevent discrimination. Substantive equality also requires the accommodation of differences within groups.

One of the key advantages of a multidimensional approach is that it provides a framework within which to address the interaction between dimensions. For example, welfare benefits might address disadvantage, but be delivered in such a way as to stigmatize the beneficiaries. Affirmative action measures can similarly redress disadvantage while at the same time causing stigma. The four-dimensional approach makes it possible to address these tensions. Given that equality aims to redress disadvantage as well as to address stigma, it is crucial to design both welfare and affirmative action measures in ways that advance dignity in addition to redressing disadvantage. Furthermore, measures aimed at redressing disadvantage or reducing stigma may not go far enough towards achieving substantive equality unless accompanied by structural change. For example, since women predominate among part-time workers, equal hourly pay for part-time workers is an important measure to redress the disadvantage of women in the labor market. But until the division of labor in the home is addressed, the gender composition of the part-time workforce is unlikely to change.

A key question in relation to substantive equality is the role of agency or choice. While enhanced agency and choice might seem to be an aim of substantive equality, liberal theories of choice have periodically been used to defeat equality claims on the grounds that the claimant could have chosen to avoid the consequences of a policy or practice. Adverse consequences are then attributed to the claimant's own choices (*D.H. v Czech Republic* 2006). On this view, individuals should only be protected against detrimental treatment on the basis of characteristics that are "immutable" or cannot be changed by the applicants' own efforts. Substantive equality, in contrast, has brought with it an acknowledgment that an individual should not be made to pay an unreasonable price for her choices (see, for example, *Mandla v Lee* 1983).

Because the role of choice in substantive equality needs to be carefully nuanced, it is not regarded as a separate dimension within the four-dimensional framework. Instead, the appropriate notion of agency should be constructed within the four dimensions. For example, the need to redress disadvantage can override apparent choice when such choices are limited by that very disadvantage, or choices appear to entrench disadvantage. Similarly, recognition issues are based on the actual consequences flowing from one's perceived identity, regardless of whether and to what extent that identity is chosen. The exercise of choice could be seen to be fulfilling the participative dimension, but this too needs to be carefully balanced against the need to redress disadvantage, including constrained choice. Under the transformative dimension, agency can be enhanced, through changing structures to widen the range of feasible options. However, for many people choice is not the only value to strive for, but should be complemented by the possibility of valuing the situation they find themselves in regardless of choice.

The following sections analyze a selection of recent developments through the prism of a multidimensional understanding of substantive equality as outlined above. In doing so, the aim is to draw together existing fragments into a more coherent whole and to highlight the missing links. This multidimensional framework can be applied to all forms of discrimination and their interaction, including in relation to race, disability, religion, or other grounds. For the purposes of this chapter and for reasons of space, here, the focus is on gender and sexual orientation.

Gender

Gender inequality in Europe can be mapped along the four axes identified above: redistribution, recognition, participation, and transformation. Women remain at a significant disadvantage in the paid workforce, as evidenced by: the persistence of the gender pay gap; segregation of women into lower paying work; a predominance of women in low paid and precarious work; and a significant “motherhood penalty” (European Commission 2014). Behind this lies the largely unchanged division of work in the home. Although women increasingly participate in the paid workforce, they remain primarily responsible for unpaid reproductive, caring, and domestic work (European Commission 2013). Thus, disadvantage in the paid labor force derives in many respects from the ascription to women of reproductive roles. In particular, undervaluation of women’s work is a direct result of the impact on socio-economic status of stereotyping or recognition harms.

The recognition dimension is also manifested through the ways in which sexual stereotypes contribute to women’s labor force disadvantage, whether through sexual harassment at work or the risk of violence in accessing workplaces. These factors in turn contribute to and are reinforced by women’s relative lack of voice, whether in collective organization through trade unions in the workforce, on company boards or in the political arena. This brings in the third dimension, the participatory dimension. Addressing these three dimensions alone will not, however, have lasting effects without changing the underlying structures which perpetuate these patterns. This is where the fourth, transformative dimension, comes into play, requiring foundational change in the ways in which the boundaries between paid and unpaid work are configured in labor law, and in the gendered roles ascribed to men and women in each of these spheres.

Although the paid labor force is the locus of much of women’s inequality, the structure of the Convention is not immediately amenable to dealing with discrimination at work. There is no express right to work and Convention rights are directed against the State so that private employers are not directly bound by the Convention. However, in an important recent development, the European Court of Human Rights has held that sex discrimination at work can fall within the ambit of Article 8, therefore triggering the applicability of Article 14. In *Emel Boyraz v Turkey*, as we have seen, the Turkish civil service refused to appoint a woman to a post as security officer on the grounds that she was a woman. The Court held that the concept of “private life” extends to aspects relating to personal identity, of which sex is an inherent part. The judgment is a clear example of the Court’s appreciation of the need to draw the link between the different dimensions of equality in order to deal with it properly. By utilizing Article 8, the Court was able to characterize work as centrally affecting both a person’s material well-being and her sense of self-esteem and relations with others. Thus, the Court stated that a measure “as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person’s identity, self-perception and self-respect and, as a result, his or her private life.” What is more, the applicant’s dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practice a profession which

corresponded to her qualifications (*Emel Boyraz v Turkey* 2014, para 44) (See, however, the partially dissenting judgement of Judge Spano.). Having held that the dismissal fell within the ambit of Article 8, the Court had no difficulty in finding that the purported explanation for refusing to allow women to perform the role of security officer was not founded on any facts (*ibid.*, para 54). This is then a clear example of the recognition dimension causing socio-economic disadvantage, in the form of denial of a job. At the same time, the Court's use of Article 8 makes it clear that the interaction also works in the opposite direction: that is, the loss of a job can cause further recognition harms.

The Court has also made progress towards substantive equality in relation to parenting rights. For many years, women have struggled to achieve protection against discrimination on grounds of pregnancy and the right to paid maternity leave. This addressed primarily the first dimension, namely, the need to redress disadvantage. But it did not go far enough to bring about structural change, the fourth dimension. This was because, by giving parenting rights exclusively or predominantly to women, this approach risked reinforcing women's primary responsibility for childcare. A transformative approach, bringing about real substantive equality, would require that men be afforded the same rights as women. Until recently, the Court had been very tentative in this respect, waiting for a European consensus to emerge (*Petrovic v Austria* 1998). But in *Markin* it held that the provision of parental leave to mothers but not fathers had the "effect of perpetuating gender stereotypes disadvantageous both to women's careers and to men's family life" (*Markin v Russia* 2012, para 141). In this case, a Russian serviceman who was responsible for his children claimed equal parenting rights as a woman. In civilian life, both men and women enjoyed equally generous parenting rights; but the Russian government argued that the need for combat effectiveness made it impossible to do the same for men in the military. In upholding the father's claim, the Court clearly drew together the relevant dimensions of substantive equality. In this way, it is moving in step with the EU (*Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* 2010; *Fredman* 2014; see also *Trimmer* 2011).

Similarly significant progress has been made towards a multidimensional understanding of substantive equality in relation to gender-based violence (GBV), which has been only recognized as an equality issue relatively recently. Once seen through the prism of substantive equality, however, there is no doubt as to this connection. First and foremost, substantive equality captures GBV as stemming from stereotyped roles whereby women are regarded as subordinate to men, which perpetuate and even justify family violence and abuse, forced marriage, dowry deaths, acid attacks, and female circumcision. This in turn leads to disadvantage in the context of the other dimensions. The physical and mental consequences help to maintain women in subordinate positions and contribute to lower levels of education, skills, and work opportunities. Similarly, women's political participation is affected. To bring about real substantive equality, all these dimensions need to be addressed in an interactive form.

This approach to GBV can now also be discerned in recent Convention case law. In *Opuz v Turkey* (2009), after a long history of appalling violence against the applicant and her mother, the applicant's partner shot his mother-in-law dead.

The applicant and her mother had filed complaints against him since 1995, but the authorities had repeatedly failed to provide sufficient protection. The Court was able to draw extensively on international law sources to hold that the State's failure to give women appropriate protection against GBV constituted sex discrimination. Particularly importantly, in addition to finding a breach of the right in Article 3 not to be subjected to torture or inhuman treatment or punishment, the Court found a breach of Article 14. The Court's approach shows a real sensitivity to the need to understand gender equality in a multidimensional way. Most important was its emphasis on the ways in which stigma, stereotypes, and prejudice against women can lead the authorities to refuse to recognize the victims as worthy of State protection and to the passive or active condoning of perpetrators' actions. The Court was also sensitive to the interaction between the harms of recognition and redistribution. It emphasized the high incidence of domestic violence in the victim's region, with the majority of the victims being Kurdish women, with little education and no independent source of income. Thus, the fact that the women at risk were already some of the most disadvantaged in Turkey aggravated and reinforced the stereotypical view of women as being in a subordinate position to men and therefore worthy of lower protection.

This brings in the fourth dimension the need for structural change. The Turkish Government argued that since the applicants had withdrawn their complaints on several occasions, any further intervention would constitute a breach of the victims' Article 8 rights to respect for family and private life. The Court roundly rejected this argument. In the earlier domestic violence case of *Bevacqua and S. v Bulgaria* (2008, para 83), it had already rejected the authorities' view that the dispute was a "private matter" so that no assistance was required. In *Opuz*, the Court reiterated that, in cases such as this, interference with the private or family life might be necessary to protect health and the rights of others (*Opuz v Turkey* 2009). *Opuz* was followed swiftly by *Eremia v Republic of Moldova*. Here too the Court held not only that the State's failure to protect the victims against domestic violence was a breach of its positive duties under Article 3, but also constituted a breach of Article 14. Significantly, the Court now regarded it as established that "the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional" (*Eremia v Republic of Moldova* 2013, para 85, citing *ibid.*, para 191). A key piece of factual evidence cited by the Court in supporting its conclusion in the applicant's favor was the fact that the relevant family protection department in her area had failed to enforce the protection order issued in her name for over 3 months and had allegedly suggested reconciliation, since she was "not the first nor the last woman to be beaten up by her husband" (*Eremia v Republic of Moldova* 2013, para 87). Moreover, the State Prosecutor had decided to suspend all proceedings against the perpetrator for a year, although the latter admitted to having physically and psychologically abused three members of his family. This was because this was considered a "less serious offence," and the perpetrator was well respected at work and in the community and "did not represent a danger to the society" (*Eremia v Republic of Moldova* 2013, para 27). In the result, the Court found that "[t]he combination of the above factors clearly demonstrates that the authorities' actions were not a simple failure or delay in dealing with

violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman” (cited in *ibid.*, para 21).

Sexual Orientation and Transgender

For lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in Europe, the dimension of inequality which is most pronounced is the recognition dimension, namely stigma, stereotyping, prejudice, and violence. However, this centrally implicates the other axes. Harassment and bullying at school and at work can have serious implications for progress in the workforce, leading to economic disadvantage. LGBTI people are generally small minorities on the political scene, making it difficult for their voice to be heard through democratic processes. Moreover, rather than celebrating and accommodating difference, social structures require LGBTI people to cover or hide their identity and relationships; this itself leads to social exclusion or marginalization. This is compounded for same-sex relationships. Failure to recognize LGBTI relationships leads to further recognition harms, particularly in relation to parenting rights, whether through custody, adoption, or surrogacy. It also leads to material disadvantage, including in relation to pensions, benefits, or housing. Earlier European Court of Human Rights cases characterized the issue as one of privacy under Article 8 rather than equality. Thus, the criminalization of homosexual relations between adults (*Dudgeon v United Kingdom* 1981) and the discharge of homosexuals from the armed forces (*Smith and Grady v United Kingdom* 1999) were found to be in breach of Article 8 alone. More recently, Article 14 has also come into play (*L. and V. v Austria* 2003). The Court has held that discrimination on grounds of sexual orientation is “undoubtedly covered” by Article 14 (*Salgueiro da Silva Mouta v Portugal* 1999) and that only very weighty reasons could justify any differentiation on this ground (*E.B. v France* 2008; *Smith and Grady v United Kingdom* 1999). Indeed, distinctions based solely on sexual orientation are unacceptable (*Salgueiro da Silva Mouta v Portugal* 1999; *E.B. v France* 2008).

In determining the meaning of equality in these contexts, the Court has taken some important steps towards a substantive approach, in particular through its appreciation of the ways in which stigma and prejudice have implications in relation to disadvantage and social and political exclusion. However, it has thus far stopped short of a truly transformational approach by failing to require the recognition of same-sex marriage. Its primary contribution towards a substantive approach has been along the recognition axis, as reflected in its acceptance that the relationship of “a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of family life, just as the relationship of a different-sex couple in the same situation would” (*P.B. and J.S. v Austria* 2010, para 30). The recognition dimension has been held to have intrinsic value, whether or not it leads to material disadvantage. In *Vallianatos v Greece*, the Court rejected the Greek government’s argument that same-sex couples lost nothing in legal terms by being barred from entering into civil partnerships available to opposite sex couples. Instead, the Court stressed, “the

civil partnerships provided for by [the relevant law] as an officially recognized alternative to marriage have an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce” (*Vallianatos v Greece* 2013, para 81).

At the same time, the Court has been vigilant in relation to the need to redress disadvantage caused by failure to recognize same-sex relations. Thus, in *P.B. and J.S. v Austria*, the refusal to extend one partner’s accident and insurance cover to the other was held to be a breach of Article 14 with Article 8 (*P.B. and J.S. v Austria* 2010, para 30; see also *Schalk and Kopf v Austria* 2010, para 94; *Vallianatos v Greece* 2013, para 73; *Karner v Austria* 2003). Similarly, the Court has gradually reversed its own case law to hold in favor of granting of parental rights (*Salgueiro da Silva Mouta v Portugal* 1999) and the right to adopt a child (*ibid.*). It has taken one step towards requiring structural change in the most recent decision of *Oliari v Italy* (2015), where it held that the Italian government had breached their positive duty under Article 8 by failing to provide a form of recognized civil partnership. However, the Court has thus far refused to take the further step towards transformation and hold that States are required to recognize same-sex marriage. Although in *Schalk* the Court found that the right to marry in Article 12 need not always be limited to persons of the opposite sex, it held that Article 12 could not be construed as imposing an obligation on contracting states to allow same-sex marriage. This was reiterated in *Hämäläinen* and *Oliari*, both very recent cases. In *Schalk* and *Oliari*, the Court also rejected the possibility that this result could be achieved by reading Article 14 together with either Article 8 or Article 12. Its chief reason was that there was not yet sufficient consensus: at the time of the *Vallianatos* decision, only nine Council of Europe states provided for same-sex marriage. The applicants in *Oliari* argued that since *Schalk*, many more countries had legislated in favor of gay marriage, and many more were in the process of discussing the issue. Given that the Convention was a living instrument, they urged the Court to redetermine the position. The Court, however, held that despite the gradual evolution of States on the matter (11 Council of Europe states recognized gay marriage at the time of the judgment), the earlier cases remained relevant. Moreover, despite the submission by the applicants that it was stigmatizing to be shut out of the institution of marriage, the Court held that Article 14, in conjunction with either Article 9 or Article 12, could not be interpreted as imposing an obligation on States to recognize same-sex marriages. It is true that at the time of the Convention, this was undoubtedly the way the provision was understood, but the Court has consistently held that the Convention should be interpreted as a living instrument. The Court nevertheless rejected the second applicants’ argument that the Court should do more than simply reflect existing consensus, but follow its own example in the early case of *Goodwin* and set the trend. While it is likely, given current trends, that there will eventually be sufficient consensus in favor of marriage, at present the Court is eschewing the transformative dimension, thereby falling short of a fully substantive approach to equality in this context.

This resistance to taking a fully transformative approach has spilled over into the Court’s treatment of equality for transsexual people. In *Hämäläinen v Finland* (2014), the applicant was born male and married and had a child before transitioning

to living as a woman. After her gender reassignment surgery, she was refused the right to change her male identity number to a female. This was because under Finnish law, a person's new gender could not be registered unless they were unmarried or their spouse gave consent to transform their marriage into a registered partnership. The applicant and her wife did not want to end their marriage or turn it into a registered partnership, although the legal effects of the latter were the same as the former. She argued that she had been treated less favorably than cissexuals, who obtained legal gender recognition automatically at birth and did not run the risk of "forced divorce" in the way that her marriage did. The Grand Chamber held that the case fell within the notion of private and family life for the purposes of Article 8. However, it held that her situation was not sufficiently similar to cissexuals for her to be able to claim to be in the same situation as cissexuals (*Thlimmenos v Greece* 2000). The claim under both Articles 8 and 14 was therefore rejected.

The latter brisk reversion to a formal understanding of equality as requiring that likes be treated alike is surprising in the light of the progress towards substantive equality seen in the other cases reviewed here. Indeed, in earlier cases, the Court had endorsed the recognition dimension, reversing previous case law to hold that discrimination against transsexual people was discrimination on grounds of sex (*Goodwin v United Kingdom* 2002). Although the Court has frequently stated that discrimination under Article 14 entails differential treatment of two otherwise similarly situated individuals, it is rare for the Court to reach its conclusion simply on the basis that the situations are not sufficiently similar. Moreover, it gave no reasons why transsexuals' situation was not regarded as sufficiently similar to cissexuals, nor who the Court would have regarded as appropriate comparators. On a substantive view of equality, by contrast, there was a clear breach of both the redistributive and recognition dimensions. The requirement that a marriage be dissolved applied only to individuals who had transitioned from one gender to another and the applicant was therefore clearly disadvantaged because of her transsexuality. This had severe implications for the recognition dimension, because her formal identity remained male and could not be changed. The real problem in *Hämäläinen* was that the Court's reluctance to engage with the transformative dimension forced it to ignore the distributive and recognition dimensions. Indeed, the Chamber admitted that one of its main motivations was the concern that to allow the applicant to remain married would in effect be requiring Finland to permit same-sex marriages, contradicting its very recent decision in *Schalk*.

Conclusion

In recent years, the European Court of Human Rights has been receptive to the importance of framing an equality guarantee that is responsive to the complex ways in which inequalities manifest. While not explicitly formulating the conception as a multidimensional notion of substantive equality, its judgments have important resonances with this approach, particularly in relation to redressing disadvantage; addressing stigma, stereotyping, and violence; and enhancing participation. It remains cautious, however, in relation to transformation or structural change, with

its one major contribution being in relation to parental leave for fathers. It is still reluctant to take the step towards requiring recognition of same-sex marriage. More worrying is its tendency to revert unexpectedly to a formal understanding of equality, as in the recent transgender case, which insisted on a like for like comparison. Although the Court's position as a supranational tribunal carries with it some inherent limitations, it is hoped that in this particularly precarious time for human rights, it continues to develop a robust understanding of the right to equality in its substantive sense.

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Women's Rights and the Inter-American System

Ciara O'Connell

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Abstract

The Inter-American System of Human Rights has proven itself to be a forum for the advancement of women's rights. From developing the first women's rights treaty specifically designed to address violence against women to issuing reparations that require states to *prevent* gender discrimination, the Inter-American System has increasingly led the way in promoting a women's rights lens to examine international human rights law. While its efforts to uncover the causes of women's rights violations may fall short at times, the jurisprudence emerging from the Inter-American System of Human Rights provides lessons on how to, and how not to, develop women's rights litigation. This chapter provides an overview of the regional system's women's rights convention (the Convention

C. O'Connell (✉)

Centre for Human Rights, Faculty of Law, University of Pretoria, Pretoria, South Africa

e-mail: ciara.o'connell@up.ac.za

of Belém do Pará), highlights notable advancements in developing women's rights in the Inter-American region, and discusses several landmark women's rights cases recently decided by the Inter-American Court of Human Rights. It concludes by looking forward to the Inter-American System's upcoming challenges and opportunities for advancing women's rights in the region.

Keywords

Inter-American Human Rights System · Regional human rights systems · Women's Rights Litigation

Introduction

Within the last decade, the Inter-American System of Human Rights (IASHR) has made significant progress in its efforts to define, interpret, and repair the gendered nature of women's human rights violations. Despite the limited number of women's rights cases to come before the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court), the IASHR has been at the forefront of developing a women's rights agenda. This chapter provides an overview of the work of the IASHR work on gender and women's rights, particularly focusing on the region's women's rights convention and jurisprudence. In addition to introducing women's rights in the IASHR, this chapter also raises critiques about the capacity for this regional human rights system to effectively take account of, prevent, and repair violations of women's rights.

This chapter consists of three parts: the first outlines the IASHR's women's rights convention, the Convention of Belém do Pará (1994), and highlights its specific attributes, shortcomings, and strategies for its use in litigation. The second discusses landmark women's rights jurisprudence emerging from the Court. Finally, the third and concluding section draws attention to areas where the IASHR could more effectively advance a women's rights agenda.

The Evolution of Women's Rights in the Inter-American System

The IASHR has increasingly been recognized as a forum for the advancement of women's human rights. Over the past two decades, the Commission issued precautionary measures, made recommendations in women's rights cases, and published numerous reports on women's rights issues (Rapporteur on Rights of Women (2011a); Inter-American Commission on Human Rights [n.d.-a](#), [n.d.-c](#)). The Court has ordered judgments in cases concerning femicide (*feminicidio*) and reproductive health, as well as issued provisional measures to protect the lives of women (Inter-American Commission on Human Rights [n.d.-b](#)). There is a noted increase in women's rights petitions submitted to the Commission over the past 10 years; however, advancing a gender perspective through the IASHR's activities has been

gradual and inconsistent (Celorio 2014). This first section introduces the IASHR treaty monitoring bodies and provides an overview of the region's women's rights convention – the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará). In addition, this section includes an introduction to women's rights advancements in the IASHR, such as the integral role of civil society before the Commission and feminist expansion of the principle of due diligence.

Defining Women's Rights

The IASHR exists within the Organization of American States (OAS) and is the regional human rights system dedicated to the purposes of advancing democracy, human rights, security, and development in the Americas (OAS n.d.-b). As mandated through the American Convention on Human Rights, the IASHR entrusts two treaty monitoring bodies with protecting, promoting, and fulfilling human rights in the American hemisphere: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (OAS 1969). The Commission and the Court share the mission of advancing human rights in the region, but their duties, responsibilities, jurisdiction, and powers of enforcement vary significantly. Each body operates using rules of procedure that outline the working relationship and activities of the Commission (OAS 2013) and the Court (OAS 2009). The Commission admits cases, issues precautionary measures, oversees friendly settlement agreements (FSAs) arranged by petitioners and states, develops merits decisions in situations where states fail to engage in FSA processes, investigates and reports on specific countries and thematic areas, monitors state compliance with OAS treaties and reparations, and recommends cases to the Court (Pasqualucci 2013). Whereas FSAs and merits decisions before the Commission are nonbinding in nature, litigation before the Court results in binding judgments. However, only those states that have accepted the jurisdiction of the Court are bound to its rulings. (The current list of signatories and ratifications is available via the OAS website.) The Court also prepares advisory opinions and provisional measures to protect persons (Burbano-Herrera 2010).

The American Convention on Human Rights (ACHR), which was drafted in 1959, and became the Inter-American region's principal human rights treaty in 1969, created the Commission and the Court (ACHR, Art. 33). The ACHR is dedicated to protecting and promoting traditional civil and political human rights, such as the right to life (Art. 4), the right to humane treatment (Art. 5), the right to privacy (Art. 11), and the right to freedom of religion (Art. 12). The OAS adopted numerous other human rights treaties, including the Protocol of San Salvador which delineates economic, social, and cultural rights, and the world's first women's rights convention designed to address violence against women, the Convention of Belém do Pará (OAS n.d.-a).

The Convention of Belém do Pará can be understood as an elaboration of the ACHR. It entered into force in March 1995, just 9 months after opening for signature deposits. It is the most ratified treaty in the IASHR, with only the United States, Canada, and Cuba withholding their ratification deposits. The Convention of Belém

do Pará defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere” (Art. 1). Feminist discourse permeates the Convention of Belém do Pará text; for example, the Preamble states, “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between men and women.” The Convention confronts violence against women in both the private and public spheres and demands that violations of women’s rights be justiciable before the Commission and the Court.

Although the Convention of Belém do Pará represents a positive advancement for women’s human rights within the IASHR, at this point in its application, only Article 7 falls under the jurisdiction of the Commission and the Court as indicated in Convention of Belém do Pará Article 12. Article 7 requires that:

States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- (a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents and institutions act in conformity with this obligation;
- (b) apply due diligence to prevent, investigate and impose penalties for violence against women;
- (c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- (d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- (e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- (f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
- (g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective restitution, reparations or other just and effective remedies; and
- (h) adopt such legislative or other measures as may be necessary to give effect to this Convention.

The Commission and the Court are limited to the singular application of Article 7 of the Convention of Belém do Pará because of the limitations the Convention imposes on the application of its own provisions. Article 12 of the convention states that petitioners “may [only] lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party.” However, the Court has determined that in addition to Article 7, “the different Articles of the Convention of Belém do Pará may be used to interpret it and other pertinent Inter-American instruments,” which

include Articles 8 and 9 of the Convention (Gonzalez et al. “Cotton Field” v. Mexico 2009, para 79).

The Convention of Belém do Pará Article 8 is fundamental to the eradication of violence against women and the promotion of women's human rights. Article 8 includes protections such as:

The States Parties agree to undertake progressively specific measures, including programs:

- (a) to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected;
- (b) to modify social and cultural patterns of conduct of men and women; including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on the stereotypes roles for men and women which legitimize or exacerbate violence against women;
- (c) to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women. (Convention of Belém do Pará, art 8)

Although the Court has determined that it does not have jurisdiction over Article 8 of the Convention of Belém do Pará, it can be argued that Article 7 cannot be fully understood, nor implemented, if not interpreted through the lens of Article 8. Furthermore, Article 9 provides a fundamental and overarching understanding of the situation within which Articles 7 and 8 exist:

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom. (Convention of Belém do Pará, art 9)

By designating and defining women's position as vulnerable, Article 9 demands that provisions outlined in Article 7 be implemented with a view to protecting women's rights despite their socially and culturally defined status as unequal to men. In addition, Article 9 takes into account the intersectional and compound nature of violence as it disproportionately impacts marginalized and disenfranchised communities (Mohanty 2003; Crenshaw 1989, 1991).

Women's rights violations enshrined within the Convention of Belém do Pará have increasingly been alleged and determined in litigation before the Commission and the Court. However, the Convention also provides impetus for investigating and reporting carried out by the Special Rapporteur on Women's Rights. Recent reports include themes such as Access to Justice for Women Victims of Sexual Violence (Rapporteur on the Rights of Women 2011b) and Access to Information on Reproductive Health from a Human Rights Perspective (ibid.). In 2004, the OAS established the Committee of Experts of the Follow-up Mechanism to the Belém do

Pará Convention, which is “a system of consensus-based and independent peer evaluation to assess the progress made by [a] States Party in their fulfilment of the objectives of the Belém do Pará Convention” (MESECVI 2012). The objective of this OAS body is to “follow through with the commitments undertaken by the States Party to the Convention, to help accomplish its stated purposes, and to facilitate technical cooperation among the States [Parties].” While MESECVI is an OAS entity designed to work alongside the Commission and the Court, thus far there is no clear collaboration forged between the three bodies.

This overview of the IASHR's Convention of Belém do Pará provides a glimpse into the women's rights legal framework in the Inter-American region. Notably, the Convention itself is formulated in such a way that it is difficult to pinpoint and define clear rights. Whereas the ACHR delineates rights such as the right to privacy (Art. 11), the Convention of Belém do Pará is worded in such a way that it is difficult for advocates and activists to build quick concise arguments and links with rights enshrined within the ACHR. This critique is raised here to draw attention to the challenges inherent in developing a treaty that at once encompasses a gender perspective and also fits within the “normal” way of defining and articulating rights. While the Convention of Belém do Pará is certainly formative in outlining women's rights within the “violence against women” rubric, perhaps the most novel and interesting components of women's rights protections in the IASHR can be found in feminist and civil society efforts to push out the boundaries of the Convention.

Making Progress: Advancing a Feminist Rights Perspective

In that the Convention of Belém do Pará locates women's rights within a violence against women framework, it creates space for women's rights advocates to flesh out the gendered nature of women's rights violations and expand upon state requirements to *prevent* violence. This section introduces two innovative approaches employed by advocates working within and outside of the IASHR to strengthen women's rights protections enshrined within the Convention of Belém do Pará.

Institutionalizing Women's Rights Civil Society

The IASHR and civil society organizations share a mutually supportive relationship. Civil society organizations may refer to the IASHR to enforce individual rights, yet the IASHR depends on civil society participation to support its legitimacy (OAS 1999; Cavallaro and Schaffer 2004). Civil society contributes to the activities of the IASHR by representing victims, providing information through thematic hearings and human rights reporting, and monitoring reparations in the compliance stages of friendly settlements, merits decisions and Court judgments (OAS 2013, Art. 23, 2009, Art. 25). The Commission and the Court incorporate contextual information provided by civil society organizations within their work and also rely on civil society organizations to monitor state compliance. However,

despite their significant monitoring role, civil society organizations do not contribute to the design of reparations. In order to understand how women's rights civil society organizations became integral to the work of the IASHR, it is beneficial to briefly examine how the Latin American women's rights movement evolved to incorporate a rights-based agenda that included participation in international human rights institutions.

Feminist activism in Latin America has historically focused on the development of meaningful citizenship as a part of the struggle for democracy (Puente Tolentino 2014). Advancing women's citizenship through empowerment was, and is, one of the primary tasks of Latin American women's rights organizations. However, since the 1980s and 1990s, Latin American women have become particularly active and influential throughout international human rights arenas. Feminist and women's rights movements began to use international human rights instruments in education campaigns to inform women and men about their rights, and actors began using international agreements to hold governments accountable and push for national policy and legislative reform (Craske and Molyneux 2002). In the 1990s, a human rights agenda came to the fore, where the "focus shifted to questions of how rights can be incorporated into general questioning of women's place in their own societies" (Craske and Molyneux 2002). Significantly, this era saw the beginning of the "institutionalization of feminism" across Latin America. This is an ongoing process as more organizations familiarize themselves with and utilize international mechanisms to inform women and men about their rights, as well as to challenge states that fail to prevent, protect, and fulfil rights. However, as women's rights organizations have become more focused on institutional engagement, there exists the risk that they will move away from their local and nationally focused agendas and contexts (Vargas 2002).

The intentional decision on the part of women's rights and feminist civil society organizations to engage with the IASHR increased the number of women's rights-focused petitions submitted to the Commission and informed the investigative work of the Rapporteur on the Rights of Women (Inter-American Commission on Human Rights *n.d.-a*). In many of the cases dealing with violations of women's rights, it is national and international women's rights organizations, often working in collaboration, which represent victims. For example, the US-based international legal NGO, the Center for Reproductive Rights partnered with Costa Rican NGO, La Colectiva, to raise a petition on abortion access before the Commission (Center for Reproductive Rights 2013). While feminist actors across Latin America raise valid concerns about dedicating limited resources to the project of institutionalizing feminism in supranational human rights bodies, it is undeniable that civil society participation has been integral to establishing a feminist agenda within the activities of the Commission and the Court.

Expanding Due Diligence

The concept of due diligence, outlined in Article 7(b) of the Convention of Belém do Pará, requires states to "prevent, investigate and impose penalties for violence

against women.” In that the Commission and the Court may only determine violations of Article 7 of the Convention, feminists have worked to expand the requirement to *prevent* violations so that it includes state duties to confront the causes of gendered violence, including discrimination, gender stereotyping, and harmful cultural practices. Elizabeth A.H. Abi-Mershed, Assistant Executive Secretary of the Commission, explains due diligence as it is protected within the Convention of Belém do Pará:

The Convention of Belém do Pará requires that states parties ensure that their agents refrain from acts of violence against women, and further requires that these states apply due diligence to prevent, investigate and punish such violence when perpetrated by non-state actors *in the home, community or wherever it may occur*. (Abi-Mershed 2009, 131; emphasis added)

Abi-Mershed argues that the due diligence standard serves the IASHR as a “flexible way of understanding what state obligation and responsibility mean in theory, and more importantly, in practice” (Abi-Mershed 2009). Further to this, Paulina García-Del Moral and Megan Alexandra Dersnah note that the application of Article 7(b) in women’s rights cases allows feminists to “strategically challenge the gendered politics of the public/private divide underlying the historical depoliticization of violence against women that, until recently, had shielded the state and international human rights law” (García-Del Moral and Dersnah 2014). Finally, Liz Melendez, Executive Director of Peruvian feminist NGO, Flora Tristan, echoes this analysis by claiming that the obligation for states to prevent women’s rights violations effectively requires states to *prevent* structural violence and discrimination, wherever and however it may originate. She argues that the most practical and effective strategy in women’s rights litigation is to locate women’s rights within civil and political, or “universal” rights, such as due diligence (Melendez 2014). The power of the due diligence provision cannot be underestimated, especially because this principle politicizes violence occurring in the private sphere and therefore disrupts traditional notions surrounding negative and positive state obligations to prevent, protect, and fulfil human rights.

The footprint of feminist civil society and internal individual efforts to engender human rights law are noticeable in the Court’s jurisprudence, as well as in the Commission’s reporting, decisions, and FSAs. However, practitioners familiar with the IASHR underline that it is not a feminist institution, and any gains made in advancing a gender perspective through the IASHR are reliant on individual actors; there is no internal agenda to institutionalize gender in the IASHR (Celorio 2014; Cardenas 2014). That being said, feminist appropriation of the due diligence principle coupled with the institutionalization of feminist civil society within the IASHR provides innovative strategies for reconceptualizing the IASHR’s approach to defining and interpreting human rights law. The following section examines notable IASHR women’s rights cases, particularly those from the Court, as these cases are binding and reveal advancements and missed opportunities in developing women’s rights within the regional system.

Litigating Women's Rights: Inter-American Court Jurisprudence

The Court has issued judgments in ten women's rights cases (Inter-American Commission on Human Rights [n.d.-b](#)). However, it can be argued that the Court has neglected to incorporate a gendered analysis of rights violations in cases concerning women on a number of occasions (Zuloaga [2008](#)). The cases selected for discussion in this chapter were chosen because they represent landmark moments in the Court's analysis of gender as a contributing characteristic to gender-based stereotyping, violence against women, and restrictions on women's health access.

Case 1: González et al. ("Cotton Field") v. Mexico ([2009](#))

In this case, the Court ruled that the state of Mexico had violated both the ACHR and the Convention of Belém do Pará when it failed to *prevent* and investigate the disappearance and murder of three poor migrant women. The Court emphasized that these murders were representative of hundreds of disappearances, rapes, and murders that were poorly investigated by the State of Mexico. This was the first case in which the Court formally developed its jurisdiction over Article 7 of the Convention of Belém do Pará, and it was also the first time that the Court determined that states have a positive obligation to respond to violence against women resulting from the actions of private actors and that those violations are justiciable under Article 7 of the Convention of Belém do Pará. In addition, the Court adopted the term "femicide" (*feminicidio*) to refer to the killing of women *because* they are women and determined that states have an obligation to ensure due diligence through "education and training programs and courses for public officials on human rights and gender [. . .] and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society" (Gonzalez et al. v. Mexico [2009](#), para 602(22)). This case is the foundational women's rights case in the IASHR because it set precedent for the application of the Convention of Belém do Pará Article 7 and also established practice that would allow the Court to interpret Article 7 through the lens of Articles 8 and 9 of the Convention.

Case 2: Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica ([2012](#))

The *Artavia Murillo et al. v. Costa Rica* case challenged Costa Rica's ban on in vitro fertilization. The judgment issued by the Court in this case was both groundbreaking and disappointing for a number of reasons. This was the first reproductive health rights case to come before the Court, and it was also the Court's first opportunity to examine the right to life as it applied to "the unborn." Not only did the Court assert that the right to life as enshrined in Article 4(1) of the ACHR should not be considered absolute when its protections "justify the total negation of other rights," but the Court also thoughtfully examined the gendered implications of stereotyping as it relates to women and men who are unable to conceive children.

Despite the advancements made in this case in relation to future efforts to advocate for women's reproductive freedom, it ultimately fell short as a women's rights case. First, civil society organizations were blocked by lawyers from

participating in the case because of concerns that the case may be linked with the abortion rights movement. Instead the petitioners elected to distance the case from issues of reproductive freedom and women's rights and developed their argument through a reproductive disability lens (Cardenas 2014; Artavia Murillo et al. v. Costa Rica 2012). As a result, the Court declined the petitioner's efforts to allege a violation of the Convention of Belém do Pará and subsequently neglected to issue reparations that accounted for gender-based discrimination. Second, the Court emphasized "that gender stereotypes are incompatible with international human rights law" while also arguing that "motherhood is an essential part of the free development of a woman's personality" in order to develop a violation of the right to private life (Artavia Murillo et al. v. Costa Rica 2012). By simultaneously rejecting and relying on gender stereotyping to develop its reasoning in this case, the Court revealed an uncomfortable tension in how it defines and locates violations of women's reproductive rights within the women's rights framework.

Case 3: Velásquez Paiz et al. v. Guatemala (2016)

This case included an in-depth analysis of the impact of gender stereotyping on violence against women and resulted in reparation measures designed to address systemic gender discrimination. The case involved Claudina Velásquez Paiz, a young law student, who was murdered by a non-state actor. The Guatemalan State failed to adequately investigate the crime, and in their petition, the victim's representatives asserted that the murder of women in Guatemala was not random and was "founded on a patriarchal construct of a woman's sexual body being men's property" (Velásquez Paiz et al. v. Guatemala 2013). The petitioner determined that "the system of oppression [was] built through violence against [women's] bodies and sexuality." The impact of gender stereotyping as it affects violence perpetrated against women was explored exhaustively in the Court judgment. For example, in examining violations of Articles 1 and 24 of the ACHR, which deal with principles of equality and nondiscrimination, the Court determined that the subordination of women is based on gender stereotypes and that "their creation and use becomes one of the causes and consequences of gender violence against women" (Velásquez Paiz et al. v. Guatemala 2016). The Court went so far as to note that violence against women is aggravated "when reflected, implicitly or explicitly, in policy and practice, particularly in the reasoning and language of state authorities." In regard to the Convention of Belém do Pará, the Court examined Articles 7(b) and 7(c) to determine that the State of Guatemala had failed in its obligation to provide due diligence to the victim and to women in general.

Finally, the reparations issued in this case have significant potential in their capacity to transform the lives of women and girls in Guatemala. Notably, the Court included the following guarantee of non-repetition:

The Court orders the State, within a reasonable time, to incorporate within the National Education System curriculum, at all levels, a permanent education program on the need to eradicate gender-based discrimination, gender stereotypes and violence against women in Guatemala, in light of the international standards on these matters and the jurisprudence of this Court. (Velásquez Paiz et al. v. Guatemala 2016, para 100)

The Court also called for training and education programs for the Guatemalan judiciary and police force. The reparations issued in this case undoubtedly set a standard for future women's rights cases.

Case 4: IV v. Bolivia (2016)

IV v. Bolivia is notable as the Court's second reproductive rights case and the first reproductive rights case to incorporate the Convention of Belém do Pará. In this case, a migrant woman with limited economic means was sterilized without her consent after delivering her child. This case is particularly interesting because the Bolivian state's Ombuds Office represented IV, the first time that a state entity was permitted to raise a petition against its own state. In its analysis of the merits of this case, the Court determined that IV's intersecting characteristics as a poor, migrant, woman contributed to her mistreatment by medical doctors. The Court determined that "the State of Bolivia incurred a breach of its positive obligation to take measures to prevent and remedy discriminatory situations," with reference to violations of Article 7(b), (c), (f), and (g) of the Convention of Belém do Pará (*IV v. Bolivia* 2016). Additionally, the Court examined the asymmetrical power imbalance between doctors and their patients, as well as provided an in-depth analysis of the right to informed consent.

In that this case included a violation of the Convention of Belém do Pará, the Court was able to issue reparations designed to address systemic gender discrimination. The Court concluded that "reparations should include an analysis that contemplates not only the right of the victim to obtain reparation, but also incorporates a gender perspective, both in its formulation and in its implementation" (*IV v. Bolivia* 2016). To this end, the Court adopted expansive reparation measures designed to train medical professionals and students, and all personnel working in health and safety systems, on issues of informed consent, discrimination based on gender stereotypes, and gender violence (*ibid.*). This case successfully linked women's reproductive rights to the violence against women framework and serves as an example for future litigation efforts that seek to effectively engender reproductive rights.

The brief case studies highlighted above reveal the inconsistent yet progressive nature of women's rights litigation in the IASHR. While there has been undeniable progress in terms of developing women's rights jurisprudence before the Court, sustainable application and protection of women's rights rely on the willingness of individual actors to engage in gendered analyses of women's rights violations. The *Artavia Murillo et al.* case provides a warning for future litigation efforts that fail to effectively incorporate a gender perspective, and the remaining three case studies highlight the potential power of the Convention of Belém do Pará.

Conclusion

As the Inter-American System of Human Rights continues to develop jurisprudence in the area of women's rights, it undoubtedly contributes to the feminist project of engendering human rights law. Not only is it important for the Commission and the Court to "get it right" when it comes to protecting and fulfilling the human rights of women in the Americas, but because regional and international human rights bodies

cross-pollinate and rely on each other to establish precedent (Shelton 1999), the IASHR must set a strong example for how to develop an effective women's rights agenda. There are currently a number of women's rights cases admitted to the Commission, each one bringing with it new opportunities to further define and repair violations of women's rights (Inter-American Commission on Human Rights [n.d.-c](#)). This chapter concludes by introducing two strategic ways forward in women's rights litigation. While these suggestions are geared toward the IASHR, they can be applied in the context of other regional and international human rights monitoring bodies.

Linking Rights: Economic, Social, and Cultural Rights and Women

While the IASHR has proven its capacity, albeit inconsistent, to incorporate a gender perspective in women's rights litigation using the Convention of Belém do Pará, it has thus far failed to apply the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) to women's rights cases. Recently the Court established its jurisdiction over the Protocol of San Salvador (the right to education), essentially paving the way for advocates and litigators engaged with the IASHR to begin framing women's rights violations using a multidimensional perspective, combining a focus on economic, social, cultural, civil, and political rights (Lluy and Others v. Ecuador [2015](#)). Such an approach would help to advance the women's rights agenda for several reasons.

First, the traditional hierarchical division of rights into generations of rights is not a useful way of articulating how rights interact (Feria Tinta [2007](#)). For instance, in cases concerning women's reproductive health, it is impossible to separate the right to health (Protocol of San Salvador, Art. 10) from the right to life (ACHR, Art. 4) or the right to privacy (ACHR, Art. 11). Or, as Rosalind Petchesky contends, "when we look at specific reproductive and sexual rights and the ways in which they cluster together with other rights in women's everyday lives [...] deciding whether to classify such rights as 'social,' 'economic,' 'cultural,' or also 'civil and political' is very difficult" (Petchesky [2003](#)). Second, the separation of human rights aligns with and subsequently substantiates the public/private divide (MacKinnon [2007](#)). Typically, economic, social, and cultural rights (ESCRs) have been considered to be less justiciable rights, existing in the private sphere, with little to no formal state regulation or protection, whereas civil and political rights are public rights, heavily regulated by the state and considered entirely enforceable. Lastly, by upholding the division of rights, the IASHR allows states to escape their positive obligation to create and support economic, social, and cultural conditions in which rights are protected, promoted, and fulfilled. Looking forward, actors involved in the IASHR must look for opportunities to allege violations of provisions that are protected and justiciable within the Protocol of San Salvador: the right to education and the right to unionize. Only when women's rights violations are investigated using such a multifaceted lens will it be possible to effectively dissect and challenge "deep-

lying imbalances of power and social structures and practices of subordination that characterize relations between women and men in most societies” (Mohanty 2003; Petchesky 2003).

Gender-Based Reparations

Finally, the IASHR operates a robust reparations mechanism, and as outlined above, the Commission and the Court have elected to issue reparation measures intended to redress gendered harm (ACHR, Art. 63). While reparations are a powerful way to repair individual, and at times, structural violence and discrimination, women's rights litigators have failed to effectively and consistently pursue the reparation mechanism from a gender perspective. Despite the Court's declaration that reparations should take gender into account, there is no institutional process to ensure that reparation measures are in fact gendered (González et al. v. Mexico 2009). To propagate a tradition of gender-based reparations in the IASHR, it is imperative that litigators provide the Commission and the Court every opportunity to delve into the gendered dynamics of women's rights violations. There are several ways to do this, including those discussed earlier in this chapter – feminist appropriation of the due diligence principle, increased engagement and collaboration with feminist civil society, and a multidimensional rights perspective that includes the Convention of Belém do Pará. However, the simultaneously easiest and most difficult way to advance a sustainable gender reparations tradition is to ensure that petitioners raising cases before the Commission and the Court are well-versed and knowledgeable about the role gender plays in women's rights violations. The above case study of *Artavia Murillo et al. v. Costa Rica* highlighted the necessity of treating women's rights as gender-specific rights and provides a warning for future litigants who may prefer to avoid the gendered implications of human rights violations.

As the IASHR moves forward, it faces opportunities to engage in women's rights cases addressing violations across a myriad of issues, including the right to abortion (*Manuela v. El Salvador*; *AN v. Costa Rica*; *Aurora v. Costa Rica*), violence against women (*Linda Loaiza López Soto and Family v. Venezuela*), and forced sterilization (*FS v. Chile*). Now that the Commission and the Court have issued decisions and judgments in a number of women's rights cases, it is imperative that actors engaged with the IASHR look back and learn from past litigation efforts. If recent case law is any indicator of what is to come, the IASHR is posed to continue leading the way in developing a progressive women's rights agenda.

Cross-References

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- [Human Rights Responses to Violence Against Women](#)

- The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
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The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children

Attilio Pisanò

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Abstract

This chapter explains the origins, nature, and tools of the Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) created by the Association of South-East Asian Nations (ASEAN) in 2010. First, it reviews the long path to the creation of this ASEAN human rights mechanism, specifically underlining its source in the United Nations 1993 Vienna World Conference on Human Rights (VWC). In-depth analyses of the 1993 Bangkok Declaration and the Vienna Declaration and Programme of Action (VDPA) are presented with a focus on the normative recognition of women's rights. Second, this chapter considers the overall transformation of ASEAN toward the realization of a "community of caring societies." Specifically, the ASEAN Intergovernmental Commission on Human Rights (2009) is analyzed and the content of the ASEAN Human Rights Declaration (2012)

A. Pisanò (✉)

Department of Juridical Sciences, University of Salento, Lecce, Italy

e-mail: attilio.pisano@unisalento.it

and the terms of reference, tools, and functions of the ACWC are explained. The role of the ACWC in linking ASEAN states and the international human rights system is discussed. Finally, the main political goals of the ACWC are defined taking into account: two 5-year plans of action adopted by ACWC in 2012 and 2016, the 2013 Declaration on the Elimination of Violence against Women and Children, and the 2015 ASEAN Regional Plan of Action on the Elimination of Violence against Women.

Keywords

Women's rights · ASEAN · ASEAN Commission on the Promotion and Protection of the Rights of Women and Children · Violence against women · Vienna World Conference

Introduction

The creation of the Association of South-East Asian Nations (ASEAN) Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in 2010 and the adoption of the ASEAN Declaration on the Elimination of Violence against Women and Children (ASEAN 2013) represent the final steps of a long path aimed at strengthening human rights in South-East Asia. Notwithstanding the academic and political debate on “Asian values,” started at the end of the 1980s (De Bary 1998), the recognition of the normative value of human rights has been developing strongly in Asia over the last 25 years. Specifically in ASEAN, recognition, promotion, and protection of human rights, in general, and of women and children's rights, in particular, have become increasingly relevant on the political agenda. Created in 1967, ASEAN has ten member states: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. It is the only organization in the complex Asian geopolitical puzzle which has seriously discussed, year by year, the creation of a regional human rights system. This is evidenced by the adoption of an ASEAN Human Rights Declaration (2012) and Declaration on the Elimination of Violence against Women and Children (2013). The subregional organization also created three institutions: the ASEAN Committee on Migrant Workers (ACMW) in 2007, the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009, and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in 2010.

The Vienna World Conference on Human Rights 1993

The ASEAN path toward the institutionalization of human rights dates back to a specific moment: the 1993 United Nations (UN) Vienna World Conference on Human Rights (VWC) which, according to the former UN Secretary General

Boutros Boutros-Ghali, represented “one of those rare, defining moments” in contemporary human rights history (Korey 2001, 273). Following the adoption of the 1948 Universal Declaration of Human Rights, the VWC was the first international conference to discuss human rights in detail since the 1968 UN Teheran International Conference on Human Rights. It did so in a global scenario marked by the emerging discourse of the “clash of civilizations” (Huntington 1996), and, after the fall of the Berlin Wall in 1989, the decline of the central opposition between liberal and communist ideologies, which had dominated international relations through the second part of the twentieth century.

Preceded by three regional preparatory conferences (Tunis 1992, San José 1993, Bangkok 1993), with the participation of 171 countries and more than 800 non-governmental organizations (NGOs), the principal aim of the VWC was the achievement of a truly universal consensus on the normative value of human rights (Pisanò 2014). After discussing in Bangkok the Asian approach to human rights, Asian states participated in the VWC. The result was the adoption of the so-called Bangkok Declaration (WCHR 1993a) whose distinctive principles are still “trademarks” of the Asian and ASEAN approach to human rights. This includes: recognition of the interdependence of human rights and the “universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization” (WCHR 1993a, 3); the consequent attention to social, economic, cultural rights rather than civil and political ones; and respect for national sovereignty, territorial integrity, and the non-interference principle. At the same time, the Bangkok Declaration pointed out the need to “explore the possibilities of establishing regional agreements for the promotion and protection of human rights in Asia” (WCHR 1993a, para 26). As far as women are concerned, the Bangkok Declaration reaffirmed the commitment of the Asian countries to “the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women” (WCHR 1993a, para 22).

The Asian discussion on human rights in the early 1990s left its clear mark on the VWC. One of the central principles of the Vienna Declaration (WCHR 1993b), adopted by all VWC participants, is evidently inspired by the Bangkok Declaration. The Vienna Declaration, affirming that “all human rights are universal, indivisible, interdependent, and interrelated” (WCHR 1993b, para 5), closely resembles the statement in the preamble of the Bangkok Declaration, which underlines “the interdependence and indivisibility of economic, social, cultural, civil and political rights” (WCHR 1993a, 4).

Furthermore, during the VWC, women’s rights assumed a central role. According to Donna J. Sullivan, a political consensus was crystallized that “various forms of violence against women should be examined within the context of human rights standards and in conjunction with gender discrimination” (Sullivan 1994, 152). This is not surprising if we consider that since the 1970s the new frontier of human rights (from a political as well as from a philosophical point of view) was the full recognition of the women’s rights as human rights. For this reason, the United

Nations declared 1975–1985 the UN Decade for Women and organized a series of dedicated world conferences in Mexico City (1975), Copenhagen (1980), Nairobi (1985), followed by the last one in Beijing (1995). Furthermore, the most important international agreement in the field of women's rights was adopted by the UN General Assembly in 1979: the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Not to forget children's rights, the Convention on the Rights of Children (CRC) was adopted in 1989, which was brought immediately in force in 1990, becoming the most ratified international human rights agreement.

The follow up of the VWC was significant (Mertus and Goldberg 1994). The UN immediately created the Special Rapporteur on Violence against Women (1994) and, soon after the VWC, the General Assembly adopted the Declaration on the Elimination of the Violence against Women (DEVAW). The DEVAW (UNGA 1993a) represents the normative framework for the two most important ASEAN documents on the violence against women: the ASEAN Declaration on the Elimination of Violence against Women (2004) and the Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN (2013).

Furthermore, the final document of the VWC, the Vienna Declaration and Programme of Action (VDPA) (WCHR 1993b), fully recognized the “human rights of women and of the girl-child . . . [as] an inalienable, integral and indivisible part of universal human rights” and called on the international community to: eliminate “all forms of discrimination on grounds of sex” as well as “gender-based violence and all forms of sexual harassment and exploitation”; and to ensure “the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels” (WCHR 1993b, section I, para 18).

Other statements dedicated to women's rights addressed: the “special needs of women and children” refugees (WCHR 1993b, section I, para 23); the “systematic rape of women in war situations” (WCHR 1993b, section I, para 28); “violations of human rights during armed conflicts, affecting the civilian population, especially women, children, the elderly and the disabled” (WCHR 1993b, section I, para 29). Significantly, the VDPA defined discrimination against women as among the “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights” (WCHR 1993b, section I, para 30).

In terms of action, the VDPA calls on governments to take all measures to counter discriminatory practices against women “in compliance with their international obligations” and “with due regard to their respective legal system” (WCHR 1993b, section II, para 22). The entire third part is dedicated to the “equal status and human rights of women” (WCHR 1993b, section II, paras 36–44). Here, five relevant statements are made: (a) the importance is highlighted on the “elimination of violence against women in public and private life and the elimination of all forms of sexual harassment, exploitation and trafficking in women” (WCHR 1993b, section II, para 38); (b) the United Nations General Assembly is urged to adopt the “draft declaration on violence against women” – the DEVAW (WCHR 1993b, section II, para 38); (c) the universal ratification of CEDAW is defined as a goal to be achieved by 2000 and, simultaneously, CEDAW signatory states are invited to

“withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law” (WCHR 1993b, section II, para 39); (d) the proposal is advanced to strengthen the UN Committee on the Elimination of Discrimination against Women through the adoption of an optional protocol to the CEDAW creating a right of petition (WCHR 1993b, section II, para 40); (e) and “women’s right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels” is reaffirmed (WCHR 1993b, section II, para 41).

In this overall scenario, the VDPA defined some key steps to encourage the recognition, the promotion, and the protection of human rights (and women’s rights) in the global field. Some of these became strategic in the ASEAN path toward the creation of its regional human rights mechanism under the auspices of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).

In addition to the VDPA’s focus on women’s rights and the DEVAW, other political commitments contained in the VDPA also contributed to the adoption of the ASEAN declarations on the violence against women and children (ASEAN 2004b, 2013) and, more broadly, shaped the complex path of ASEAN toward the normative recognition of human rights. For example, the role of the National Human Rights Institutions (NHRIs), initially defined by the Paris International Workshop on National Institutions for the Promotion and Protection of Human Rights, 1991, was further refined at the Vienna conference (WCHR 1993b, section II, paras 20, 34–36, 74, 84–86). A few months later, the UN General Assembly adopted a resolution concerning the Principles relating to the Status of National Institutions (the Paris Principles) (UNGA 1993b). The VDPA also emphasizes the relevance of a regional approach aimed at promoting and protecting human rights (WCHR 1993b, para 37) and the important role played by NGOs in the promotion of all humanitarian activities, at national, regional, and international levels (WCHR 1993b, section II, para 38).

Toward an ASEAN Human Rights Mechanism

The VWC and its final documents represented the beginning of a new era for human rights in South-East Asia, including women’s rights. There are some statements concerning the situation of the women in the ASEAN countries before the VWC. For example: 1976 Declaration of the ASEAN Concord (Bali Concord Declaration); 1976 institution of the ASEAN Sub-Committee on Women (later renamed the ASEAN Committee on Women); 1987 Manila Declaration; and 1988 Bangkok Declaration of the Advancement of Women in the ASEAN Region (Pisanò 2016). However, a specific human rights-based approach for women was developed only after 1993 when human rights became, step by step, an institutional part of the ASEAN policies.

Indeed, prior to the Vienna World Conference, the Second UN Workshop for the Asia Pacific Region on Human Rights Issues, held in Jakarta 1993, adopted a

discouraging position toward any regional cooperation aiming to create an Asian mechanism promoting and protecting human rights (Chiam 2009). In contrast, just 1 month after the conclusion of the VWC, the 26th ASEAN Foreign Ministers annual meeting (Singapore, July 23–24, 1993) produced a document in which some paragraphs were dedicated to human rights (ASEAN 1993, paras 16, 17, 18). This document acts as a “bridge” between the Bangkok Declaration (WCHR 1993a), the Vienna Declaration and Programme of Action (WCHR 1993b), and the subsequent advances within ASEAN regarding the establishment of a human rights body (Durbach et al. 2009). ASEAN foreign ministers actually “welcomed the international consensus achieved during the World Conference on Human Rights in Vienna and reaffirmed ASEAN commitment to, and respect for, human rights and fundamental freedoms as set out in the Vienna Declaration” (ASEAN 1993, para 16); and, further, they stated the need to “consider the establishment of an appropriate regional mechanism on human rights” (ASEAN 1993, para 18). Furthermore, that same year the September Kuala Lumpur ASEAN Inter-Parliamentary Organization General Meeting adopted a Declaration on Human Rights – the first ASEAN political statement specifically focused on human rights (AIPO 1993).

Thus, the year 1993 represents a turning point in the history of human rights in the ASEAN. New initiatives emerged as a direct result of the VWC. Several governments created NHRIs (Goodman and Pegram 2012; Renshaw 2011; Cardenas 2002) compliant with the Paris Principles. Asian NHRIs began a period of mutual cooperation leading to the establishment in 1996 of the Asia-Pacific Forum of National Human Rights Institutions (Renshaw and Fitzpatrick 2012). One year earlier, the international NGO, Law Association of Asia and Pacific (LAWASIA), set up the Working Group for an ASEAN Human Rights Mechanism (hereinafter: Working Group). Since 1996, the Working Group participated at the ASEAN Foreign Ministers annual meetings. Its pivotal role was formally recognized by the 31st ASEAN Foreign Ministers annual meeting of Foreign Ministers (Manila, July 24–25, 1998) (Hsien-Li 2011; ASEAN 1998b). Inspired by the 50th anniversary of the Universal Declaration of Human Rights, the final joint statement of the 1998 Meeting also formally recognized CEDAW and CRC as primary tools to protect women’s and children’s rights (ASEAN 1998b, para 29). A similar statement was included in the Ha Noi Plan of Action adopted in the following December summit of ASEAN heads of state and/or government (ASEAN 1998a, para 4.9).

During the first decade of the twenty-first century, the ASEAN path toward the establishment of a regional human rights mechanism has also been intertwined with the long and complex process, called ASEAN Vision 2020, aimed at changing the institutional nature of ASEAN to a “community of caring societies” (ASEAN 1997). In this process of redefinition of the ASEAN political mission, it is strongly significant that the first relevant step toward the creation of an ASEAN Women’s rights mechanism was taken by the first workshop organized in Jakarta by the Working Group. The workshop was open to governmental representatives, national human rights institutions, and human rights NGOs. The final report of the workshop formally recommended the “establishment of an ASEAN Commission on Women and Children’s Rights” (Working Group 2001, para 12(m)(i)). The same

recommendation was also suggested in subsequent workshops (Manila 2002; Bangkok 2003, 2009; Jakarta 2004; Kuala Lumpur 2006; Manila 2007; Singapore 2008) (Pisanò 2016).

From 2004, it is possible to see real change in the ASEAN strategy aimed at promoting women's rights. Indeed, 2004 is another turning point in the ASEAN history as the ASEAN institutional change process coincides with the process aimed at strengthening the protection of women. In November 2004, the Vientiane Action Program (VAP) was adopted by the 10th ASEAN summit of the heads of state and/or government (Davies 2013; ASEAN 2004c). It defined a new agenda, covering the period 2004–2010, of gradual political integration toward the creation of an ASEAN Community and the adoption of a new ASEAN Charter. Among other things, the VAP encouraged ASEAN states to promote human rights by: developing actions in the field of education; creating a network between the different national human rights bodies; developing “an ASEAN instrument on the protection and promotion of the rights of migrant workers”; and finally by establishing “an ASEAN Commission on the promotion and protection of the rights of women and children” (ASEAN 2004c, art 1.1.4.7). The same summit adopted, as an integral part of the VAP, the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children (ASEAN 2004a), which fully engages in the wider international debate on the subject of trafficking in persons marked by the adoption of the United Nations Convention against Transnational Organized Crime (2000) and its first Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children (2000).

A few months earlier, in June 2004, the ASEAN Foreign Ministers adopted the Declaration on the Elimination of Violence against Women in ASEAN Region (ASEAN 2004b). The declaration contains political commitments aimed at eliminating violence against women inspired by DEVAW and CEDAW, such as: bilateral and regional cooperation (ASEAN 2004b, para 1.2); the adoption of gender mainstreaming policies (ASEAN 2004b, para 1.3); the strengthening of the economic independence of women (ASEAN 2004b, para 1.5); efforts to develop appropriate legislative, educational, and social measures with the purpose of preventing violence against women (ASEAN 2004b, para 1.6); among other provisions.

In the wake of the VAP, the Working Group for an ASEAN Human Rights Mechanism gained a central position in 2005, when it was formally invited by ASEAN to contribute to implementing the political commitments agreed to in Vientiane. Thus, the Working Group organized the first Roundtable Discussion on the ASEAN Human Rights Mechanism (Working Group 2005). Here it was decided to develop common policies in the fields of women and children's rights particularly through the institution of a special committee for their promotion and protection. Thus, the “ASEAN commitment to continue working for the establishment of an ASEAN human rights mechanism [was] reaffirmed” as was “the importance of a step-by-step, multi-track and building-blocks approach involving governments, national human rights institutions, parliaments, and civil society groups in the ASEAN region” (Working Group 2005, para 12). The roundtable pointed out “the vital role of civil society groups” and highlighted the need to join civil society groups

to adopt “a more cooperative approach in the spirit of working in productive partnership with ASEAN Governments in the promotion and protection of human rights” (Working Group 2005, para 20). The idea to create an institution aimed at protecting and promoting human rights was reaffirmed in subsequent roundtables organized by the working group. Specifically the fourth roundtable formally proposed the creation of a dedicated ASEAN Commission on the Promotion and Protection of the Rights of Women and Children. Such a commission should be seen “as an end in itself” (Working Group 2008, para 20), “complement” the proposed ASEAN Human Rights Body, and “nurture regional responses to issues specific to women and children’s rights” (Working Group 2008, para 19).

The ASEAN Intergovernmental Commission on Human Rights and the ASEAN Human Rights Declaration

The Vientiane Action Program (VAP) reached its goal when the new Charter of the ASEAN was signed in 2007 during the Singapore summit of the ASEAN Heads of State and/or Government (Jetschke 2008). Although the VAP had proposed the establishment of “an ASEAN Commission on the promotion and protection of the rights of Women and Children” (ASEAN 2004c, art1.1.4.7), the new ASEAN Charter did not institute a human rights mechanism but laid the foundation doing so. Article 14 provided that: “In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body” and that this “ASEAN human rights body shall operate in accordance with . . . terms of reference to be determined by the ASEAN Foreign Ministers Meeting” (ASEAN 2007, art 14; Muntarbhorn 2013, 123).

Nevertheless, some statements relating to women’s rights were included in the subsequent Declaration on the Roadmap of the ASEAN Community 2009–2015 (ASEAN 2009b). It states that the new ASEAN Community is built on three pillars: (a) the ASEAN Political-Security Community; (b) the ASEAN Economic Community; (c) the ASEAN Socio-Cultural Community. The overall role of human rights seems to be marginal. But specifically regarding women and children’s rights, under the heading ASEAN Political-Security Community Blueprint, a target is established “to complete a stock-take of existing human rights mechanism and equivalent bodies, including sectorial bodies promoting the rights of women and children” (ASEAN 2009b, para A.1.5.ii). In addition, it contains an undertaking “to cooperate closely with efforts of the sectoral bodies in the establishment of an ASEAN commission on the promotion and protection of the rights of women and children” (ASEAN 2009b, para A.1.5.vii). Finally, under the heading ASEAN Socio-Cultural Community Blueprint, an entire section is dedicated to “Social Justice and Rights,” which includes as a political goal to “work towards the establishment of an ASEAN commission on the promotion and protection of the rights of women and children” (ASEAN 2009b, para C.1.i).

The Terms of Reference of the ASEAN human rights body (ASEAN 2009a) were defined by a High Level Panel in 2008 and approved in 2009 by the 42nd Annual ASEAN Foreign Ministers' Meeting (Phuket, Thailand). Finally, the ASEAN Inter-governmental Commission on Human Rights (AICHR) was formally launched in 2009 during the 15th Summit of ASEAN Heads of State and/or Government (Cha-Am Hua Hin, Thailand), ostensibly with the primary aim to promote and protect human rights and fundamental freedoms, as well as to strengthen the international human rights system (Pisanò 2014). Notwithstanding the long process leading to the constitution of the AICHR, the result is quite disappointing. The AICHR is defined as "a consultative inter-governmental body" (ASEAN 2009a, art 3); it has been characterized as "prima facie innocuous" (Munro 2011, 1189) and having "politically inoffensive goals" (Ciorciari 2012: 217). The functions of the AICHR are inter alia, to "develop strategies for the promotion and protection of human rights and fundamental freedoms" (ASEAN 2009a, art 4.1); "develop an ASEAN human rights declaration" (ASEAN 2009a, art 4.2); "promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN member states" (ASEAN 2009a, art 4.4); "encourage ASEAN member states to consider acceding to and ratifying international human rights instruments" (ASEAN 2009a, art 4.5); "engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN including civil society organizations and other stakeholders" (ASEAN 2009a, art 4.8); and, finally, to "obtain information from ASEAN member states on the promotion and protection of human rights" (ASEAN 2009a, art 4.10). Further, no petitions or communications alleging violation of human rights can be accepted by the AICHR from individuals, states, or NGOs. The AICHR can only obtain information from states about the promotion and protection of human rights (ASEAN 2009a, art 4.10); it cannot make recommendations to ASEAN states and must submit an annual report at ASEAN foreign ministers meetings. In addition, AICHR members speak for their governments where "the appointing Government may decide, at its discretion, to replace its Representative" (ASEAN 2009a, art 5.6). (For detailed discussion and analysis of the significance of these provisions, see: Jetschke 2015; Ortuoste 2014; Pisanò 2014.)

Within this framework, the AICHR prepared a draft of an ASEAN human rights declaration which was discussed without the active participation of civil society organizations (Gerard 2014; Asplund 2014; Renshaw 2011) and then approved during the 21st Summit of ASEAN Heads of State and/or Government in 2012 (Phnom Penh, Cambodia). The ASEAN Human Rights Declaration (AHRD) is a document with a preamble and 40 articles, divided into six areas: General Principles; Civil and Political Rights; Economic, Social, and Cultural Rights; Right to Development; Right to Peace; Cooperation in the Promotion and Protection of Human Rights (ASEAN 2012). The AHRD offers a list of fairly standard rights without establishing a body to monitor state behavior (Pisanò 2014) and contains few references to women's rights. Recalling Article 18 of the Vienna Declaration, it affirms that "the rights of women, children, the elderly, persons with disabilities, migrant workers and marginalized and vulnerable groups are an inalienable, integral

and indivisible part of human rights and fundamental freedoms” (ASEAN 2012, art 4). The AHRD also gives specific and express protection for mothers during and after pregnancy, including “paid leave or leave with adequate social benefits” (ASEAN 2012, art 30.2) and states that “motherhood and childhood are entitled to special care and assistance” (ASEAN 2012, art 30.3). (For further discussion of the provisions of the AHRD, see Pisanò 2016.)

The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children

The end of a long and complex path to regional institutionalization of protection of rights for women and children came with the launch of the ACWC during the 16th summit of ASEAN Heads of State and/or Government in April 2010 (Ha Noi Vietnam). This was followed by the adoption of the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (ASEAN 2010) at a subsequent ASEAN summit in October 2010. The latter urges member states to engage in “closer regional cooperation in promoting and protecting the rights of women and children especially those living under disadvantaged and vulnerable conditions” (ASEAN 2010, art 2). Moreover, the need to “strengthen the ability of ASEAN Member states to fulfil their commitments to CEDAW ... [and] CRC...” was strongly reaffirmed (ASEAN 2010, art 3).

The normative framework of the ACWC is represented by the ratification of the CRC and CEDAW by all the ASEAN states (Pisanò 2016). According to the terms of reference of the ACWC, the organization is intended to operate without a regional ASEAN definition of women and children’s rights, but with the specific goal “to complement, rather than duplicate, the function of CEDAW and CRC Committees” (ASEAN 2010, para 3.4). Consequently, the first purpose of the ACWC is “to promote and protect the human rights and fundamental freedoms of women and children in ASEAN taking into consideration the different historical, political, socio-cultural, religious and economic context in the region and the balances between rights and responsibilities”(ASEAN 2010, para 2.1). Specifically, the ACWC is required:

[T]o uphold human rights as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, CEDAW, CRC, Beijing Platform for Action (BPFA), World Fit for Children, International Humanitarian Law and other international human rights instruments and regional declarations related to women’s and children’s rights to which ASEAN Member States are parties. (ASEAN 2010, para 2.5)

Further analysis of the terms of reference of the ACWC (ASEAN 2010) shows it to be an institution which has to play a linking role between the international human rights system and the ASEAN states but, at the same time, also between the individual ASEAN states and their policies concerning women and children’s rights. Consequently, the ACWC’s nature is exclusively promotional. The responsibility to

protect women's rights is left to the individual states, which are the only institutions in charge of women's rights and empowerment. For these reasons, it is not surprising that the terms of reference of the ACWC recognize that "the primary responsibility to promote and protect the fundamental freedoms and rights of women and children rests with each Member State" (ASEAN 2010, para 3.5). This is clearly inspired by a similar provision in the terms of reference of the AICHR (2009b, para 2.3). Furthermore, the ACWC should respect the principles of ASEAN as embodied in Article 2 of the ASEAN Charter among which are: "respect for the independence, sovereignty, equality, territorial integrity and National identity of all ASEAN Member States" (ASEAN 2007, art 2(a)); the principle of "non-interference in the internal affairs of ASEAN Members States" (ASEAN 2007, art 2(e)); "respect for the right of every Member State to lead its National existence free from external interference, subversion and coercion" (ASEAN 2007, art 2(f)); "adherence to the rule of law, good governance, the principle of democracy and constitutional government" (ASEAN 2007, art 2(h)).

The de facto political and promotional nature of the ACWC, which is to persuade more than obligate the ASEAN states, is evident throughout the terms of reference. Paragraphs 3.6 and 3.9 recommend the continuous search for consensus and dialogue among ASEAN states as a pillar in the ACWC strategy (ASEAN 2010). Specifically, Paragraph 3.6 states that the ACWC ought to "pursue a constructive non-confrontational and cooperative approach to the enhancement, promotion and protection of rights of women and children." The ACWC is additionally required to "adopt a collaborative and consultative approach with ASEAN Member States, academia, and civil society pertaining to the rights of women and children" (ASEAN 2010, para 3.9). Like the AICHR, the ACWC is defined as a "consultative body" (ASEAN 2010, para 4), which is further underlined in the requirement that "decision making in the ACWC shall be based on consultation and consensus in accordance with the ASEAN Charter" (ASEAN 2010, para 7.1).

The mandate and functions of the ACWC are to: "Promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children" (ASEAN 2010, para 5.1) and "Develop policies, programs and innovative strategies to promote and protect the rights of women and children to complement the building of the ASEAN Community" (ASEAN 2010, para 5.2). It is also empowered to "Promote public awareness and education of the rights of women and children in ASEAN" (ASEAN 2010, para 5.3). Regarding engagement with international human rights monitoring processes, the ACWC is sanctioned to: "Assist, upon request by ASEAN Member States, in preparing for CEDAW and CRC Periodic Reports, the Human Rights Council's Universal Periodic Review (UPR) and reports for other Treaty Bodies, with specific reference to the rights of women and children in ASEAN" (ASEAN 2010, para 5.6); and "Assist, upon request by ASEAN Member States, in implementing the concluding observations of CEDAW and CRC and other Treaty Bodies related to the rights of women and children" (ASEAN 2010, para 5.7).

More generally, the ACWC has communications functions to "Facilitate sharing of experiences and good practices, including thematic issues, between and among

ASEAN Member States related to the situation and well-being of women and children and to enhance the effective implementation of CEDAW and CRC through, among others things, exchange of visits, seminars and conferences” (ASEAN 2010, para 5.11). It is also authorized to “Propose and promote appropriate measures, mechanisms and strategies for the prevention and elimination of all forms of violation of the rights of women and children, including the protection of victims” (ASEAN 2010, para 5.12); and to “Encourage ASEAN Member States to consider acceding to, and ratifying, international human rights instruments related to women and children” (ASEAN 2010, para 5.13).

However, among the mandates and functions of ACWC, there is no trace of powers actually allowing ACWC to protect women and children’s rights. Neither is there any trace of powers permitting ACWC to impose any form of binding obligation on member states. Consequently, any issue relating to the protection of women’s and children’s rights remains a matter of exclusive domestic state jurisdiction (Pisanò 2016).

The Elimination of Violence Against Women: A Primary Goal of the ACWC

The most relevant ACWC’s actions to date have been developed in the field of elimination of violence against women, which was one of the main goals of its first five-year work plan for the 2012–2016 period (ASEAN 2012). This aim can surely be defined as a primary goal of the ACWC, which is also evidenced by the adoption in 2015, of the Declaration on the Elimination of Violence against Women and the Elimination of Violence Against Children in ASEAN Region (ASEAN 2013) and the important ASEAN Regional Plan of Action on the Elimination of Violence against Women (RPA on EVAW) (ASEAN 2016). To all these, political initiatives should be added: the organization by ACWC of the 2013 Regional Workshop on Promoting the Right to a Nationality for Women and Children in the Implementation of CEDAW and CRC in ASEAN; the 2013 Regional Workshop on Promoting the Rights of ASEAN Women and Children through Effective Implementation of the Common Issues in CEDAW and CERC Concluding Observations with Focus on Girl Child; the 2014 Workshop on the Promotion of Access to Justice for Women Victims of VAW Trafficking case; and the publication of ASEAN Good Practices in Eliminating Violence against Women and the Gender Sensitive Guideline for Handling Women Victims of Trafficking in Persons (Malaysia/ASEAN n.d.).

It is not to be forgotten that the violence against women was one of the most relevant issues debated at the 1993 Vienna World Conference after which the United Nations adopted the DEVAW. Clearly, today’s debate on the elimination of violence against women dates back to the Vienna World Conference, which marked a turning point on the subject of violence against women and, at the same time, gave a strong impulse to the ASEAN path toward the creation of a human rights mechanism.

Generally speaking, the 2012–2016 work plan of the ACWC contains several goals which confirm the promotional nature of the organization. Consequently, the section of the work plan dedicated to protection of women's rights mainly involves the strengthening of several single national protection systems and the "setting [of] performance standards on supplementary child protection systems" (ASEAN 2012, No. 12, p. 8), leaving the political responsibility to enhance women's rights to the individual State).

In light of the above, the 2012–2016 Plan of Action and the 2012 ACWC Rules of Procedure define the ACWC as a body whose main purpose is to create a favorable humus for women and children's rights and to build links among the ASEAN countries, UN special agencies (i.e., UNESCAP, UNICEF, UNODC, UNESCO), international NGOs (e.g., Save the Children), and Civil Society Organizations (CSOs) (Pisanò 2016).

Consequently, the drafting process of the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN (ASEAN 2013) involved Civil Society Organizations (CSOs) and NGOs interested in enhancing women and children's rights. The Declaration was formally adopted by the 23rd summit of ASEAN Heads of State and/or Government in October 2013 (Bandar Seri Begawan, Brunei). However, the Declaration does not provide for any monitoring mechanism and expresses only generic aims, for example: strengthening "national legislations for the elimination of violence against women and violence against children" and enhancing the protection and reintegration of victims (ASEAN 2013, art 1); integrating "legislations, policies and measures to prevent and eliminate violence" (ASEAN 2013, art 2); strengthening a "holistic, multi-disciplinary approach to promote the rights of women and children" (ASEAN 2013, art 3); and strengthening "existing national . . . mechanisms . . . in implementing, monitoring and reporting the implementation of the Concluding Observations and Recommendations of CEDAW, CRC and other Treaty Bodies as well as the accepted recommendations under the UN Universal Periodic Review Process . . . related to the elimination of all forms of violence against women and violence against children" (ASEAN 2013, art 4).

Most recently, the 13th meeting of the ACWC (October 2016, Singapore) finalized the new ACWC Work Plan for 2016–2020, which defined 16 thematic areas for implementation of projects and activities. Specifically concerning women's rights, the 2016–2020 Work Plan prioritizes: strengthening institutional capacity of ACWC; eliminating violence against women and children, as well as the trafficking in women and children; promoting and protecting rights of women (and children) with disabilities; promoting implementation of international, ASEAN, and other instruments related to the rights of women and children; implementing gender equality in education; addressing the social impact of climate change on women and children; strengthening economic rights of women with regards to feminization of poverty, and women's rights to land and property; adopting a gender perspective in policies, strategies, and programmes for migrant workers; adopting political initiatives in the field of gender mainstreaming, women participation in politics and decision making, governance, and democracy; and tackling early marriage (ASEAN n.d.).

Finally, very interestingly, the Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW) (ASEAN 2016) defines the elimination of violence against women “as a priority” for the ASEAN Member States. This goal is to be achieved through some well-structured strategies and actions including, most notably: prevention of VAW (Action 1); protecting and supporting services for victims/survivors of VAW (Action 2); and adopting initiatives relating to the legal framework, prosecution, and justice system (Action 3), capacity building (Action 4), research and data collection (Action 5), management, coordination, monitoring, and evaluation of the VAW (Action 6), developing partnership and collaboration with CSOs and NGOs (Action 7), and implementation review and communications (Action 8) (ASEAN 2016).

Conclusion

The ASEAN Human Rights Mechanism is something completely new in the global Asian scenario. Both the AICHR and the ACWC have been created to strengthen enjoyment of human rights, acting in cooperation with ASEAN member states and not against them. The publication of ASEAN 2025 Forging Ahead Together (ASEAN 2015) reaffirms the commitment of ASEAN member states to enhance “regional initiatives to promote and protect the rights of women and children as well as persons with disabilities especially through the work of the ACWC” (ASEAN 2015). Yet, the ACWC’s specific mission is not to protect human rights but to promote human rights, leaving the full responsibility for the protection of rights and empowerment of individuals and groups to each single ASEAN member state (for further discussion, see Langlois et al. 2017).

Notwithstanding the clear weakness of the ASEAN human rights bodies and their heavy dependence on governments, their establishment has to be viewed favorably. Above all, in the field of women’s rights, it has to be considered that while violations of women’s rights are not exclusively culturally motivated, it is true that cultural, educational, and promotional actions can contribute to eliminating violence against women. For this reason, the soft power of ACWC can be an important tool to gain, step by step, full recognition of women’s rights. In this specific field, cultural change is essential to actually guarantee women’s enhancement. This is the difficult horizon of the ACWC; this is its main challenge.

Cross-Reference

- ▶ [Human Rights Responses to Violence Against Women](#)
- ▶ [The Convention on the Elimination of All Forms of Discrimination Against Women](#)
- ▶ [Women’s Rights as Human Rights: Twenty-Five Years On](#)

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Part III

Gendered Civil and Political Rights



Electoral Quotas and Women's Rights

Claire McGing

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Abstract

Electoral gender quotas, which aim to increase either the proportion of women candidates or political representatives, are currently used in over a hundred countries around the world. In most cases quota measures have been adopted over the past two decades. This chapter shows that the 1995 Beijing Declaration and Platform for Action fundamentally changed the international discourse on the diagnosis of women's underrepresentation in politics and thus the solutions to it. As opposed to waiting for women to incrementally "catch up" with men, quotas represent a fast-track approach to increasing women's representation in politics. Significantly, the use of electoral gender quotas means that the Global South has now overtaken the Global North as world leaders in women's parliamentary representation. This is a rapid turnaround on the situation just 20 years ago where the Scandinavian countries and the Netherlands were at the top of the world rankings for women's representation.

C. McGing (✉)

Social Sciences Institute and Department of Geography, Maynooth University, Maynooth, Ireland
e-mail: claire.f.mcging@mu.ie

Despite there being resistance to their adoption and full implementation in most contexts, this chapter argues that electoral gender quotas have significantly advanced women's access to parliamentary politics at a global level. The use of proportional representation (PR) continues to progress women's representation to a much greater extent than plurality/majoritarian systems, and PR systems are generally more facilitating of quota implementation. Voluntary party quotas can be as effective as legal quotas if the right institutional and ideological factors are present. When properly implemented, quotas obstruct highly male-dominated recruitment patterns by encouraging or requiring parties to select increased numbers of women candidates or representatives.

Keywords

Electoral gender quotas · Women in politics · Descriptive representation · Political parties · Candidate recruitment · Electoral systems · Substantive representation

Introduction

Ever since the achievement of women's suffrage, women politicians have had to adjust to political institutions. With the adoption of gender quotas [...] crucial structural changes are for the first time being made to and by the political institutions in order to facilitate the inclusion of women. This is new – and highly controversial.

– Dahlerup (2018, 58)

Gender quotas are now a global phenomenon and are employed in a variety of sectors in political, public, and economic life. Quotas are a form of affirmative action or positive discrimination aimed at increasing the presence of women in decision-making structures (Lovenduski 2005). Put simply, they are about numbers and percentages (Dahlerup 2018).

This chapter differentiates between electoral gender quotas, which target either the proportion of women candidates or representatives in politics, and other quota systems such as quotas for internal political party positions and corporate boards in the private sector. No one could have predicted the rapid spread of electoral gender quotas in all global regions over the last two decades, particularly since the Beijing World Conference on Women in 1995 (Krook 2015). This growth has occurred despite the controversy often ensued by the discussion, adoption, and implementation of electoral gender quotas (Krook et al. 2009). Significantly, electoral gender quotas have been introduced by many parliaments across the world with majority male representation, raising questions as to why male political elites support measures that could dilute their own power as a group.

This chapter builds on earlier quota research (e.g., Dahlerup 2007; Dahlerup and Freidenvall 2005) to offer a fresh take on the “state of play” in relation to the adoption, implementation, and effectiveness of electoral gender quotas at a global level. Firstly it outlines the international human rights framework concerning

women's participation and representation in politics. As we will see, the right of women to be included in political decision-making on equal terms with men is enshrined in international declarations and conventions and is also endorsed by regional organizations concerned with human rights. Following a discussion on women's descriptive representation (numerical representation) in parliaments across the world and also why the political underrepresentation of women is a "democratic deficit" that needs to be remedied (Dahlerup 2018), the chapter considers the various types of electoral gender quotas and lists which models are most predominant in different global regions. We will consider the discourse around the adoption of gender quotas and assess why quotas in politics are controversial. The effectiveness of electoral gender quotas will be considered, before the chapter concludes with a short discussion and suggests areas for further research.

Since the lower house of parliament yields more power than the upper house in nearly all bicameral systems, and given that lower/single house representatives are directly elected while membership of the upper house may be by appointment, hereditary handover, indirect election, or election via a limited constituency, this chapter focuses mainly on the use of electoral gender quotas in lower/single houses of parliament. This is also the standard measure used to track women's political representation around the world, including the UN Millennium Development Goals.

Gender Quotas and Women's Rights: The Human Rights Framework

The right of women to participate in public and political life on equal terms with men is recognized in international human rights law. One of the first tasks of the Commission on the Status of Women (CSW) was to write the 1952 Convention on the Political Rights of Women. The convention requires parties to ensure that women have the right to vote and run for election on the same terms as men. When the convention was written, women in many countries in Asia, Africa, and Central/South America were mobilizing for enfranchisement, and, in states where women did have the right to stand for office, the percentage they comprised of parliaments was in single digits.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 and ratified by 189 states, guarantees the right of women to vote in elections and to participate in public life. Significantly, Article 4 directs parties to implement "temporary special measures" to accelerate gender equality (UNGA 1979, 3). The convention stresses that the operation of these measures should cease when the objectives of equality of opportunity and treatment have been achieved.

As the UN Decade for Women drew to a close in 1985, the Nairobi Forward-Looking Strategies for the Advancement of Women (UN 1985) encouraged member states to take more concrete steps to advance women's political representation (Krook 2015). The report states that political parties and other organizations should "institute measures to activate women's constitutional and legal guarantees of the right to be elected and appointed by selecting candidates" (UN 1985).

Krook (2015, 2) notes the significance of the UN's CEDAW Committee specification in 1988 that the term "temporary special measures" in Article 4 of CEDAW referred to "positive action, preferential treatment, or quota systems to advance women's integration into education, the economy, politics, and employment." Over the years, the UN CEDAW Committee has criticized many countries for low numbers of women in politics and urged them to make more use of temporary special measures.

The issue of women's access to politics and decision-making is dealt with extensively by the 1995 Beijing Declaration and Platform for Action (FWCW 1995). Although the promotion of special measures by transnational human rights actors was not new and domestic campaigns for gender quotas were already underway in many countries, mainly in Central and South America, Beijing is regarded as a pivotal moment in the global diffusion of electoral gender quotas (Dahlerup 2018). Women's descriptive representation globally at the time of the conference was at just 10%. Significantly, the declaration fundamentally changed the international discourse on the diagnosis of women's underrepresentation (a point we will return to later). Instead of placing emphasis on women's supposed lack of knowledge, interest, or qualifications for office, the declaration outlines "discriminatory attitudes and practices" and "unequal power relations" as barriers to equal participation (FWCW 1995, 79). The wording of the declaration is somewhat contradictory, however, as it moves between achieving a "critical mass" of women decision-makers (which is usually taken to mean 30%) and the "equitable distribution of power" between women and men (Dahlerup 2018, 40). Although the word "quota" is never actually used (it was presumably too controversial at the time), the declaration instructs member states to consider "positive action" if necessary in addition to other "soft" measures to increase women's inclusion in politics (FWCW 1995, 81). The UN reiterated this point in its 2005 and 2015 reviews of the declaration.

Beijing provided an important catalyst for domestic women's movements and their allies to campaign for quotas, who were aided by information sharing through transnational women's networks and NGOs. The declaration legitimized their demands. Interestingly, electoral gender quotas were finally brought "over the line" in Costa Rica, Brazil, and Peru after many years of debate as a result of the publicity created by the Beijing Conference (Krook 2006).

At a regional level, the African Union advocates that member states should achieve "gender parity" in politics (Dahlerup 2018), while European institutions including the Council of Europe, European Commission, and the European Parliament have also been to the forefront in calling for political parties and countries to implement gender mechanisms for politics.

Women's Descriptive Representation

Women's descriptive representation in single/lower houses of parliament globally has risen from just 11.7% in 1997 to 23.6% in early 2018. Today, women hold at least 30% of parliamentary seats in 50 countries and, in 13 of these, account for at

least 40% of parliamentarians which is now the internationally recognized measure of “gender balance” in decision-making bodies (60:40 representation of either sex). These figures are historic highs, and the rate of growth over the past two decades has been impressive, but women’s voices remain marginalized in parliamentary politics (Lovenduski 2005). The level of growth also appears to have stagnated in recent years with women’s representation increasing by just 0.1% between 2016 and 2017. Women’s underrepresentation as parliamentarians also has implications for their ability to “crack the glass ceiling” at senior leadership levels. In 2017, women’s participation at the ministerial level stood at just 18.3%, although there has been an increase in the number of jurisdictions with a woman Head of State or Head of Government.

While all regions have reported progress in relation to women’s descriptive representation, a geographical analysis shows considerable regional variations (see Table 1 below). The Nordic region stands out as the only one to have achieved over 40% women’s representation and has been leading the way on this issue for quite some time, reaching 35% female representation two decades ago, but progress has stalled considerably. Indeed, Denmark, Iceland, and Sweden all saw women’s representation fall in their most recent parliamentary elections (Dahlerup 2018).

No other world region has of yet reached 30%. The Americas and Europe (excluding the Nordic countries) have experienced similar rates of growth since 1997, and women currently account for 28.6% of parliamentarians in the former and 26% in the latter. Much of the change in the Americas has been the result of the implementation of legislative candidate quotas in Latin American parliaments. The sub-Saharan African region is close behind with 23.7% women’s representation, up from just 10.8% in 1997, and the region has seen some historic gains for women in politics.

Women currently hold less than one-fifth of seats in Asia (19.5%) and the Arab States (18.5%), although rates of increase in these regions have been significant especially in the Arab States considering women held less than 4% of seats 20 years ago. By contrast women remain significantly underrepresented in parliamentary politics in the Pacific where cultural barriers to the political participation of

Table 1 Women’s representation in single/lower houses: regional averages (%), 1997 and 2018

Region	1997	2018
Nordic countries	35.9	41.4
Europe – OSCE member countries (including Nordic countries)	14.3	27.3
Americas	13.5	28.6
Asia	9.7	19.5
Europe – OSCE member countries (not including Nordic countries)	12.3	26.0
Sub-Saharan Africa	10.8	23.7
Pacific	12.8	15.5
Arab states	3.7	18.5
Total	11.7	23.6

Source: Inter-Parliamentary Union (n.d.)

women remain particularly strong (Zeitlin 2014). Just 15.5% of seats in the region are held by women, well below the global average, and there has been minimal change since 1997.

Why Does Women's Descriptive Representation Matter?

There is a well-rehearsed literature examining why the descriptive representation of women in global politics matters. The arguments can be summarized under three broad themes: justice arguments, difference arguments, and pragmatic arguments (Lovenduski 2005).

Influenced largely by liberal feminism and the stress it places on achieving equal political and legal rights between women and men, arguments from justice are the most powerful. In essence, those of this view argue that it is simply unfair for men to be disproportionately represented in politics. The underrepresentation of women results from direct or indirect discrimination and not because, as was once assumed, men have some biological advantage over women that makes them more superior politicians. This perspective does not presume that women will make any difference to the political process – it is about descriptive representation – but argues that gendered barriers must be dismantled in the name of equal opportunity. The equal representation of women, the “politics of presence,” is an end in itself. Phillips (1995, 65) concludes that: “There is no argument from justice that can defend the current state of affairs. [. . .] [but] there is an argument for parity between women and men.” Furthermore, as discussed, the right of women to participate in representational democracy is recognized internationally as a human right.

Different arguments are more contentious and linked to the substantive representation of women: the representation of women's interests in parliament, by women representatives (Phillips 1995). Drawing on Kanter's foundational study (Kanter 1977) of women in male-dominated corporate environments, early research in this area focused on the theory of “critical mass” which asserts that women's seat holding in parliament must reach a certain threshold – usually 30%, sometimes 15% – to enable them to “make a difference” to policy. The theory assumes that a few “token” women are unlikely to make an impact until they grow into a considerable minority and can better assert themselves; an explicit link is thus made between women's descriptive and substantive representation. In more recent years, however, critical mass has come under scrutiny, and newer research in this area is more sensitive to both institutional and gender dynamics (Lovenduski 2005). The ability of (gendered) political actors to make a substantive impact on policy for women has to be considered, as they may be limited by party affiliation and ideology, how long they have served in parliament, and whether or not they hold positions of power in relation to policy making, for example, as chair of a parliamentary committee or member of cabinet (Wangnerud 2009). Having said that, we should not assume that women representatives are necessarily committed to feminism and gender equality or that all women share common interests or perspectives as women – critical mass theory has been charged as positing essentialist portrayals of women and men (Childs and Krook 2006).

Newer research on substantive representation therefore disputes the linear assumptions of critical mass theory – it is impossible to identify a “tipping point” after which policy is automatically more favorable to women. However, numerous empirical studies do conclude that women representatives, in varying numbers, are more inclined than men to substantively represent what they regard as “women’s issues” and that they give a higher priority to policies relating to education, health, and social affairs (policy areas that are often of disproportionate concern to women), but this cannot be taken for granted (Wangnerud 2009). Rather than focus on critical mass, other scholars focus on “critical actors” for women (Childs and Krook 2006). These are representatives who initiate women-friendly policies on their own and encourage others to substantively represent women. They may do so even when women comprise a minority of parliamentarians, and, importantly, critical actors can be men. “Their common feature is their relatively low threshold for political action” (Childs and Krook 2006, 528).

In an intersectional world, scholars are also increasingly questioning the nature of “women’s interests.” Most studies frame the substantive representation of women through a feminist lens, but Celis and Childs’s (2012) work on conservative women suggests that nonfeminist and antifeminist women representatives also “act for” women in a substantive way. “Good” substantive representation involves recognizing the diversity and ideological conflict of women’s interests.

Despite scholarly reservations about the “predictions” of critical mass, the theory remains important for feminist campaigners globally as an argument for increasing women’s descriptive representation through the use of quotas and, as discussed, is referenced in the Beijing Declaration. The concept is even used by women politicians themselves in response to criticism that they are not making enough of a “difference” for women (Dahlerup 2018). Critical mass is now as significant a mobilizing tool for increasing women’s descriptive representation as it is an academic theory regarding the substantive impact of this increase.

Finally, pragmatic arguments relate to the more widely accepted advantages of increasing the number of women representatives. Political parties, even those who are less ideologically inclined to advocate for gender equality, may run more women candidates in an attempt to “court” women voters or to appear more modern (Lovenduski 2005). Alternatively, arguments from pragmatism can refer to the benefits that women bring to the conduct of parliamentary politics and link to arguments about difference. Women politicians are perceived to be less adversarial and more consensual in political debate (Mackay 2001). While often charged as an essentialist view, a number of empirical studies conclude that “changes in political style, discourse, and decision-making” are associated with higher numbers of women representatives (Lovenduski 2005, 23). Others in this vein advocate for the importance of women’s symbolic representation. Women (and other underrepresented social groups) feel better represented when they see more individuals in office who share descriptive characteristics with them, while an increase in the number of representatives with these characteristics acts to socially legitimize their presence especially among overrepresented groups, for example, men who are mostly middle-class, able-bodied, and heterosexual (Mansbridge 1999).

A related argument is that women politicians serve as role models to other women and encourage them to become politically active. Wolbrecht and Campbell's (2007) cross-national study concludes that the presence of more women parliamentarians heightens political discussion and participation among women, particularly adolescent girls.

Explaining Women's Underrepresentation

Phillips (1991, 79) adequately concludes that explanations for the underrepresentation of women in politics "lack the drama of the singular cause." A substantial "women and politics" literature shows the complex interaction between cultural and institutional factors in influencing gender representation. The culture of masculinity deeply embedded in political parties and parliaments, especially but not exclusively in older institutions where the norms, conventions, and rules of recruitment and representation were set by men in favor of male lifestyles, creates barriers for women aspiring to enter politics and continuing difficulties for those who do manage to be selected and elected (Lovenduski 2005). The persistent gender division of labor in all societies means that women continue to undertake more family and other caring responsibilities than men. As a result, women have fewer resources like time, finance, confidence, and local networks to build up a political career (Norris and Lovenduski 1995).

However, there is an increasing awareness that "supply" problems do not fully account for women's underrepresentation and research is increasingly examining demand-side explanations on the part of political parties, who are the main "gatekeepers" to public office (Kenny 2013). Political parties may discriminate against aspiring women candidates in different ways. For example, particular criteria about what makes a "good candidate" for election are typically gendered – it is based on the status quo – and thus privilege men and masculinity. Relatedly, parties may be reluctant to select women because they fear that voters will react negatively to them. The near-automatic reselection of incumbents, who are mostly (white, middle-class, able-bodied, and heterosexual) men, further restricts opportunities for women to come through the system (McGing 2013). Some studies also conclude more direct forms of discrimination against aspirant women, such as sexist questions being asked of women aspirants in the selection process (Shepard-Robinson and Lovenduski 2002). Importantly, supply- and demand-side factors interact with each other at each stage of political recruitment. For instance, women may hesitate to come forward for selection if they perceive discrimination in the process. As the demand for women candidates increases, supply will increase. Fundamental change must come from political parties (Lovenduski 2005).

Research shows that these gendered individual and party-level factors interact with, and are also influenced by, macro-level variables (themselves highly gendered) such as the electoral system, levels of socioeconomic development, and societal cultural norms to impact on the proportion of women in each national parliament (Norris and Lovenduski 1995; Reynolds 1999).

In terms of electoral systems, numerous studies observe that the proportion of women in parliament increases as the examination moves from plurality/majority systems to those based on PR rules (e.g., Norris 2004; Reynolds 1999). This is largely because of district magnitude, the number of seats per constituency. In most plurality/majority systems, there is only one candidate in each constituency, and the “winner takes all.” By contrast, PR systems have multimember constituencies although the number of seats varies considerably in different countries; in Israel and the Netherlands, the whole country constitutes one national constituency, while parliamentary constituencies in the Republic of Ireland elect between just three and five representatives (Farrell 2011). Multimember constituencies give parties more room to select women candidates without having to displace the (male) incumbent or worry about a negative reaction from voters if the only candidate is a woman – the higher the number of seats, the greater the impact should be, although this is mediated by the behavior and strategies of individual parties (McGing 2013). Incumbency effects are also slightly weaker in PR systems (Lovenduski 2005).

PR systems tend to facilitate more centralized recruitment (Farrell 2011). This gives the party leadership more control over the selection process and gives them the opportunity to increase the proportion of women candidates, if they are ideologically and pragmatically inclined to do so. In decentralized systems where selection is determined by local/regional delegates, or increasingly by individual party members in geographical constituencies through the process of one member/one vote, it is considerably more difficult for party leaders to manage the social diversity of candidate tickets (Hazan and Rahat 2010).

The benefit of PR rules is further illustrated by countries that have a mixed electoral system which combine the principles of plurality/majority and proportionality. In Germany and New Zealand, the proportion of women selected and elected tends to be lower in the single seat constituencies than on the party list (Tremblay 2008).

As discussed below list PR systems are favorable for the implementation of quotas because, unlike other forms of PR that give voters more control over influencing the composition of parliaments, parties operating under such systems can, and in some jurisdictions are mandated to, alternate their national or regional lists of candidates by gender along with meeting a gender threshold for candidates (Dahlerup and Freidenvall 2005).

Although a small number of countries using plurality/majority systems in combination with quotas have surpassed 30% women's representation including Uganda and France, electoral systems remain a good overall indicator of women's representation levels. By contrast socioeconomic and cultural variables, such as women's participation in the workforce, a developed welfare state, a high Human Development Index, a postindustrial society, the dominant religion, and years lapsed since women's enfranchisement, are becoming less stable as explanatory factors (Tremblay 2008). There are two important points here. Firstly, largely as a result of electoral gender quotas, countries of the Global South are now overtaking the Global North in electing women to parliament. At present, the top six ranked countries in the world for women's parliamentary representation are all non-OECD countries:

Rwanda, Bolivia, Cuba, Namibia, Nicaragua, and Costa Rica. Secondly, feminist scholars focusing on single case studies as opposed to large N studies show that gender differences between parties within the same jurisdiction are just as significant as they are between different countries (Dahlerup 2018). Party ideologies, structures, and cultures that support gender equality can act to negate socioeconomic and cultural variables that work against women's representation at a national level. Left-wing and Green parties have tended to be more inclusive of women's participation and more favorable of quota measures than conservative and anti-immigration/xenophobic parties (Dahlerup 2018). The left-right gender divide is becoming less pronounced in established democracies, as right-wing parties seek to feminize their image and some have been led by women (Dahlerup and Leyenaar 2013).

Defining Electoral Gender Quotas

Recent and rapid increases in women's descriptive representation are largely attributable to the adoption of electoral gender quotas (Dahlerup and Freidenvall 2005). Gender quotas for lower houses of parliament and unicameral parliaments are currently used in over a hundred countries around the world. In bicameral systems a number of these countries also employ quotas for upper house elections/appointments, while quotas are also used at subnational levels of politics. One of the earliest examples of quotas dates back to Pakistan in 1956 where ten parliamentary seats were set aside for women, followed by Bangladesh in the 1970s, which used a similar model (Lovenduski 2005). The explosion of gender quotas has occurred over the past 30 years, particularly from the 1990s onwards. Quotas are found in semi- and nondemocratic systems as well as democracies (Dahlerup 2007). They are most commonly found in PR systems because they are easier to implement in multi-seat constituencies with multiple candidates from the same party, but quotas have also been adopted in plurality/majority and mixed electoral systems.

Broadly speaking, there are three "types" of gender quotas in politics: party quotas, legal candidate quotas, and reserved seats (Krook 2006). Party quotas are implemented on a voluntary basis by parties – first by left-wing and Green parties largely in response to the pressures exerted by women party activists and the external women's movement – and operate at the selection stage of party recruitment or more rarely at the shortlisting stage. An example of the latter is the British Labour Party's use of all-women shortlists in certain vacant seats for parliament. In this case the quota targets the composition of aspirants for selection. Party quotas usually prescribe that a certain proportion of candidates should be women. This type of quota is currently used in at least 54 countries by at least 1 party with parliamentary representation.

Legal candidate quotas operate in a similar way to party quotas in that they both focus on achieving "equality of opportunity" by enhancing the selection of women candidates, but there are important distinctions between the two models. Legislative quotas are mandated by legal or constitutional reform and thus apply to all political parties contesting elections in the jurisdiction. Additionally, most

legal candidate quotas include enforcement mechanisms involving either financial penalties for parties or, more effectively, the rejection of the party's candidate list by electoral authorities (Dahlerup and Freidenvall 2005). Financial penalties may not have the desired effect if larger parties are prepared to accept the fine instead of fully implementing the quota, as happened in France (Lovenduski 2005). Nonetheless, the Republic of Ireland shows that well-designed, punitive monetary sanctions can be highly effective in encouraging parties to comply fully with the law (Buckley et al. 2016).

In list PR electoral systems, both party and legislative quotas can include "rank order rules" to enhance their effectiveness. Even if women account for 30% of candidates, there may be no increase in women's descriptive representation if they are placed in low positions on the party list. This practice first started in Sweden in the early 1990s when the Social Democratic Party, under pressure from feminists threatening to establish a women's party, introduced the "zipper method," which is the practice of alternating party candidate lists by gender. This practice was later adopted by a number of other Swedish parties in a "contagion effect" (Freidenvall 2003) and is today used by many progressive parties on a voluntary basis. There are other types of rank order rules. There may be a more modest requirement that, for every three candidates on the party list, one must be a woman, a requirement that the top two candidates are not the same gender, or a 60:40 rule for the top five placed candidates. Some form of rank order rule is legislated for in a number of countries, including Argentina, Belgium, Ecuador, Mexico, and Tunisia. This is called a "double quota."

Studies have shown that the most effective electoral gender quotas include both rank order rules and enforcement mechanisms (Schwindt-Bayer 2009) – without them, quotas may be purely symbolic (Dahlerup and Freidenvall 2005). Interestingly, we are now witnessing a global wave of legal quota revisions, most of which strengthen quota rules by increasing the proportion of women candidates to be selected, by adopting rules for rank ordering or by strengthening enforcement mechanisms (Dahlerup 2018). Lawmakers are increasingly recognizing that rules about the proportion of women candidates, while well-intentioned, do not necessarily guarantee an increase in women's representation if parties do not act "in the spirit" of the law and continue to run men in electable positions. Mexico has strengthened its quota law a number of times, and the effect of this has been significant (Dahlerup 2018). Between the 2003 and 2015 parliamentary elections, women's seat holding increased from 22.6% to 42.6%.

Previous research by Dahlerup (2007) illustrates regional clustering in relation to the types of electoral gender quotas employed around the world. Legislative candidate quotas were predominant in Central/South America – Argentina was the first country in the world to legislate for candidate quotas in 1991 and started a contagion effect in the region – while party quotas were the most common measure employed in Western Europe. An updated regional analysis of quotas for this chapter shows little change to these patterns in 2018, apart from Europe where an increasing number of parliaments have legislated for candidate quotas. The European Union "pioneers" of legislative candidate quotas – France, Belgium, Portugal, Slovenia,

Spain, and Croatia – have in more recent years been followed by Poland, the Republic of Ireland, Greece, and Luxembourg (in order of their adoption). Italy had a legislative quota for elections to the lower house in 1994, but the law was declared unconstitutional in 1995. Legal quotas are, however, used today for elections in 12 of Italy's 20 regional governments and also for European elections. The legislation of candidate quotas by a number of postcommunist/socialist countries in Central and Eastern Europe is particularly significant as historically there was heavy resistance to quota measures in these contexts. They served as a reminder of “forced emancipation” of Soviet rule (Dahlerup and Freidenvall 2005, 34). However, it is a myth that most communist countries had a 30% quota for women's political representation. Gender quota laws for candidates are now in place in Albania, Poland, and the seven independent states that were formerly part of Yugoslavia (Dahlerup and Antić Gaber 2017).

Reserved seats are mandated by legal or constitutional change in 23 countries. They can take a number of different forms, but they all reserve a certain number of seats for women (and sometimes for other social groups such as youth or ethno-religious groups) either in specially designated constituencies or regular constituencies. Reserved seat quotas are thus focused on achieving “equality of results” rather than “equality of opportunity.” Dahlerup (2007) shows that reserved seats are found almost exclusively in Africa, Asia, and the Middle East (but other quota types are also used in these areas). Increasingly women are being elected as opposed to appointed to reserved seats. Countries where women are elected to reserved seats include Jordan, Uganda, Morocco, and Rwanda. Reserved seats can act to encourage women's descriptive representation in strongly patriarchal cultures – depending on the number of seats reserved for women which generally range from 10% to 30% when converted to percentages – and they have also been employed as part of a country's reconciliation process and transition to democracy, such as Iraq (Dahlerup 2007).

Different types of quotas can be in operation in one country. In Rwanda, for example, two women per province are elected by a special electorate comprised of women's organizations and local councilors. These reserved seats are used in conjunction with a legal candidate quota for district elections, which specifies that at least 30% of candidates on the party list must be women (Dahlerup 2018). Rwanda has the highest proportion of women parliamentarians in the world (61.3%) largely as a result of these combined measures.

The Adoption of Electoral Gender Quotas

Electoral gender quotas represent an instrumental or fast-track approach to increasing women's descriptive representation (Dahlerup 2018), as opposed to an incremental approach. The incremental view is that the proportion of women candidates will gradually increase in line with other advances for women in society, such as their access to education and participation in the workforce. Soft “equality promotion” strategies, like training and mentoring for aspiring women candidates,

financial assistance for campaigning women, or the setting of aspirational targets, may also be emphasized as part of the incremental track to facilitate women to “catch up” with men in politics (Lovenduski 2005).

It is often wrongly assumed that women's representation in Scandinavia reached record highs as a result of the early implementation of gender quotas by political parties. In fact, the Scandinavian story is more accurately characterized as an incremental strategy (Dahlerup and Freidenvall 2005). Significant activism on the part of the women's movement, the early expansion of the welfare state, increases in women's socioeconomic opportunities and the use of List PR all fostered a more amenable environment for women's candidacy relative to other countries in Western Europe, at an earlier point in time. A number of political parties in Denmark, Sweden, and Norway introduced voluntary gender quotas in the 1980s when women already accounted for 20–30% of parliamentarians, which at that point was a global high (Dahlerup and Freidenvall 2005). A large minority of women parliamentarians, supported by the wider women's movement, mobilized their parties to implement voluntary quotas to consolidate women's descriptive representation. As Matland (2004, 64) concludes: “In the Scandinavian case, quotas may not lead to significant representation, but rather, significant representation may lead to quotas.” Competition on the issue of women's representation by different political parties within the three jurisdictions but also across the wider Nordic cluster further encouraged parties to act, particularly on the ideological left (Dahlerup and Freidenvall 2005). Not all parties introduced voluntary quotas for public elections, for example, the Center Party in Norway. Scandinavia is often held up as “the model” by those advocating for increases in women's descriptive representation, but “it would not be easy to transplant the Scandinavian institutions in other countries and assume they will function in a similar manner” (Matland 2004, 64).

In shifting the discourse from an incremental to an instrumental approach, the diagnosis of women's underrepresentation changes. Even though the document also makes reference to softer measures to assist women in politics, Beijing in 1995 firmly shifted the global discourse on women's representation from an incremental approach to an instrumental one. Quotas firmly place the burden of change on political parties as the “gatekeepers” to elective office, recognizing that the gendered privileging of individual men and cultural masculinity in party institutions suppresses the demand for women candidates, despite increases in the supply of individual women candidates as women become more active in parties (Kenny 2013). The focus is on achieving rapid results – fix the culture, instead of “fixing” the women.

As Dahlerup and Freidenvall (2005, 27) argue in relation to the Scandinavian experience: “It took approximately 60 years for Denmark, Norway and Sweden to cross the 20% threshold, and 70 years to reach 30%. Today, women's movements are unwilling to wait so long.” The Republic of Ireland, for example, proves a cautionary tale for advocates of the incremental approach in historically conservative cultures. The rapid expansion of economic and social opportunities available to Irish women during the “Celtic Tiger” era of the 1990s and early 2000s, in addition to the use of soft measures by all major parties, did not lead to more women entering

parliament (McGing 2013). Only the introduction of legal candidate gender quotas in 2012 by a parliament with 85% male representation would act to finally dismantle the monopoly of men in Irish politics and increase women's parliamentary representation from just 15% to 22% in one electoral cycle (Buckley et al. 2016).

The increasing adoption of quotas by male-dominated parties and parliaments, in all types of societies, is a significant phenomenon in the latest "wave" of quotas. This is mainly because of mobilization by domestic women's movements and women in political parties for quotas, complemented by international and regional pressures, but pragmatic considerations are also important as discussed above: the representation of women is electorally and politically attractive (Lovenduski 2005).

Electoral gender quotas, despite their rapid global spread and increasing support from male party elites, remain controversial in most societies for a number of reasons (Lovenduski 2005). It is the "fast-track" nature of quotas that causes much of the controversy, the assumption being that women selected, elected, or appointed as a result of quota rules are being promoted over more qualified men. Quotas are seen in this vein as a threat to the "meritocratic" principles of politics, as unfair to men, and this discourse is particularly prominent in liberal models of citizenship which focuses on the (presumed gender-neutral) individual, for example, the USA and the UK (Krook et al. 2009). There is no objective criteria to define what "merit" means in politics, however, and the concept is highly gendered in the first place considering that the norms of candidate selection were set by men who never have their credentials for politics scrutinized (Murray 2014). Empirical studies on the educational and political profiles of candidates in quota systems dispute the argument that quotas result in "unqualified" candidates, when measured by these variables. Women politicians in Argentina generally have the same level of education as men (Franceschet and Piscopo 2012), and in some Asian quota systems, women actually have a higher level of education (Dahlerup 2018). Nugent and Krook (2016) show that women MPs selected under all-women shortlists in the British Labour Party have more electoral experience overall than their women and men party colleagues and also Conservative Party MPs.

The Effectiveness of Electoral Gender Quotas

What impact have electoral gender quotas had on women's descriptive representation in politics? Table 2 (below) shows the top 15 countries in the world for women's seat holding in early 2018. All but two countries employ some form of quota: eight have legal candidate quotas, and in five countries, at least one party with parliamentary representation uses party quotas. Only Cuba (a one-party state) and Finland, with 48.9% and 42% women's representation, respectively, do not have any quotas.

The global picture shows that electoral gender quotas have significantly advanced women's access to parliamentary politics, despite there being resistance to their full implementation in some countries (Krook 2016). Interestingly, the data suggests that party quotas can have a considerable effect on gender representation even though they have no sanctions for noncompliance. Party quotas have had an impact in left-wing and

Table 2 Women's representation in single/lower houses: top-ranking countries (%), 2018

Country	% Women in parliament	Election year	Quotas	Electoral system
1. Rwanda	61.3	2013	Legal quota and reserved seats	PR
2. Bolivia	53.1	2014	Legal quota	Mixed
3. Cuba	48.9	2013	N/A	One party
4. Namibia	46.2	2014	Party quota	PR
5. Nicaragua	45.7	2016	Legal quota	PR
6. Costa Rica	45.6	2018	Legal quota	PR
7. Sweden	43.6	2014	Party quota	PR
8. Mexico	42.6	2015	Legal quota	Mixed
9. South Africa	42.4	2014	Party quota	PR
10. Finland	42.0	2015	N/A	PR
11. Senegal	41.8	2017	Legal quota	Mixed
12. Norway	41.4	2017	Party quota	PR
13. Mozambique	39.6	2014	Party quota	PR
14. Spain	39.1	2016	Legal quota	PR
15. France	39.0	2017	Legal quota	P/M

Source: Inter-Parliamentary Union ([n.d.](#))

Green parties where there is a greater ideological willingness to advance gender equality. In older democracies like Germany, Sweden, and the UK, women's representation in social democratic and labor parties has remained stable or increased since the adoption of party quotas in the 1980s and 1990s (Dahlerup 2018). Centralized candidate selection systems and the presence of women's party activists who can push for quota implementation are also important factors for the success of party quotas (Davidson-Schmich 2006).

PR electoral systems and PR lists in mixed systems continue to advance women's candidacy and representation to a much greater extent than plurality/majority systems. As discussed, quotas are easier to adopt and implement in PR systems, especially those that facilitate rules regarding the rank ordering of candidates. Electoral gender quotas are most effective when there is a good "fit" with wider institutional structures, and it is important that policy makers design them with this in mind.

Most significantly, as already discussed, the use of electoral gender quotas means that many Global South parliaments are now overtaking the Global North as world leaders in women's descriptive representation. No longer is it the case that wealthier countries elect more women to parliament. This is a rapid turnaround on the situation just 20 years ago when the majority of the top countries were in the Global North, with Sweden, Denmark, Norway, the Netherlands, and Finland emerging at the very top (in that order). The Scandinavian model is no longer the model for improving women's descriptive representation – or at least the only model that other states aspiring to increase women's descriptive representation have to follow.

Conclusion

This research has shown that electoral gender quotas are most effective when they combine with wider institutional structures and cultural norms, particularly PR, party ideologies that support gender equality, and the presence of women party activists both within and outside of parties. Importantly, voluntary party quotas can be as effective as legal quotas if the right institutional and ideological factors are present. The rapid increase in women's descriptive representation in many regions in the Global South is particularly significant and further questions the incremental approach to women's representation. Despite repeated discussion about the "Scandinavian model" – a region where progress has stalled considerably – the Global South has showcased how to grow women's representation at a much more rapid pace.

Of course, electoral gender quotas do not correct all of the institutional and cultural barriers that prevent women's equal access to politics and soft measures like the training and the financial resourcing of women candidates may also be required alongside quotas for maximum effect. Nor do quotas solve the various difficulties that women face once elected to office, for instance, combining motherhood with parliamentary duties. However, when properly implemented, quotas do obstruct highly male-dominated recruitment patterns by actively encouraging parties to select increased numbers of women candidates or representatives (Dahlerup and Freidenvall 2005). Further research should consider the adoption and implementation of gender quotas at other levels of politics, including quotas for internal party positions and for subnational elections. Women's descriptive representation at lower levels is important in itself, but it also facilitates them to build up the experience and resources to contest national elections.

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Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality

Laura van Waas, Zahra Albarazi, and Deirdre Brennan

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L. van Waas (✉)

Department of European and International Law, Tilburg University, Tilburg, The Netherlands
e-mail: Laura.vanWaas@uvt.nl

Z. Albarazi

Eindhoven, The Netherlands
e-mail: zahra.albarazi@gmail.com

D. Brennan

Melbourne University, Melbourne, Australia
e-mail: Brennan.deirdre19@gmail.com; debrennan@student.unimelb.edu.au

Abstract

Sixty years ago, it was the norm for men and women to be treated differently under countries' nationality laws. Nationality was a status that derived from the male head of household and women did not hold equal or independent nationality rights. Today, only a small minority of countries worldwide continue to uphold this discrimination, preventing women from passing on their nationality to their children or spouse on an equal basis with men. Yet the consequences of these unequal systems for affected families are significant, not just in terms of rights and status but also wellbeing and security. The state too is held back, when a section of the population is excluded from fully participating in society as a product of discriminatory nationality regimes. The recognition of these impacts by the Convention on the Elimination of Discrimination Against Women, and other human rights mechanisms, combined with the actions of national women's rights groups are creating a pathway to global reforms and the promise of a future free of gender discriminatory nationality laws.

Keywords

Citizenship · Nationality · Gender discrimination · Inequality · Human rights · CEDAW

Introduction

In tens of countries around the world, a mother cannot give her nationality and accompanying citizenship rights to her child – at least not on the same terms as a father can. Many women in these countries are unaware of this restriction in the law and the potential it has to affect their lives. That is, until they have a child. Until then, they did not realize that their child would not share their nationality. Until then, they did not realize that they are citizens of a country that does not recognize equal citizenship rights. Until then, they did not realize that having children who cannot obtain their nationality may have huge repercussions on their family's access to a variety of rights and services.

Only a few decades ago, the majority of countries worldwide treated men and women differently when it came to citizenship rights. However, for a variety of reasons, including successful advocacy for the advance gender-equal civil and political rights, reforms have swept across the globe. Today, efforts continue to ensure universal gender neutrality in nationality laws, including by engaging with human rights norms and mechanisms. Indeed, this is what CEDAW demands, with Article 9 recognizing the equal nationality rights of women with men.

This chapter discusses the pathway towards nondiscriminatory nationality rights, but also highlights the problems that remain in place. It begins by setting out what the issue is, and what this means for those affected. It then shows how utilizing human rights mechanisms, specifically CEDAW, has advanced the issue in the global emergence of women's nationality rights. Finally, it seeks to discuss the

future of nationality rights as more than just a women's rights issue, but one that is cross-cutting with children's rights, the Sustainable Development Agenda and emerging efforts to tackle the global challenge of statelessness.

The Issue

Individual Impact

Milan's teaching career is under threat. He is a thoughtful yet reserved man in his early 40s who was born, and who always lived, in Nepal. His mother and father are both Nepali citizens. Milan, however, is not. Neither is he a citizen of any other country. He is without nationality: stateless – defined in international law as a person “who is not considered as a national by any state under the operation of its law” (UN 1954). He chose a teaching job as it is one of the few jobs he could get without having to demonstrate his citizenship – which he does not have – to his employers. But now, because of a change of law which will require him to register his citizenship card at work, even that may change.

He wants to be a citizen, but due to discrimination against women in his country, he has not been able to acquire nationality. His father died when he was young, and there are problems establishing his legal link to him. His mother, just as much a citizen as his father, cannot transfer her nationality to him. This is because in Nepal, mothers face various legal and practical obstacles in giving their nationality to their children.

Milan's employment challenges, and the fact that his wage has to be sent to his mother's bank account because he cannot open one himself, are not the only problems his lack of citizenship causes. He reflects:

I think that what is the most crippling thing about this being a stateless person, is not being able to have hope, that is the most crippling thing [. . .] and I think when it happens to a very young person who hasn't understood many things about life it can be really, really confusing. That is why I mention part of my life [as] a state of zombie, zombieness [sic]. Usually you don't know where you are going and that could happen many ways, but in my case it is due to lack of citizenship. (Equal Rights Trust 2014)

The Scale of Gender Discrimination in Nationality Laws

As noted, there are still many countries around the world where women cannot transfer their nationality to their children on an equal basis with men. At the time of publication, states where this discrimination against women can be found are: Bahamas and Barbados in the Americas; Brunei Darussalam, Malaysia, and Nepal in Asia; Burundi, Liberia, Swaziland, Togo in Africa; and in the Middle East and North Africa – Bahrain, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria, and United Arab Emirates

(Equality Now 2016). In these countries, a mother who has given birth to a child, and who is a fully fledged citizen of a country, will face difficulties and will most likely not succeed in making sure that her child shares her nationality. It is also important to note that over 50 countries deny female citizens equal rights with males in their ability to confer nationality to nonnational spouses (Equality Now 2016).

The modalities and extent of this discrimination vary. In Qatar, for example, the law simply states that to be Qatari you must have a Qatari father (State of Qatar 2005). Under no circumstance will a Qatari mother be able to give her nationality to her child. In less restrictive criteria of the nationality law of Liberia, if the mother is unmarried and has a child outside of Liberia, then the child will not obtain her nationality (Republic of Liberia 1974).

Underlying Reasons for Gendered Nationality Rights

Why would a country prohibit half of their population from enabling their children to be citizens of that country? There are various reasons that underlie this discrimination. Sixty years ago, the majority of states did not provide equal rights to women in nationality laws. A key motivation for this was the understanding that for family unity reasons a family should have one nationality, and as patriarchy would suggest, children belong to their father, therefore it was men who transferred their nationality (Albarazi and Van Wass 2014). As British and French nationality codes contained this discrimination when they were established, the problem became global when these legal traditions, including their discriminatory provisions, were disseminated worldwide through colonialism (Govil and Edwards 2014). However, since the adoption in 1979 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the majority of countries have reformed their laws on this point.

Nevertheless, many decades later, for those countries that retain this discrimination, the situation has now become more complex. Although embedded in a patriarchal mentality, the policy of not allowing mothers to transfer their nationality to their children has become intertwined with other forms of discrimination and geopolitical contexts. States may see this provision as allowing them to keep control of demographic changes or to exclude from their citizenry other communities based on their race, ethnicity, or religion. This can be illustrated with the example of Lebanon, where only men can transmit nationality. In Lebanon, a sizeable proportion of the population is foreign, notably Palestinian refugees who have been there for generations, and more recently Syrian refugees. Meanwhile, Lebanon's political system rests on the very delicate matter of the religious demographics of the country. The common discourse against reforming the law is that children of Palestinian men and Lebanese women, and now Syrian men and Lebanese women, will become Lebanese and this will shift the confessional balance of the country (El-Khoury and Thibaut 2012).

Broader Consequences

While the original purpose of these laws was to ensure unity of the family, research has demonstrated that this discrimination is doing exactly the opposite (Albarazi 2014, 11–19). Instead of family unity being protected, families are being split up. Children, fathers, and mothers cannot always live with each other in the same country because often only nationals will always have a right to reside. Travelling together also often becomes problematic. When children cannot obtain the nationality of their mothers, this may also mean that children cannot own property or land in the country of their mothers, or even inherit property. This can create tensions between children and the broader families of their mothers – between those who cannot inherit and those who can. In countries where the nationality law allows women to transfer nationality in the situation where the father is not available, it may mean that a couple will never formally marry or unite even if they want to, or even resort to divorce in the future. In Kuwait, for example, the law allows for children of Kuwaiti mothers to apply for citizenship if the foreign father has irrevocably divorced the mother or has died (State of Kuwait 1959). Abeir, a Kuwaiti mother whose children are stateless because her husband is, talks about this phenomenon she finds themselves in. “I begged my husband to divorce me; it was the only way to solve the children’s problem. He told me, ‘Dear, after all these years you want us to separate, I can’t do it.’ Even my son kept on asking me to get a divorce” (WRC 2013, 3).

Nearly 40 years after the creation of CEDAW, more than one quarter of countries still retain discriminatory nationality laws that severely affects the life of Milan and hundreds and thousands of individuals and their communities. What is clear is that the consequences of this discrimination can be far-reaching in terms of affecting the women, their children, and their families. One of the most dire, potential impacts is that children may be left stateless (see, for example, ISI 2017b). However, the consequences do not stop there, as communities and broader society are also effected. Prevented from fully participating in economic, social, and political life may leave a significant portion of a country’s population feeling that they do not truly belong – having implications for the state’s development as a whole.

CEDAW and the Global Emergence of Women’s Nationality Rights

The History of Nationality Rights as a Women’s Rights Issue

A woman’s right to independently acquire, retain, confer, and change her nationality has been recognized by the international human rights community long before the establishment of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In 1963, the Commission on the Status of Women (CSW) was invited by the United Nations General Assembly (UNGA) to prepare a draft declaration that would combine in a single instrument, international standards articulating the equal rights of men and women. That draft, The Declaration on the

Elimination of Discrimination Against Women (hereinafter: the Declaration) was adopted by the General Assembly in 1967. It is within the Declaration that we find early acknowledgement of the importance of a woman's autonomous rights over her nationality.

Under Article 5, specific reference is made to a woman's nationality rights in relation to marriage – which today remains a problem in over 50 countries in the world (GCENR [n.d.](#)). This chapter affirms that men are not, and should not be seen as, guardians of women. Laws that automatically deprive citizenship from women upon marriage and force the citizenship of their spouse upon women reinforce the idea that once a woman is married, she loses her independent identity. As stated in the Declaration:

Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband. (UNGA [1967](#), art 5)

Early reference to the rights of women to confer their nationality to their children on an equal basis with men can be interrupted under Article 6 of the Declaration. Although the latter is a statement without the binding force of a treaty it has been noted that “its drafting was none the less a difficult process. Article 6, concerning equality in marriage and the family [...] proved to be particularly controversial” (UNWOMEN [n.d.](#)). It states:

All appropriate measures shall be taken to ensure the principle of equality of status of the husband and wife, and in particular [...] [p]arents shall have equal rights and duties in matters relating to their children. In all cases the interest of the children shall be paramount. (UNGA [1967](#), art 6(2)(c))

The embeddedness of calls for women's equal nationality rights in the history of the women's rights movement is a testimony to the gravity of this issue, past, present, and for women going forward. The foresight of thinkers at the time that this is a critical right for women further strengthens the argument that there is no longer any legitimate justification for gender discriminatory nationality laws.

The Establishment of CEDAW and Women's Equal Nationality Rights

Growing consciousness, during the 1960s, of the patterns of discrimination against women and considerable momentum by states and organizations that wanted to address such discrimination, led to the preparation of the text of CEDAW in the late 1970s. On September 3, 1981, the Convention entered into force (UNWOMEN [n.d.](#)). CEDAW is a binding treaty that gave force to the provisions of the 1967 Declaration and today, there are 189 state parties to the Convention. Article 1 of CEDAW defines discrimination against women as “any distinction, exclusion or restriction 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” (UNGA 1979, art 1).

In addition to the general protection against all forms of discrimination against women, Article 9 of CEDAW specifies equal nationality rights for women to acquire, change, or retain their nationality and to confer nationality on their children:

States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. [para 1]; [and] States Parties shall grant women equal rights with men with respect to the nationality of their children [para 2]. (UNGA 1979, art 9)

Article 9 further reinforces CEDAW’s general prohibition of discrimination against women, as through guaranteeing equal nationality rights, access to other rights is strengthened. While much of the language of Article 5 from the 1967 Declaration remains in Article 9 CEDAW, there are significant additions, including clear and specific references to children. This evolution in language and the outright prohibition of nationality laws that discriminate on the basis of gender indicates the growing realization that these laws, as explained in the first part of this chapter, can have detrimental consequences for the lives they affect.

Recommendations by CEDAW’s Committee on the Nationality Rights of Women

The UN Committee on the Elimination of all Forms of Discrimination Against Women (hereinafter: the Committee or UNCEDAW) was established in 1982 and has since made hundreds of recommendations in their Concluding Observations to states on how to fulfill their obligations under CEDAW. The recommendations in all Concluding Observations from the first Committee session in 1984 through 2015 were examined for their content on the right of every woman to enjoy the same rights as men to acquire, transfer, retain, and change their nationality. Attention by the Committee to women’s nationality rights is evident from the mid-1990s and gained particular momentum and sustained attention from the 2000 onwards. One hundred recommendations were found to have been made by the Committee to states, to amend nationality laws to ensure women equal rights with men to pass on their nationality to their foreign spouses and children; and that the laws are in conformity with Article 9 of the Convention. The earliest of these was a recommendation in 1994 to Iraq:

Members urged the Government to review its Nationality Act of 1961 with a view to eliminating gender discrimination. The representative explained that, in the case

of a marriage between an Iraqi woman and a foreigner, the man could not acquire Iraqi nationality nor were the children of such a union entitled to Iraqi nationality. (UNCEDAW 1994)

Nineteen of the 25 countries that still deny women equal rights with men to confer nationality to their children have received recommendations from the Committee to resolve these discriminatory provisions in their most recent review. Research for this chapter shows that no recommendations have been made to date to Barbados or Malaysia, while Kiribati has yet to be reviewed under CEDAW. Three of the 25 states, Iran, Somalia and Sudan, are not State Parties to the Convention and as such no recommendations have been made to them. In 1994, the International Year of the Family, the Committee issued General Recommendation no. 21 on equality in marriage and family relations, which called upon states to ensure a woman's right to a nationality as a critical measure to her full participation in society (UNCEDAW 1994). A General Recommendation is a clarification of rights under CEDAW intended to provide guidance for the practical implementation of human rights and to lay out criteria for evaluating the progress of states in their application of these rights. In its postreview recommendations to Syria in 2014, the Committee calls on the state to grant women equal rights with men in relation to their nationality – to bring Syria fully in line with its obligations under both Article 9 of CEDAW and under General Recommendation no. 21:

The Committee [...] urges the State party to: Immediately amend its Nationality Law (Decree No. 276/1969), in particular article 3, in order to ensure that women and men enjoy equal rights to acquire, transfer, retain and change their nationality, in line with article 9 of the Convention; and ensure its implementation [para 38 (a)]; [and to] Fully implement Decree No. 49/2011 so as to ensure that it covers all Syrian Kurds who are still stateless, in particular women and girls and their children [para 38 (b)] (UNCEDAW 2014, para 38). (UNCEDAW 2014)

Recognizing the particular vulnerabilities of stateless women and of gender discriminatory nationality laws as a cause of statelessness, the Committee has also made 30 recommendations to states to accede to the 1954 Convention relating to the Status of Stateless Persons (UN 1954) and the 1961 Convention on the Reduction of Statelessness (UN 1961).

The Future of Nationality Rights as a Women's Rights Issue

At a national, and in places regional level, campaigns for the reform of gender discriminatory nationality laws are strong. Women's rights groups in Bahrain, Lebanon, Kuwait, Nepal, Togo and others have organized workshops with government bodies and civil servants on the importance of granting women equal rights with men in relation to their nationality. Protests have taken place on the streets of Kathmandu and Beirut (Saidi 2015). Where laws are now reformed, there are examples of good practice in implementing the reforms. For example, listening

centers set up in Morocco to share stories of the detrimental effects of these laws on families, and lobbying of parliamentarians in Indonesia on the state's obligations under CEDAW, were pivotal to the success of the reforms (UNHCR [n.d.](#)).

The increased and sustained engagement by the CEDAW Committee on women's nationality rights is nourishing these continued movements. However, it is not overly harsh to point out that there is a lack of awareness or action among the global women's rights and feminist movements on the importance of eradicating this form of discrimination against women. While CEDAW has the potential to catalyze change amongst state actors, and the Global Campaign for Equal Nationality Rights (GCENR [n.d.](#)) mobilizes action at a local, regional and international level, it is critical that leading, and more mainstream, global women's rights actors and activists support the work of national women's rights groups and this call for change.

Leveraging Other Frameworks to Effect Change

As highlighted above, achieving equal nationality rights for both sexes is not only a question of women's rights. Where mothers are unable to pass on their nationality to their children, this is as much an issue of child rights as it is of discrimination against the women concerned. Where wives are unable to pass on their nationality to a foreign spouse, this affects their husbands too. Where statelessness is created, perpetuated or prolonged through such discriminatory laws, this undermines the enjoyment of the right to a nationality – a fundamental right of every person. And where any of these problems arise, the knock-on effects are wide-ranging, impacting on the enjoyment of family life, socioeconomic rights, well-being, and development.

All of this means that when looking at the issue of gendered nationality laws, CEDAW and the women's rights angle are just part of the picture. There are numerous other international frameworks and initiatives under which this problem can be flagged and through which change can be sought. This section of the chapter looks at three such avenues: firstly, by broadening out the human rights focus to consider other instruments and mechanisms that complement CEDAW by exploring the position of this issue within the UN's Sustainable Development Agenda; and finally by discussing the development of global campaign efforts targeting gender equal nationality rights.

The Right to a Nationality as a Broader Human Right

Under international law, the right to a nationality finds its expression not only in the affirmation of equal nationality rights for men and women but more generally as a fundamental right for all to enjoy. Following its inclusion in Article 15 of the Universal Declaration of Human Rights, the right to a nationality therefore not only found its way into CEDAW but also into a multitude of other instruments at both the global and regional level.

For instance, the Convention on the Rights of the Child (CRC) – the world’s most universally ratified human rights treaty – guarantees the right of every child to acquire a nationality in its Article 7. As with all of the rights in CRC, Article 7 is to be interpreted in light of the principle of nondiscrimination, meaning that children have the right to acquire a nationality, “irrespective of the child’s or his or her parents’ or legal guardians’ race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” (UN 1989, art 2). This is one of the general principles that the Committee on the Rights of the Child (UNCRC) has identified as cross-cutting in the CRC (for further discussion, see: UNCRC 2003). In its consideration of States Parties reports, the Committee on the Rights of the Child (UNCRC) – mandated to oversee implementation of the CRC – has understood this to mean that states must ensure equal rights for both parents to pass on nationality to their children, calling for the removal of gender discrimination from nationality laws (ISI 2016, 13–18). The Committee has made recommendations to states on this issue since the mid-1990s and had raised it in at total of 47 Concluding Observations to states by mid-2017 (ISI n.d.). For example, in respect of Qatar:

The Committee remains seriously concerned that the Nationality Act does not confer citizenship to children of Qatari women and non-Qatari fathers, as it does where the father is Qatari [and] [...] urges the State party to review its legislation on nationality in order to ensure that nationality can be transmitted to children through both the maternal and paternal line without distinction, in particular for those children who would otherwise be stateless. (UNCRC 2017)

As a cross-cutting human rights issue, affecting women and children while also impacting the enjoyment of other rights, gender discrimination in nationality laws has also received significant attention within the Universal Periodic Review (UPR) of the UN. In the first two cycles of the UPR combined, a total of 141 recommendations were made in which states were specifically urged to address the gender discrimination *in their nationality law*. A further 21 recommendations directly asked states to withdraw their reservation to Article 9 of CEDAW (Albarazi et al. 2017). The UPR is an important political mechanism for promoting the implementation of human rights standards and drawing attention to the issue in this framework is a useful complement to the work of the UN Treaty Bodies such as the CEDAW and CRC Committees. For instance, as Japan recommended in the second cycle review of Bahrain in 2012: “Continue to take the vital steps to grant citizenship to children of Bahraini mothers in the same fashion as children of Bahraini fathers *as CEDAW and the CRC have pointed out*” (HRC 2012, 25, emphasis added).

A further avenue that human rights law offers in respect of promoting equal nationality rights for men and women is the route of individual complaints. To date, the only international human rights body to decide such a case is the European Court of Human Rights. In *Genovese v. Malta*, the Court found Malta’s nationality policy to be in violation of the right to private life and the principle of non-discrimination

(arts 8 and 14, respectively, of the European Convention on Human Rights). This complaint in fact concerned discrimination against men, rather than women, as their right to transmit nationality to a child born out of wedlock was restricted. Nevertheless, the case clearly demonstrates how the principle of nondiscrimination is to be interpreted in the context of rules relating to the transmission of nationality from parent to child and its application in the context of binding litigation.

Gender Equality in the Sustainable Development Goals

The Sustainable Development Goals (SDGs), adopted by the UN General Assembly in September 2015, outline the key priorities for global development work for the period until 2030. An important feature of these goals – and one which distinguishes them from the previous Millennium Development Goals – is their focus on addressing inequality and breaking down underlying structural barriers to development (UNGA 2015). One of the 17 Goals, SDG5, is directly concerned with achieving gender equality and Target 5.1 is to “end all forms of discrimination against all women and girls everywhere” (UNGA 2015, 18). Under SDG10 there are further targets relating to tackling inequality such as Target 10.3, to “ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws” (UNGA 2015, 21).

Under these specific SDG targets that relate to realizing equality, legislation that prevents women from passing on their nationality to their children or their foreign spouse – or otherwise disadvantages one sex over the other – should be reformed. Moreover, the achievement of the SDGs more generally will be served by making these changes. Given the role that nationality plays in unlocking access to socioeconomic rights and services, addressing problematic nationality policies is critical to the achievement of many of the development Goals and Targets, including those relating to poverty reduction, quality education, and good health. Tackling structural discrimination in nationality law will also help to ensure that SDG Target 16.9 – to “provide legal identity for all, including birth registration” (UNGA 2015, 25) – is pursued in a manner that does not *increase* exclusion and run counter to the core philosophy of the global development agenda. (For further discussion of the relationship between the SDGs and issues of nationality and statelessness, see ISI 2017a.)

Global Campaigning on Equal Nationality Rights

While states have made strong legal and political commitments to ensuring that women enjoy equal nationality rights with men, under human rights law and within the SDGs, some work remains to be done to achieve this on the ground in all countries. To raise the visibility of the issue and leverage these frameworks effectively, international stakeholders have adopted “campaigning” as a strategy to complement and reinforce the work of national advocates for reform. The Global

Campaign for Equal Nationality Rights was established in 2014 with the specific mission of “mobilising international action to end gender discrimination in nationality laws” (GCENR [n.d.](#)). This joint UN and civil society initiative offers a channel for collective engagement and for amplifying the message that restricting women’s nationality rights conflicts with contemporary norms and interests.

The Campaign to End Statelessness by 2024, spearheaded by the Office of the United Nations High Commissioner for Refugees (UNHCR) has also made “removing gender discrimination from nationality laws” one of the concrete actions through which the reduction and eventual eradication of statelessness will be achieved (UNHCR [2014](#), 12–13). When later, in 2016, a dedicated global Coalition on Every Child’s Right to a Nationality was established by UNHCR in collaboration with UNICEF, this same objective was also included in the focal areas for the Coalition’s engagement (UNHCR/UNICEF [n.d.](#)). As such, as an issue that impacts women’s rights, engenders statelessness and affects children, the realization of equal nationality rights has now penetrated a range of different international initiatives – something that should help to accelerate reform in the coming years in those countries where the problem remains.

Conclusion

The year 2017 was a positive one with regards to reform of discrimination found in nationality law. The beginning of the year brought with it the news that Madagascar had removed discrimination against women in transferring nationality to their children, and Sierra Leone followed only a few months after. Madagascar also provides a good example of where the use of CEDAW and other human rights frameworks was aligned with other efforts to create enough visibility, international pressure, and domestic will for reform to be achieved. For example, in 2012, the CRC Committee recommended that Madagascar: “urgently finalize the reform of the legislation on nationality of children and [ensure] that no discrimination exists against children born of a Malagasy mother and a father of foreign nationality or children born out of wedlock [...] [and more generally] ensure that children born in Madagascar do not risk being stateless” (UNCRC [2012](#), para 32). Two years later, in 2014, Madagascar received three recommendations under the UPR to amend its nationality law (HRC [2014](#), 17). Following this in 2015, the CEDAW Committee recommended that Madagascar “Amend its nationality law to enable Malagasy women to transmit their nationality to their foreign or stateless spouse and to their children on an equal basis with men, in accordance with article 9 of the Convention” (UNCEDAW [2015](#), 9). Significantly, all of these pushes within the UN human rights framework came in parallel to a concerted national movement against this discrimination. Civil society in the country campaigned actively for reform; worked with artists, the affected population, and journalists; lobbied parliamentarians; and brought in international technical experts where needed. In the end, law reform was achieved (GCENR [2017](#)).

Of course, in Madagascar, Sierra Leone, and all other countries that have amended their laws in recent years, just reforming the nationality legislation is not sufficient in and of itself to conquer the problem of unequal citizenship rights. There are many examples of challenges in the implementation of legal reforms which bring equality on paper but not in reality – even, in some cases, long after the reform took place. Additionally, gender discrimination in other laws can lead to problems enjoying the fruits of an equal nationality rights regime in practice, such as where civil registration or family law is discriminatory against women, getting in the way of their ability to pass on their nationality (for example, see Fisher 2015). However, as a first step, law reform is paramount, since preventing women from transferring their nationality to their children is an antiquated policy that no one can argue has a place in a country's nationality law. And reforms *are* taking place, with many examples worldwide of how amendments are being brought about, including with the help of strategies involving the use of human rights mechanisms and norms.

Cross-References

- ▶ [International Law and Child Marriage](#)
- ▶ [Islam, Law, and Human Rights of Women in Malaysia](#)
- ▶ [The Convention on the Elimination of All Forms of Discrimination Against Women](#)
- ▶ [Women's Rights as Human Rights: Twenty-Five Years On](#)

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Women Human Rights Defenders

Amie Lajoie

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Abstract

In 1998, the United Nations General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms or as it is most commonly referred to as the 1998 Declaration on Human Rights Defenders (DHRD). Following a 13-year drafting process, the adoption of the DHRD was hailed as a "milestone" by the international human rights community. The term "human rights defender" (HRD) encompasses those who, "individually or with others, act to promote or protect human rights"

A. Lajoie (✉)

School of Sociology and Political Science, National University of Ireland – Galway,
Galway, Ireland

e-mail: amielajoie@gmail.com

(OHCHR 2004, 2). This chapter outlines the evolution of the HRD framework since 1986 and explores the space allocated to women within it, referred to as “women human rights defenders” (WHRDs). Conversations about “gender” and “women” in popular HRD discourses tend to rely on essentialized ideas about women as inherently susceptible to gender-based forms of violence. Building on feminist critiques of human rights practice and analyses of the women’s human rights movement of the 1990s, this chapter considers how narrow gendered discourses have promoted a masculine ideal that tends to marginalize women’s identities and experiences in the wider HRD framework.

Keywords

Human rights defenders · Feminist theory · Gender · International human rights law · Public-private divide

Introduction

According to Alice Edwards, “rarely is feminist theory or human rights law [...] concerned with women as human rights defenders or political activists” (Edwards 2011, 85). The possibility of understanding women politically as “activists” and “agents for change” remains a challenge as the image of a “woman” is continually caught in traditional and essentialist trappings. Such views are intensified in the pervasive “Western gaze” toward women in the Global South who are often portrayed in human rights discourses as the inevitable victims of biology and the “backward” cultures of “others.” Arguably, this thinking echoes imperialist ideologies that fail to recognize and contest the gender hierarchies working within wider social, political, and economic structures in both the Global North *and* South (Merry 2003; Mutua 2001, 2008). Feminist academics and practitioners therefore face a challenge: How to advocate for the “human rights of women” while avoiding promulgating reductionist categories of “women as victims” and “vulnerable female subjects”?

This challenge is also evident in the development of the “human rights defender” (HRD) framework. The HRD framework is an evolving paradigm within the international human rights project, which focuses on the human rights advocacy of individuals and groups. Human rights defenders are defined broadly as those who, “individually or with others, act to promote or protect human rights” (OHCHR 2004, 2). This space, which foregrounds “grassroots activism,” wherein women often play prominent roles, would, at first glance, appear to be a woman-friendly paradigm, offering hope that discussions of “women human rights defenders” (WHRDs) might escape reductionist gender tropes and stereotypes. However, this chapter argues that the HRD framework that has emerged displays a deep-rooted masculine bias, which operates to marginalize women’s experiences and identities within the HRD paradigm. It discusses the dynamics of this outcome and how women human rights defenders are challenging the gendered limitations of the paradigm.

This rest of this chapter is divided into four sections. The first offers a brief introduction to the HRD framework and discusses the mainstream narrative of the “human rights defender.” The second section explores the drafting of the 1998 UN DHRD and the difficulty of defining an individual “defender of universal rights” in international human rights law. The third section compares the objectives of the HRD framework with the work of the women’s human rights movement of the 1990s. Finally, the fourth section investigates efforts to include women in the HRD framework and the evolution of the identity of “women human rights defender” and its limitations.

The HRD Framework

In 1998, the United Nations General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, commonly referred to as the UN Declaration on Human Rights Defenders (DHRD) (UNGA 1998b). This document marked a significant shift in international human rights law by focusing on the particular role of individuals in the realization of human rights’ principles. Since 1998, a community of practitioners, inside and outside the UN, has developed an extensive framework of national, regional, and international mechanisms to offer practical support and protection to “human rights defenders” (HRDs). The term “human rights defenders” has since moved beyond the human rights system and is widely used in mainstream media.

Since 1998, the United Nations Office of the High Commissioner for Human Rights (OHCHR) has published several documents that further clarify the meaning of the term “human rights defender” and aim to raise awareness of the provisions of the DHRD. According to the OHCHR, “human rights defenders are identified above all by *what they do*” (OHCHR 2004, 1, emphasis added). The DHRD reinforces rights previously enshrined in other human rights instruments and applies them specifically to “human rights defenders.” These include the following: “the right to be protected,” “the right to freedom of assembly,” “the right to freedom of association,” “the right to access and communicate with international bodies,” “the right to freedom of opinion and expression,” “the right to protest,” “the right to develop and discuss new human rights ideas,” “the right to an effective remedy,” and “the right to access funding” (OHCHR 2011, 3–4). In addition, human rights defenders “conduct peaceful activities” (OHCHR 2004, 19). No specific training is required to be a human rights defender. The act of promoting and protecting human rights can be an aspect of a paid occupation, such as that of journalists, lawyers, judges, activists, police officers, medical personnel, politicians, and teachers. Human rights defenders may also be unpaid volunteers, interns, or students. HRDs must recognize the universality of all human rights and maintain “a commitment to international human rights standards, a belief in equality and in non-discrimination, determination and, in many instances, *tremendous courage*” (OHCHR 2004, 8, emphasis added). In HRD discourses,

human rights defenders are presented as leaders of social and political change in their communities – advocating for rights on behalf of others.

To augment the provisions of the DHRD, in 2000, the UN Commission on Human Rights (hereinafter, the Commission) established the mechanism of “Special Rapporteur on the situation of human rights defenders” (formerly Special Representative) to monitor implementation of the DHRD and raise awareness of the situation of HRDs around the world. The position has been held by Hina Jilani, a lawyer and women’s rights activist from Pakistan; Margaret Sekaggya, a magistrate from Uganda and former Chairperson of the Uganda Human Rights Commission; and Michel Forst, former UN Independent Expert on the situation in Haiti. As the first mandate holder, Hina Jilani played a formative role to the early construction of the HRD framework and was the first to make a distinction between “women” and “men” human rights defenders.

International NGOs (such as Amnesty International, Civil Rights Defenders, Front Line Defenders, Human Rights First, Human Rights Watch, and International Federation for Human Rights) are the most active stakeholders in the HRD framework and often work in cooperation with the Special Rapporteur. The official websites of these NGOs declare as their primary objective the assistance of defenders, working predominately in non-Western contexts, who are targeted or “at risk” as a result of their work. International NGOs coordinate with governments and the UN to facilitate support and protection mechanisms for HRDs. Such mechanisms include solidarity and monitoring visits, trial observations, security and personal trainings, temporary relocation, scholarships and fellowships, grants and relief programs, medical assistance and counselling services, and legal assistance and urgent appeals on behalf of HRDs (Barcia 2011). There are also several awards presented to HRDs by international NGOs and states such as the Martin Ennals Award (coordinated by ten human rights NGOs and established in 1994), the Human Rights Defender Tulip (awarded by the Dutch government’s Office of Foreign Affairs and established in 2007), and the Front Line Defenders Award for Human Rights Defenders at Risk (awarded by the eponymous Irish NGO and established in 2005). These awards are made almost exclusively to individual HRDs in non-Western countries.

Despite the inclusion of “individuals, groups and organs of society” in the official title of the DHRD, the HRD framework rarely deals with “groups and organs of society.” For example, the 2014 report of the Special Rapporteur notes that the cases “of more than 530 individuals” were taken up but offered no such figure for “groups” (HRC 2014, 4). The focus on the individual is seen particularly in the rhetoric of international NGOs who champion the HRD framework. For example, during 1994–2016, 21 out of the 23 winners of the Martin Ennals Award were individuals, and two were groups (MEA n.d.). In addition, the organizational slogan of Front Line Defenders (FLD) is: “protect one, empower a thousand” (Front Line Defenders n.d.). According to FLD, “across the world, individuals take immense risks to defend the rights of their communities” (Front Line Defenders 2015). The primary function of the HRD framework, therefore, is to highlight the efforts of individual activists working in particular states and to elevate them to the attention of the international human rights community.

This pattern lends credence to the argument that the HRD framework predominately reflects the interests of Western states and NGOs. However, the ways in which the HRD framework has been used in practice in various regional and local settings since 1998 counter this critique of the HRD identity as purely an expression of Western thinking. Reference to “human rights defenders” is found in policy and jurisprudence of the regional human rights systems of Europe, Africa, and Latin American in particular. For example, in 2004, the African Commission on Human and Peoples’ Rights created the position of Special Rapporteur on Human Rights Defenders. Since 1998 there have been many cases presented to the Inter-American Court of Human Rights that deal with the work of individual HRDs (Quintana and Fernández 2014). In addition, the Association of Southeast Asian Nations (ASEAN) and active regional NGOs such as the Asian Forum for Human Rights and Development (FORUM-ASIA) and the Asia Pacific Forum on Women, Law and Development (APWLD) have all developed specific programs and policies concerning human rights defenders.

In 2004, the Office of the High Commissioner for Human Rights (OHCHR) published Fact Sheet 29 entitled Human Rights Defenders: Protecting the Right to Defend Human Rights (OHCHR 2004), a 50-page document outlining who exactly is a “human rights defender” and how the 1998 Declaration protects these individuals. It asserts, “the State is the primary perpetrator of violations against human rights defenders” (OHCHR 2004, 14). The role of the HRD is, therefore, one of challenging the state, usually portrayed as a powerful monolithic actor or oppressive regime. Highly reverential rhetoric is commonly used to describe human rights defenders and their activities. This resonates with Makau Mutua’s critique of the “idiom of human rights” as an “elusive, yet lofty idealism [that] is almost biblical in its forbidding language” (Mutua 2008, 25). For example, human rights defenders have been described as “the lifeblood that our democracies need in order to flourish and survive over time” (HRC 2017, 3). The work of HRDs is characterized as urgent and necessary: “wherever human rights defenders are under attack, respect for human rights is curtailed” (UNGA 2008, 19). Further, to violate the rights of human rights defenders is to violate the rights of the collective: “the protection of defenders is an indispensable element of the social and institutional framework for the protection of all human rights” (UNGA 2008, 19).

Academic research focusing on human rights defenders has begun to emerge in recent years, adopting a similarly positive standpoint. For example, Alice Nah and colleagues (Nah et al. 2013) identify eight areas of research relevant to the policy and practice of protecting HRDs in their local contexts. These are:

[T]he definition and use of the term ‘human rights defender’; perceptions of risk, security and protection; culture, gender and diversity (with particular emphasis on protecting women human rights defenders); the use of legal and administrative mechanisms for repression; the effectiveness of protection mechanisms; strategies and tactics for protection; fostering enabling environments for the defence of human rights; and the impact of technology and digital security on HRDs. (Nah et al. 2013, 401)

This research views human rights defenders uncritically as agents of change (Nah et al. 2013, 401). It is concerned with how the “international community” (the vast

network of NGOs, regional and national institutions, and the United Nations) can better support and protect human rights defenders. As such it engages with the HRD framework on its own terms. This chapter goes a step further by also considering the role and significance of the underpinning gendered assumptions and ideological influence of the paradigm in limiting the role of women human rights defenders.

Drafting the DHRD: A Site of Contested Meaning

To understand the significance of the contestations and ideological underpinnings of the HRD framework today, it is important to trace the genealogy of its founding document. The text of the 1998 Declaration on Human Rights Defenders was a highly contested UN document that took more than 13 years to agree. From 1986 to 1998, a drafting group of state delegates within the UN Commission met annually to debate the contents of the text and produce official reports on the group's progress. Four key phases within this time period influenced the international human rights community and the drafting of the DHRD. These were as follows: the polarized later years of the Cold War during 1986–1988; the end of the Cold War and the collapse of the USSR in the period 1989–1990; the immediate aftermath of the Cold War post-1989 followed by a period of strong momentum toward the implementation of human rights, which culminated in the second World Conference on Human Rights in Vienna in 1993; and, finally, the largely pro-global human rights era of the mid- to late 1990s. Understanding the changing political landscape of this period helps to contextualize the construction of the human rights defender framework as a product of the international relations within which it was formed and the limited space for women human rights defenders within it.

Within the early years of the drafting group's meetings, contestations between state delegates were consistent with the ideological fault lines of Cold War politics. Soviet bloc states and China typically attempted to curtail the dominance of the West. Commonly raised points of contestation included assertions of state sovereignty and states' rights to noninterference in their domestic affairs and criticisms of Western states for their prioritization of civil and political over economic, social, and cultural rights. For example, in 1986 the delegation from Bulgaria asserted that the DHRD "should not encroach upon the principles of sovereignty of States [...] [and] the working group should avoid giving individuals rights to agitate against their legitimate governments" (UNCHR 1986, 12). In 1987 delegations from the Philippines and USSR proposed that "priority shall be given to the realization of the new international economic order as a necessary element for the effective promotion of human rights" (UNCHR 1987, 10 and 24). The struggle to recognize the indivisibility of *all* human rights would continue throughout the 13-year drafting process – a struggle also faced by the women's human rights movement of the 1990s.

In the comparatively pro-human rights climate of the early 1990s, debates in the drafting group shifted to battles over interpretations of universality and cultural identity. Non-Western states in particular pressed to have the DHRD recognize that, in the words of the delegate from Turkey:

Everyone, individually or in association with others, should have and promote respect for the rights, freedoms, identity and human dignity of all other members of the community, as well as for the cultural identity of the community as a whole. (UNCHR 1993, 15)

This was supported by Cuba, which remained the most vocal opponent of the DHRD during the debates. According to the Cuban delegate: “[the] nature of every society and its cultural heritage should be preserved in the light of present-day attempts to homogenize the world according to a particular cultural or political model” (UNCHR 1993, 9). Such opinions were vehemently opposed by Western state delegates. For example, the United States asserted that “respect for cultures [...] should be exercised only to the extent that such respect, as well as the cultures themselves, was consistent with international standards of human rights and fundamental freedoms” (UNCHR 1993, 14). Western delegates won the debate in the end, and the final text does not address “cultural identity” (UNGA 1998b). The prioritization of the “international” over the “particular,” and the alignment of the former with civil and political rights against the state, remains a lasting legacy within the HRD framework. This bias is also evident when the work of HRDs, cast as defenders of “universal rights,” is presented as in opposition to local and cultural norms – as will be discussed, a tendency that is especially notable when women human rights defenders are involved.

In 1997, the atmosphere of the drafting group’s sessions became so tense that in-person deliberations regarding the draft were considered futile; the group was simply unable to reach a compromise (UNCHR 1997). At the conclusion of the 1997 session, the Group “entrusted” the Chairman-Rapporteur Jan Helgesen from Norway with “the task of holding informal consultations” prior to the 1998 meeting in order to produce a draft text for consideration (UNCHR 1998, 4). This was in response to the pressure placed by the Commission; it wished to see the DHRD completed in time for the 50th anniversary of the Universal Declaration of Human Rights in December 1998. On 10 December 1998, the United Nations General Assembly (UNGA) adopted without a vote the 2500-word document, marking the official recognition of the identity of “human rights defender” in international human rights law.

However, the DHRD does not offer any groundbreaking revelations concerning human rights defenders as such – in fact, the term “human rights defender” does not appear in the text at all. Nor is there much indication of the actual role and activities of the individuals and groups working toward the realization of human rights in local and national contexts. While celebrating the DHRD as a significant achievement and “a milestone” (UNCHR 1998, 12), activists, NGOs, and states acknowledged the fundamental limitations of the document. Clearly, on its own the DHRD would not be a sufficient or effective tool for HRDs on the ground. In addition, before the adoption, 26 UN member states led by Egypt requested an “interpretative declaration” to accompany the original DHRD. The joint statement acknowledges reservations of the 26 states regarding the provisions set forth in the DHRD. Signatories of the interpretative declaration are the following: Algeria, Bahrain, Benin, China, Cuba, Democratic People’s Republic of Korea, Djibouti, Egypt, Ethiopia, Iran, Iraq, Kuwait, Lao People’s Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Mauritania, Myanmar, Niger, Oman, Pakistan, Qatar, Singapore, Sudan, Syria, United Arab Emirates, and Vietnam

(UNGA 1998a, 1). The declaration asserts that these states “opt out” of specific provisions in the DHRD, including those that specify a hierarchy of international over domestic law. The contestations throughout the drafting process, as well as the interpretative declaration, are indicative of political and ideological tensions still present in the prevailing discourse on human rights defenders and the refusal of some states to acknowledge the existence and rights of “defenders” in their countries.

The HRD paradigm, therefore, is marked by different forms of exceptionalism in international relations. As seen within the drafting group meetings, the paradigm appears to create a dynamic of “good states,” invariably in the West, that are sanctioned to criticize “bad states,” typically non-Western, regarding how they treat activists on the ground. This bias in the HRD paradigm is especially visible in how Western-based “international organizations” and states reserve the name “human rights defender” almost exclusively for activists in the Global South.

The HRD framework also sustains an individualist bias; it approaches the realization of human rights by focusing mainly on the activities of individuals. It supposes a triangular relationship among international human rights norms, the domestic context, and the “human rights defender.” In narratives of this relationship, the individual HRD from the onset is pitted against the monolithic, rights-offending state. This invokes a “David and Goliath” motif, where the morally superior champion proves victorious in an impossible situation and overcomes seemingly insurmountable odds to achieve victory (Fairchild 2018). In the story of David and Goliath, it is David’s goodness and religious faith that give him legitimacy and the strength to succeed. In the HRD framework, defenders are similarly championed in their efforts to contest the rights-abusing state and are buoyed by their “faith” in human rights and human dignity. It offers a narrative in which the individual defender is constructed as the legitimate opponent of an illegitimate state and, in so doing, bolsters the ascribed attributes of the HRD as “heroic,” “peaceful,” “righteous,” and “courageous.” This mode of representation reinforces narrow, individualist understandings of human rights, which privilege top-down “universalism” and valorize the actions of the individual human right defender vis-à-vis the state in the public sphere. This emphasis on defenders’ individual valor and conflict with the state invokes strong associations with traditional “masculine” social roles, which puts women at a disadvantage in their efforts to be human rights defenders. Since its inception, the HRD framework has privileged the experiences and perspectives of men. Indeed, women comprise only 20% of human rights defenders who have received support from the UN Special Rapporteur (HRC 2008, 2017). The next section considers the human right defender in light of feminist critiques of mainstream human rights developed in the 1990s.

The HRD Framework and the Women’s Human Rights Movement of the 1990s

As the members of UN Commission were deliberating on how to legally define a “human rights defender,” the women’s human rights movement was working to bring an understanding of “women’s rights” from the margins to the center of

human rights discourse (see Bunch and Reilly, this volume). These two streams of activism emerged simultaneously in a period marked by the emergence of new, active transnational social movements (Moghadam 2005). The women's human rights movement of the 1990s was a departure from prior feminist engagement with the UN. The earlier phase of feminist efforts, from 1945 to 1985, culminated in a series of world conferences as part of the UN Decade for Women (1975–1985) and the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979. Feminist activism during this period fought for women's formal equality under the law and an end to gender-based discrimination, exemplified in the adoption of CEDAW (Reilly 2009, 46–48).

In the 1990s, the movement focused on contesting the liberal constructions of the public-private divide, as well as the recognition of violence against women and the right to reproductive health within the international human rights framework. Feminist activism then focused on achieving recognition at the UN World Conference on Human Rights (Vienna, 1993) that “women's rights are human rights” (WCHR 1993). To disrupt narrow and male-biased readings of human rights, the international women's human rights agenda was twofold; it targeted mainstream human rights practice to better address women's concerns, and it pressed for the recognition of new normative understandings of rights abuses experienced by women (Bunch 2001; Reilly 2009). The following subsections focus on three tenets of the women's human rights movement that are also relevant to a feminist analysis of the human rights defender framework.

The Public-Private Divide and Violence Against Women

The division of life and society into two separate and distinct “public” and “private” spheres is an organizing concept of political life that has been extensively and critically discussed in feminist writing (Okin 1998; Charlesworth and Chinkin 2000). According to Susan Moller Okin, “sometimes explicitly, but more often implicitly, the idea is perpetrated that these spheres are sufficiently separate, and sufficiently different, that the public or political can be discussed in isolation from the private or personal” (Okin 1998, 116). Feminist thinking has comprehensively exposed and criticized the gendered implications of this binary. Rights abuses that take place in the private sphere, traditionally understood to be the “world of women,” were invisible in human rights discourses and viewed as beyond the scope of public and state accountability. In the 1990s, the women's human rights movement succeeded in changing this thinking. It expanded understanding of human rights norms to better reflect women's lived experiences. This included achieving recognition that abuses of women's rights by private actors are no less human rights violations than violations by states (Bunch 2001; Friedman 1995). This analysis also underlines the indivisibility of all rights on the understanding that women who lack economic, social, and cultural rights are less able to exercise their civil rights not to be subjected to violence (Bunch and Reilly 1994).

In summary, a feminist human rights perspective reveals how the public-private divide serves to “hinder progress in advancing substantive visions of human rights in women’s lives” (Reilly 2009, 30). HRD discourses are regressive, therefore, to the extent that they reinforce the public-private dichotomy, privilege male-defined civil and political rights over economic, social, and cultural rights, and present the state as the primary opponent of the human rights defender.

The Right to Reproductive Health and Justice

Feminist activists in the 1990s also succeeded in broadening definitions of human rights to include the right to reproductive health and justice. Both the 1994 Programme of Action of the Cairo International Conference on Population and Development (UN 1994, Chap. VII) and the Beijing Declaration of the Fourth UN World Conference on Women (see FWCW 1995, annex II, para 94–96) recognize women’s reproductive health rights as human rights. However, after 1995 a well-organized countermovement emerged, led by an alliance of conservative actors who consistently “objected fiercely to measures it saw as ultimately challenging the structure of the family or allowing women full control over their reproductive systems or sexuality” (Friedman 2003, 323). According to Doris Buss, this alliance is “defined by an opposition to feminism,” reacting to the “feminist successes in the international realm” (Buss 2004, 73).

The right to reproductive health remains a crucial aspect of the ongoing women’s human rights agenda. It is also a highly contested part of the women human rights defender paradigm. This was particularly the case in the drafting of the UN General Assembly 2013 Resolution on “protecting women human rights defenders.” In an early draft of the text, the Resolution referenced the necessity of protecting the right to a woman’s sexual and reproductive health (UNGA 2013a, para 8). However, this was later dropped from the Resolution’s final text (UNGA 2013b). (The relevance of this is discussed in more detail below.)

The Indivisibility of All Human Rights

Although violence against women became the single most visible issue of the 1990s Global Campaign for Women’s Human Rights, the campaign also highlighted structural violence and promoted an understanding of human rights, which recognized all human rights as indivisible and interdependent. According to campaign organizers Bunch and Reilly (1994):

Neo-liberal policies and structural adjustment programmes, as well as continuing manifestations of colonialism, negate economic, social and cultural rights, and civil and political rights. [...] [Further] where social and economic rights are denied and the state abdicates responsibility for assuring life and well-being (food, shelter, work, health, access to land and other economic recourses, welfare and education) women bear disproportionately the burden of sustaining life and livelihood. (Bunch and Reilly 1994, 141)

That is, women's human rights advocates have long supported economic rights and the right to development as fundamental to the realization of women's human rights. Recognizing the indivisibility of human rights in this way presents a challenge to traditional interpretations of human rights, specifically in terms of questioning the prioritization of civil and political rights against the state. The HRD paradigm, however, does not similarly advocate for such rethinking. Rather, these articulations are left unopposed in popular HRD discourses. By focusing almost exclusively on protecting individual champions of rights against classic state-sponsored violations, the HRD framework does not question or challenge other sources of social and economic power that are used to deprive women of their rights. At the same time, the message that violence against women violates human rights has been incorporated into the HRD in ways that fit with persistent tropes in traditional rights discourses of women as "victims" and defined by particular "notions of women's sexual vulnerability" (Otto 2005, 106). As discussed below, such thinking has carried over to into popular perceptions of "women human rights defenders" within the HRD framework, whereby women are defined primarily in terms of their perceived specific physical and sexual vulnerability as women, in contrast to men defenders who are not recognized as vulnerable in comparable, essentialized terms.

Definitions of "Women Human Rights Defenders"

In 2004, the Office of the High Commissioner for Human Rights offered the following brief overview of the "particular situation" of "women human rights defenders" (OHCHR 2004, 20):

In many parts of the world, the traditional role of women is perceived as integral to a society's culture. This can make it especially hard for women human rights defenders to question and oppose aspects of their tradition and culture when they violate human rights. *Female genital mutilation is a good example of such practices*, although there are many others. Similarly, many women are perceived by their communities as an extension of the community itself. *If a woman human rights defender is the victim of a rape because of her human rights work she may be perceived by her extended family as having brought shame on both the family and the wider community*. As a human rights defender she must carry the burden not only of the trauma of the rape, but also of the notion within her community that, through her human rights work, she has brought shame on those around her. Even where no rape or other attack has occurred, women who choose to be human rights defenders must often confront the anger of families and communities that consider them to be jeopardizing both honor and culture. (OHCHR 2004, 21, emphasis added)

The above text conveys the dominant way that women are discussed in the HRD paradigm. It reveals and reiterates prevailing ideas about "community" and "culture," strongly associated with the private domain, as the primary obstacles for women who are working to defend human rights. Within this discourse, the hostility that women encounter in undertaking "human rights work" is predominantly related to their membership in traditional (non-Western) cultures and communities. Frequent

references to “rape” and “female genital mutilation” also reinforce connotations of “being female” and “being a victim.”

As discussed, the women’s human rights movement advocated for the recognition of all forms of violence against women (VAW), whether perpetrated by state or non-state actors, in public or in private life, as violations of human rights. However it did so with an emphasis on the interrelation of such violence and forms “structural inequalities” that vary from context to context (Bunch and Reilly 1994). From this perspective, the naming of VAW as a “common concern” among women around the world “does not erase but emanates from the recognition of the [multiple] empirical forms and extent of *different experiences of differently situated women* of VAW” (Reilly 2011, 70). This counters the “one-size-fits-all” narrative in which all women are assumed to be inherently susceptible to sexual violence in the same way. Yet, within the HRD framework, such essentialist thinking is evident and exacerbated by Western-centric ideas about women in non-Western contexts who are generally viewed as additionally susceptible, supposedly for reasons of “culture” and “tradition.” At the same time, the “women human rights defender” identity, the space allotted to women’s identities and experiences in HRD discourse, remains an aside. The next subsection considers two major events that helped to solidify current understanding of “women human rights defenders” (WHRDs) as part of the HRD framework while also contributing to the continuing ambiguity of the WHRD identity. These are the establishment of the Women Human Rights Defenders International Coalition and the UN General Assembly Resolution on women human rights defenders (UNGA 2013b).

Women Human Rights Defenders International Coalition

On 29 November 2005, over 200 delegates from 70 countries met in Sri Lanka for a 4-day International Consultation on Women Human Rights Defenders. The event was the result of a yearlong international campaign to raise awareness of “women human rights defenders” (Real and Chai 2006). The campaign was supported by Hina Jilani, who was at the time UN Special Representative of the Secretary General on the situation of human rights defenders. In response to the recommendations made during the Consultation, the Women Human Rights Defenders International Coalition (hereinafter, the Coalition or WHRDIC) was founded in 2008. The Coalition is a transnational network of 28 NGOs focused on human rights, women’s rights, and LGBTI rights that works to support the activities of “women human rights defenders.” According to the coalition’s website, it “provides a global network of support and solidarity” and is “a resource and advocacy network for women human rights defenders worldwide” (WHRDIC n.d.). The coalition’s slogan is “defending women, defending rights” and as such is “a play on the earlier slogan, “women’s rights are human rights”” (Real 2011, 223).

At the 2005 consultation, “women human rights defender” was defined as an umbrella term that “refers both to women active in human rights defense who are targeted for who they are, as well as those targeted for what they do” (Real and Chai

2006, 6). As such this definition “refers to human rights activists who are women, as well as all activists who defend the rights of women and LGBT persons” (Real 2011, 221). The motivation behind the broad definition was to help facilitate a “collective” to “advocate for the rights of both women and LGBT activists” (Real 2011, 221; see also Bunch and Reilly, this volume). However, in NGO practice, the inclusion of male/LGBTI activists under this label happens rarely. Further, since 2005 there has been increased attention to LGBTI human rights defenders as a particular group of HRDs distinct from both women and general HRDs. For example, Special Representative Jilani outlined the specific situation of “defending the rights of lesbian, gay, bisexual, transgender and intersex persons” as distinct from “women human rights defenders” (HRC 2007). International NGOs tend to follow this trend and make distinctions between defenders of LGBTI rights and WHRDs. For example, in 2014 the International Service for Human Rights (ISHR) compiled a unique report focusing on the situation of LGBTI HRDs (ISHR 2014).

Nonetheless, the fact that grassroots activists and NGOs came together to support a coalition for women and LGBTI activists reveals how both of these groups have been excluded from the established definition and norm of the “human rights defenders.” International and regional NGOs leveraged the solidarity established by the women’s human rights movement to challenge the masculine and hetero-normative bias of the established HRD framework. However, the ambiguity of the category “women human rights defender” remains an ongoing point of contention. Four primary meanings of the term “women human rights defender” are currently in use in HRD discourses and practice. These are women who work on issues related to women’s rights, women who are HRDs, persons of any gender who work on issues pertaining to women’s rights, or WHRD used as an umbrella term for women and LGBTI defenders (Lajoie 2018, 88–89). Moreover, many women who do not work on “women’s issues” also prefer to drop the “women” and identify only as a “human rights defender” (Lajoie 2018, 149). Arguably, this lack of cohesion and clarity in the discourse is indicative of both the WHRD identity’s contested meaning and its residual status.

UN General Assembly Resolution on Protecting Women Human Rights Defenders

The most significant development regarding women in the HRD framework was the adoption of a UN General Assembly Resolution on “protecting women human rights defenders” (UNGA 2013b). The resolution was celebrated as an “important step forward” in the recognition of WHRDs in international discourse (Tolmay and Viana 2013, 1). Significantly, clauses in the Preamble make specific reference to the Vienna Declaration and Programme of Action (WCHR 1993), the Declaration on the Elimination of Violence Against Women (UNGA 1993), the Programme of Action of the International Conference on Population and Development (UN 1994), as well as the Beijing Declaration and Platform for Action (FWCW 1995; UNGA 2013b, 1–2).

However, a notable change from an early to the final adopted version of the resolution on women human rights defenders (UNGA 2013b) was the deletion of a paragraph urging states to “promote and protect the human rights of all women, including their right to have control over and decide freely and responsibly on matters related to *their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence*” (UNGA 2013a, para 8, emphasis added). The inclusion of this paragraph in the original draft resolution reveals a commitment by some states and NGOs to the objectives of the 1990s women’s human rights movement and the recognition of reproductive health rights activists as WHRDs. The subsequent deletion, however, signals that this aspect of the women’s human rights movement is highly contested in HRD discourse and that some WHRDs are less welcome than others in the established HRD framework.

Regarding the supposed, specific vulnerability of women human rights defenders, significantly, in the final text of the resolution (UNGA 2013b), the identity of a “women human rights defender” is strongly associated with themes of physical threat and violence. There are 19 references to “violence” in the body of the text: 7 refer to violence in general (ibid., Arts 9 and 21); 8 concern “gender-based violence” (ibid., Arts 9 and 21); 6 mention “sexual violence” and/or “rape” (ibid., Arts 16 and 21); and there are 3 mentions of “violence against women” in the Preamble. The resolution asserts that women human rights defenders are “at risk of and suffer from violations and abuses” (ibid., Art 8); “can experience gender-based violence, rape and other forms of sexual violence” (ibid., Art 8); suffer from “stigmatization that may result from such violations and abuses” (ibid., Art 10); face “vulnerability to violence” (ibid., Art 11) as well as “particular risks” (ibid., Arts 9 and 5); and “are victims of sexual and other forms of violence” (ibid., Arts 21 and 7). In contrast, the term “violence” appears just twice in the original Declaration on Human Rights Defenders (UNGA 1998b) and only five times in the most recent UN General Assembly Resolution concerning human rights defenders as a whole (UNGA 2015). Of these latter five references to violence, a majority also refer to women human rights defenders (UNGA 2015, Arts 4, 14, and 21).

By placing such a strong emphasis on WHRD’s susceptibility to gender-based and sexual violence, the General Assembly Resolution on women human rights defenders repeats the gender biases of traditional human rights discourse that base “human rights claims on women’s vulnerability and pain, which has the unfortunate effect of producing, anew, protective and imperial representations of women” (Otto 2005, 122). This conception is in tension with the heroic “agent of change” at the core of HRD discourse and arguably undermines the very purpose of the recognition of WRHDs in the first place. The HRD will serve women defenders more effectively if greater emphasis is placed on the resolution’s call on states to “empower women” (UNGA 2013b, Art 14) and to “develop and put in place [...] gender-sensitive public policies and programmes that support and protect women human rights defenders [...] while also extending protection measures to their relatives, including children, and otherwise to take into account the role of many women human rights defenders as the main or sole caregivers in their families” (UNGA 2013b, Art 19).

Conclusion

The development of the HRD framework in the late 1990s and 2000s was an offshoot of the revival of positive international engagement with human rights in the 1990s. The establishment of this framework is, to a certain extent, a reaction to the significant shifts in human rights thinking that were taking place during this time. In particular, the expansion of rights is championed by feminist interventions. So far, the HRD paradigm in key respects reflects a step back from these new gender-conscious definitions by refocusing most attention on the activities of repressive regimes against individual human rights activists. In this regard the HRD framework reasserts conventional understandings of state-sponsored violations of civil and political rights and constructs the lone heroic male against the state as the standard human rights defender. This in turn makes it difficult to grasp wider structural inequalities (e.g., poverty or health system failures) as the critical human rights issues they are, not least for women.

Throughout these developments, the HRD paradigm has incorporated essentialized understandings of women's vulnerability while ignoring the larger message of the women's human rights movement, which also calls for a focus on women's empowerment and the transformation of structural inequalities. Instead, when discussing WHRDs and "women's issues," human rights discourses revert to Western-centric stereotypes of women in the Global South that promote negative associations of "family" and "community" and reiterate ideas of the stereotypical "third world" woman who suffers at the hands of "primitive" cultural norms (Edwards 2011, 75).

Violence against women is without doubt a pressing human rights concern in most societies. However, the ways in which the issue is understood within the HRD framework are problematic. The pervasiveness of references to gender-based and sexual violence, and the underlying assumption that women are inherently susceptible to such violence, further marginalizes women by setting up a sharp contrast between the vulnerable WHRD and the agentic male hero of HRD discourses. Not only does this represent women overwhelmingly as victims; it also renders invisible the vulnerability of male bodies, including to sexual violence. Without deeper engagement within the HRD community with feminist and gender critiques of traditional human rights thinking, the potential of the HRD paradigm as a vehicle of women's empowerment, and their transformative human rights activism on the ground, will continue to be unrealized.

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Part IV

Human Rights in Family and Private Life



Human Rights Responses to Violence Against Women

Sheila Dauer

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Abstract

The last 25 years has seen the establishment of new global women's human rights norms, especially in relation to combating all forms of gender-based violence. The international human rights system has facilitated bringing individual cases of violence against women to the CEDAW Committee through the Optional Protocol (UNGA 1999). A commitment to mainstreaming gender in all treaty bodies' norm interpretation and to all UN agencies has included a broader understanding of gender-based violence. Some of the most important developments have occurred at the regional level with groundbreaking decisions at the Inter-American Commission and Court of Human Rights and new treaties: the Inter-American Convention of Belém do Pará on Violence against Women, adoption of the Protocol to the African (Banjul) Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and the

S. Dauer (✉)

Institute for the Study of Human Rights, Columbia University, New York, NY, USA

e-mail: Sd2521@columbia.edu

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

Keywords

Violence against women · CEDAW · Optional Protocol · DEVAW · UN world conferences on women · Women's human rights · Convention of Belém do Pará · Maputo Protocol · Istanbul Convention

Introduction

Violence against women and girls is the scandal of our times. It is widespread and occurs in all economic, social, and political systems, cultures, races, and ethnicities and in times of peace as well as war. One in five women and girls aged 15–49 across 87 countries reported experiencing physical and/or sexual violence by an intimate partner (UNDESA [n.d.](#)). Forty-five countries have no laws specifically protecting women from domestic violence (World Bank [2018](#)). In US prisons, female inmates have been raped and sexually coerced by correction officials and pregnant prisoners shackled while in labor and after childbirth (Amnesty International [1999](#), 69–73). In Bosnia and Rwanda, rape was used as a weapon of war, not only to punish and humiliate individual women, but also to destroy the close ties of families and the community (Askin [2003, 2004](#)). A 2011 study of sexual violence against women in DRC estimated that 1152 women were being raped every day – a rate equal to 48 per hour (Peterman et al. [2011](#)). The underlying cause lies in discrimination which denies women equality with men in all areas of life. The UN CEDAW Committee issued General Recommendation 19 (UNCEDAW [1992](#)) recognizing that violence against women is both rooted in discrimination and serves to reinforce it. Violence is one of the crucial social mechanisms by which women are forced into a subordinate position.

Why despite all we know about violence against women does it continue to be so pervasive and widespread? Violence continues because governments may implicitly condone it, ignoring acts of violence in the family and community, thus allowing impunity to be the norm and preventing women from achieving equality in political, economic, and social life. Consistent lack of accountability for violence against women creates a climate in which these acts are seen as normal and acceptable. During the UN Decade for Women (1975–1985) and the Fourth World Conference on Women in Beijing (FWCW [1995](#)), women activists and feminist international lawyers began to criticize the international human rights law regime, applying a gender lens. Charlotte Bunch ([1990](#)) challenged the human rights community to see different types of violence against women as egregious, even life-threatening, and the necessity of integrating the issue into the human rights system. Hilary Charlesworth et al. ([1991](#)) analyzed human rights law and practice, showing it was based on the male experience in the public sphere of politics, public institutions, business, and paid employment. The private sphere, considered to be women's domain, consisted of the family, children, and the home. Human rights law, the

critics said, was established to protect men in the public sphere against the excesses of state power. It ignored abuses of women by non-state actors in the private sphere of home and family assuming that women were under the “protection” of the male head of household. In fact, the private sphere was and is where women suffer egregious abuses and violence at the hands of intimate partners and other family members.

What does a gender-sensitive human rights perspective contribute to the solution? According to the office of the UN High Commissioner for Human Rights:

Framing violence against women as a human rights violation implies an important conceptual shift. It means recognizing that women are not exposed to violence by accident, or because of an in-born vulnerability. Instead, violence is the result of structural, deep-rooted discrimination which the state has an obligation to address. Preventing and addressing violence against women is therefore not a charitable act. It is a legal and moral obligation requiring legislative, administrative and institutional measures and reforms. (UNOHCHR [n.d.-b](#))

Globally, women have gained experience in working to prevent and heal violence against women. Their experiences have led to ways of working to change not only laws, policies, and procedures but social norms, ideologies, and subjectivities (Merry [2006](#); Zavella [2017](#)). They have been supported by the advocacy of international women’s networks. As Bunch and Frost note:

The term ‘women’s human rights’ has served as a locus for praxis, that is, for the development of political strategies shaped by the interaction between analytical insights and concrete political practices. Further, the critical tools, the concerted activism, and the broad-based international networks that have grown up around movements for women’s human rights have become a vehicle for women to develop the political skills necessary for the twenty-first century. . . . A woman’s human rights framework equips women with a way to define, analyze, and articulate their experiences of violence, degradation, and marginality. Finally, and very importantly, the idea of women’s human rights provides a common framework for developing a vast array of visions and concrete strategies for change. (Bunch and Frost [2000](#))

The next section discusses some of the most significant developments in international and regional human rights systems in response to women’s movements’ calls to address gender-based violence as a violation of human rights.

International Human Rights Instruments Addressing Violence Against Women

The recognition of violence against women as a human rights issue is surprisingly recent in the history of human rights law and practice. In the 1970s women activists, lawyers, and delegates to the UN knew that women worldwide were still in subordinate positions to men and were unable to fully enjoy the rights and freedoms promised in UN human rights treaties and covenants. The UN Commission on the

Status of Women prepared a draft Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted by the General Assembly in 1979.

Convention on the Elimination of all Forms of Discrimination Against Women

CEDAW is the principal UN treaty that uses a gender lens to describe state obligations with respect to women's equality. It uses groundbreaking language that rejects the public-private distinction that has excluded women's equality concerns from the practice of human rights. The treaty calls for women's equality with men in civil, political, economic, social, and cultural rights. Article 1 defines discrimination. Article 2 sets out policy measures governments should pursue to eliminate discrimination, including taking "all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise" and establishing government obligations to monitor private actor and business actions that may discriminate against women. Article 16 is especially relevant to efforts to address violence against women as it requires eliminating discrimination against women in all matters relating to marriage and family relations. The language brings the private sphere into the realm of human rights obligation. Article 16.1(e) states that men and women should have the "same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." Article 16.2 prohibits child marriage and requires states to provide a minimum age for marriage and to register all marriages.

CEDAW General Recommendations Relating to Violence Against Women

General recommendations are interpretations of treaty provisions and comments on thematic issues, or methods of work, directed at States Parties to guide their compliance with the treaty. The UN Committee on the Elimination of Discrimination against Women (UNCEDAW) has adopted six general recommendations that deal with different forms of violence against women. First, General Recommendation No. 12 (UNCEDAW 1989) recommends that governments put legislation in place to protect women against all kinds of violence in everyday life (including sexual violence, abuses in the family, and sexual harassment at the work place) and collect statistics on men and women who are victims. Second, General Recommendation No. 14 (UNCEDAW 1990) opposes harmful traditional practices, in particular, female circumcision.

Third, General Recommendation No. 19 (UNCEDAW 1992) defines violence against women as violence directed against a woman because she is

a woman or violence that affects women disproportionately. Such violence includes inflicting physical, mental, or sexual harm or suffering, or threats of such acts, coercion, and other deprivations of liberty. It states that gender-based violence may violate the provisions of CEDAW regardless of whether those provisions expressly mention violence. General Recommendation 19 reiterates that “discrimination under the Convention is not restricted to action by or on behalf of Governments” and that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation” (UNCEDAW 1992, para 9). The Committee affirmed this due diligence standard in 2007 through its consideration of two complaints which successfully alleged a failure on the part of the Austrian state to investigate and prosecute acts of violence against women (UNCEDAW 2007a, b).

Fourth, General Recommendation No. 21 (UNCEDAW 1994) addresses equality in marriage and family relations. It states:

In considering the place of women in family life, the Committee ... [stresses] that the provisions of General Recommendation 19 ... concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. States parties are urged to comply with that general recommendation to ensure that, in both public and family life, women will be free of the gender-based violence that so seriously impedes their rights and freedoms as individuals. (Ibid., para 40)

Fifth, General Recommendation No. 27 (UNCEDAW 2010a) on older women and protection of their human rights speaks of gender stereotypes leading to physical violence (para 16).

Finally, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (UNCEDAW 2017), recognizes that the prohibition of gender-based violence has become a norm of international customary law. It discusses structural causes of gender-based violence, notably “the ideology of men's entitlement and privilege over women” (ibid., para 19) and the pernicious effects of prejudices and gender stereotyping. Along with reiterating well-known obstacles to eliminating violence against women – culture, tradition, religion, and fundamentalist ideology – the Committee highlights factors like reduction in public spending and austerity economics and requires states to use due diligence with respect to acts or omissions of non-state actors like corporations operating extraterritorially. General Recommendation No. 35 recognizes the effects of intersectionality, in that gender-based violence may affect some women to different degrees or in different ways (ibid., para 12). The recommendation also says specific measures may be required to address violence targeted against women with disabilities without their informed consent or that criminalize abortion, sex work, or being lesbian, bisexual or transgender (ibid.). Finally General Recommendation No. 35 stresses the importance of research and systematic data collection, analysis, and publication (UNCEDAW 2017, para 28).

CEDAW Optional Protocol

The Optional Protocol to CEDAW (UNGA 1999), which entered into force in 2000, allowed the Committee to hear complaints from individuals or to inquire into “grave or systematic violations” of the convention. The protocol has led to decisions against member states on issues such as domestic violence, parental leave, forced sterilization, and the systematic killing of women in Ciudad Juarez, Chihuahua, Mexico. As of October 2016, the protocol had 80 signatories and 109 States Parties. This subsection highlights a selection of cases taken up under the optional protocol that are relevant to violence against women.

In *A.T. v. Hungary* (UNCEDAW 2005), the Committee ruled that Hungary had violated numerous articles of the Convention by failing to adequately protect women against domestic violence. It recommended that the complainant be immediately protected from her abusive former partner. Further it called on Hungary to improve its handling of domestic violence cases and immediately adopt that Committee’s previous recommendation to introduce a law allowing protection and exclusion orders. The recommendations were implemented by the time of Hungary’s sixth periodic report to the Committee in 2006. Further, in the case of *A.S. v. Hungary* (UNCEDAW 2006), the Committee ruled that the forced sterilization of a Romani woman violated the Convention. It recommended compensating the complainant for the breach of her rights, a review of legislation on “informed consent” in cases of sterilization to ensure it complied with international human rights standards, and ongoing monitoring of Hungarian medical facilities to ensure that changes were put into practice.

In two cases concerning Austria – *Sahide Goekce (deceased) v. Austria* (UNCEDAW 2007a) and *Fatma Yildirim (deceased) v. Austria* (UNCEDAW 2007b) – the Committee ruled that the Austrian government had failed to protect women from domestic violence. It recommended strengthening the implementation and monitoring of existing domestic violence laws and greater training for police. In *V.P.P. v. Bulgaria* (UNCEDAW 2011b), a case in which the authorities had delayed for 2 years indicting a perpetrator of a sexual assault on a minor, the Committee ruled that the state failed to fulfill its obligations in law, in investigations, and in prosecution and thereby had violated the rights of the author’s daughter.

Breaking new ground in socioeconomic rights, the case of *Alyne da Silva Pimentel Teixeira (deceased) v. Brazil* (UNCEDAW 2011a) dealt with a poor, pregnant woman of Afro-Brazilian descent who died of preventable causes following the stillbirth of her baby. The mother of the deceased alleged triple discrimination based on race, gender, and socioeconomic status. The Committee ruled that Brazil had violated CEDAW Article 2 (i.e., the state’s obligation to pursue “all appropriate means and without delay a policy of eliminating discrimination against women”); Article 12 (i.e., the state’s obligation to “eliminate discrimination against women in the field of health care”); and General Recommendation 28 (UNCEDAW 2010b) (i.e., relating to the core obligations of States Parties under Article 2). The Committee also called on the state to ensure “appropriate reparation, including adequate financial compensation, to the author and to the daughter [of the

deceased]” (UNCEDAW 2011a, para 8.1) and established that the state is responsible for monitoring conditions in private hospitals (ibid., para 8.2(d)).

In *Cecilia Kell v. Canada* (UNCEDAW 2012a), an indigenous woman alleged discrimination when she lost her house to a national development project. The Committee ruled that Canada had failed to fulfill its obligations under Article 1 (i.e., the overarching right to nondiscrimination) and Article 16 (i.e., equal rights in family life). It also found that the state should provide monetary compensation and housing matching the housing of which the author was deprived (ibid., para 11).

In 2012, in *Isatou Jallow v. Bulgaria* (UNCEDAW 2012b), the Committee ruled that the government had failed to investigate allegations of domestic violence and had given custody of Jallow’s daughter to her abuser without investigation (ibid., para 8.5). Moreover, the Committee found that these actions were the result of stereotypes concerning the roles of women and men in marriage that ignore “the fact that [domestic violence] disproportionately affects women” (ibid., para 5.8) and the state had not considered “the best interest of the child” (ibid., para 3.5).

Finally, in *R.P.B. v. Philippines* (UNCEDAW 2014), the Committee ruled that gender and disability stereotyping in a rape trial where the victim was deaf led to nonprosecution of the perpetrator. It called on the state to change its rape laws to “place the lack of consent at its centre” (ibid., para 9(b)(i)); to “guarantee the free and adequate assistance of interpreters, including in sign language, at all stages of the proceedings whenever necessary” (ibid., para 9(b)(ii)); and to provide “adequate and regular training . . . to the judiciary and legal professionals so to ensure that stereotypes and gender bias do not affect court proceedings and decision-making” (ibid., para 9(b)(iv)). The Committee’s ruling also called on the state to “provide barrier-free education with interpreting” for the complainant (ibid., para 9 (a)(iii)).

Other Significant Mechanisms and Norms Addressing Violence Against Women

Since the Second World Conference on Human Rights (WCHR 1993), a wide range of new mechanisms have emerged aimed at tackling violence against women. This includes the norm-setting Declaration on the Elimination of Violence against Women or DEVAW (UNGA 1994). The Declaration reflected the culmination of decades of advocacy by the women’s rights movement to achieve recognition of violence against women as a human rights concern and not a purely private matter in which the state should not interfere. It recognizes that violence against women violates women’s rights and fundamental freedoms, such as the right to life, to be free of discrimination, not to be tortured or treated cruelly, to the highest standard of physical and mental health, and to just and safe working conditions. DEVAW requires states to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons” (UNGA 1994, art 4(c)). It defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to

women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life” (UNGA 1994, art 1).

The Declaration innovatively identifies three levels of gender-based violence in the family, the community, and perpetrated by the state. Abuses in the family include domestic violence, marital rape, incest, dowry-related violence, FGM, and other harmful practices (*ibid.*, art 2(a)). Violence in the community includes rape, sexual harassment at work and other institutions, trafficking in women, and forced prostitution (*ibid.*, art 2(b)). Finally, the Declaration includes physical, sexual, and psychological or condoned violence perpetrated by the state (*ibid.*, art 2(c)). The due diligence standard obligates states to take positive measures to prevent and protect women from gender-based violence, punish perpetrators, and compensate victims. “The principle of due diligence is crucial as it provides the missing link between human rights obligations and acts of private persons” (UNOHCHR *n.d.-b*).

The Special Rapporteur on violence against women and its causes and consequences has played a leading role in further developing the due diligence standard (UNOHCHR *n.d.-a*). The first Special Rapporteur, Radhika Coomaraswamy, was appointed in 1994, as recommended by the Vienna Programme of Action (WCHR 1993). She and subsequent mandate holders (Yakın Ertürk, Rashida Manjoo, and Dubravka Simonovic) have helped the CEDAW Committee to explain what the due diligence standard requires of states. In 1999, Coomaraswamy observed that “[t]he principle of ‘due diligence’ is gaining international recognition” (UNCHR 1999, para 23). In particular, she noted:

The due diligence standard of State responsibility for private actors was discussed in detail by the Inter-American Court of Human Rights in the judgement of the Velasquez-Rodriguez case handed down on 29 July 1988. In that case, the Government of Honduras was held responsible for violating human rights in the case of disappearances [even if the state was not directly involved]. (UNCHR 1999, para 24)

Yakın Ertürk, the second Special Rapporteur, in her 2006 report to the UN Commission on Human Rights (now the Human Rights Council), further refined the definition of due diligence and integrated it more closely with the general principles of gender equality and non-discrimination (UNCHR 2006, para 35). Under the obligation of prevention, Ertürk addresses the duty to transform patriarchal gender structures and values that perpetuate violence against women (*ibid.*, para 15). This includes social structural deficiencies such as ongoing gender discrimination that creates environments conducive to acts of violence against women.

In 2011, the third Special Rapporteur, Rashida Manjoo, reporting on multiple intersecting forms of discrimination against women, argued that efforts must be taken to address “the structural aspects and factors of discrimination, which include structural and institutional inequalities” (UNHRC 2011, 2). This form of violence can be termed structural violence in that there is a systemic set of structures affecting the individual, family, and community through economic and social factors. The state’s responsibility to due diligence occurs at both the structural and individual levels.

In a report to the General Assembly, the fourth Special Rapporteur on violence against women, Dubravka Šimonović expresses concern about the global prevalence of gender-based killings of women or “femicide” (UNGA 2016, para 28). She calls on states to “[c]ollect and publish data on femicide and other forms of violence against women and establish a femicide watch or observatories on violence against women with such functions” (ibid., para 82 (c)). Also at CSW61 UNOHCHR (2017).

Mainstreaming Violence Against Women in the Work of Other Human Rights Mechanisms

There has also been significant progress in the mainstreaming of violence against women in other areas of human rights work. In 1998, UN treaty body chairs took on the “development of approaches to norm-interpretation and monitoring consistent with the objectives of each of the human rights treaties and which increase attention to the gender dimensions of these objectives” (HRI/IMC/1998/6). Since that time there have been general comments and cases on gender-based violence against women consistent with mainstreaming violence against women (see, e.g., HRC General Comment 28 replacing General Comment 4 on equality of rights between men and women). This mainstreaming has reached special rapporteurs besides the Special Rapporteur on violence against women. For example, the rapporteurs on extrajudicial, summary or arbitrary executions, disabilities, cultural rights, education, health, and many others. In addition, mainstreaming gender is included in UN Security Council Resolution 1325 on women, peace and security. Finally, the Women’s Major Group (WEDO [n.d.](#)), which has the mandate to facilitate women’s human rights and gender equality perspectives into UN policy processes on sustainable development, stresses mainstreaming of gender and gender-based violence.

In a report to the Human Rights Council (UNHRC 2017), the Special Rapporteur on extrajudicial, summary, or arbitrary killings, Agnes Callamard, uses a comprehensive notion of intersectionality to describe a gender-sensitive approach to states’ obligation to respect and protect women’s and girls’ right to life (ibid., paras 21, 54, 60, 64, 79). Examples of gender-specific violations that fall within the rapporteur’s mandate include women facing the death penalty (UNHRC 2017, paras 41–45). This encompasses women in a wide range of circumstances, for example, female migrant workers, domestic violence victims, women who have been accused of “adultery” or are in same-sex relationships, and women involved in drug-related offenses (ibid.).

The Special Rapporteur elaborates: “Women facing capital prosecution arising out of domestic abuse suffer from gender-based oppression on multiple levels. For instance, it is exceedingly rare for domestic abuse to be treated as a mitigating factor during capital sentencing proceedings. Even in those countries with discretionary capital sentencing, courts often ignore or discount the significance of gender-based violence” (ibid., para 32). Similarly, migrant women are disproportionately affected by the death penalty because they may be unfamiliar with the laws, have inadequate

legal representation, lack knowledge of the language, and lack a support network. In addition the extenuating circumstances under which the crime was committed may be ignored (*ibid.*, para 43).

Femicide, the so-called “honor” killings, and killings on the basis of gender expression are also forms of arbitrary killing in which women are targeted that the Special Rapporteur has prioritized for action (*ibid.*, paras 51–56). Claudia Ivette Gonzales (20) Esmeralda Herrera Monreal (15) and Laura Berenice Ramos Monarrez (17) were living in Ciudad Juarez (Mexico) when they disappeared after leaving work. Their families contacted the police for help. Law enforcement officials dismissed the families’ concerns saying they were “probably with their boyfriends.” They did not undertake any serious or effective investigation into the disappearances. The bodies of the three young women were found in the cotton fields of Ciudad Juarez showing evidence of torture, mutilation, and sexual abuse. The families, with the help of international human rights organizations, local advocates, and civil society groups, brought the case to the Inter-American Commission on Human Rights, which passed it to the Inter-American Court of Human Rights. The Court noted: the “existence of State responsibility for killings by private individuals, which are not adequately prevented, investigated or prosecuted. It also underscored that these responsibilities are heightened when an observable pattern has been overlooked or ignored, such as is often the case with gender-based violence, femicide, or harmful practices” (*ibid.*, para 35).

It is well known that transgender persons, particularly male to female, face extreme physical, sexual, and emotional abuse at the hands of inmates, prison guards, and police (UNODC 2009, 103–122). Moreover, “[k]illings of transgender persons in conditions of detention that fail to take into account the risks they face, where these and the seriousness of the harm could be well foreseen owing to their gender expression, are arbitrary” (UNHRC 2017, para 46).

Notably, the report’s final recommendations to states include a strong call to “implement the recommendations of the Special Rapporteur on violence against women, its causes and consequences” (UNHRC 2017, para 111) and specifically to “[c]ollect and publish data on femicide and other forms of violence against women” and “[c]ooperate to establish and implement a common methodology for the collection of comparable data and the establishment of a femicide watch” (*ibid.*).

The treaty-monitoring committee of the International Convention for the Protection of all Persons from Enforced Disappearance (UNGA 2007) has also addressed gender-based violence in its concluding observations. Specifically, with respect to Argentina, the Committee emphasized the “particularly cruel effect of enforced disappearances on women and children” and noted that “[w]omen who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender violence” (UNCED 2013, para 41). The same report recognized that female relatives of a disappeared person “may suffer serious social and economic disadvantages and be subjected to violence, persecution and reprisals as a result of efforts to locate their loved one” (*ibid.*).

Developments in Regional Human Rights Systems: Some Highlights

The human rights system of the Organization of American States (OAS) includes an Inter-American Commission on Human Rights (Commission) that reviews cases and the Inter-American Court of Human Rights (Court) that interprets the articles of the American Convention on Human Rights (OAS 1969) and the Convention of Belém do Pará (1995). The latter is the world's first binding treaty to recognize violence against women as a human rights violation. A number of important cases have been decided in the Inter-American system with reference to this Convention. In *Maria da Penha Maia Fernandes v. Brazil* (2001), the Commission ruled that in order for laws to protect against violence, the state must implement them effectively. Specifically, the ruling required Brazil, among other things, to "[c]omplete, rapidly and effectively, criminal proceedings against the person responsible for the assault and attempted murder" of the complainant (ibid.). In *González et al. ("Cotton Field") v. Mexico* (2009), a case of femicide, Mexico was found to have failed to protect, investigate, and prosecute killings and torture of young women in Ciudad Juarez, Chihuahua, Mexico (see chapter ► "Women's Rights and the Inter-American System," in this volume). Another example is *Jessica Lenahan (Gonzales) v. United States of America* (2011), the first case of domestic violence in the United States brought before the Commission, which contributed significantly to awareness of the relevance of international human rights norms in challenging domestic violence in the United States (Schneider et al. 2012). In 1994 the Commission established the office of Rapporteur on the Rights of Women, which has been occupied by several mandate holders to date. Rapporteurs are tasked with analyzing OAS member states' compliance, from a gender perspective, with general regional human rights instruments (i.e., American Convention on Human Rights and the American Declaration of the Rights and Duties of Man), as well as having a particular role in relation to the elimination of gender-based discrimination and violence against women, as recognized in the Convention of Belém do Pará (IACHR n.d.).

The African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights are the principal bodies of the human rights system of the African Union (AU). The Commission accepts complaints (communications) from individuals, groups, nongovernmental organizations, and states concerning violations of the African (Banjul) Charter on Human and Peoples' Rights (OAU 1981; African Commission n.d.) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (AU 2003). With less access for NGOs, the Court can receive cases filed by the Commission and in some cases from States Parties, as well as individual complaints (African Court n.d.). The Maputo Protocol is the first human rights instrument to expressly recognize a right to abortion, under certain conditions, and to require access to a safe abortion if a woman should meet these conditions. Among the special mechanisms of the Commission is a Special Rapporteur on the rights of women in Africa, established in 1998. The rapporteur's mandate is broadly promotional encompassing fact finding, as well as collaboration with NGOs and

support to States Parties to advance gender equality, including combating violence against women (see in particular, ACHPR 2017).

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (COE 2011) is the Council's first legally binding treaty containing a comprehensive legal framework and government obligations to end violence against women, combat domestic violence, and prosecute perpetrators. The Convention contains detailed articles against sexual violence including rape (COE 2011, art 36), forced marriage (ibid., art 32, 37), forced abortion and sterilization (ibid., art 39), sexual harassment (ibid., art 40), and "honor" crimes (ibid., art 42). The Council of Europe recommends relevant cases to the European Court of Human Rights.

Human rights regimes are also emerging in Asia and the Arab-speaking world that include women's rights provisions. The Association of South East Asian Nations (ASEAN) adopted the Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in ASEAN (ASEAN 2013; see also ► [The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children](#), in this volume).

The League of Arab States adopted the Arab Charter on Human Rights (League of Arab States 2004), which declares: "The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children" (ibid., art 33(2)). The Article allows civil society to include information on family violence in parallel reports submitted to the Arab Committee on Human Rights.

Conclusion

Achievements of the Beijing Platform for Action (FWCW 1995) energized many thousands of women to return home to countries around the world to organize and take action. Many governments joined by civil society have followed through with changes in constitutions, laws, policies, and other concrete changes that have led to improvements in the lives of women and girls. The momentum continues to this day. After the Beijing Conference, OXFAM started the "We Can" campaign in South Asia running (2004–2011) to highlight violence against women as an obstacle to development (Oxfam n.d.). The 16 Days of Activism to end Gender-Based Violence initiated by the Center for Women's Global Leadership in 1991 continues to be a vehicle for action (Bunch and Reilly 1994). In 2000, Women in the Philippines campaigned on 18 Days of Action to include 12 December, the day the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was adopted. Trafficking of women and girls had been highlighted in all the UN world conferences on women.

In 2008, UN Secretary General Ban Ki Moon launched the campaign UNITE to end Violence against Women to raise public awareness and political will to supply the resources needed to prevent and end the violence. With the partnership of UN Women, the Asia UNITE Campaign began in 2008; Africa UNITE began in 2010; Europe and

Latin America and the Caribbean followed. In 2016 the UNITE Campaign chose the 16 Days of Activism against Gender-Based Violence to galvanize action on the need for sustainable financing for efforts to end violence against women and girls toward fulfillment of the 2030 Agenda for Sustainable Development (UN n.d.).

Women's organizing and political strategies have had a profound impact on human rights systems around the world. The last 25 years has seen the establishment of new global women's human rights norms, especially in relation to combating all forms of gender-based violence. Over the same time period, we have seen the development of new human rights mechanisms internationally and in every region that can assist with putting these norms into practice. Struggles to implement existing commitments to women's rights, especially the elimination of gender-based violence, continue. But defenders of the human rights of women have more tools at their disposal than ever before to hold states accountable and to demand the policy changes and resources necessary to respect, protect, and fulfill the rights of women everywhere to live a life free from gender-based violence.

Cross-References

- ▶ [Advancing Sexual and Reproductive Health and Rights of Adolescents in Africa: The Role of the Courts](#)
- ▶ [Disability, Domestic Violence, and Human Rights](#)
- ▶ [Gender Equality and the European Convention on Human Rights](#)
- ▶ [International Law and Child Marriage](#)
- ▶ [Islam, Law, and Human Rights of Women in Malaysia](#)
- ▶ [Sex Trafficking and International Law](#)
- ▶ [Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence](#)
- ▶ [Sexual Health and Sexual Rights](#)
- ▶ [Social and Cultural Implications of "Honor"-Based Violence](#)
- ▶ [The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children](#)
- ▶ [The Convention on the Elimination of All Forms of Discrimination Against Women](#)
- ▶ [UN Security Council Resolution 1325: The Example of Sierra Leone](#)
- ▶ [Women and the Human Rights Paradigm in the African Context](#)
- ▶ [Women Human Rights Defenders](#)
- ▶ [Women's Human Rights and the Law of Armed Conflict](#)
- ▶ [Women's Rights and the Inter-American System](#)

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Advancing Sexual and Reproductive Health and Rights of Adolescents in Africa: The Role of the Courts

Ebenezer Durojaye

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Abstract

Across the world, adolescents encounter various challenges that may implicate the enjoyment of their sexual and reproductive health and rights. The situation of adolescents in Africa is aggravated by high poverty levels and a high disease burden in the region. Some of the challenges facing adolescents in Africa include high incidence of child marriage, unwanted pregnancy, unsafe abortion, and sexually transmitted infections, including HIV and maternal mortality. It is estimated that 1 in 3 girls is married before attaining 18 (UNFPA, *Marrying too young: end child marriage*. UN Population Fund, 2012), while an estimated 16 million adolescent girls aged 15–19 (most of them in poor regions, including Africa) give birth yearly. Also, about 31% of young women aged 20–24 in least-developed countries gave birth before age 18 between 2000 and 2009 (UNICEF et al., *Violence against Children in Tanzania: Findings from a National Survey 2009*. UN Children's Fund, US Centers for Disease Control and Prevention and Muhimbili University of Health and Allied Sciences, 2011). An in-depth study of

E. Durojaye (✉)
Dullah Omar Institute, University of the Western Cape,
Cape Town, South Africa
e-mail: ebenezerdurojaye19@gmail.com

four sub-Saharan African countries found that 60% or more of adolescent men and women did not know how to prevent pregnancy and one-third or more did not know of a source for contraceptives (Guttmacher Institute and IPPF, Facts on the sexual and reproductive health of adolescent women in the developing world. Allan Guttmacher Institute and International Planned Parenthood Federation, 2010). The majority of about 300,000 women and girls that die annually (800 deaths per day) due to complications arising from childbirth are from Africa (UNFPA 2011).

Against this backdrop, this chapter examines how national courts can effectively realize the sexual and reproductive health and rights of adolescents in Africa. More particularly, the chapter discusses how courts can advance the autonomous decision-making powers of female adolescents by asking the “female adolescent question.” The discussion in this chapter benefits largely from courts’ decisions in Britain, South Africa, Colombia, and other jurisdictions. Before examining the roles of courts in the advancement of the sexual health of female adolescents, the chapter briefly discusses the social construction of adolescents. It concludes by noting that national courts will need to ask the female adolescent question in order to address some of the challenges militating against the sexual and reproductive health of adolescents in the region.

Keywords

Adolescents · Sexual health · Role of courts · Female adolescent question · Africa

Introduction

Across the world adolescents encounter various challenges that may implicate the enjoyment of their sexual and reproductive health and rights. The situation of adolescents in Africa is aggravated by high poverty levels and a high disease burden in the region. Some of the challenges facing adolescents in Africa include high incidence of child marriage, unwanted pregnancy, unsafe abortion, and sexually transmitted infections, including HIV and maternal mortality. It is estimated that 1 in 3 girls is married before attaining 18 (UNFPA 2012), while an estimated 16 million adolescent girls aged 15–19 (most of them in poor regions, including Africa) give birth yearly. Also, about 31% of young women aged 20–24 in least developed countries gave birth before age 18 between 2000 and 2009 (UNICEF et al. 2011). An in-depth study of four sub-Saharan African countries found that 60% or more of adolescent men and women did not know how to prevent pregnancy and one-third or more did not know of a source for contraceptives (Guttmacher Institute and IPPF 2010). The majority of about 300,000 women and girls that die annually (800 deaths per day) due to complications arising from childbirth are from Africa (UNFPA 2011).

In particular, young women are more vulnerable than young men: in Kenya, for example, women aged 15–24 are four times more likely to have HIV than males of

the same age (National AIDS Control Council 2010). Also, young people are said to account for the highest number of HIV-/AIDS-related deaths in the region (National AIDS Control Council 2010). Moreover, studies have revealed high incidences of sexual violence among adolescents in the region (UNICEF et al. 2012), especially in South Africa, where it is almost becoming an epidemic (HRW 2001; SAIRR 1999).

Despite these challenges facing adolescents worldwide, it has been observed that many governments have failed to take measures to adequately address the sexual health needs of young people, and access to comprehensive health-care services for adolescents has remained acutely lacking (Durojaye 2011; Stefiszyn 2014).

Courts, regional human rights bodies, and other institutions such as national human rights institutions (NHRIs) and nongovernmental organizations (NGOs) have important roles to play in advancing the sexual health needs of adolescents, especially with regard to access to contraception. These institutions or bodies can play great roles in monitoring governments' obligations to realizing the sexual health needs of adolescents in their countries. They can also work together with governments to ensure speedy realization of adolescents' sexual health needs. However, the focus of this paper will be on the important roles of national courts in advancing the sexual health needs of adolescents, particularly with regard to access to contraception. Attention is given to national courts due to the fact that they occupy a pivotal position in the provision of remedies to the violations of rights at the national level and due to the remoteness of remedies provided by international or regional bodies.

Thus, this chapter examines how national courts can effectively realize the sexual and reproductive health and rights of adolescents in Africa. More particularly, the chapter discusses how courts can advance the autonomous decision-making powers of female adolescents by asking the "female adolescent question." The discussion in this chapter benefits largely from courts' decisions in Britain, South Africa, Colombia, and other jurisdictions. The focus on these countries is based on recent jurisprudence emerging on the sexual and reproductive health of adolescents. Before examining the roles of courts in the advancement of the sexual health of female adolescents, the chapter briefly discusses the social construction of adolescents. It concludes by noting that national courts will need to ask the female adolescent question in order to address some of the challenges militating against the sexual and reproductive health of adolescents in the region.

Autonomy and the Construction of Adolescents

Adolescence is often described as a stage between childhood and adulthood. It is typically a period where the major psychological task is to "determine identity; develop power to make decisions and be in control; and develop a mature sexuality" (WHO 2004). According to the World Health Organization, "adolescents" are people in the age group of 10 to 19 years, while "youth" are people within the ages of 15 to 24 years (WHO 2011). Development varies depending on the stages of an adolescent. The early stage of adolescence

(10–14 years) usually witnesses the beginning of sexual maturation and abstract thinking (Jenkins 1999). During this stage, the adolescent is unable to grapple with the vicissitude of life and is often susceptible to peer pressure more than family members would have thought or expected (Planned Parenthood 2001).

The stage of middle adolescence (15–17 years) is characterized by improved thinking skills and intelligence, great desire for emotional and psychosocial independence from parents, and increased sexual awareness and interaction with the opposite sex. Moreover, it is a stage at which most adolescents experience their first sexual acts. The last stage of adolescence (17–19) involves the manifestation of traits of maturity, independence, and more settled ideas and opinions. This is the stage at which the adolescent has fully manifested the qualities of an adult and is more interested in forming serious relationships.

Despite these developmental stages in adolescents, in most societies, adolescence has been equated with childhood. This position is unconsciously supported by the definition of a child under the CRC where a child is regarded as anyone under 18 years of age. The implication of this is that adolescents, like children, are viewed as vulnerable, dependent, weak, and innocent (Piper 2000). This perception of adolescents has often meant that they are always deserving of protection, and therefore steps need to be taken in order to afford them adequate protection in society. This protectionist approach tends to give way to a paternalistic view regarding adolescents. Based on this, adolescents are viewed erroneously as asexual, incapable of anything good, or unable to discern wrong from right; hence, parents and adults in society must save these “neophytes,” lest they destroy themselves or be destroyed by others. Locke, for instance, argues that a child is an irrational being incapable of thinking for itself. He states further that children cannot do what is rational since they are yet unable to see what is rational (Archer 1993; Locke 1996, 33–36). It is believed that the adolescent’s mind exists in a state of *tabula rasa* – emptiness. Locke is not alone in holding this view. Mill completely excluded children in his doctrine of liberty. He reasoned thus: “It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children” (Mill 1863, 24).

National Courts and Adolescents’ Sexual and Reproductive Health

Courts can hold governments accountable for their failure to live up to their obligation of realizing the sexual health and rights of adolescents as guaranteed under national constitutions or international human rights instruments. Also, courts can set standards which will guide governments in ensuring the realization of the right to health, including sexual health and the rights of adolescents. Courts have the primary responsibility to interpret the law and give life to the provisions of laws. In this regard, courts are expected to demonstrate a level of activism and creativeness in advancing the human rights of citizens. In some cases, courts have been found to champion legal reforms through their decisions. For instance, the first recognition for

the right to abortion in the United States was not through legislation, but rather, through judicial decision in the case of *Roe v Wade* (1973). Also, courts can become catalysts for change and transformation in society through their decisions. However, the extent of the roles courts can play in advancing health-related rights, including sexual and reproductive rights, will depend largely on the ability of courts to purposively interpret the provisions of constitutions and other laws.

Judicial Decisions Relating to the Sexual Health Needs of Adolescents

As regards sensitive issues such as advancing the sexual and reproductive health needs of adolescents, courts can interpret the law purposively so as to remove any barrier created under the law to adolescents' access to sexual health information and services. This will be so if the provisions of laws are unclear or conflicting with one another. In doing this, it will be necessary for courts to bear in mind the female adolescent question. In other words, the implications of a court's decision on the life of a female adolescent should always be prioritized, because of their disadvantaged position in society and their susceptibility to sexual ill health. Cook (2004) has observed that courts can play a great role in holding governments accountable for the failure to protect individuals' right to health by allowing their agencies or private agencies to trample on the rights of citizens. Judicial decisions often lay down precedents which are followed in subsequent court decisions.

In dealing with issues relating to the sexual health needs of adolescents, it may be useful for courts to adopt the "practical measure" (Twinomugisha 2007) approach. This allows the courts to critically evaluate steps taken by African governments in realizing the right to health of the people in general, and access to sexual health services for adolescents in particular. Whenever courts are faced with a case dealing with human rights violations in the context of access to sexual health services for adolescents, courts may draw inspiration from international norms or standards and from the experiences of courts in other jurisdictions to ask the following questions:

- To what extent do policy and budgetary measures respect, protect, and fulfill the right to health-care services, particularly for vulnerable groups such as adolescents?
- Do these measures prioritize access to contraception for adolescents?
- Are these measures faithful to accessibility, availability, acceptability, and good quality in the context of access to sexual and reproductive health for adolescents in general and female adolescents in particular?
- Do these measures recognize the evolving capacities (autonomy) of adolescents on matters relating to their sexuality?
- How justified or reasonable are the measures in question?
- What are the gender implications of the measures in question?

These questions are by no means exhaustive, but rather, they are only intended to serve as guides for the courts when dealing with issues relating to adolescents' sexual health in the context of access to contraception. Therefore, national courts are at liberty to further develop other relevant questions depending on the circumstances of a case. However, recourse to questions as these will help the courts in coming to a logical conclusion on issues bordering on access to sexual health services (including contraceptive services) for adolescents. For instance, a court may wish to know the nature of laws and policies that have been enacted in relation to access to sexual health services for adolescents, and whether these laws or policies facilitate or hinder access to sexual health services to adolescents, particularly female adolescents.

The significance of adopting the abovementioned set of questions and indicators lies in the fact that they serve as a marking scheme for courts in determining governments' commitment to respecting, protecting, and fulfilling the sexual and reproductive health and rights of adolescents. In other words, they can serve as good criteria in assessing governments' commitment to advancing the sexual health and rights of adolescents. Moreover, these questions will help national courts in Africa to achieve consistency in their decisions when dealing with issues such as access to sexual health services for adolescents.

These decisions will be evaluated based on two broad subheadings: Recognizing adolescents' decision-making capability (autonomy) and recognizing the gender dimension of adolescents' decision-making powers (asking the female adolescent question).

Recognizing Adolescents' Decision-Making Capability (Autonomy)

As noted earlier, the capability of adolescents to exercise full decision-making powers with respect to sexual health matters is often doubted, hence the need to involve parents, guardians, the court or even health-care providers. Although, usually, the need to involve a third party in decision-making by an adolescent is often stronger in cases relating to invasive medical treatment such as abortion, nonetheless, this requirement has almost always been applied to all cases involving adolescents. With regard to abortion, it is believed that making a decision on this issue involves emotional and psychological challenges, which an adolescent may not be competent to handle. Thus, in jurisdictions such as the United Kingdom and America, the involvement of third parties (parents, courts, or health-care providers) is often mandated in order to ensure that the adolescent comes to a reasonable decision-making conclusion.

In the context of other sexual health services, experience has also shown that adolescents are often required to involve third parties before they are allowed access. This approach is rooted in paternalism or what Cook and Bernard referred to as "parentalism." It is generally believed that parents or guardians have the moral and social responsibility to look after their children and wards. This responsibility includes providing for the health needs of adolescents. Thus, adolescents

seeking medical advice, including sexual health advice, are expected to obtain their parents' consent before such advice is provided. The decision of the English House of Lords in *Gillick v West Norfolk* case (1986) centers on this controversial issue. In that case, a claimant had challenged as unlawful a guidance issued by the Secretary of State permitting a person under 16 to seek contraceptive advice and treatment. The question for determination before the Court was whether a doctor could lawfully give contraceptive advice or treatment to a girl under 16 without the consent of the girl's parents. The majority decision of the court was of the view that a doctor could lawfully give such an advice and treatment to such a girl if it was established that she had "sufficient maturity and intelligence" to understand the nature and implications of the proposed treatment sought and provided that certain conditions were fulfilled.

The approach adopted by the majority of the Court in that case seems to have taken into consideration the peculiar life experiences of young women seeking sexual health services. Rather than the conservative and restrictive approach of the minority in that case, the majority had taken a more realistic approach by examining the incidence of teenage pregnancy among young women in Britain and the need to address such a challenge. According to the majority, rather than imposing a blanket restriction on a girl under 16 from consenting to sexual health treatment, the important consideration should be whether such a girl has the maturity to understand the nature of treatment being provided and the implications of such treatment. Although the majority did admit that the ideal thing to do would be for the doctor to advise the girl to inform her parents of such treatment, however, if she declines to so act, treatment should not be denied if she has exhibited the maturity to understand the nature of the treatment and its implications. In the view of the majority, "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his [sic] duties towards the child and towards other children in the family" (per Lord Fraser, *Gillick v West Norfolk* (1986), para 170). This would seem not only to be a realistic approach, but also a gender-sensitive approach. It is trite that most of the adolescents who require sexual health treatment are females; therefore, the issue of parental consent (even though it affects all adolescents) tends to have more serious implications for female adolescents than their male counterparts.

The anti-*Gillick* judges (minority decision made up of Lords Brandon and Templeman) failed to see the gender implications of insisting that a girl under 16, who is seeking sexual health treatment, must obtain parental consent before being attended to by a health-care provider. They had reasoned that a girl under 16 lacked the capability to consent to contraceptive treatment without parental consent. The basis of the anti-*Gillick* judges' reasoning was rooted in conservatism and moral sentiments. For instance, Lord Brandon had reasoned that to provide contraceptive advice to a girl under 16, to examine her with a view to her using contraception and to prescribe contraceptive treatment for her, would encourage or facilitate the commission of an offence under the Sexual Offences Act of 1956.

In Lord Templeman's view, a girl under 16 could not be said to be "sufficiently mature" enough as to engage in sexual intercourse and thus be able to give valid consent to medical treatment, particularly with regard to contraceptive treatment. He too had relied on the provision of the Sexual Offences Act to come to the conclusion that it was never the intention of the parliament to confer autonomy on a girl under 16 to make crucial decisions regarding her life. Lord Templeman had reasoned further that parents have the right under the law to make decisions on behalf of "the infants" on all matters in which "the infant" is unable to decide (Pilcher 1997). As for him, it may be possible for an infant to consent to a medical treatment in certain circumstances depending on his or her age of understanding; however, he concluded by saying that a girl under 16 is incompetent to make decisions in relation to contraceptive treatment.

There are two important conclusions that can be drawn from the reasoning of the anti-*Gillick* judges. One is that, children are not "persons" and, therefore, are not entitled to the rights of "personhood" usually enjoyed by persons, that is, adults, particularly with regard to contraceptive services. The second is that children are incompetent and immature and, therefore, they do not possess the right to self-determination, albeit in relation to contraceptive treatment. According to Erdman (2009), these conclusions are not only misleading but also reinforce the paternalistic view of children. She argues further that empirical evidence has shown that the involvement of a third party in adolescents' sexual health decision-making does not necessarily improve the quality of such decisions.

However, the pro-*Gillick* judges (majority decision made up of Lords Fraser, Scarman and Bridge) were more eager to advance the autonomy of a girl under the age of 16 by holding that a doctor could, in certain circumstances, provide contraceptive treatment to her without parental consent or knowledge. Lord Scarman rejected the argument of the anti-*Gillick* judges that the parliament never intended to confer autonomous decision-making power on a girl under 16, claiming that there was nothing in the law to suggest this restrictive interpretation. According to him, the law has never treated the powers of parents over their children as "sovereign" and "unquestionable"; rather such rights existed for the benefits and welfare of the child and must be exercised only if they are in the best interests of the child. In other words, the exercise of parental rights and responsibilities over the child is only justifiable if it satisfies the "best interests" principle. Lord Scarman then summed up his argument in these words:

[A]s a matter of law, the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates, if and when the child attains a sufficient understanding and intelligence to enable him [sic] to understand fully what is proposed. (*Gillick v West Norfolk*, para 423)

After a careful review of important laws such as the Sexual Offences Act and other pieces of legislation, the majority came to the conclusion that none of these laws suggests that a child under the age of 16 cannot consent to contraceptive advice or treatment. In coming to such a decision, a doctor must consider the following conditions often referred to as "Lord Fraser's Guidelines":

- (i) That the girl (although under 16 years of age) will understand the doctor's advice
- (ii) That the doctor cannot persuade the girl to inform her parents that she is seeking contraceptive advice
- (iii) That the girl is very likely to begin or continue having sexual intercourse with or without contraceptive treatment
- (iv) That unless she receives contraceptive advice or treatment, her physical and/or mental health are likely to suffer
- (v) That her best interests require the doctor to give her contraceptive advice and/or treatment without parental consent (*Gillick v West Norfolk*, para 413)

These requirements, which must be satisfied by a girl under the age of 16 before being provided with contraceptive services, are intended to advance the sexual autonomy of adolescent girls to seek sexual health services, especially with regard to contraception. In other words, a girl under the age of 16, who is “*Gillick*-competent” (Douglas 1992), will be regarded as mature and capable of making lawful decisions to seek contraceptive services without the need for parental consent. This is consistent with the principle of the evolving capacities of the child recognized in both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

In the *Axon* case (*R on the Application of Axon v Secretary of State for Health*, 2006), the Court seems to have followed the same approach by the majority in the *Gillick* decision. In that case, a mother of five daughters challenged a health guidance purporting to allow a girl under 16 to seek contraceptive advice and treatment without parental consent. According to Mrs. Axon, such a health guidance is unlawful and illegal. Justice Silber adopted wholly the reasoning of the pro-*Gillick* judges to refuse the application of Mrs. Axon challenging the health guidance in question. He rejected the argument that a health guidance, which allows a girl under 16 to seek sexual health treatment without parental consent or knowledge, was illegal or unlawful. According to him, “the very basis and nature of the information which a doctor or a medical professional receives relating to the sexual and reproductive health of any patient of whatever age deserves the highest degree of confidentiality.” The court was not convinced by the argument that allowing a girl under 16 to consent to sexual health treatment would interfere with the right to family life.

While admitting that this issue may potentially pit the rights of parents against that of the child, the court resolved that in such situations a balance must be struck between the conflicting interests. Relying on the decision of the European Court of Human Rights in the case of *Yousef v the Netherlands* (2003), the Court asserted that in the event of a conflict between parental right and the right of an adolescent to autonomous sexual health decisions, the latter should take priority over the former. This, according to the court, will be consistent with the principles of the best interests of the child and the evolving capacities of the child both recognized under the CRC. The Court further emphasized the importance of ensuring confidential sexual health

treatment to adolescents, noting that without such assurance, young people will shun treatment thereby causing “undesirable and troubled consequences” for them. The reliance on the principle of evolving capacities of the child by the court to arrive at its decision is an affirmation of the sexual autonomy of adolescent to consent to sexual health services without parental consent. It is a welcome development and it is commendable.

The Court in *Axon* did recognize the importance of third-party involvement in adolescents’ decision-making, particularly with regard to invasive treatment such as abortion; however the court was not convinced that such an involvement should override the autonomy of the adolescent. This is a clear affirmation of the ability of adolescents to make crucial decisions with regard to their sexuality. It is a positive decision which can potentially be relied on to advance the sexual autonomy of adolescents and young people in general and adolescent girls in particular. In a world where the sexuality of adolescents (particularly female adolescents) has often been subjected to moralization, the decision in *Axon* provides a glimmer of hope for the realization of the sexual health needs of adolescents, particularly in the context of access to contraception. The decision exemplifies pragmatism and sensitivity to the sexual health needs of female adolescents.

Another important case where the court has affirmed the autonomy of adolescents to consent to sexual health treatment without the need for parental consent is the South African case of *Christian Lawyers Association v Minister of Health* (2004). In that case, a High Court was called upon to determine the legality of Section 5 of the Choice on Termination of Pregnancy Act (CTPA), which allows a girl under 18 to seek an abortion without parental consent. The applicant in that case had challenged this provision as being contrary to Sections 28(1) (b) (family care), 28(1) (d) (best interests of the child) and 9(1) (equality) of the South African Constitution of 1996, and as such unlawful. In its judgment, the court rejected this contention saying that the provision of CTPA allows every woman regardless of whether she is 18 or not to seek abortion during the first trimester and that there is no compulsion on such a woman to seek parental consent but that she is merely obliged to consult with her parents if she so desires. In arriving at its decision, the court noted that under the CTPA “all women” can consent to abortion services within the first 12 weeks and therefore the issue of age should not be a barrier; otherwise the essence of the law will be defeated.

Moreover, the Court invoked the provision of Section 12 of the South African Constitution, which guarantees the right to bodily and psychological integrity, to hold that a woman under 18 has the autonomy to make decisions regarding her sexuality. According to the court, “It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities” (para 56). This is a purposive approach to interpreting the law, which pays attention to the plights of young women in South Africa. By this statement, the Court seems to be asking the female adolescent question. The provision of Section 5 of CTPA at issue is broadly drafted in such a way as to limit the powers or influence of parents in decision-making of children or adolescents. Indeed, from the wording of this section, there is now a reduction in

“parental roles in decision-making from the authoritative role embodied in the notion of parental power under common law to voluntary consultation by the child, medical professionals acting as ‘gate keepers’ to this potential parent/child consultation” (Himonga and Cooke 2007). To this extent, this provision adopts a more radical approach to children’s and adolescents’ autonomy more than the CRC.

While this decision seems to affirm the right of a young woman to seek abortion services, it fails, however, to critically evaluate the logic behind this conclusion. The Court seems to have been preoccupied with explaining the meaning of “informed consent,” generally without paying attention to an equally important issue raised in that case – capacity to consent to treatment for adolescents. In particular, the court fails to elucidate its decision with reference to international human rights standards such as the principle of the evolving capacities of the child as contained in the CRC and the African Children’s Charter. To this extent, one may argue that though the conclusion of the court was correct, the means of reaching this conclusion are less than satisfactory. Bearing in mind that South Africa has ratified both the CRC and the African Children’s Charter, one would have expected the court to invoke these instruments as aids in coming to its conclusion. It should be noted that Section 39 of the South African Constitution enjoins the court to consider international law while interpreting the provisions relating to the Bill of Rights.

Notwithstanding these shortcomings in the *Christian Lawyers Association* case, an important lesson to be drawn from the case is that young women under the age of 18 are by no means less capable of exercising sexual health choices, particularly with regard to issues relating to abortion and contraception. What is important to bear in mind is that the adolescent girl making these choices must have made them having a good understanding of the issues and their implications. By affirming the autonomy of a girl under 18 to seek abortion services without the need for parental consent, the court is more or less recognizing the capability of female adolescents to make important sexual choices that concern them.

In a more recent case, the South African Constitutional Court has affirmed the right of adolescents to engage in consensual sexual act as this is consistent with respect for their dignity. In that case, a challenge against Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act was brought, arguing that these sections are constitutionally invalid to the extent that they criminalize consensual sexual conduct between children. The applicants had argued before the court that Sections 15 and 16 of the act unjustifiably infringe children’s constitutional rights to dignity, privacy, and bodily and psychological integrity, as well as the principle in Section 28(2) of the Constitution that a child’s best interests must be of paramount importance in all matters concerning the child. In a unanimous decision, the Constitutional Court held that Sections 15 and 16 of the act are unconstitutional in that they infringe the rights of adolescents (12 to 16 year olds) to dignity and privacy, and further in that they violate the best-interests principle contained in Section 28(2) of the Constitution. Influenced by expert evidence before the court, it was further held that limiting the sexual activities of adolescents through criminal law may impair their development as human beings and negatively affect the very children the act seeks to protect.

In affirming the rights of children under the Constitution, Khampepe J explains as follows:

I wish to explicate the manner in which courts should approach children's rights in general. In my view, the correct approach is to start from the premise that children enjoy each of the fundamental rights in the Constitution that are granted to "everyone" as individual bearers of human rights. This approach is consistent with the constitutional text, and gives effect to the express distinction that the Bill of Rights makes between granting rights to "everyone" on the one hand, and to adults only on the other hand. (*The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, 2013)

Thus, the Court concluded that criminalizing consensual sexual acts among adolescents impugns their dignity and is inconsistent with the "best interests of the child" principle. While this decision does not specifically affirm that adolescent should engage in "uncontrolled" sexual acts, it does affirm that sexual expression and consensual sexual acts form part of developmental state of adolescents, which enhances their dignity. While the decision of the court in this case is commendable, it, however, falls short of addressing the specific needs of female adolescents. It was missed opportunity for the court not to engage with the lived realities of female adolescents in the context of the Sexual Offences Act. In short, the court failed to ask the female adolescent question by not specifically examining the impact of the impugned provisions of the Sexual Offences Act for adolescent girls.

Recognizing the Gender Dimension of Adolescents' Decision-Making Powers (Asking the Female Adolescent Question)

In matters relating to the sexual health of adolescents, courts can similarly play important roles in making inquiries into the female adolescent question with regard to cases brought before them. Courts have an important role to play in removing barriers to the enjoyment of sexual and reproductive health of adolescents. In doing this, courts will need to inquire to the situations or circumstances which often make it difficult for female adolescents to exercise their sexual choices, particularly with regard to access to contraception. Such inquiries are necessary essentially in a male-oriented society, such as Nigeria, where studies have shown that male sexuality is privileged over female sexuality (Odejide 2007). In some cases, barriers to access to contraception for adolescents are often masked by gender inequality and patriarchal tradition. Thus, courts will be required to "lift this veil" of patriarchy by analyzing the gender implications of cases involving adolescents. Such an analysis must take into cognizance the peculiar life circumstances of female adolescents in Nigeria. In essence, it must recognize that the low status of women and adolescent girls in the country constitutes a great threat to the realization of their sexual health and rights. This is evidenced by the high rates of unwanted pregnancies, STIs, including HIV/AIDS, and unsafe abortion (Sledgh et al. 2009). Pillard (2007) correctly observes that:

Various forms of inequality and stereotyping contribute to a status quo in which many women get pregnant in circumstances in which they either do not want children, or want children yet feel they cannot have them. Girls and women disproportionately are taught to be in denial about their own sexual urges, and yet rely inappropriately on their sex appeal. The denial occurs both ways: Women are expected to deny the presence of their sexual desire (to guard chastity), and to deny its absence (to be sexually responsive to men). In a world in which such denial is the norm, women will lack the kind of agency and responsibility needed to meet their own desires for pleasure, well-being, support, and meaning in their lives.

Sometimes courts may need to demonstrate some degree of activism in order to strike down sociocultural or legal barriers to adolescents' access to contraception. In other words, courts will need to do more than mere formal application or interpretation of the law but where necessary "lift the veil of patriarchy" behind such laws, customs, or practices in order to address the root causes of discrimination against women and girls in society. This may require courts to demand evidence-based information and data rather than reliance on customary or religious beliefs. For instance, in *Axon* the court was prepared to go a step further in a bid to determine the propriety or otherwise of a girl under 16 to seek sexual advice, without the need for parental consent, by relying on available data and statistics on teenage pregnancy in the United Kingdom. The mere fact that the court in this case relied on a report showing an increase in teenage pregnancy among young girls under the age of 16 and low contraceptive use among young people in general in Great Britain is an indication of the court's willingness to base its judgments on established evidence rather than mere sentiment. This position of the court seems to coincide with the suggestion of Cook and Ngwenya (2006) to the extent that any decision that must be taken in relation to sensitive issues, such as sexual health needs of adolescents, must be founded on empirical evidence rather than mere sentiment or morality. Indeed, as mentioned above, there is no evidence justifying such involvement as it may not mercenarily lead to good decisions for adolescents. Erdman (2009), therefore, suggests that in determining whether or not a third-party involvement in adolescents' decision-making is necessary, such a finding must be based on established evidence and fact rather than mere assumptions.

More importantly, in the *Axon* case, Justice Silber rejected the argument that permitting young people to seek treatment on sexual health without parental consent will encourage sexual immorality. Rather, he was of the view that if parents talk to their children about sexual health, they are less likely to engage in unprepared sex and less likely to conceive as young women (Erdman 2009). This reasoning seems to be sensitive to the plight of young girls who might be in need of sexual health services but might face challenges due to the need for parental consent. It particularly speaks to the plight of adolescent girls in Africa, where religious and cultural beliefs often undermine adolescents' right to seek information and services with regard to their sexuality.

By considering the implications of a lack of confidential sexual health treatment for an adolescent girl before arriving at its decision, the court in *Axon* is more or less asking the female adolescent question. It is an indication that the court is willing to put sexual health challenges facing adolescent girls at the center of its decision. More

importantly, the decision represents an affirmation of the right to sexual autonomy on the part of an adolescent girl with regard to seeking contraceptive services. In the view of Bridgeman (2006), the implication of the *Axon* case is that though parents are primarily responsible for the health and well-being of their young ones, such young people, however, can decide for themselves whether to seek advice, information, and services as regards their sexual health needs without the knowledge of their parents. The approach of the court to invoke human rights standards and principles contained in international human rights instruments such as the CRC is highly commendable. Such an approach provides greater opportunities to advance adolescents' sexual health and rights, particularly in relation to access to contraception.

Limitations to the autonomous decision-making of adolescents, especially female adolescents, in matters of sexual health, particularly as regards access to contraception, are often hinged on the fact that female adolescents are incapable of making a developed moral decision. In other words, female adolescents are "too immature," "irresponsible," and "too young" to engage in consensual sexual acts. This belief tends not only to undermine the sexual autonomy of women and girls but also subjugate their human rights to that of men. Erdman has observed that moral decision-making has always been situated within a gender framework based on "two hierarchically arranged standards of moral reasoning invariably associated with gender: the masculine glorified, the feminine designated" (Erdman 2009). Pillard (2007) has also criticized the different roles which society often assigns to women and men, noting that such different roles tend to compromise sexual choices of women and girls.

Africa remains highly patriarchal, and where gender inequality is often very pronounced and women's and girls' rights are given little attention, female adolescents are bound to encounter some challenges in exercising their sexual choices. Thus, in some cultures in the region, it is still believed that reproduction is the primary function of women and girls and that a woman is expected to sexually please her husband. This in turn limits women's and girls' autonomous decision-making powers as regards sexual health matters. Therefore, the decision in *Axon* constitutes a positive step toward "lifting the veil" of gender inequality which often masks as custom and tradition.

Recent developments have shown that courts are beginning to strike down the sex-biased "maternal wall" that has constrained women's sexual choices. Also, courts are beginning to demonstrate the willingness to question the gender implications of laws and policies limiting women's and girls' sexual choices. For instance, the Colombian Constitutional Court has delivered a judgment relating to the sexual autonomy of a young girl to consent to medical abortion. In that case, the Constitutional Court had been called upon to determine whether a 14-year-old girl could lawfully consent to an abortion and whether the provisions of the penal code criminalizing abortion were constitutional. The court had invoked principles and standards laid down under international human rights instruments and consensus statements to arrive at its decision. For example, the court relied extensively on the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child, including

consensus documents such as the International Conference on Population and Development (ICPD) and the Beijing Platform for Action, to hold that a denial of abortion right to a girl under the age of 14 constitutes a gross violation of the sexual and reproductive rights of a woman. The court further held that criminalization of abortion violates the rights to health, equality, dignity, and liberty of a woman, all recognized in various human rights instruments and consensus statements such as the Cairo and Beijing Declarations (Women's Link Worldwide 2007).

In arriving at its decision, the Court had reviewed the challenges women in Colombia face in realizing their health needs, particularly with regard to safe abortion and sexual health services. According to the court, such challenges, often due to restrictive laws, are not only violations of women's rights but further reinforce the subjugation of women in society. More importantly, the Court reasoned that a girl of 14 who had exhibited a good understanding of the implications involved in a treatment could consent to an abortion. Beyond the fact that this landmark decision liberalizes abortion law in Colombia, one other significance of the decision is that the court tends to accord recognition to the right of a girl of 14 to exercise her autonomy with regard to issues relating to sexual health services, including seeking contraceptive services. Indeed, the court affirms the rights of all individuals to decide freely and responsibly the number and spacing of their children and to have the information and means to do so. According to the Court, women, including girls, should not be treated merely as "reproductive instruments in human race"; rather they must be recognized as independent entity capable of making autonomous sexual and reproductive health decisions.

This is a radical challenge to the patriarchal notion referred to above, which generally subordinates women's rights to that of men and assigns reproductive roles as women's primary responsibility. Thus, denial of abortion right or access to contraception is merely a means of perpetuating the status quo. Due to gender inequality, women and girls are usually unable to negotiate safe sex with their partners. This situation usually poses grave implications for women's and girls' health. Therefore, the recognition by the Colombian Constitutional Court of the right of a girl under 14 to seek sexual health services, including abortion and contraceptive services, is a bold attempt by the court to "lift the veil" of patriarchy, which the Colombian criminal law represents. The court inquired into the logic behind this restrictive law and found that it is meant to limit sexual choices of women and girls. It then proceeded to affirm the sexual autonomy of a girl under 14 to make "responsible" and "reasonable" decisions relating to her sexuality.

More importantly, the Court invoked the provisions of the CRC by upholding respect for parental rights, but subject to the evolving capacities of a girl of 14 to make decisions relating to her human rights, including the right to health and sexual autonomy. By so doing, the court seems to be asking the female adolescent question. Rather than acting in abstraction, the court seems to have contextualized the peculiar challenges confronting young women with regard to their sexual health needs in Colombia. Given the fact that the Colombian society is an essentially conservative and male-oriented one, this bold decision by the Constitutional Court symbolizes a new dawn in the recognition of women's and girls' sexual autonomy.

This decision by the Colombian Constitutional Court represents one of the most important roles of the court in carrying out legal reforms. According to Cook, the decision is an unequivocal recognition of all women's rights, particularly pregnant women, adolescent girls, rural women, poor women, and indigenous women (Cook 2007). She notes further that the decision has set a new standard in the recognition of women's rights as human rights internationally. Perhaps what is highly commendable about this decision is the ability of the court to invoke human rights principles and standards contained in international and regional human rights instruments such as the CEDAW, CRC, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem do Para) to reach its decision.

In addition, the Court also relied extensively on interpretations provided by treaty monitoring bodies such as the CEDAW Committee and the Committee on the CRC. The Court particularly cited General Recommendation 24 of CEDAW on Women and Health (UNCEDAW 1999) to affirm that laws and policies which inhibit women and girls from expressing their sexual autonomy are not only discriminatory but also violate women's and girls' human rights. By so doing, the Court has demonstrated the relevance of "soft law" in advancing the sexual autonomy of adolescent girls to seek sexual health services. While "soft law" is not legally binding on states, it remains an important source in clarifying the nature of a state's obligations under international human rights law. In particular, it can be invoked to determine the commitment of a state to realizing the sexual health needs of female adolescents. This decision is a testament that courts can play a crucial role in freeing women and girls (by advancing their sexual autonomy) from "historically routine conscription into maternity or motherhood" (Pillard 2007).

As seen from above, it would appear that the essence of the Lord Fraser's guidelines laid down in *Gillick*, which was adopted wholly in *Axon*, is to put a female adolescent at the center of any decision to be taken with regard to her seeking contraceptive treatment. Rather than placing emphasis on parental power to consent on behalf of a girl under 16, the guidelines seem to prioritize the interests of such a girl over her parents. This approach seems to coincide with asking the female adolescent question. It would be important for national courts to adopt similar position should a case of similar nature come before them.

Given the serious threats to the sexual health needs of adolescent girls in the region, one would expect that any interpretation that will be provided by the courts, as regards a female adolescent seeking sexual health treatment, will favor the girl and not unduly give regard to parental powers to exercise control. Bartlett (1990) has emphasized this when she asserts that the "woman question" must aim not only to question existing wrongs but must also anticipate the remedy that will be brought through raising this question. Cook (1995) has similarly noted that applying the woman question in judicial decisions involved understanding the disadvantaged position of women in society and reflecting this in the judgment of the court. It is one thing to acknowledge the challenges facing women in society; it is another thing for this to be reflected in any action taken to address this situation. Perhaps a remarkable distinction between the anti- and pro-*Gillick* judges is the fact

that the former represent conservatism, paternalism, and the “welfarist approach,” whereas the latter represent pragmatism, liberalism, and a recognition of the evolving capacities of the child.

Conclusion

This chapter has shown the important role of the courts in advancing the sexual and reproductive health of adolescent in Africa. It argues that through progressive interpretation of laws and policies, courts can strike down discriminatory laws and facilitate access to sexual and reproductive health to adolescents in general and female adolescents in particular. Although issues relating to adolescent consent to sexual and reproductive health services remain controversial, the courts can play an important role in affirming the sexual autonomy of adolescents. In considering whether adolescents should be allowed to consent to sexual and reproductive health services, fundamental principles relating to the rights of adolescents and children should be taken into consideration. In essence, the best interests of the child principle, the evolving capacities of children, nondiscrimination and gender-sensitivity, life and survival as well as the right to dignity of children and adolescents.

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Disability, Domestic Violence, and Human Rights

Paul Harpur and Heather Douglas

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Abstract

Research indicates that people with disabilities experience domestic and family violence both more often and differently to those who do not have a disability. Indeed, disability is often associated with reduced economic status, reduced capacity of survivors to make complaints, and a greater risk that complaints will be inappropriately actioned. This chapter examines how international human rights law has responded to domestic and family violence against

P. Harpur
TC Beirne School of Law, University of Queensland, Brisbane, QLD, Australia
The Burton Blatt Institute, Syracuse University, Syracuse, NY, USA
e-mail: P.harpur@law.uq.edu.au

H. Douglas (✉)
TC Beirne School of Law, University of Queensland, Brisbane, QLD, Australia
e-mail: H.douglas@law.uq.edu.au

women with disabilities. In particular, it argues that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) affords the greatest recognition to date of the human rights of women survivors of domestic and family violence who have a disability. To better understand how the CRPD is being implemented to tackle disability domestic violence, country reports on the implementation of the CRPD are analyzed. The findings reveal that despite the promise of the CRPD, many countries still have a long way to go in developing appropriate responses to disability domestic violence.

Keywords

Women with disabilities · Domestic and family violence · International law · Human rights · CRPD

Introduction

This chapter analyzes how the new disability human rights paradigm introduced by the United Nations Convention on the Rights of Persons with Disabilities (CRPD) recognizes the rights of women with disabilities who are survivors of domestic and family violence (DFV). While all survivors of DFV may be vulnerable and need legal and institutional support and protection (Laing 2010), there is increasing recognition that intersecting attributes create additional vulnerabilities and regulatory challenges for lawmakers (Sokoloff and Dupont 2005; Crenshaw 1991). Research indicates that people with disabilities experience DFV both more often and differently to those who do not have a disability (Healey et al. 2013; Brownridge 2009). This different context and experience is referred to as “disability DFV.”

The CRPD defines disability to include people who have long-term physical, mental, intellectual, or sensory impairments that, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others (CRPD, Art. 1). The CRPD does not concern itself with the cause of the impairment. In a situation where there is DFV, trauma and an inability to access medical support can aggravate existing medical conditions and lead to the development of new impairments (Bagshaw et al. 2000). While DFV can cause impairments, in this chapter we focus on the situation where disability already exists.

Persons with disabilities continue to experience direct and indirect discrimination and broader inequalities in society, for example, in getting to court, giving evidence, completing forms, and leaving the family home (ALRC 2010, 312, 845). They also experience heightened vulnerability to violence in the community (McDermott 2012, 211–212). In a domestic setting, disability may amplify individual vulnerabilities to violence. As explored further in the first section of this chapter below, disability is often associated with reduced economic status, reduced capacity of survivors to make complaints, and greater risk that those complaints will be inappropriately actioned (ALRC 2010, 306). While many who experience DFV may be highly dependent on their abuser, fear disclosing abuse, and lack economic independence, these issues are often heightened for a person with a disability

(WWDA 2007). Limits in communication may interact with other barriers to inclusion in society to increase the isolation of the person and their risk of DFV (WWDA 2007). DFV perpetrated on a person with a disability may also be less visible and may be perpetrated in unique ways that diverge from forms of DFV explicitly recognized in policy and legislative instruments. In part, because of these interrelated factors, rates of disability DFV are proportionately higher and extend for a longer period of time than other manifestations of DFV (Frawlet et al. 2015). Despite this, the complex relationship between disability and DFV has received insufficient examination to date (Healey et al. 2013, 63). This chapter argues that the CRPD represents an important step forward for women survivors of DFV who have a disability. The next section analyzes the impact of the CRPD and considers how it affords the greatest recognition to date of the human rights of women survivors of DFV who have a disability.

Women with Disabilities and the Experience of DFV

While the role that gender, race, and economic and social factors play in facilitating DFV is now better understood (Sokoloff and Dupont 2005), the existence of an impairment is another important point of intersection that adds further complexity to the way DFV is experienced (Healey et al. 2013, 52). When compared to women without disabilities, women with disabilities are 37.3% more likely to experience DFV, with 19.7% reporting a history of unwanted sex compared to 8.2% of women without disabilities (PWDA 2013).

Unique Forms of Violence

One of the challenges in combating violence against women with disabilities is that the form the violence takes may not be recognized as violence by people who do not understand the impact of impairment on oppression and vulnerability. Feminist activists and scholars have acknowledged the diversity of women's lives and that their experiences are influenced by their intersecting identities (Crenshaw 1991; chapter "Intersectionality and Women's Human Rights"). Women with disabilities experience discrimination and negative stereotyping because of both their gender and disability identities (Lin et al. 2010, 1264–1268). Women with disabilities may also be mothers or belong to an ethnic group, thus further complicating their identity (Garland-Thomson 2006, 257).

While emotional, physical, and sexual abuse are common forms of DFV for people regarded as both able and disabled, abusers often use survivors' disabilities to aggravate the impact of their violence (Thiara et al. 2001). It is notable that research reports that persons with mental illnesses (such as schizophrenia and schizoaffective disorders, bipolar disorder, major depression, or alcohol-induced disorders) experience the highest levels of sexual and physical DFV (Hughes et al. 2012, 1621–1629). An interrelated mix of disability, illiteracy, and poverty may make women with an intellectual disability particularly susceptible to economic

abuse (Douglas and Harpur 2016, 305). Survivors who require support from their partners for daily tasks can be especially vulnerable to abuse. For example, survivors who rely upon their partners can experience abuse when their partner cares for them in a manner designed to control the survivor or to make her fearful for her well-being (Hague et al. 2011).

A number of forms of violence are unique to people with disabilities. How these unique forms of violence manifest depends upon the impairments experienced by a survivor. For example, survivors who rely upon mobility aids, medication, or medical technologies are extremely vulnerable to partners who restrict access to such items. Abusers have been reported to hide, refuse to obtain, or administer medication to cause both emotional and physical harm (Dillon 2010). As a form of entrapment and humiliation, abusers have left people in wheelchairs, turned off power to electric wheelchairs that are charging, left survivors stranded by hiding their wheelchairs, and have prevented them from accessing external supports, which would increase the survivor's independence (Thiara et al. 2001).

Threatening pets is not uncommon in DFV situations (Ascione et al. 2007). While survivors with or without disabilities have emotional attachments to pets, survivors with disabilities have significantly different relationships with their pets when those pets are disability assistance animals, such as guide dogs for the blind or deaf (Harpur et al. 2016). Assistance animals have a critical role in the lives of persons with disabilities. This means that pressure to get rid of their service animal or actions that cause harm to the animal, refusing to facilitate opportunities for the person to appropriately train or care for the animal, or restricting the capacity of the person to use the animal to mitigate the impact of their impairment in other ways can have substantial detrimental impacts upon survivors.

In his analysis of abuser-related characteristics, Brownbridge identifies a number of reasons for abusers to abuse an intimate partner who has a disability. He identifies the association between violence against women and patriarchal domination and suggests that some men may see women with a disability as easier to dominate or control (Brownridge 2006, 809). He also points to the need that some abusers have to assert sexual propriety over a partner and to the possibility that many carers may be stressed and that this stress may help to explain their violence toward an intimate partner with a disability who they care for (Brownridge 2006, 809). Others suggest that abusers can draw on the discourse of natural entitlement associated with the medical model that constructs persons with disabilities as in need of care (Adams et al. 1995).

The Role of the State and the Medical Profession in Perpetrating Abuse

Survivors of DFV may be reluctant to disclose DFV to their medical practitioner, and this reluctance may be intensified in cases where the survivor has a disability (Dowse et al. 2013). Many people with disabilities have had negative experiences with the health sector. At its most extreme, experiences have involved physical, sexual, and psychological abuse (D'Antonio 2004, 45). During the twentieth century, people

with disabilities often endured forced sterilizations, non-consensual medical experimentation, and even death by targeted eugenic inspired euthanasia (Lemke 2013, 71–72). Whistle-blowers' reports of ill treatment and persecution by health sector representatives continue to emerge. There is evidence that abuse, such as forced sterilizations, continues to be experienced by persons with disabilities in interactions with the medical industry (O'Neill and Peisah 2011, chapter "► [Women Human Rights Defenders](#)").

Persons with disabilities confront the additional fear that their complaints about DFV will be constructed as a symptom of a psychological condition, rather than a complaint about a real event requiring legal intervention. Mental illness is a feared label as such a diagnosis is associated with punishment, blame, stigma, and "state sponsored coercion in the forms of involuntary commitment and forced medication laws" (Lewis 2006, 339–341). Being aware of these fears, abusers often refer to a survivor as "crazy" or in need of mental health treatment (Humphreys and Thiara 2003). For most survivors, an abuser has little capacity to forcibly institutionalize them. However, for persons with certain disabilities, the capacity of an abuser to have the survivor institutionalized is increased; this heightens the impact of such threats, especially where the abuser is the guardian or carer for the survivor. Survivors who have impaired intellectual capacity may be more likely to believe that such threats can be carried out (Douglas and Harpur 2016). Whether or not their fears are justified, it is foreseeable that such survivors may be reluctant to report abuse if they believe it might result in a psychiatric diagnosis. This leads some survivors with disabilities to prefer remaining with the abuser than exposing themselves to feared violence from health professionals (Thiara et al. 2012, 48–49).

Implementation and Enforcement Problems

Even if a person with a disability successfully lodges a complaint with law enforcement authorities, the legal system has often failed to provide survivors with adequate support. The police response, completion of applications for protection orders, and access to legal advice and advocacy services have been issues of concern generally (Douglas and Stark 2010). The impact of these issues may be amplified when a person has an impairment (Douglas and Harpur 2016). While these barriers to justice can be redressed through education, appropriate design, and support, the response to date has been inadequate.

Survivors often require assistance to access justice responses. Isolating survivors from potential support networks is a tactic experienced by survivors with and without disabilities (ALRC 2010, 88; chapter ► "[Human Rights Responses to Violence Against Women](#)"). Survivors with disabilities are often particularly vulnerable to being isolated by their abuser due to mobility and communication limitations. Some survivors rely on their partners to facilitate their contact with family, friends, and agencies (Nixon 2009, 77–89; Radford et al. 2006, 233–245). Survivors with cognitive disabilities, for example, may have reduced capacity to communicate with authorities, or they respond in a way that is not "recognized," and

survivors with mobility problems may lack the ability to leave their home without assistance. When a survivor's primary means of communication with other people and services is via their partner, and that partner is abusive, the survivor will confront significant difficulties when attempting to escape, or seek assistance to respond to, an abusive situation (Thiara et al. 2001).

Abusers may construct a public identity of a caring and loving person. For example, when the abuser showers the survivor, manages the survivor's finances for them, is the survivor's driver, and takes them to all their medical appointments, this results in the abuser having almost total control over the survivor's life. When that abuser is also engaging in physical and sexual violence, who will listen to the survivor? Authorities may construct the abuser as a hero and may be more willing to listen to the abuser's voice (Hague et al. 2011). The fact that survivors with disabilities are often unable or unwilling to report violence, and are regularly not believed if they do, places them at heightened risk of being targeted by abusers (Lund 2012).

How International Human Rights Laws Have Responded to Disability DFV

The previous section considered how disability may amplify individual vulnerabilities to violence in a domestic setting. This part discusses how international human rights laws have responded to disability DFV. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD) are the primary sources of international law documents regulating DFV against women with disabilities. Here it is argued that the provisions of the CPRD provide the greatest recognition to date of the human rights of women survivors of DFV who have a disability.

The CRPD as the First Convention to Expressly Protect Women Survivors of DFV

While CEDAW promotes equality for women in a number of areas, this convention does not contain a provision dealing with violence against women (Meyersfeld 2010, 6). This omission in CEDAW has been remedied, to some extent, by the General Assembly's 1993 Declaration on the Elimination of Violence against Women (DEVAW) and CEDAW's General Recommendation 19 (1992). General Recommendation 19 redefines what is required to achieve gender equality and provides that DFV impedes gender equality and that the "full implementation of the Convention require[s] States to take positive measures to eliminate all forms of violence against women." While there is increasing acceptance under international law that DFV violates human rights (Harne and Radford 2008, 21–22), these developments have not considered how the existence of impairment impacts on DFV.

Adopted on 13 December 2006, the CRPD is the first human rights convention to specifically protect the human rights of persons with disabilities, and more specifically for this article, it is the first convention that specifically deals with violence against persons with disabilities. Specifically, the Preamble of the CRPD: “Recogniz[es] that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” (para (q)) and “Emphasiz[es] the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities” (para (s)). The CRPD Preamble further affirms “that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities” (CRPD Preamble, para (x)).

In order to promote equality and reduce violence against people with disabilities, the CRPD places a range of positive and negative duties on States Parties to protect the human rights of persons with disabilities.

The CRPD and a New Disability Human Rights Paradigm

The CRPD emphasizes the role society plays in disabling people (McCallum and Martin 2013). This position is most clearly articulated in the Preamble of the CRPD, where the CRPD “Recogniz[es] that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others” (para (e)). That is, similar to social model scholarship, the CRPD Preamble explains that some of the key causes of disablement are barriers in society.

The rights protected in the CRPD are comprehensive. As a sweeping human rights convention, the CRPD posits an extremely broad human rights agenda (Lord et al. 2015, 497). The express recognition of persons with disabilities, the inclusion of incidental rights, and a comprehensive rights regime mean that persons with disabilities are now truly entitled to the right to equality for the first time in human rights history (Waterstone 2010). The impact of the CRPD on creating a new disability politics cannot be over emphasized. Quinn heralds the CRPD as the “Declaration of Independence” for persons with disabilities (Quinn 2005, 541). How then is the CRPD a declaration of independence for women survivors of DFV?

What the CRPD Requires of States Parties

The CRPD includes disability-specific human rights protections in Articles 3–9, which include universal rights, and Articles 10–30, which include substantive rights. These rights often restate existing rights, but some of the rights are included to ensure that well-established human rights can be realized. For example, while

existing human rights conventions already identify that all people have a right to access justice, CRPD Article 13 restates that persons with disabilities have this right and then provides vehicles to ensure that people with impairments can exercise this right, including reasonable accommodations and awareness training for law enforcement agencies. The CRPD further provides disability-specific restatements of the rights to life (CRPD, Art. 10), liberty and security of the person (CRPD, Art. 14), freedom from torture or cruel, inhuman or degrading treatment or punishment (CRPD, Art. 15), and rights relating to protecting the integrity of the person (CRPD, Art. 17). The CRPD also includes the right to live independently and to be included in the community (CRPD, Arts. 1 and 19(a)), as well as rights to respect for privacy (CRPD, Art. 22) and to an adequate standard of living and social protection (CRPD, Art. 28). The provision in the CRPD that is most relevant to eliminating disability DFV is the right to be free from exploitation, violence, and abuse (CRPD, Art. 16).

The right to be free from exploitation, violence, and abuse specifically includes protection from disability DFV. This right requires States Parties to take all “appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects” (CRPD, Art. 16(1)). The inclusion of Article 16 is significant, as unlike CEDAW, the CRPD contains an express recognition of the rights of people to live in an environment where there is no DFV. The CRPD goes further and explains how States Parties to the convention should adopt a multifaceted approach to ensure that this right can be realized.

To enable persons with disabilities to exercise this right, the CRPD explains that States Parties must ensure, *inter alia*, appropriate forms of assistance and support for persons with disabilities and their families and caregivers, “including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse” (CRPD, Art. 16(2)). Where abuse does occur, the CRPD requires states to have in place appropriate legislative frameworks “to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted” (CRPD, Art. 16(5)). As a bare minimum, the CRPD requires States Parties to have laws on the books that criminalize disability DFV and to have measures that ensure adequate enforcement of such laws. As such, the rights regime in the CRPD goes further than CEDAW and other human rights instruments in specifying what needs to be done to protect the rights of women survivors of DFV who have disabilities. The articulation of what needs to be done to protect women survivors of DFV who have disabilities places this issue firmly on the human rights agenda.

The Committee on the Rights of Persons with Disabilities: General Comment No. 3

The United Nations committee that monitors compliance with the CRPD, the Committee on the Rights of Persons with Disabilities (UNCRPD), has issued a general comment

on women with disabilities. General Comment No. 3 (UNCRPD 2016) explains how Article 6 relates to a range of other articles in the CRPD, including articles on violence against women with disabilities (CPRD, Art. 16) and sexual and reproductive health and rights, including respect for home and the family (CPRD, Arts. 25 and 23). In terms of violence, the general comment acknowledges that women experience violence in private and public spaces, as well as at the hands of “social service providers” (CPRD, Art. 18). While General Comment No. 3 covers a range of issues concerning the rights of women with disabilities, here, in examining how states are faring, the focus is on issues concerning DFV.

How States Are Faring

To date, states are regularly failing women with disabilities who experience DFV. Women with disabilities are often unable to have their complaints of exploitation, violence, and abuse successfully responded to by authorities, and in many situations, their credibility is doubted and their complaints are dismissed (UNCRPD 2016, Art. 18). General Comment No. 3 notes that violence against women with disabilities is caused by a range of impairment and cultural factors, including the erroneous perception that women with disabilities are “burdensome to others” and “a cause of hardship, an affliction [and] a responsibility” (UNCRPD 2016, Art. 47). To enable women to exercise their rights to live free from violence requires considerable efforts from States Parties:

The obligation to fulfil imposes an ongoing and dynamic duty to adopt and apply the measures needed to secure the development, advancement and empowerment of women with disabilities. States Parties must adopt a twin track approach through: a) systematically mainstreaming the interests and rights of women and girls with disabilities across all national action plans, strategies and policies concerning women, childhood and disability as well as in sectoral plans concerning, for example: gender equality, health, violence, education, political participation, employment, access to justice and social protection; and b) targeted and monitored action aimed specifically at women with disabilities. A twin track approach is an essential pre-cursor to reducing inequality with regard to participation and enjoyment of rights. (UNCRPD 2016, para 27)

Similar to other UN human rights conventions, States Parties to the CRPD must submit an initial report within 2 years after the entry into force of the CRPD and then every 4 years afterward, unless an earlier report is requested by the monitoring committee (CPRD, Art. 35). All state reports to UNCRPD discussed in this chapter are publically available online via the Office of the United Nations High Commissioner for Human Rights Treaty Body Database (OHCHR 2017). The States Parties Reports to the Committee on the Rights of Persons with Disabilities (UNCRPD) were examined to understand how states are engaging with disability DFV and their obligations under the CRPD to combat this form of abuse. The number of reports will continually increase as more state reports are submitted. At the time of publication, more than 100 state reports had been submitted. There is no requirement to submit in a particular language, and reports were submitted in English, Arabic,

French, Russian, and Spanish and a combination of these languages. A total of 88 reports available in English form the basis of this overview.

It is important to understand the limitations associated with comparing and contrasting state reports. The state reports provide a summary and are not intended to form a comprehensive stock taking of the laws and policies in the jurisdiction. For example, the Australian report does not mention current criminal laws that render crimes against persons with certain disabilities as aggravated offences (Harpur and Douglas 2015, 405; UNCRPD (Australia) 2012). Furthermore, it is likely that some of the conclusions of various state reports could be open to challenge given the limited research in this area. For example, Malta concluded that there were “very few” survivors with disabilities (UNCRPD (Malta) 2015, para 96) but has not collected any data on disability DFV to support this conclusion.

Indeed, the lack of data on survivors with disabilities was a common problem across almost every state report. The CRPD requires States Parties to gather statistics and data to enable them to formulate and implement policies to give effect to the convention (CRPD, Art. 31). The importance of collecting appropriate statistics and data was emphasized by Lord and Stein who observed that the “drafters of the CRPD were particularly concerned about the dearth of disability-specific statistics and data” (Lord and Stein 2017). Unfortunately many state reports concluded that there was a “lack” or limited availability of data (UNCRPD (New Zealand) 2013, para 126; UNCRPD (Brazil) 2014, para 42; UNCRPD (Paraguay) 2011, para 202; UNCRPD (Ukraine) 2014, para 170). Others noted that the data available was not “reliable” (UNCRPD (Norway) 2015, para 139), “precise” (UNCRPD (Macedonia) 2015, para 93), “accurate” (UNCRPD (Jordan) 2015, para 114), or “comprehensive” (UNCRPD (Indonesia) 2016, para 179) – making it difficult to understand the issues and appropriately intervene. The Armenian report (UNCRPD (Armenia) 2015, para 128) reflects this problem explaining that there are “no statistics on persons with disabilities who have been subjected to violence and it is difficult to figure out the number of persons with disabilities among the victims of violence.”

While most jurisdictions have failed to collect appropriate statistics and data, some state reports go against this trend. Sweden observes that “studies on victims of violence show that women with disabilities are particularly vulnerable” (UNCRPD (Sweden) 2012, para 310), and Estonia explains that “nearly one fifth (18%) of adult disabled people had experienced psychological violence and 1% had experienced physical (including sexual) violence” (UNCRPD (Estonia) 2015, para 107). Peru observes that it had been collecting statistics on disability DFV since 2008, noting that in 2008–2009, there were 1030 (1.2%) people assisted in emergency women’s centers who reported DFV who also had a disability (UNCRPD (Peru) 2011, para 68). Data and statistics gathering are required by CRPD; without them it is impossible to know the full extent of the issue.

It is notable that the intersection of gender and disability was recognized in most reports either expressly or implicitly as compounding vulnerability. For example, the

report of the European Union (UNCRPD (EU) 2014, para 184) identified the need to address “the intersectionality of gender and disability.” Some reports failed to consider the connection between DFV and disability at all. A number of reports do not mention the words “abuse,” “violence,” “domestic,” or “family” in relation to domestic violence (UNCRPD (Gabon) 2014; UNCRPD (Turkmenistan) 2013; UNCRPD (Hungary) 2011).

The most common response to disability DFV identified in the country reports was that the issue was the subject of specific education, public awareness, and training programs in their country, with 19 reports mentioning this response (e.g., UNCRPD (Austria) 2012, para 169; UNCRPD (Morocco) 2015, para 92). Public awareness and education programs are important in the prevention of DFV, but in order to reach more marginalized populations, such as those who have a disability, they must be appropriately targeted (OurWatch 2017).

Many jurisdictions have identified the need for more robust measures and have criminalized violence against persons with disabilities. One way to approach this is to create new offences based upon the particular vulnerabilities of persons with disabilities. For example, in Slovenia there is an offence of abandonment of a “helpless person” (which is defined to include some persons with disabilities); and sexual contact with a “defenseless person” (including some persons with disabilities) is deemed to be without consent and criminalized (UNCRPD (Slovenia) 2014, para 72). Another regulatory approach identified in a number of reports is to identify disability of the victim of a standard offence as an aggravating feature, generally attracting a higher penalty (e.g., UNCRPD (Guatemala) 2015, para 70; UNCRPD (Italy) 2015, para 49). Additionally, Section 232 of the General Civil Penal Code in Norway specifies that disability of the victim of an assault with bodily harm is an aggravating circumstance that may lead to an increase in the penalty (UNCRPD (Norway) 2015, para 138).

Criminal laws often fail to protect survivors of DFV. For example, rape in marriage is not unlawful in a number of states (UN Women 2011), and where it is, many countries fail to prosecute (Temkin 2008). Noting that existing laws fail to protect survivors of DFV generally, persons with disabilities, who are often more socially isolated than the wider survivor population and experience violence in ways that differ from the mainstream, are arguably less likely to be able to adequately access criminal law protections. To help identify and reduce disability DFV, some jurisdictions have specifically defined and prohibited this form of abuse (e.g., UNCRPD (China) 2011, para 65; UNCRPD (Myanmar), 2015, para 54). Yet, one of the problems already identified in this chapter is that the line between intimate and carer relationships can be blurred. To enhance the capacity of survivors to escape violence, some reports focused on access to services. Equal access to services, such as shelters, was highlighted in some country reports as a response to the expectations of the CRPD (e.g., UNCRPD (Denmark) 2013, para 153; UNCRPD (Germany) 2013, para 32). In many jurisdictions, anti-discrimination laws require providers of goods and services and parties that are implementing state programs not to directly or indirectly discriminate against persons with disabilities (Harpur 2017, 205).

Conclusion and Recommendations

Despite the existence of the Convention on the Rights of People with Disabilities, and public policy models that construct persons with disabilities as citizens entitled to exercise all of their human rights, many in the community hold different views. One reaction to persons with disabilities is hatred and disgust (Sherry 2010). A more common reaction is one of charity, pity, and devaluing the voice of persons with disabilities (Shakespeare 2014, 233; Sin 2013).

Survivors with disabilities experience DFV more frequently and differently from the wider survivor population. Survivors with disabilities often rely upon their abusers for assistance with daily tasks, making it more difficult for them to seek help. As discussed in the first part of this chapter, some abusers reportedly use survivors' impairments to intensify DFV (such as threats of institutionalization) and use disability-specific forms of violence (such as interfering with mobility aids). The CRPD recognizes and has helped to raise awareness of the vulnerability of survivors with disabilities. It imposes international law obligations on states to provide legislative responses that adequately respond to disability DFV and to put measures in place that ensure adequate enforcement of such measures. However, country reports suggest that there is still some way to go before the aspirations of the CRPD are fully realized.

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Part V

Social and Economic Rights of Women



Sexual Health and Sexual Rights

Susana T. Fried and Andrea Espinoza-Kim

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Abstract

The agenda of sexual health and human rights has dramatically evolved and expanded since the early 1990s. The Programme of Action of the International Conference on Population and Development in Cairo in 1994 (ICPD) and the Platform for Action of the Fourth World Conference on Women in Beijing in 1995 (FWCW) manifested a new paradigm of sexual health and human rights. At these global meetings, and in response to many years of social movement advocacy, world leaders formally acknowledged sexual health and reproductive rights, as well as rights related to sexuality, as critical to the enjoyment of the right to the highest attainable standard of health and to gender equality. However, the form and content of “sexual rights” and their interaction with reproductive health and rights were left on the pending agenda. Similarly left to be elaborated was the difference in experiences of sexuality-related rights and violations of those rights by people facing forms of multiple and overlapping discrimination and marginalization. This elaboration has advanced through a dynamic and vexed dialogue

S. T. Fried (✉) · A. Espinoza-Kim
Global Health Justice Partnership, Yale University, New Haven, CT, USA
e-mail: susana.fried@gmail.com; andiespinozak@gmail.com

between human rights, gender equality, LGBTQI (lesbian, gay, bisexual, transgender, queer, and intersex), and public health communities; among individuals and groups who are marginalized because of who they are, what they do, and/or where they are located structurally and geographically; between governments and constituents; and between countries in regional and global policy dialogues. This chapter explores crucial nodes in this discourse, describing and analyzing critical advances and persistent challenges. These nodes comprise issues at the intersection of sexual health and human rights such as abortion, contraception, disability, gender identity, HIV, same-sex conduct, and sex work. We expand on the current discourse focusing on three rights claims areas: challenging of criminalization of consensual sexual conduct and sexual and reproductive health, securing bodily integrity, and affirming positive sexuality. Finally, we highlight some critical ways to move forward.

Keywords

Sexual health · Sexual rights · Reproductive rights · Human rights · Public health · Discrimination · Marginalization

Introduction

The engagement of sexual health with human rights has emerged as a shifting field of practice, advocacy, and inquiry over the past three decades. This chapter explores crucial nodes in this discourse, describing and analyzing critical advances and persistent challenges. These nodes comprise issues at the intersection of sexual health and human rights such as abortion, contraception, disability, gender identity, HIV, same-sex conduct, and sex work. It explores a number of fields of mobilization and human rights advocacy that strongly influenced the understanding of sexual health as a human rights concern and, later, the struggle to delineate “sexual rights” as a legitimate area of rights claiming.

The chapter looks to several UN World Conferences as pivotal moments and the evolution of international human rights norms and standards, largely advanced by various sexuality-related rights advocates and movements. It considers the trajectory and tensions in debates about sexual health and human rights issues through three rights claims areas: first, challenging criminalization by engaging public health strategies and evidence; second, affirming bodily integrity by distinguishing between sexual health and sexual rights; and third, securing free and fully informed decision-making through positive sexuality. After examining some of the key debates that have resulted in transformation and stagnation, the chapter highlights several significant changes as these have been reflected in international and regional human rights debates. We conclude by suggesting some ways forward.

The analysis exposes both advances and challenges. Local and national advocacy efforts have achieved major changes in laws and policies as well as social practices and ideologies around sexual health and sexuality-related rights. At the same time, the countermobilization has been persistent, well-funded, and global (Imam et al.

2016; Malca et al. 2017). Context is everything – the ability to advocate for and exercise sexual health as a human right is fundamentally conditioned by each local context. Factors such as geopolitical, social and economic power differences, as well as race, ethnicity, sexuality, gender, gender identity, sex characteristics, religion, health status, (im)migrant status, and disability, among others, play significant roles in any individual's experience of sexual health and the barriers they face to securing it, within and beyond the framework of human rights. Discrimination, marginalization and the structural layering of privilege and lack thereof are usually significant obstacles to sexual health and sexual rights.

Nonetheless, much has changed in the past few decades. One of the most significant transformations has been delinking sexual health and sexuality-related rights from reproductive health and rights, though acknowledging their links. Closely aligned to this is an understanding of both sexual health and sexual rights as political matters reflecting structural power differentials, not just technical or biomedical concerns. In other words, we increasingly understand that sexual health and sexuality-related rights are neither subsumed under reproductive health and rights, nor are they limited to any single issue, such as same-sex conduct or abortion. Moreover, and crucially, advocates have demanded that sexual health and sexuality more generally should be understood as embedded in a particular social, political, economic and cultural context, which sets the parameters of the meanings we make of sexual health and sexual rights. While these changes have been evolving in fits and starts for many decades, we begin at a pivotal moment – 1994.

Constructing an Understanding of Sexual and Reproductive Health as Human Rights Concerns

The Programme of Action of the International Conference on Population and Development (or ICPD) in Cairo in 1994 and the 1995 Beijing Declaration and Platform for Action of the Fourth World Conference on Women (or FWCW). The conference outcomes, negotiated among participating UN member states, were heavily influenced by massive mobilization of activists working to advance sexual rights and gender equality, including sexual and reproductive health and rights organizations, women's rights organizations, and organizations focused on sexual orientation from all regions of the world. More than 4000 representatives of over 1500 nongovernmental organizations (NGOs) from 113 countries attended the independent NGO Forum '94, and many engaged in advocacy with negotiators from member states (UNFPA [n.d.](#)). In Beijing, at the FWCW, more than 4000 accredited NGO representatives attended the intergovernmental negotiations and some 30,000 attended a parallel NGO Forum (UN Women [n.d.](#)). Similarly, in 1994 the International AIDS Conference, an independent (non-UN) biannual meeting of activists, researchers, scientists and UN agency representative and government representatives, had 10,000 participants (see IAS [2016](#)). In all these venues, civil society participants represented groups working at the local and national levels,

as well as regional and global networks. Groups that opposed human rights, gender equality, and the advancement of sexuality-related rights were also loudly present.

As a result of this active engagement, the parameters of sexual and reproductive health and rights expanded. This was especially so within the public health field where massive civil society and social mobilization, notably around HIV insisted that global HIV spaces, as well as regional and national ones, should be understood as spaces of political advocacy and decision-making, rather than as showcases for various scientific and technical agendas. The specific terminology of sexual and reproductive health entered the global human rights lexicon in 1993 at the World Conference on Human Rights in Vienna (Hadi 2017). Thereafter, during the ICPD and the FWCW, world leaders and policy makers formally acknowledged sexual health and reproductive rights, as well as rights related to sexuality, as components of the right to the highest attainable standard of health and as a crucial confluence of the public health and human rights fields. Although the conceptualization of sexual health was broadened to transcend reproduction, advocates were unable to fully decenter the early link of sexual health to women and reproduction. This was primarily due to the lack of consensus and the sensitivities around the interpretation of sexual rights (as a nascent concept) and reproductive rights. Thus, related issues such as abortion, contraception, sexual violence, among others, remained contentious and were stymied in their translation into policy and practice (Hadi 2017).

Significant progress has been made since in all aspects of sexual health and rights. The understanding of sexual health has continued to evolve beyond reproduction by women to include the holistic sexual wellbeing of men, women, and people of all genders. With this expanded interpretation, there has also been increasing recognition that the realization of this new standard of sexual health is contingent upon the “respect, protection and fulfillment of all human rights” (Kismodi et al. 2015) and that sexual health rights are core elements of attaining social justice, sustainable development, and public health. Still, today, many sexual and reproductive health and rights issues remain contentious in a variety of contexts.

Increasing recognition of the responsibility of the government to establish laws that respect, promote, protect, and fulfill the realization of sexual health and sexual rights without discrimination has promoted unequivocal progress. Yet, while law and policy reform has had an important impact, the law is not by itself sufficient. It often does little to undo structural discrimination and marginalization. Governments must therefore ensure policies and other measures that promote the right to health and the realization of sexual and reproductive rights (Kismodi et al. 2015). This idea is encompassed by the concept of “due diligence” that emerged in a women’s rights context in the late 1990s and early 2000s to elaborate governments’ responsibility to *promote rights and hold perpetrators accountable* for rights abuses (UNCHR 2006; UNHRC 2013). Because human rights are indivisible, such laws, policies, and measures must uphold other interrelated rights – necessary condition and consequence – of the realization of sexual health (Miller et al. 2015a, b).

Discrimination and inequality have been increasingly central concerns as the understanding of sexual health in a human rights frame, or sexuality-related rights, have coalesced as an articulation of rights. Protection from human rights harms,

such as sexual assault and rape, coerced sex or harmful practices has helped to frame our understanding of sexual health and human rights. At the same time, this approach has sometimes led to an overreliance on punitive laws and policies, without considering the ways that engaging the punitive power of the state reinscribes existing power structures and systems of marginalization and discrimination, such as those based on race, ethnicity, language, (im)migrants status, sexual orientation, and gender identity, among others. Thus, it has been important to counterpose this emphasis on protection against harms with more positive rights expressions, such as in relation to “consensual sex outside of marriage, consensual same-sex conduct, transactional sex between consenting persons, such as sex work, sexual activity among and between older adolescents, conduct related to gender expression such as cross-dressing, as well as seeking or providing sexual and reproductive health information and services, such as for contraception and abortion” (Kismodi et al. 2015, 256). This has been introduced and amplified by strong social movements and advocates representing a range of issues and communities, demanding that governments respect, protect, and fulfill *all* of their rights. At the same time, extreme opposition in the form of conservative social, religious, and political groups has challenged sexuality-related rights in international human rights norms and standards and in the practice of sexual health and rights in countries around the world.

Understanding Sexuality-Related Rights in Relation to Sexual Health

As our understandings of sexuality and sexual health have changed, so has the articulation of sexual rights, woven by an analytical and dynamic dialogue on the engagement of human rights in the realm of sexuality. Initially, this dialogue was centered on the need to protect certain groups of individuals (i.e., women and LGBTQI people) from harm such as abuse and killings. However, sexual health is increasingly recognized as a crucial juncture of related yet often siloed fields including: violence against women, sexual and reproductive health, LGBTQI rights, the rights of people living with HIV, the rights of people living with disabilities, adolescents and young people, among others (ICHRP 2009). Sexual rights affirm a fundamental component of the self – sexuality – beyond sexual orientation, sexual conduct, and sexual identity. Hence, as Ignacio Saiz has commented: “sexual rights offers enormous transformational potential not just for society’s ‘sexual minorities,’ but for its ‘sexual majorities’ too” (Saiz 2004, cited in ICHRP 2009, 8).

Sexual rights thus became part of human rights experts’ agendas, as demanded by advocates for sexuality-related rights and pushed back against by fundamentalist religious and cultural forces. Though there has been consensus on the centrality of sexuality-related rights to the attainment and crystallization of the highest standard of sexual health (WHO 2006), this is, as yet, partial and still warrants the further refinement and definition of the content of sexual rights. Based on a technical consultation hosted by the World Health Organization in 2002, and noting that “[t]he responsible exercise of human rights requires that all persons respect the rights of

others” (WHO 2006, 5), the WHO offered the following working (unofficial) definition of sexual rights:

Sexual rights embrace human rights that are already recognized in national laws, international human rights documents, and other consensus statements. They include the right of all persons, free of coercion, discrimination, and violence, to:

- The highest attainable standard of sexual health, including access to sexual and reproductive health care services.
- Seek, receive, and impart information related to sexuality.
- Sexuality education.
- Respect for bodily integrity.
- Choose their partner.
- Decide to be sexually active or not.
- Consensual sexual relations.
- Consensual marriage.
- Decide whether or not, and when, to have children.
- Pursue a satisfying, safe, and pleasurable sexual life. (WHO 2006, 5)

Central to the dialogue of the involvement of human rights in sexuality has been the analysis of laws, policies, and practices that uphold or put at risk sexual rights and sexual health, especially related to protection from discrimination, respect for privacy, and freedom of expression of groups, often at the frontline of sexual rights violations – such as sex workers, LGBTQ people, people living with HIV, among others, and especially those from communities who are already marginalized because of race, ethnicity, sexuality, ability, or other status (WHO 2015). This endeavor focused on calling for the decriminalization of consensual sexual conduct – following the path of the fight for the decriminalization of contraception and abortion – supported by evidence of the negative impact of these laws on the health outcomes of groups facing punitive laws and policies. On the other hand, efforts have also been made to set standards and guiding principles for laws and policies to promote and safeguard sexual rights and sexual health.

Though not without some dissent, criminal law has been considered a core instrument for the protection of human rights, including sexual health and sexual rights (Tulkens 2011). Significant advances have been made in the criminalization of violence against women, for instance. However, there are also instances where criminal provisions violate sexual rights such as laws that impede people from expressing their sexuality and gender identity and/or exercising decisions over their own bodies, including decisions on when and with whom to have sex, marry, or engage in consensual sexual behavior. For example, laws that criminalize same-sex sexual conduct and/or LGBTQI practices. After deeply fractious debates, in 2011 and 2015, the UN Human Rights Council issued reports on violence and discrimination against individuals based on their sexual orientation and gender identity (see UNHRC 2011, 2015).

In other instances, criminal laws hinder the attainment of the highest standard of sexual health of people pushed to the margins. Laws that criminalize selling sex and

laws criminalizing people living with HIV (when they expose or transmit HIV to others) have been reported to perpetuate discrimination, stigma, and marginalization and create barriers for these communities to access sexual and reproductive health services (WHO 2015). Categorizing a person's behavior as criminal and thus punishable inherently entails moral judgment and stigma that inevitably reinforces existing structures of discrimination and marginalization. Accordingly, agents of such behavior – driven by fear of discrimination, prosecution and arrest, violation of their rights to privacy and even fear of being subjected to violence – attempt to hide it from others and to avoid state agents, including in the health sector (UNDP 2012).

Whether due to criminal laws or to a dearth in laws that guarantee and safeguard sexual rights, in many countries, women, sex workers, people living with HIV, people with disabilities, migrants, and LGBTQ persons do seek sexual and reproductive health services and face discrimination and other human rights violations. They may also experience rejection by providers who refuse to provide them services, or are forcefully subjected to procedures like sterilization (UNDP 2012; WHO 2015). Often times, members of such groups also stand at the intersection of racism, gender-based discrimination, and poor socioeconomic status, compounding and perpetuating negative sexual health outcomes.

From Protecting Sexual Health to Advancing Sexual Rights: Challenges and Advances

The project of advancing sexual health as a human rights concern and disentangling sexual health and sexual rights has been an uneven process. On the one hand, as Sen (2014, 600) observes, there has been “an inclusive trend towards human rights to health that goes beyond the right to health services [...] [to direct] attention to girls’ and women’s rights to bodily autonomy, integrity and choice in relation to sexuality and reproduction.” On the other hand, punitive laws, policies and practices around sexual health and sexual rights have persisted, while conservative and fundamentalist groups have, in some cases, gained traction.

Recognizing both gains made and ongoing obstacles, this chapter focuses on rights claims in three areas. The first works at the intersection of public health and human rights to *bring public health evidence to support rights related to sexuality and to challenge various forms of criminalization*. Challenges to criminalization of sexuality, sexual conduct, and sexual and reproductive health are intimately connected to movements for safe and legal abortion and contraception; HIV prevention, treatment, care and support; reproductive rights; the rights of people who use drugs; and, among others, the rights of sex workers, trans people and gay and other men who have sex with men, especially in the context of HIV. One important strand of these efforts has emphasized the centrality of access to affordable, accessible, acceptable and high-quality services, and in elaborating on the meaning of the right to the highest attainable standard of health.

The second area of rights claims involves disentangling sexual health and rights by *affirming rights connected to bodily autonomy*. Bodily autonomy rests heavily on

the right to privacy and to access to the full range of information required for making safe and healthy decisions about one's sexuality and sexual practices. It encompasses: freedom from violence; access to affordable, youth-friendly and quality sexual and reproductive health services; control over decisions relating to one's body (including fully informed consent to medical procedures); health care and services; contraceptive and family planning choices; knowledge about sexuality; and the ability to make decisions over when, where and with whom to engage in sexual activities. Securing bodily autonomy requires being treated with dignity and with the capacity for autonomous decision-making. Ultimately, it is measured by one's ability to fully exercise one's sexual rights, as well as by gender equality and the elimination of all forms of discrimination and violence, with the understanding that these are fundamental commitments of governments to advance rights-based development with equality.

The third area of rights claims is the articulation of the centrality of *positive sexuality* to sexual health and human rights and the necessity to have *the power and information required to make decisions* about one's sexual and reproductive life, especially for those who face forms of multiple and overlapping discrimination and marginalization. Increasingly, the sexual health and sexual rights discourse stresses the importance of highlighting everyone's right (e.g., those who are transgender, gender nonconforming or differently abled) to make free and informed choices about sexuality regardless of sex characteristics, physical or other challenges, sexual orientation, gender identity or procreative intention, etc.

At the core of changes in how sexual health and sexual rights have been considered within the human rights world is the question of whether sexuality is understood as a "rights-worthy aspect of the person" (Miller et al. 2015a, 9). Increasingly, changes have been crystallized in international and regional human rights norms and standards, in national laws, and in local, regional and global advocacy networks. In particular, several national and regional human rights standards have been developed in the past 20 years, to protect, respect, and promote the health of lesbian, gay, and transgender populations, as well as sex workers, for instance, as delineated by Anand Grover, the UN special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (UNHRC 2010). At the same time, progress has been equally avidly opposed, as reflected, for example, in the ever-shrinking boundaries of the right to safe and legal abortion in the United States.

Challenging Criminalization with Public Health Evidence and Strategies

The advancement of sexual rights has, at crucial moments, been supported by the public health field; the understanding that the attainment of the highest standard of sexual health and well-being (and of health more broadly), is strongly determined by socio-political factors (i.e., social determinants of health) and a rights-enabling

context. Therefore, the WHO affirms that: “The achievement of the highest attainable standard of sexual health is therefore closely linked to the extent to which people’s human rights – such as the rights to non-discrimination, to privacy and confidentiality, to be free from violence and coercion, as well as the rights to education, information and access to health services – are respected, protected and fulfilled” (WHO 2015, 1). More specifically, an environment that maintains and reinforces sexual health and promotes human rights depends on: access to accurate and comprehensive information about sexuality, including both risks and options; access to quality, nondiscriminatory and affirming sexual health care; and access to justice and economic security.

Debates about the impact of criminalization on public health have been driven as much by the political advocacy of multiple players who have made human rights discourse and claims central to public health debates, as they have by epidemiological information. These social movements and advocacy fields (e.g., around abortion, HIV, comprehensive sexuality education, young people’s rights or the rights of people living with disabilities) have sought to amplify human rights as a framework for public health decision-making and service delivery.

This has been bolstered by international treaty monitoring bodies, regional protocols, and intergovernmental agreements that have reflected on sexual health and sexual rights from the perspective of public health. For instance, General Comment 14 of the UN Committee on Economic, Social and Cultural Rights (UNCESCR 2000) provided an evolving understanding of the right to health, presented as both freedoms and entitlements, as follows:

The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. (Ibid., para 8)

Thus, the right to health has been placed squarely within the realm of governments’ obligations to respect, protect, and fulfill rights.

Another important precedent was set in 1994, when the UN Human Rights Committee established that criminalization of sexual relations between consenting adults is a violation of their right to privacy and thus infringes on the obligations contained in the International Covenant on Civil and Political Rights (UN Doc CCPR/C/50/D/488/1992). The pertinent case concerned a Tasmania, Australia law that criminalized same sex conduct on the pretense of reducing transmission of HIV (Toonen v Australia 1992) as well as to protect morality.

The issue of HIV put the conflict between public health and criminalization of nonheteronormative sexual conduct and gender identity directly on the global health and rights agenda. Evidence from HIV studies showed that criminalization hampered countries’ HIV responses. The UN special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health strongly affirmed the importance of evidence-informed and proportional legislation,

noting: “When criminal laws and legal restrictions used to regulate public health are neither evidence-based nor proportionate, States should refrain from using them to regulate sexual and reproductive health, as they not only violate the right to health of affected individuals, but also contradict their own public health justification” (UNGA 2011, para 18).

Due to the disproportionate burden of sexual ill health, including HIV, imposed on marginalized individuals and communities (e.g., sex workers, LGBTQI persons), in addition to moral claims, some countries justify the criminalization of same-sex conduct on the basis of protecting public health. However, this position has been refuted by evidence that criminalization of such people has damaging health consequences through marginalization, discrimination, and restricted or deterred access to health services (WHO 2015).

For instance, the overt rationale for laws that criminalize sex work is the protection of sex workers’ health. Yet, evidence shows that such laws ostracize sex workers and expose them to sexual health risks and to violations of their rights. Fearing prosecution, persecution, and surveillance, as well as discrimination, stigmatization, and poor treatment, sex workers have constrained access to services such as STI and HIV testing and care, contraceptive and abortion services, maternal health services, and postexposure prophylaxis care (WHO 2015). This is detrimental to their ability to make informed and healthy decisions about their sexual life, and their ability to have autonomy and control over their bodies and reproduction (WHO 2012a). Therefore, UN agencies and special rapporteurs have called for decriminalizing sex work (UNDP 2012; Kerrigan et al. 2013; UNHRC 2010).

Some countries have successfully enacted comprehensive laws that provide for safety and health standards for the workplace, as well as sexual and reproductive health services. In Australia, this type of law reform resulted in a decrease of STIs and HIV infection rates, as well as up to 100 percent uptake of condom use among sex workers in brothels (WHO 2015). Other countries such as the Netherlands, Colombia, South Africa, among others, have used labor laws to promote sex workers’ health and sometimes their rights (ibid.). In New Zealand, the government and the country’s major national sex worker collective organization collaborated on health and safety guidelines for the sex industry following decriminalization. Sex workers have successfully brought employment abuses before a labor disputes panel, and they have held brothel operators accountable for exploitive practices and against the police (Abel 2014). Although violence against sex workers has not disappeared, sex workers are more likely to report crimes committed against them to the police than they were prior to decriminalization (PLRC 2008). Few countries, however, have completely decriminalized sex work.

Criminalization of HIV is another area lacking evidence informed laws and policies. In 2013 there were 63 countries with at least one HIV-related criminal provision (UNAIDS 2012). HIV-related criminal laws can be used to prosecute people living with HIV for allegedly exposing others to the risk of HIV, or transmitting it to others. Evidence shows that these laws do not prevent transmission; rather, they deter people from seeking or adhering to treatment, prevent people from getting tested, and perpetuate stigma and discrimination (WHO 2015). Because men who

have sex with men, transgender persons, sex workers, and, in many countries, adolescent girls and young women are among those disproportionately affected by HIV, HIV-related criminal laws further infringe the right to sexual health of these groups and further subject them to discrimination and marginalization (ibid.; UNOHCHR 2017).

Supported by international recommendations and advocacy (UNDP 2012; UNHRC 2010), there have been advances in the decriminalization of HIV (see, for example, HIV Justice Network n.d.) In 2015, the High Court of Kenya found the country's law criminalizing HIV to be unconstitutional, finding provisions "too vague and that disclosing patients' HIV status violates their rights to privacy and confidentiality" (CRR 2015). They further called for a review of the law to ensure no further litigation (ibid.). Nonetheless, debates about criminalization and decriminalization of same-sex conduct remain highly contested. Most recently, this occurred in the debates about the UN Sustainable Development goals, in which it was explicitly excluded (Poku et al. 2017; Martínez-Solimán 2015). Criminalization of sex work; HIV exposure, nondisclosure, and transmission; consensual sex outside of marriage (criminalized as "adultery"); and abortion has been similarly challenged and contested in international, regional, and national human rights venues often with setbacks or exclusion (Rothschild 2005).

Access to safe and legal abortion is another area in which progress has been fostered by the strategic use of public health information. Since 1996, significant progress has been made on enhancing legal access to safe abortion around the globe. Laws that preclude women from accessing safe abortion and postabortion care are discriminatory as they impede (only) women from exercising their right to health, bodily autonomy, and informed decision-making and place (only) women at risk of death and other consequences of unsafe abortion. Moreover, restrictive abortion laws can validate or influence other barriers such as conscientious objection on the part of practitioners or institutions, further restricting access and thwarting women's ability to secure their right to sexual and reproductive health (WHO 2012b). Conversely, evidence shows that legalizing abortion – when accompanied by affordable, accessible and acceptable quality services – promotes sexual health, which decreases unsafe abortion rates and associated negative consequences (i.e., maternal mortality and morbidity related to abortion) (Kismodi et al. 2015).

While making progress toward legalizing abortion in specific cases (e.g., when the health of the mother is at risk or in cases of rape), advances have been slow and heterogeneous. Developing countries are still four times more likely than developed countries to have restrictive abortion policies (UNDESA 2014).

Evolving Bodily Autonomy: Disentangling Sexual Health and Sexual Rights

Despite a lively conversation in communities and countries about sexuality-related rights, it has been difficult to disentangle sexual health and sexual rights in international human rights norms and standards. While significant advances

have been made in the area of nondiscrimination, it has been harder to affirm sexual rights in the context of (dis)ability, sex work, and HIV. Moving beyond the protectionist logic and a still-observable tendency to treat women, in particular, as subjects of violence and violations rather than autonomous actors, bodily autonomy is a broad concept that encompasses both sexual and reproductive health and rights, as well as freedom from human rights violations that impinge on the physical integrity of the human person (see especially, UNGA 1966 art 6–8). As an evolving concept, it traverses: freedom from violence; access to affordable, quality, sexual and reproductive health services that are responsive to non-conforming adults and adolescents; control over decisions relating to one's body, including fully informed consent to medical procedures and decisions on contraceptives and family planning knowledge about sexuality; and the ability to make decisions over when, where and with whom to engage in sexual activities. Securing autonomy requires being treated with dignity and with the capacity for autonomous decision-making (Sen 2014).

Important as it is to affirm that discrimination is a barrier to women's health and women's rights, the discussion often remains firmly rooted in sexual health specifically, rather than sexuality more generally, thereby significantly circumscribing the ambit of bodily integrity. Take, for instance, the Convention on the Rights of People with Disabilities (CRPD), negotiated between 2002 and 2006; as in many negotiations in the 20 years since the World Conference on Human Rights (Vienna, 1993), including the ICPD, FWCW, and the numerous review meetings that followed, sexuality was one of the most contested issues. While reference to protection from sexual violence or forced sterilization were relatively uncontroversial, efforts to include sexuality as a positive aspect of the lives of people living with disabilities was highly debated (Schaaf 2011; also see Douglas and Harpur in this volume). As Ruiz notes in an analysis of the work of the CRPD Committee: "The silence on affirmative sexual and reproductive rights reinforced prejudices that equate disability with incompetence, incapacity, impotence, and asexuality" (Ruiz 2017, 97). This means that despite significant references to sexual health and sexuality in the CRPD, these generally express a "protectionist logic" and the committee's concluding comments remain "narrowed to worries about health rather than conceived as a way of advancing sexual desire, freedom, and self-determination" (Ruiz 2017, 96).

Relatedly, the principle of consent – presupposed in the discourse of human rights and sexual health – is widely invoked but still remains somewhat equivocal (ICHRP 2009). The equivocation becomes particularly evident when discussing adolescent sexual health and rights. Due to the stigma often associated with early sexual activity, adolescent girls are deterred from seeking reproductive health services, including contraceptives. This deterrence deprives them of their rights to become informed and make autonomous decisions about their reproduction and sexuality, which curtails their right to bodily autonomy and puts them at risk of sexual ill health (including STIs and HIV infection) and unwanted pregnancy. In many context, such violations are prompted by restrictive laws and policies that hinder adolescent girls' access to reproductive health services without parental/guardian consent, or restricts access to those who are married (UNFPA 2016) vitiating their sexual rights.

Laws and policies restricting access to reproductive services to adolescents are rooted in different ideologies – from deeming sex appropriate only within marriage and/or for adults, to harmful gender stereotypes that affect women from an early age. In many countries age of consent for sex is conflated with age of consent for marriage. Many aspects of consent remain difficult to secure: for example, under what conditions is consent meaningful and what are its limitations? However, while it is necessary to grapple with issues related to age within each specific context, human rights standards are clear that young peoples' privacy and confidentiality must be protected as well as access to sexual and reproductive health services without parental consent on the basis of a young person's evolving capacities (WHO 2015). Such measures must also take into consideration adolescents' very different abilities and dispositions to engage in sex depending on their age and their social location (UNCRC 2016; EngenderHealth *n.d.*). The Committee on the Rights of the Child also states that the age for sexual consent is not equivalent to age of adult status nor the age for legal marriage (UNCRC 2016, para 40). It calls for governments to ensure access to comprehensive sexuality education, including safe abortion and contraception and addressing social beliefs and taboos on adolescent sexuality (*ibid.*, para 60) and for states to review age of consent for sexual health services such as HIV testing (*ibid.*, para 62–63).

General Comment 22 by the Committee on Economic, Social and Cultural Rights (UNCESCR 2016) offers some advance beyond protectionist or health-based consideration of sexual health within a human rights context. It lays out a jurisprudence that distinguishes between sexuality, sexual health and reproduction, drawing heavily on its General Comment 14 on the right to health (UNCESCR 2000). It notes in particular that the “right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health” (UNCESCR 2016, para 25).

Another issue that is key to ensuring bodily autonomy is access to a mix of forms of modern contraception. Unambiguously, international, regional, and local standards view contraceptives as a measure of women's ability to exercise control over the spacing and timing of childbirth and of their right to bodily autonomy and fully informed decision-making in matters of their sexual health and sexuality. Unlike in the case of abortion laws, progress on the liberalization of contraceptives has been steady and fairly distributed across the globe since 1990 (Finlay et al. 2012). WHO has included emergency contraception as part of the WHO Model List of Essential Medicines (WHO *n.d.*), promoting its mainstreaming. Nevertheless, progress has not impacted all women equally. In addition, some countries still restrict access to contraceptive and related services by requiring married women to obtain the consent of their husbands, or adolescents, the consent of their parents in order to access services.

Fully Informed Decision-Making and Positive Sexuality and Sexual Health

The ICPD Programme of Action notably defined reproductive rights to be inclusive of sexual health, where reproductive health is: “a state of complete physical, mental and

social well-being [...] [whereby] people are able to have a safe and satisfying sex life and [...] the capability to reproduce and the freedom to decide if, when and how often to do so" (ICPD 1994a, para 7.2). This was augmented at the Fourth World Conference on Women, which agreed: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences" (FWCW 1995, para 96). While the language of the Beijing Platform for Action emphasized women's human right to sexuality, it has been generalized in more recent UN negotiations that do not specify "women's" right to sexuality.

However, different aspects of sexual rights have advanced unevenly. For instance, international and regional human rights bodies have increasingly articulated a standard that unequivocally calls for the decriminalization of same-sex conduct and for prohibiting discrimination against LGBT people. They have found that criminalization of consensual, same-sex conduct inherently infringes on the right to privacy and the right to nondiscrimination. For example, the UN Working Group on Arbitrary Detention found that detaining a group of men on the basis of their presumed sexual orientation amounted to "arbitrary deprivation of liberty and a violation of the principle of equal protection of the law" (Pearhouse and Klein 2006, 30).

Gender nonconforming women, for example, face compounding consequences due to gender-based discrimination and laws constraining women's freedom of movement. In many contexts, they face persistent levels of violence by people they know most – in their families and in their communities – for not complying with established gender norms, violating their right to gender expression and thus their sexual rights (World Bank 2015; UNCEDAW 2017, para 43.) Amid this sociopolitical context, and despite solid gains in international and regional human rights norms and standards, lesbian, gay, and transgender people are all too often precluded from making free and informed decisions about sexuality and are prevented from pursuing a satisfying, safe, and pleasurable sexual life free of discrimination and violence.

Beyond the specific impact of criminal laws, the bodily autonomy of people with nonconforming sexuality and/or gender identity is further put at risk by unequal access to sexual and reproductive health services (WHO 2015, e.g. 18–19, 23–29). LGBTQI people, as well as sex workers, are deterred from seeking services due to fear of prosecution, discrimination, stigma, and harassment. Based on stigma or stereotypes, providers can refuse the provision of services, including appropriate sexual health information. They often violate LGBTQI persons' and sex workers' right to privacy by unjustifiably sharing private information and even subject them to procedures like abortion, sterilization, or anal examination without consent (WHO 2015, 23). Violating their right to information, privacy, and access to health services, these circumstances curtail their right to bodily autonomy and preclude them from making fully informed decisions about their sexual health. Thus, a disproportionate

burden of sexual ill health of LGBTIQ people and sex workers is perpetuated (WHO 2015, 13–14).

Moreover, health providers and the health system as a whole are often ill prepared to meet the specific needs of transgender people, especially for those choosing gender transition (WHO 2015, 25). Quality and confidential services such as counseling, surgery, hormone therapies, and voice therapy are rarely readily accessible or affordable. Consequently, this puts trans-persons who seek illicit or clandestine services at risk of severe complications and even death and erodes their ability to exercise their sexual rights and secure their right to sexual health.

UN treaty monitoring bodies, including the Human Rights Committee, Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social, and Cultural Rights, Committee against Torture, and the Committee on the Rights of the Child, as well as a number of UN special procedures have now all addressed the range of rights protecting freedom of sexual orientation and decisions and practices relating to same-sex sexual conduct. A number of treaty monitoring bodies have explicitly called for decriminalization in their concluding comments or reports to states, for instance in the cases of the Human Rights Committee's consideration of the periodic reports of Togo (UNCCPR 2011, para 14) and the United States (UNCCPR 2006). Indeed, a hard-fought Human Rights Council resolution in September 2014 reaffirmed the elimination of anti-LGBT discrimination as a top priority for the United Nations (Carroll and Itaborahy 2015).

The rights of sex workers and people living with HIV have faced even more resistance than the rights of LGBTIQ people. In both cases, the issue revolves around the question of “choice.” The UN Convention on the Elimination of Discrimination against Women (CEDAW) has been ambiguous. On the one hand, it obligates states to protect women and girls against exploitation in the context of “prostitution.” At the same time, it does not prohibit sex work as such, but rather the “exploitation of prostitution” (UNGA 1979).

Advocates and legal scholars increasingly emphasize that choice without the means to effect it renders “choice” meaningless. The discussion has been especially salient in the context of access to services and commodities, as well as in the context of abortion and HIV testing and treatment. General Comment 20 of the Committee in the Right of the Child stresses this connection, situating the existence of services and commodities within their social and economic context. It states:

There should be no barriers to commodities, information and counselling on sexual and reproductive health and rights, such as requirements for third-party consent or authorization. In addition, particular efforts need to be made to overcome barriers of stigma and fear experienced by, for example, adolescent girls, girls with disabilities and lesbian, gay, bisexual, transgender and intersex adolescents, in gaining access to such services.

In some countries, advocacy and mobilization by women's rights, sexual rights, and reproductive justice advocates has helped translate these shifts into legal and policy reform. In Colombia, for instance, a Supreme Court decision (Corte Constitucional 2009) not only reiterated the legality of abortion, based on a previous

Supreme Court ruling (Corte Constitucional 2006) but paired the realization of this right to access to safe and affordable services. Discussing the significance of the case to the African human rights context, Charles Ngwena notes: “Aligning itself with the philosophy of the indivisibility of human rights underpinning the CESCRR, it conceived constitutionally guaranteed fundamental rights as not only obligations of restraint on the part of the state, but also positive obligations that implicate state dispersal of resources necessary to fulfil the rights” (Ngwena 2014, 186).

Conclusion

Persistent and cohesive advocacy efforts of different groups and their allies, both in the public health and human rights field – and their increasingly collaborative efforts – have galvanized important progress, especially in advancing the rights of women, LGBTQI people, sex workers, and people living with HIV. Each step has also been met with strong opposition.

The work of human rights bodies at the international and regional levels, UN agencies, and even some national initiatives (Ngwena 2014; CRR 2015) have started to highlight the harms caused by punitive laws, policies, and practices and to call for reforms. As human rights discourse on sexuality – including the role of criminal law – develops, further considerations are needed to refine the scope and form of laws related to sexual rights. It is also important to attend to strong efforts to undo discriminatory, heteronormative, and punitive laws and policies. For instance, there is a growing movement to challenge “gender ideology,” a term meant to promote socially conservative or even fundamentalist laws, policies, and practices, and to reverse policies that seek to dismantle discriminatory norms, policies, and practices associated with heteronormativity and the traditional binary ideas of masculinity and femininity (Kaoma 2016).

The social imaginary encompassing sexuality, gender, and their respective social parameters inherently imbues laws, policies, and practices, as they reinforce, perpetuate, or establish themselves. Hence, jurisprudence is a key component of the architecture, the material and nonmaterial conditions, wherein sexual rights and sexual health can be exercised and realized. The jurisprudence around sexuality, accompanied by changes in social and political norms and practices, requires further development regarding sexual behavior more broadly. It must consider, for example, other forms of discrimination or constraints such as those faced by individuals and communities experiencing multiple and overlapping exclusions related to race, ethnicity, language, (im)migrant status, health status, (dis)ability, sexual orientation, gender identity and expression, sex characteristics, among other grounds. In addition, discussions around the sexual rights of other groups such as domestic workers, immigrant workers, people who use drugs, people in confined settings, etc. are still underdeveloped, though some changes are starting to take place.

Countries also build this architecture through health, social, and justice systems that promote gender equality and human rights as affirmative obligations. Countries must ensure sexual and reproductive health services are accessible, affordable,

acceptable, and of good quality. All policies regarding sexual and reproductive health should be rooted in human rights-based approaches, with respect for dignity, bodily integrity, and guaranteeing confidentiality. Along with an active and vibrant civil society, these changes are the key building blocks to enable informed decision-making and autonomous decisions over sexuality and to ensuring gender expression, free of stigma or discrimination. Ultimately, the person – in all their diversity and variety – must be at the center of concern of laws, policies, and practices.

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Securing the Social and Economic Rights of Women in Economic Policy Making

Diane Elson

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Abstract

The Convention on the Elimination of All Forms of Discrimination Against Women includes economic and social rights, as well as civil, political, and cultural rights. It does not make any specific reference to economic policies, but the “appropriate measures” to which it does refer clearly encompass economic policies as well as legislative changes. Economic and social rights are spelled out in more detail in the International Covenant on Economic, Social and Cultural Rights which has more to say about the use of resources to realize these rights. Economic policy has the potential to support or to undermine the fulfillment of women's economic and social rights. Securing those rights requires economic

D. Elson (✉)

Department of Sociology, University of Essex, Colchester, UK

e-mail: drelson@essex.ac.uk

policy to comply with human rights obligations and norms and standards. This chapter spells out in detail what this would entail.

Keywords

Women's economic and social rights · Convention on the Elimination of All Forms of Discrimination Against Women · International Covenant on Economic, Social and Cultural Rights · Human rights obligations and economic policy · Maximum available resources · Progressive realization · Nonretrogression

Introduction

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted in 1979, entering into force as a treaty in 1981) includes economic and social rights, as well as civil, political, and cultural rights. It does not make any specific reference to economic policies, but the “appropriate measures” to which it does refer clearly encompass economic policies as well as legislative changes. Economic and social rights are spelled out in more detail in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which has more to say about the use of resources to realize these rights. Economic policy has the potential to support or to undermine the fulfillment of women's economic and social rights, as recognized by the CEDAW Committee and the UN Committee on Economic, Social and Cultural Rights (UNCESCR). Securing those rights requires economic policy to comply with human rights obligations and norms and standards. This chapter spells out in detail what this would entail and considers women's opportunities.

CEDAW and Economic and Social Rights

CEDAW requires states to pursue women's equality in all spheres. Article 1 states that:

For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction 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.

Article 3 requires that:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Some articles of CEDAW elaborate in more detail obligations for nondiscrimination and equality with respect to specific economic and social rights. For instance, Article 10 is about education; Article 11 is about employment; Article 12 is about health care; Article 13 requires that “States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life.”

CEDAW has a particular concern with the need to redress women’s disadvantage. For example, Article 4(1) of CEDAW provides that “adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention.” This signals that CEDAW is about substantive and not purely formal equality. This has been further clarified by the CEDAW Committee in General Recommendation No. 25 on temporary special measures that:

In the Committee’s view, a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. [...] Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women. (UNCEDAW 2004, para 8)

This makes clear that states’ CEDAW obligations not only relate to the measures that they adopt but also to the results of those measures. Appropriate economic policy is a key factor in securing a redistribution of resources between women and men and in transforming women’s opportunities to achieve equality of results. The Convention itself does not mention economic policy, but the CEDAW Committee has indicated on a number of occasions that states have obligations to use economic policy measures, such as policy on public expenditure, to fulfill women’s equality rights. For example, the committee has explained in General Recommendation No. 24 that Article 12 of the Convention places an obligation on States Parties to take appropriate legislative, judicial, administrative, budgetary, economic, and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care (UNCEDAW 1999, para 17).

This point has been reinforced in Concluding Observations on periodic reports submitted by countries. For instance, in 2013, the Concluding Observations on Angola paint a bleak picture of the state of maternal health in Angola and call upon the government to “Increase the funding allocated to health care, and the number of healthcare facilities and of trained health-care providers and medical personnel” (UNCEDAW 2013a, para 32b).

Some low-income countries are hampered in mobilizing resources because wealthy individuals and corporations use tax havens and jurisdictions that provide secrecy to avoid paying taxes. In 2016 the CEDAW Committee recognized this in a pathbreaking expression of concern about Switzerland. Following a joint submission and accompanying factsheet on the extraterritorial effects of Swiss-facilitated tax abuse – prepared by the Center for Economic and Social Rights with Alliance Sud,

Global Justice Clinic of NYU Law School, Public Eye, and Tax Justice Network – the CEDAW Committee expressed concern in Concluding Observations on Switzerland at the potentially negative impact of Switzerland’s financial secrecy and corporate tax policies on the ability of other states, particularly those already short of revenue, to mobilize resources for the fulfillment of women’s rights (CESR [n.d.](#)). The CEDAW Committee recommended that Switzerland carry out independent, participatory, and periodic impact assessments of the extraterritorial effects of its corporate tax and financial secrecy policies on women’s rights and substantive equality, in a public and impartial manner.

The CEDAW Committee has also expressed concern in a number of Concluding Observations about the impact of cuts to public expenditure on women’s economic and social rights. For example, the CEDAW Committee found in 2013 that cuts to public services and social security are having a negative impact on women (particularly older women and women with disabilities) in the UK. The committee urged the UK government “to mitigate the impact of austerity measures on women and the services provided to women, especially women with disabilities and older women. It should also ensure that spending reviews continuously focus on measuring and balancing the impact of austerity measures on women’s rights” (UNCEDAW [2013a](#), para 21).

Equality and nondiscrimination rights in international human rights treaties require immediate realization. Thus, where social and economic provision is occurring unevenly in a country and women are disproportionately disadvantaged in relation to such provision, CEDAW requires the state to immediately address this disadvantage (Fredman and Goldblatt [2014](#)). This applies, *inter alia*, to the right to equal participation in the political and public life of a country which is covered by CEDAW Article 7. This right is specified not only with respect to the right to vote, and in holding public office, but also to participate in the formulation of government policy and the implementation thereof. This clearly applies to economic policy, but this remains a very male-dominated area of policy (Elson [2006](#), 132–133; Schuberth and Young [2011](#), 138–144).

Women’s Economic and Social Rights and the International Covenant on Economic, Social, and Cultural Rights

As well as CEDAW, the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966 and entered into force in 1976) is also important for realization of women’s economic and social rights.

ICESCR Article 3 states that States Parties undertake “to ensure the equal right of men and women to the enjoyment of all the economic, social and cultural rights set forth in the present Covenant.” In a General Comment in 2005, the Committee on Economic, Social and Cultural Rights (UNCESCR) made it clear that:

The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. [...] Guarantees of non-discrimination and equality in international human rights

treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience. (UNCESCR 2005, paras 6 and 7)

The rights specified in ICESCR include the right to work, including the opportunity to gain a living by work which is freely chosen (Art 6); the right to just and favorable conditions of work, including fair wages and equal remuneration for work of equal value, remuneration that provides a decent living, safe and healthy working conditions, equal opportunity in promotion, and rest, leisure, and periodic paid holidays (Art 7); the right to form and join trade unions (Art 8); the right to social security (Art 9); the right to an adequate standard of living, including adequate food, clothing, and housing (Art 11); the right to the highest attainable standard of physical and mental health (Art 12); the right to education (Art 13); and the right to take part in cultural life, enjoying the benefits of scientific progress, and the freedom indispensable for scientific research and creative activity (Art 15).

ICESCR has more specific reference to resources than does CEDAW; Article 2(1) of the ICESCR states the obligation of states to realize the rights in the treaty thus:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant.

General Comment No. 3 (issued in 1990) further clarified the concept of “progressive realization.” This concept does recognize that the resources at the disposition of a government are not unlimited and that fulfilling economic and social rights will take time. At the same time, the concept of “progressive realization” is not intended to take away all “meaningful content” of a state’s obligation to realize economic, social, and cultural rights: “It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal” (UNCESCR 1990, para 9).

Furthermore, in 2007 the committee stated that:

The ‘availability of resources,’ although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction. Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances. The Committee has already emphasized that, even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes. (UNCESCR 2007, para 4)

The committee has indicated in General Comment No. 3 that there is a strong presumption that retrogressive measures on the part of a state are not permitted. An example of a potentially retrogressive measure would be cuts to expenditures on

public services that are critical for realization of economic and social rights or cuts to taxes that are critical for funding such services. If such retrogressive measures are deliberate, then the state has to show that they have been “introduced after consideration of all alternatives and are fully justifiable by reference to totality of rights provided for in the Covenant and in context of the full use of the maximum of available resources” (UNCESCR 1990, para 9). For example, cutting government spending on health and education, while not cutting expenditure on arms, is likely to violate the principle of nonretrogression.

General Comment No. 3 also confirms that States Parties have a “core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.” This means that a State Party in which any “significant number” of persons is “deprived of essential foodstuffs, of essential primary health care, etc. is *prima facie* failing to meet obligations” under the Covenant (UNCESCR 1990, para 10). The provision of minimum essential levels is an immediate obligation. This means that it is the duty of the state to prioritize the rights of the poorest and most vulnerable people.

The Committee on Economic, Social and Cultural Rights has indicated in General Comment No. 16 that the right of individuals to participate must be an “integral component” of any policy or practice (UNCESCR 2005, para 37). Furthermore, in a statement on poverty and the ICESCR, the committee has stated that: “the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes” (UNCESCR 2001, para 12). The committee has also emphasized that: “rights and obligation demand accountability [...] whatever the mechanisms of accountability, they must be accessible, transparent and effective” (UNCESCR 2001, para 14).

Key Human Rights Principles and Obligations

From the above discussion of CEDAW and ICESCR, we can extract six key human rights principles that should be applied to the formulation of economic policy (Balakrishnan and Elson 2008):

- Nondiscrimination and equality
- Progressive realization
- Use of maximum available resources
- Avoidance of retrogression
- Satisfaction of minimum essential levels of each of the rights
- Participation, transparency, and accountability

If economic policy complied with these principles, it would operate to redress women’s socioeconomic disadvantage in relation to men without reducing men’s enjoyment of economic and social rights. Leveling down would be avoided and substantive equality would be achieved.

Even in the context of economic crisis, governments must pay regard to these principles. The Chair of the Committee on Economic, Social and Cultural Rights issued clarification on this matter in relation to austerity measures in a letter to governments in May 2012, stating that:

Any proposed policy change or adjustment has to meet the following requirements: first the policy is a temporary measure covering only the period of crisis; second the policy is necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights; third the policy is not discriminatory and comprises all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected; fourth the policy identifies the minimum core content of rights [...] and ensures the protection of this core content at all times. (Pillay 2012)

Further guidance on obligations is provided by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (OHCHR 2005, Annex 5) which differentiate three dimensions of obligations:

The obligation to respect requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus the right to housing is violated if the State engages in arbitrary forced evictions.

The obligation to protect requires States to prevent violations of such rights by third parties. Thus the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work.

The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Each of these obligations contains elements of obligations of conduct and obligations of result. The Maastricht Guidelines explain these obligations that:

The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. [...] The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.

States not only have economic and social rights obligations with respect to the people living in their jurisdiction but also extraterritorial obligations to people living in other countries who are affected by the actions of that state, as clarified in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht University and International Commission of Jurists 2011).

Human rights obligations do not directly prescribe a particular mix of private and public action (as noted in paragraph 8 of General Comment No. 3 on the nature of States Parties' obligations). But it is clear that they do require states to adopt that mix of public action, and incentives for and regulation of private action, that will best

address both immediate obligations to ensure minimum essential levels and non-discrimination and equality and obligations for progressive realization, using maximum available resources, of all economic and social rights.

Clarification on what this means with respect to specific economic policies is being developed by UN special rapporteurs on specific rights, academic researchers (e.g., Balakrishnan et al. 2016); NGOs (e.g., Center for Economic, Cultural and Social Rights), and UN agencies (e.g., UN Women 2015). The obligations cover the whole range of economic policies: fiscal and monetary policy, international trade and investment policy, and regulatory policy (Balakrishnan and Elson 2011). Here, because space is limited, we focus on fiscal and monetary policy and their link to maximum available resources.

Maximum Available Resources and Securing Women's Economic and Social Rights

It is widely accepted that not only public expenditure but also tax revenue and development assistance need to be considered in determining whether a government is making use of maximum available resources to realize economic and social rights. It is also necessary to take into account government borrowing and monetary policy and financial regulation (which can constrict or expand the available resources, as explained further below) (Balakrishnan et al. 2011; Elson et al. 2013).

This can be summarized as the five-point MAR Star (Balakrishnan et al. 2011; Elson et al. 2013): the extent to which a government is making use of “maximum available resources” (MAR) for the progressive realization of economic and social rights depends on:

- How it spends money
- How it raises revenue
- The development assistance it receives
- The extent to which it borrows – and how it invests the loans
- The type of monetary policy and financial regulation it operates

Below the implications of the components of the MAR Star for women's economic and social rights are discussed, drawing on Elson (2017a) and Balakrishnan et al. (2016).

Public Expenditure and Women's Economic and Social Rights

Discussion often begins with funding for programs specifically targeted to women (such as training or credit specifically for women). Such programs do not violate the principle of nondiscrimination, even if they exclude men, provided that the programs are “temporary special measures” aimed at overcoming past discrimination and achieving substantive equality. As indicated above, CEDAW specifically allows

such measures – Article 4.1. However, allocations for such programs are only ever a very small proportion of total government expenditure, so it is important to examine the rest of government expenditure from a gender equality point of view.

One way to do this (though by no means the only way) is to examine the distribution of expenditure between women and men (or girls and boys) in relation to particular rights. For example, a study of the distribution of educational expenditure in Timor-Leste in 2007 found that the share of boys was higher than of girls (Austen et al. 2013). The disparity was particularly pronounced in the case of rural girls at secondary education level. This reflects disparities in enrolment in school, not explicit discrimination against girls. The inequality in the distribution of expenditure is because families are not sending girls to school at the same rate as boys. Nevertheless, it signifies that the government is not fully meeting its obligation with respect to equality in the right to education. Article 10 of CEDAW requires that “States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education.” The state has a responsibility here because there are measures it is required to take under CEDAW to persuade and enable families to send girls to school at the same rate as boys. These measures can include providing scholarships for girls, providing separate school toilet facilities for girls and boys, and providing more women teachers. This could be funded by redistributing existing education funding, redistributing to the education sector from other sectors, and raising more revenue (for instance, in the case of Timor-Leste, from the recently discovered fossil fuel resources) and allocating it to implement the measures.

It is also important to examine whether a government is allocating adequate funding to ensure that women have access to minimum essential levels of economic and social rights. Access to water is an important example. The right to water was identified by UNCESCR as a right implied by ICESCR and was formally recognized as the human right to water during the 64th session of the UN General Assembly in a resolution adopted in July 2010. The Human Rights Council reaffirmed this decision with a resolution adopted by consensus on 30 September 2010.

However, many poor rural households in developing countries still lack access to clean piped water, and the women and girls in these households have to spend a lot of time collecting and purifying water for domestic use (Fontana and Elson 2014). Moreover, a disproportionate level of funding is still directed to extending services in urban areas. In addition, total international aid commitment to water and sanitation is only around 5% of all reported international aid (Fontana and Elson 2014).

A further issue is affordable access to clean water, identified as critical by United Nations special rapporteur on the human right to safe drinking water and sanitation (De Albuquerque 2012). Connection charges are often a significant barrier for those living in poverty. The special rapporteur notes that governments can apply subsidies or rebates to assist low-income populations who cannot afford to pay the full price for water services. One possibility is to make the subsidy universally available, as in South Africa, where the government makes a fixed basic amount of water available to all households regardless of status, while those who use more pay a rising tariff.

The evidence suggests that the expenditure being committed to provide clean water is too small and too badly distributed in many countries for the government to fulfill its human rights obligation to ensure all women enjoy a basic level of access to clean water. This could be remedied by a combination of measures, such as redistributing existing water expenditure to low-income rural areas, redistributing expenditure from other uses that are less important for achieving essential levels of economic and social rights, mobilizing more tax revenue in equitable ways and allocating this to investment in water, donors providing more aid for water, and borrowing to invest in clean water, which has multiple payoff in terms of improvements in health, better schooling outcomes for girls, and more time for women to engage in income-earning activities (Fontana and Elson 2014).

Financial crisis has often been followed by cuts to types of public expenditure that are important for realization of women's rights (Elson 2013). There is certainly a cause for concern that the deep cuts to expenditure on social security benefits and public services adopted in the UK since 2010 are retrogressive with respect to women's rights (Elson 2012). The measures are not temporary, and they reduce the incomes and access to public services of households comprising single women more than of household comprising single men and couples (Pearson and Elson 2015). Social security benefits for poor women have been particularly subject to cuts, as have services for migrant women and for black, Asian, and ethnic minority women (Lonergan 2015; Sandhu and Stephenson 2015).

The government that introduced these cuts argued that they were essential in order to reduce the budget deficit and government borrowing, but it made little use of tax increases to reduce the deficit via an increase in government revenue. In the UK fiscal consolidation since 2010 has comprised 82% expenditure cuts and 18% tax revenue increases (Institute for Fiscal Studies 2015, 10). Moreover, the main tax measure was an increase in value-added tax (VAT), which takes away more, in proportion to their income, from low-income than from high-income people. Income tax and corporation tax have been reduced.

Taxation and Women's Economic and Social Rights

The tax system is vitally important for the realization of women's economic and social rights. It must raise sufficient revenue and be designed and implemented in compliance with human rights principles; in particular, the tax system should comply with the principle of nondiscrimination and equality.

One useful indicator is the ratio of tax revenue to GDP. The average tax to GDP ratio in OECD countries rose from 30.1% in 1970 to 35.5% in 2000. In developing countries, the average tax ratio did not change very much, rising from 16.2% in the 1970s to 17.0% in 2000 (Bird 2010). It is easier to mobilize tax revenue in high-income countries, where the informal economy is a much smaller share than in low-income countries, but it is possible to improve tax effort in all countries. For example, in a number of sub-Saharan African countries, the amount of revenue collected has been enhanced through institutional reforms in the way that taxes are administered and collected, independent of changes in tax policy (OECD and ADB 2010).

However, the efforts of many governments to raise more revenue are frustrated by tax avoidance and evasion, facilitated by the government that set up tax havens and allow secret bank accounts to be set up. The amounts of revenue that are lost are substantial. For instance, estimates of the annual tax revenue lost to developing countries from transnational corporations amount to between USD 98 and 106 billion somewhat more than the USD 83.5 billion total overseas development assistance provided in 2009 by OECD countries (Balakrishnan et al. 2016, 62). As noted earlier, the CEDAW Committee has taken up this issue with respect to Switzerland. It would be good to see the committee take this up in Concluding Observations on the periodic reports of all countries that have created tax havens.

The share of tax revenue raised by different types of taxes varies with the level of national income (Barnett and Grown 2004, 12–13). In low-income countries, about two-thirds of tax revenue is raised through indirect taxes, including trade taxes (such as tariffs on imports), excise taxes (such as taxes on alcohol and cigarettes), and broad-based taxes on goods and services, such as general sales tax and VAT. In high-income countries, indirect taxes account for only about one-third of tax revenue. The other two-thirds is raised through direct taxes on incomes of individuals (or households) and businesses. In low-income countries, income tax accounts on average for just over a quarter of tax revenue, while in high-income countries, it accounts on average for over a third of tax revenue.

The text of CEDAW does not contain any explicit reference to taxation. However, it implies the principles of nondiscrimination, and substantive equality should be brought to bear upon taxation, as with any government measure. It implies that women must be treated as equal to men in tax laws, as individual, autonomous citizens, rather than as dependents of men. Moreover, the incentives/disincentives for particular kinds of behavior created by tax laws should promote substantive, and not merely formal, equality between women and men, including egalitarian family relations (Elson 2006, 77).

The case of personal income tax (PIT) provides a good example. When joint taxation is the rule, tax liability is assessed on the combined income of both partners, and they file a joint tax return. In these cases, the partner with the lower income (mostly women) might effectively pay more tax, than they would if they were taxed as separate individuals. This happens if aggregating the income of the two partners takes the joint income into a higher tax bracket than the bracket in which the lower earner would fall if filing as an individual. This would create a disincentive to women's participation in the labor market. Himmelweit (2002, 16) argues that separate taxation of each person in a couple (individual filing) "can be seen as a step towards gender equality in employment. [...] Separate taxation also improves women's bargaining power within their households; as women usually earn less than their husbands, wives will generally gain from being taxed at an individual, rather than a joint, rate."

Another problem is the structure of the exemptions and deductions that are a feature of most forms of PIT. Grown and Valodia (2010) provide an internationally comparative review of gender aspects of tax systems, covering Argentina, India,

Mexico, Ghana, Morocco, South Africa, Uganda, and the UK. The research uncovered implicit biases against women in the PIT systems in all the countries, mainly the result of the nature and structure of exemptions and deductions and the manner in which these relate to the distribution of employment and income. In many of the countries, for example, contributions to private pension funds attract generous tax exemptions or deductions, which benefit men more than women, because men's higher incomes, and higher likelihood of formal sector employment, mean that they are more likely to contribute to private pension funds.

Poor women, especially in developing countries, are likely to be outside the direct scope of personal income tax, since there is generally a minimum income below which there is no liability to pay income tax. However, all women are affected by broad-based indirect taxes like VAT, sales tax, and excise duties. These taxes are levied on amount consumed, irrespective of income, and are thus regressive in the sense that poorer people pay a larger share of their income in these taxes than do rich people. Insofar as women have lower incomes than men, they would tend to pay a higher share of their income than men on VAT and general sales taxes. This would not be true of many excise taxes because they are on goods like alcohol, tobacco, and petrol (gasoline) that tend to be consumed by men more than by women. The unequal gender impact of VAT on household incomes may be offset if tax revenue funds public services and social security for low-income women, as is the case in some countries, such as in Scandinavia.

Overseas Development Assistance and Women's Economic and Social Rights

Article 2.1 of the ICESCR refers to the duty of states to provide "international assistance and cooperation, especially economic and technical." Though overseas development assistance (ODA) can be an important source of revenue for governments, there are some potential problems as well. ODA takes the form of loans, as well as grants; interest has to be paid on loans, and the loan has eventually to be repaid. These payments of debt service and amortization of loans mean that not all of the ODA that flows into a country every year is a net addition to the resources available to the government. Even the net inflows can overstate the amount of new resources being made available, since debt relief is counted as part of the new ODA. However, debt forgiveness simply writes off debt; it does not make any new resources available.

In addition, the net value of ODA will be reduced if ODA is tied to purchases of imports from donor countries that cost more than goods and services available locally or on the international market. The proportion of bilateral aid that is formally untied has been rising; however, research has found that in most investment projects, the main contract and technical assistance is still procured from donor countries, so some of the ODA that has flowed into a recipient country almost immediately flows back out again to the donor (Clay et al. 2009). If governments are very

dependent on ODA as a proportion of their budget, they are vulnerable to the variability in aid flows, making hard to plan expenditures. In addition, much ODA is distributed more in accordance with the political interests of donor countries than the needs of recipient countries.

Of course, the impact of ODA on women's economic and social rights depends on how the additional resources are used. To steer the use of resources in what they believe is the right direction, some bilateral donors have increasingly promoted a rights-based approach to development, including the governments of the UK, Sweden, Switzerland, Canada, and Germany (Piron 2005). However, there are drawbacks to a rights-based approach to development, if it becomes another set of conditions that rich countries impose on poorer countries, without any reciprocal understanding of the obligations of rich countries. Some of the donor governments that press aid recipients to adopt a rights-based approach to development are themselves engaged in activities (such as the promotion of arms sales, the provision of tax havens, and the failure to adequately regulate banks) that may undermine the capability of recipient governments to fulfill their obligations. The best way to use ODA to build the capacity of recipient governments to fulfill their human rights obligations is to assist with the development of processes by which citizens and their elected representatives can participate in budget decision-making and implementation, track the use of funds and their impact, and hold governments to account.

Government Borrowing and Women's Economic and Social Rights

Borrowing makes more resources available to a government in the short run, but it creates a future charge on government budgets, as interest has to be paid on the loan and eventually it has to be repaid. In deciding whether borrowing contributes to or hinders the realization of women's rights, it is critical to consider whether the government is using the debt to finance the creation of assets that will both help in the realization of women's rights and generate future streams of revenue with which the debt can be serviced and repaid. Well-chosen, gender-equitable public investments in education, health, nutrition, care services, water and sanitation, clean energy, safe public transport, and good-quality housing can help to realize women's rights and can generate future revenues via raising women's productivity. It can also promote an increase in private investment, by women themselves, and by businesses attracted by a healthy, well-educated female work force. Enhanced productivity and investment support faster growth and higher incomes which, in turn, increase tax revenues and allow governments to pay back the initial loan.

However, some governments have failed to invest loans in that way and have left behind a large accumulation of debt that reduces the resources available to subsequent governments for the realization of human rights. The human rights system recognized this with the appointment of an independent expert tasked with developing guidelines to ensure that debt repayments do not undermine economic and social rights obligations. The Guiding Principles on Foreign Debt and Human Rights, endorsed by the Human Rights Council in 2012, include the concepts of

onerous, odious, and illegitimate debt as tools with which to analyze the implications of accumulated debt (HRC 2012).

Onerous debt generally refers to a situation in which the obligations attached to the debt – for example, debt servicing payments – significantly exceed the benefits which have been derived from taking on the debt. Odious and illegitimate debt refers to situations in which debt was incurred by a government and used in ways that do not contribute to realization of human rights. For example, borrowed funds were invested in ways that served only to enrich an elite who secreted their gains in overseas tax havens or were used to finance war or repression. Public debt audit commissions have been created in some countries, such as Greece, where previous governments have accumulated very high levels of debt to assess the legitimacy of a country's accumulated debt and consider if there is a case for repudiation (or forgiveness) of some of the debt.

Debt forgiveness, if granted, comes at a price: creditors demand policy changes as a condition of extending additional borrowing, typically cuts to public expenditure and increases in broad-based taxes such as VAT, in programs supervised by international financial institutions, such as the IMF and the World Bank. The Guiding Principles on Foreign Debt and Human Rights state that:

International financial organizations and private corporations have an obligation to respect international human rights. This implies a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights.

However, so far, there is little evidence of the recognition of these obligations.

Monetary Policy and Women's Economic and Social Rights

Expenditure, taxation, and borrowing are classified as fiscal policy and conducted by the Minister of Finance. Monetary policy, conducted by central banks, also matters, as it directly affects the resources available for the realization of women's economic and social rights. It does this by influencing interest rates, exchange rates, and the amount of credit available in the economy, which in turn influences investment, output, and employment. Thus, it has implications for the whole range of women's economic and social rights, most directly the right to work and the right to an adequate standard of living.

In most countries, central banks are quasi-independent institutions, free to make their own decisions on interest rates and exchange rates provided they meet objectives set by the government that appoints the governor of the central bank. Several central banks have a strict mandate under law to maintain the rate of inflation at a specified low rate, for example, the European Central Bank.

Many others have formally adopted a policy of "inflation-targeting." If a low rate of inflation is the only (or main) objective, there are likely to be higher interest rates than would otherwise be the case, as central banks raise interest rates to depress

demand, guided by neoclassical economic theory which considers inflation as primarily caused by excessive aggregate demand. The result is to keep unemployment higher than it otherwise would be.

However, inflation is not necessarily the result of a monetary policy which is too lax. In many countries, inflation is not a problem of excessive credit leading to too much demand but rather a problem of poor infrastructure, low productivity, and/or the monopoly power of some businesses which have sufficient market power to raise prices. Increasing prices in global markets for essential goods, such as food and energy, can also contribute to inflation through the cost of imports. Monetary policy could do more to mobilize resources in countries where there is high unemployment and underemployment if central banks had regard to job creation as well as to inflation. This is particularly important for women's right to work, as there is evidence that when central banks try to control inflation by raising interest rates, it has more adverse impact in developing countries on jobs for women than for men (Braunstein and Heintz 2011).

Participation, Transparency, and Accountability in Economic Policy

Both fiscal and monetary policy tend to be conducted by small groups of mainly male experts and politicians. Powerful corporations and rich people lobby, usually behind closed doors, for policies that are advantageous to them (Norton and Elson 2002). In some countries there is some scope for NGOs, independent research institutes, and parliamentarians to try influence policy in ways that will help to secure women's economic and social rights. For instance, the UK Women's Budget Group (WBG) publishes assessments of each UK government budget and spending review and calls for policies that have a positive impact on women's economic and social rights, circulating these assessments to ministers, parliamentarians, journalists, and other NGOs. These assessments helped to inform the shadow report to CEDAW made by a consortium of UK women's organizations.

The WBG also presses for greater transparency, calling upon the UK government to itself publish assessments of the impact of economic policies on women. Greater transparency in finance for gender equality is at the heart of efforts led by UN Women to track and measure public allocations for gender equality and women's empowerment, in the context of the Sustainable Development Goals. Women's organizations can press for greater transparency by lobbying their governments to comply with the requirements for reporting against SDG Indicator 5.c.1: "Proportion of countries to track and make public allocations for gender equality and women's empowerment" (Elson 2017b). Governments are to be asked to report whether allocations for gender equality and women's empowerment are made public in a timely and accessible manner through official government publications (such as a gender budget statement) and channels including ministry websites, official bulletins, and public notices.

Accountability can be promoted through a variety of processes, including parliamentary questions and hearings, reports of UN human rights special rapporteurs and independent experts, inputs into NGO shadow reports to human rights treaty bodies, publicity in the media, and engagement with electoral processes. There is no one process that is guaranteed to be effective in holding governments to account on whether their economic policies are in compliance with women's economic and social rights, so women's organizations must be ready to seize opportunities when they arise. An example is the thematic report to the UN General Assembly, 73rd session in 2018, being prepared by the independent expert on foreign debt and human rights which will focus on the impact of economic reforms and austerity measures on women's human rights. Women's organizations have been invited to submit evidence. The report will be debated in the UN General Assembly, and women's organizations will be able to publicize the findings as part of their efforts to hold governments to account for fulfilling women's economic and social rights.

Conclusion

Women's human rights include economic and social rights, and economic policies are key measures which can assist in realizing women's economic and social rights or undermining them. Although the texts on international human rights treaties do not specifically mention economic policy, treaty bodies and international jurists have clarified that economic policy comes within the scope of human rights obligations. From these clarifications, six key human rights principles can be identified against which economic policy can be judged. In particular, appropriate fiscal and monetary policy can assist government in making use of maximum available resources to secure the progressive realization on human rights and the immediate obligation to address women's unequal enjoyment of economic and social rights. It is clear that some kinds of economic policies are not in compliance with the human rights obligations of governments. Women's organization must seize opportunities to hold governments to account for their failures and press for policies that are in compliance with human rights.

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Sex Trafficking and International Law

Heather Smith-Cannoy

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Abstract

The main concern of this chapter is to show that by beginning with a criminal justice approach to sex trafficking, the international community has been decisively less focused on trafficking victims' human rights. Indeed, there are often moments during the criminal prosecution of traffickers that necessitate that victim's rights be trampled in the name of securing a conviction. In this way, victim protection and prosecution of traffickers can be at odds – forcing state authorities to pick one over the other. Further, when prominent reporting institutions use successful convictions as the metric by which success in the fight against trafficking is measured, victim protections are sacrificed. Section “Sex Trafficking and Modern International

H. Smith-Cannoy (✉)
Lewis & Clark College, Portland, USA
e-mail: hsmith@lclark.edu

Law: A Short History” reviews the development of modern international law on trafficking. Section “Trends” highlights global trafficking trends, and section “Data Collection Challenges” illustrates some ways in which current approaches to trafficking victims sacrifice their rights in order to convict traffickers. A version of this chapter originally appeared in *the Human Rights Review*.

Keywords

Sex trafficking · Palermo protocol · International law · Victims’ rights

Introduction

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) was adopted by the international community in 2000. Since that time, over 170 countries have signed on and a flurry of activity has surrounded the issue of human trafficking. National action plans have been implemented, new anti-trafficking legislation has been passed in virtually every corner of the globe and the large proportion of countries in the world are working to investigate, prosecute, and convict traffickers. Like pirates before them, under international law, traffickers today are best understood as *hostis humani generis*, the enemy of all mankind.

The main concern of this chapter is to show that by beginning with a criminal justice approach, the international community has been decisively less focused on trafficking victims’ human rights. Indeed, there are often moments during the criminal prosecution of traffickers that necessitate that victim’s rights be trampled in the name of securing a conviction. In this way, victim protection and prosecution of traffickers can be at odds – forcing state authorities to pick one over the other. Further, when prominent reporting institutions use successful convictions as the metric by which success in the fight against trafficking is measured, victim protections are sacrificed. Indeed, Kelley and Simmons (2015), based on their analysis of the effects of the US State Department’s Trafficking in Persons Reports, argue that the ability to disseminate numerical indicators constitutes an exercise in social power, critically shaping policy outputs by encouraging states that are monitored by the US State Department to pass anti-trafficking laws. This chapter buttresses their argument and extends it to suggest that one important policy output of this criminal justice focus on traffickers is a simultaneous sacrifice of the rights of trafficking victims.

The chapter proceeds as follows: the first section reviews the modern international law on trafficking. The second section highlights global sex trafficking trends by drawing on the most recently published global reports. In the third section, the political and empirical challenges associated with data collection on trafficking are reviewed. The final section illustrates some of the ways in which the criminal justice focus of international law has served to undercut the human rights of sex trafficking victims.

Sex Trafficking and Modern International Law: A Short History

Prior to the emergence of the Palermo Protocol, there were few treaties that directly confronted human sex trafficking. Allain describes three distinct eras of international law on human trafficking, beginning with the pre-League of Nations era, the League of Nations era, and the United Nations era (2017, 1). In the first of these eras, in 1904, the international community addressing human trafficking for the first time adopted the International Agreement for the Suppression of the White Slave Traffic (UNTC 1904). The treaty emerged out of a series of conferences in Europe in response to a scandal involving underage prostitutes working in London with the sanction of the government (Allain 2017, 3). As its name suggests, the treaty criminalized the trade in white women and girls for “immoral acts,” to the exclusion of trafficking victims of other races (Gallagher 2010, 76). In 1910, the second pre-League of Nations era treaty emerged (UNTC 1910), also focusing on the suppression of the white slave traffic, it criminalized trafficking through “fraud, violence, threats, abuse of authority, or any other method of compulsion, procured, [which] enticed or led away a woman or girl for immoral purposes” (Gallagher 2010, 14). The anti-trafficking treaties of this era are decisively focused on protecting white women and girls from sexual exploitation abroad.

During the League of Nations era two notable treaties emerged, which emphasized similar themes as those of the pre-League era – namely, protecting women and girls from sexual exploitation, although, as Gallagher explains, the treaties of this era jettisoned the overtly racist language used in the earlier treaties (Gallagher 2010, 14). In 1921, the newly-formed League of Nations adopted the International Convention for the Suppression of Trafficking in Women and Children (LON 1921). Article 2 highlights the potential for both female and male children to be victimized by traffickers, a slight departure from the prior focus on female children. In Article 4, the States Parties agree to extradite those accused of trafficking if requested by another state, even in the absence of existing extradition conventions between them. In 1933, the Convention for the Suppression of Traffic of Women of Full Age, adopted by the League of Nations (LON 1933), included as a punishable offense the attempt to traffic. As Gallagher (2010) explains, across all of the treaties in the pre-League and League of Nations eras the parties focused on criminalizing the process of trafficking victim recruitment, rather than on the outcome of that process (that is, being held forcibly against one’s will in a brothel) (14).

In the United Nations era, anti-trafficking treaties developed a slightly more nuanced approach to trafficking – focusing on criminalizing both the recruitment of victims and the outcome of that process. In 1949 the UN General Assembly passed the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (UN 1949). Like its predecessor, the 1949 treaty also criminalizes recruitment for the purpose of sexual exploitation (art 1) whether or not the victim has consented. Article 2 reveals new international attention to exploitation at the destination, rather than simple efforts to criminalize recruitment. In Article 2, the parties to the treaty agree to punish anyone who knowingly

rents a building to another for the purpose of prostitution and knowingly finances or manages a brothel.

In 2000, the General Assembly passed the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). Unlike its predecessors, the Palermo Protocol is not focused exclusively on the sexual exploitation of women and girls. Article 3(a) includes references to prohibiting trafficking for the purpose of labor exploitation, slavery, and organ removal. The Palermo Protocol departs significantly from previous treaties in encouraging States Parties to provide trafficking victims with housing, counseling, medical assistance, as well as employment and training opportunities (art 6), and an opportunity to remain in victim-receiving states, either on a temporary or permanent basis (art 7).

The Palermo Protocol, therefore, represents progress over earlier anti-trafficking treaties. It is progressive in its attention to both the prosecution of traffickers and protections for trafficking victims, as well as requiring development of national anti-trafficking legislation. Yet the two major data gathering entities, the United Nations Office on Drugs and Crime (UNODC) and the US State Department both focus most heavily on whether a country has passed national anti-trafficking legislation and whether that legislation is used to investigate, prosecute, and convict traffickers. When taken together the otherwise commendable efforts of these institutions to collect data on trafficking is reduced to a simple litmus test for countries striving to demonstrate that they are tough on traffickers, pass anti-trafficking legislation, and prosecute traffickers. Though the US State Department in particular also examines victim protection, the methods for supporting and assisting victims vary so dramatically, both within and between countries, that victim protection provides an inconvenient metric for comparison. This encourages treating the criminal prosecution of traffickers as the gold standard for evaluating efforts to combat trafficking.

Trends

Trafficking and Slavery

The overlap between issues of migration, smuggling, trafficking, and slavery presents challenges for both academics and activists. For example, is a woman who knowingly accepts a job in a foreign country as a prostitute an economic migrant? In many instances, the conditions surrounding her employment diverge dramatically from the terms of employment guaranteed to her at the outset. Does this deception make her a victim of human trafficking? Does it make her a modern slave? Migration decisions are complex – and the potential of migrants seeking economic opportunities to become slaves in foreign countries highlights the difficulties inherent in applying these labels. The US State Department defines trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery” (US State Department 2009).

This definition of trafficking focuses on deception and fraud and excludes those migrants who willingly accept the risks inherent in extra-legal migration in exchange for better employment opportunities. In this analysis, individuals who are either coercively or voluntarily transported within their own country or across state borders for the purpose of exploiting their labor are treated as trafficking victims.

An array of research highlights the widespread problems of modern slavery and links slavery directly with human trafficking (Bales 2004, 2007; Cameron and Newman 2008; Scarpa 2008; Parrot and Cummings 2008; Bales and Soodalter 2009). Bales (2004) identifies an important distinction between antiquated versions of slavery and the modern variant. Earlier forms of slavery engendered legal ownership of another person recognized by the government (Bales 2004, 5). Modern slaves are not legally owned. Governments no longer permit one individual to claim ownership over another. However, slaveholders use violence to control slaves and Bales contends that the lack of government oversight benefits slaveholders because they are not legally responsible for their “property.”

Modern slaves – be they Albanian women sold into prostitution in Italy, children working in the agricultural industry as bonded laborers in India, or Burmese women working in Thai brothels – are all subject to brutality and violence, forced to work, and paid little to nothing for their servitude. Many scholars have sought to expand the definition of slavery to include forced domination and exploitation (Hathaway 2008; Bales 2004; Quirk 2007). There is, however, considerable debate about whether trafficking victims should be considered slaves. Grounding her analysis in a review of international law, Gallagher (2009) argues that the 1926 definition of slavery adopted by the League of Nations Slavery Convention emphasized legal ownership. In subsequent efforts to develop anti-slavery treaties, she argues states consciously resisted expanding the definition of slavery beyond legal ownership (Gallagher 2009, 799–809). The implication for the modern debate is that while trafficking victims are controlled and exploited, they are not legally owned and therefore are not slaves. In a relatively short period of time, this debate about whether trafficking victims should be understood to be slaves has gravitated to near a consensus.

Many scholars writing on human trafficking appear comfortable using the language trafficking victim and slave interchangeably (Jakobsson and Kotsadam 2011; Hernandez and Rudolph 2015; Kara 2011). States, however, are notoriously slow and conservative in adapting their practices and generally reluctant to create treaties that diminish their sovereignty. Yet the slavery label for trafficking victims is appropriate for modern practices possessing all the hallmarks of slavery (short of legal ownership). A process that begins with subtle or violent coercion and ends with passports and travel documents being withheld from victims who are forced to work to repay traffickers for grossly inflated travel fees cannot be considered voluntary labor migration. Coercive employment through violence and without remuneration cannot be placed among other, legitimate forms of labor. Even where victims understand the nature of the work that lies ahead, many choose their fate because they lack any other economic opportunities and are forced into undesirable work by a weak labor market. Although extant international law does not equate trafficking

victims with slaves – the mechanisms of control and exploitation come so close to conditions of chattel slavery that the two conditions should share the same moniker.

The Geography and Scope of Global Sex Trafficking

This subsection focuses on trafficking for the purposes of sexual exploitation. The key to identifying sex trafficking is to consider the process whereby a victim is recruited through fraud, deception, or perhaps force and promised a legitimate or well-paying job, either in their own country or abroad. Once the victim is transported to a particular location to begin “work,” they are enslaved; their identity documents are taken away, or they are compelled to repay an exorbitant debt for “travel expenses.” The victim’s freedom of movement is often curtailed by keeping them in a hotel or locked apartment under threat that their family may be harmed if they do not cooperate. This approach to sex trafficking is consistent with the definition of trafficking in the Palermo Protocol, which defines it as:

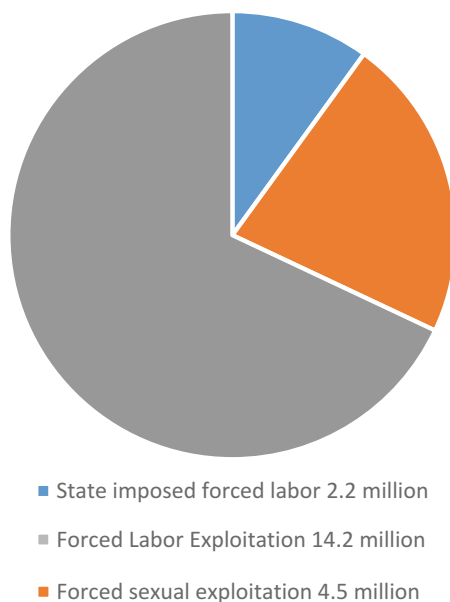
- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article. (UN 2000, art 3)

It is notable that neither a lack of victim consent nor transportation across national borders are essential features of sex trafficking according to this definition. Victim consent is irrelevant here because giving one’s consent to what one is told is a legitimate job, only to have that “job” become something else entirely renders the act of voicing consent in that circumstance irrelevant. Once a person is rendered powerless by traffickers, having given initial consent does not alter their status as a trafficking victim. In the last 10 years, as better data has been collected on sex trafficking, it has become apparent that a large proportion of victims are trafficked domestically and intra-regionally, weakening previously held assumptions that sex trafficking victims are most often trafficked across international borders (ILO 2012; UNODC 2016).

In the following paragraphs, the most recent data available on global trafficking is discussed, on the understanding that data on a black market economy like trafficking are problematic for a variety of reasons. In 2012, the International Labour Organization (ILO) estimated that 20.9 million people were victims of forced labor globally (ILO 2012, 13). This is a large increase from the ILO's estimate in 2008 putting the number of forced laborers at 12.3 million people globally (ILO 2009, 3). This number includes victims who are compelled to work by private actors in economic activities such as agricultural work, construction, domestic work, or those forced by private actors to engage in sex work or to work by their government in prisons, for example. Ninety percent – 18.7 million people of the 20.9 million forced laborers – are exploited in the private economy. Of these 18.7 million, 68% work in economic activities like agriculture and construction (ILO 2012, 13). Another 22% of the total population of forced laborers – 4.5 million people – engage in sex work (ILO 2012, 1). The last 10% are compelled to work by their governments in prisons or are conscripted into the military (ILO 2012, 13). ILO statistics also suggest that women and girls make up a disproportionate share of those trafficked for commercial sex, approximately 98% (ILO 2012, 15). While authoritative, the ILO numbers are by no means settled as the most accurate (Fig. 1).

In 2009, 2014, and 2016 the United Nations Office on Drugs and Crime published their Global Report on Trafficking in Persons, the most recent of which covers 136 countries. The reports synthesize data collected from countries around the world on the number of people detected across three categories of

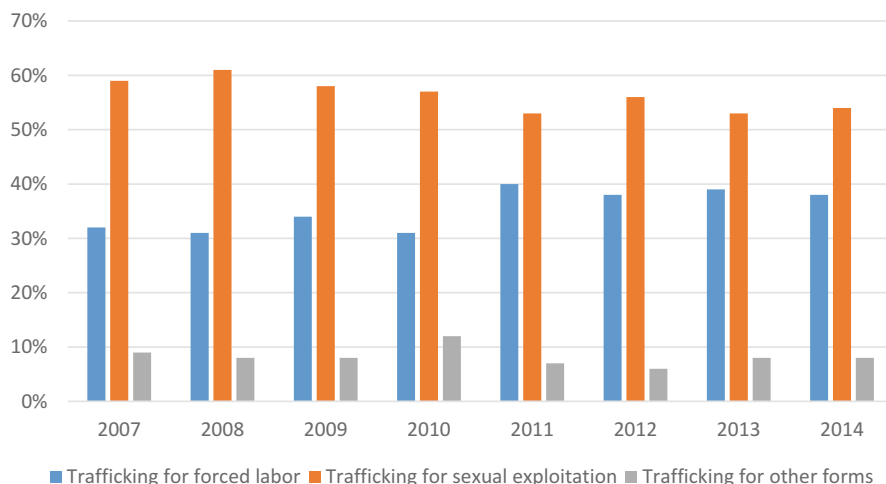
Fig. 1 ILO global estimates by form of forced labor: 2002–2011 (Source: ILO 2012)



Source: ILO 2012.

trafficking – trafficking for forced labor, trafficking for sexual exploitation, and trafficking for other forms of exploitation. The latter category includes trafficking for organ removal, forced begging, sham marriages, and pornography production. UNODC’s data goes back to 2007 and reveals some interesting trafficking trends that challenge the data contained in the ILO’s most recent report. According to UNODC, between 2007 and 2014, the share of victims reportedly trafficked for sexual exploitation as compared to the two other categories did not change dramatically (UNODC 2016, 6). As a share of the total number of trafficking victims, those trafficked for sexual exploitation during these years comprised between 53% and 61% of all reported trafficking victims (UNODC 2016, 6). The UNODC report suggests that as a share of all trafficking victims, the proportion of victims trafficked for sexual exploitation is shrinking, while the share of those trafficked for forced labor is growing (UNODC 2016, 28). Recall that the ILO’s data suggest that trafficking for forced labor, rather than sexual exploitation, is the more common form of trafficking in the world (Fig. 2).

Whether one accepts the ILO’s interpretation that trafficking for forced labor is the most common form of trafficking or UNODC’s view that trafficking for sexual exploitation is the most common form of trafficking, both sets of data suggest that women and children comprise the largest share of trafficking victims. The ILO also suggests that among all three categories of forced labor, women and girls represent the greatest share of victims – 11.4 million or 55% of total forced labor victims (ILO 2012, 14). Within the category of trafficking for sexual exploitation, among adult victims, women make up 98% of the total share of reported trafficking victims (ILO 2012, 14).



Source: UNODC 2016, 6.

Fig. 2 UNODC’s trends in the forms of exploitation among detected trafficking victims: 2007–2014 (Source: UNODC 2016, 6)

The 2016 UNODC Trafficking Report suggests that 70% of all detected trafficking victims are women and children (UNODC 2016, 23). Yet even as women make up the overwhelming majority of detected trafficking victims, as a proportion their numbers have been decreasing over time. In 2005, women made up 84% of all detected trafficking victims, compared to 71% in 2014 (UNODC 2016, 23). As the proportion of female trafficking victims has decreased slightly over time, we have seen a proximate rise in the proportion of male trafficking victims. Between 2012 and 2014, one in five reported trafficking victims was male (UNODC 2016, 23). The vast majority of these cases of male trafficking victims (85.7%) were trafficked for forced labor, while just 6.8% were trafficked for sexual exploitation (UNODC 2016, 25). Among all female trafficking victims, 72% were trafficked for sexual exploitation (UNODC 2016, 28). The bottom line is that women are typically trafficked for sexual exploitation while men are typically trafficked for labor exploitation. While adult women are trafficked more than any other group and the proportion of male victims is rising over time, children remain the second most commonly detected group of trafficking victims (UNODC 2016, 25).

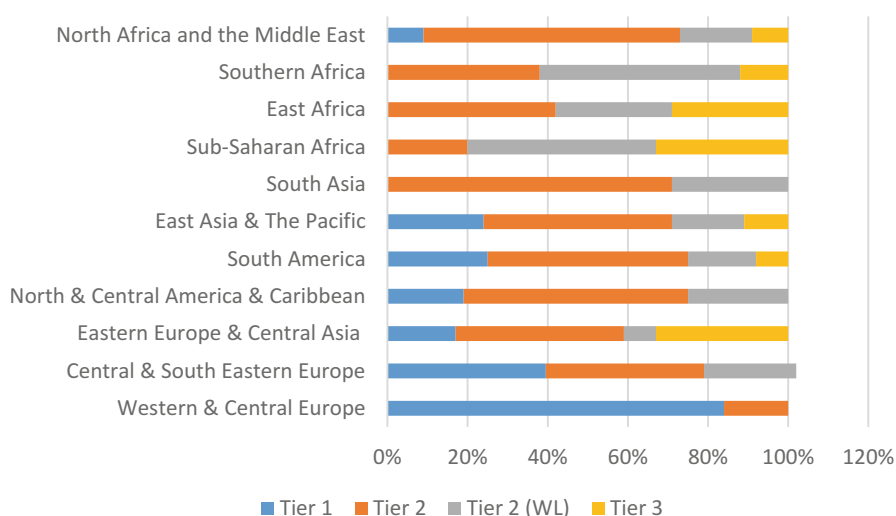
These global statistics mask important regional differences in trafficking patterns and trends. For example, in North Africa and the Middle East 34% of all detected trafficking victims were male, while in Eastern Europe and Central Asia 53% of all victims are male (UNODC 2016, 24). Yet in sub-Saharan Africa, the overwhelming majority of trafficking victims (64%) are children (UNODC 2016, 26). The Central African Republic has a severe child trafficking problem with an estimated 6000–10,000 boys recruited by armed groups, while girls are trafficked for forced marriage, domestic servitude, and sexual exploitation (US State Department 2017, 122). In sub-Saharan Africa, 39% of all detected trafficking victims are boys. While in East Asia and the Pacific, women make up the largest share of victims and sexual exploitation is the most common form of trafficking in this region (UNODC 2016, 102).

Recent research has made great strides in shedding light on the causes of human trafficking by separating out “push factors” – those factors that push victims away from countries of origin and “pull factors” – those factors that pull victims to new destinations (Cho 2015). Push factors for trafficking tend to mirror push factors for migration – poor countries, for example, generate more trafficking victims because victims tend to be more inclined to leave in search of better economic opportunities (Cho 2015, 7). Transitional economy status also serves as a push factor for trafficking victims because insecure economic conditions make it difficult to find reliable employment, sending people elsewhere for work (Cho 2015; Akee et al. 2010). A high rate of migration between two countries also tends to increase human trafficking between them (Akee et al. 2014). Another cause of trafficking identified in the literature is what Cho (2015) refers to as the “crime pillar” explanation of trafficking. This can mean the pre-existence of organized crime syndicates, corruption in government, low levels of prosecution for trafficking offenses, etc. In such contexts, existing transnational organized crime syndicates in a particular country, which were once focused on selling drugs or arms, often transition into selling people (Shelley 2011). Cho’s study suggests that both high crime rates and corruption have an important role to play to explaining underlying causes of trafficking.

Some of the conventional wisdom surrounding the causes of human trafficking does not pan out in empirical studies. In particular, it has often been assumed that gender inequality in a particular country could serve as a trafficking push factor, making women more inclined to seek opportunities elsewhere (Bettio and Nandi 2010). Yet in Cho's seminal analysis (2015), gender inequality was not a significant predictor of trafficking flows. Rather, she finds, when a country's GDP is heavily dependent on food, beverage, and tobacco industries, it tends to have lower levels of trafficking (Cho 2015). Cho (2015) interprets this to mean that people are disinclined to seek out opportunities elsewhere when there is an abundance of low-skilled work, dampening trafficking possibilities. A final set of variables that scholars point to as explanations for trafficking includes the rule of law, level of corruption (Cho et al. 2013), and strength of anti-trafficking legislation (Cho and Vadlamannati 2012). In theory, a weak rule of law, high levels of corruption, and weak anti-trafficking legislation should increase the likelihood of trafficking. Cho (2015) finds that high levels of corruption and weak trafficking legislation serve as significant push factors. Cho et al. (2013) find that countries with legalized prostitution experience a "higher reported incidence of trafficking inflows" than countries without legalized prostitution, suggesting that legalization expands the demand for prostitutes and traffickers step in to fill the demand (Cho et al. 2013, 71).

Bales also helps to explain how we arrive at this point, where so many millions of people are bought and sold. He suggests "the enslaved fieldworker who cost the equivalent of \$40,000 in 1850 costs less than \$100 today" (2007, 12). This "glut" as Bales calls it, in the global supply of slaves, means that there is an abundance of potential slaves in the world. The fact that trafficked sex slaves are the single most profitable type of slave, costing on average \$1895 each but generating \$29,210 annually, leads to stark predictions about the likely growth in commercial sex slavery in the future (Kara 2009, 19). When we include reduced transportation costs arising from globalization, it becomes easier to understand why transnational sex slavery is growing.

Growth in human sex trafficking, the emergence of the Palermo Protocol, and the US Trafficking in Persons Reports (TIP) have sparked sharp increases in both the number of countries adopting domestic legislation to punish traffickers and the number of trafficking prosecutions. Between 2003 and 2016, the number of countries that criminalized trafficking increased from just 33 in 2003 to 158 in August of 2016 (UNODC 2016, 48). Figure 3 below graphs the 2017 US State Department's TIP tier placements. Tier 1 countries are those that make sustained efforts to pass anti-trafficking laws and assist victims. Tier 2 countries do not fully comply with the US Trafficking Victim Protection Act 2000 (TVPA), meaning that they may be major origin, transit, or destination countries for trafficking or that the government is passing inadequate laws to curb trafficking. The Tier 2 Watch List signifies that a country is in danger of dropping to Tier 3 due to a dramatic increase in the number of trafficking victims, failure to provide evidence of government efforts to prevent trafficking, or the country has promised to take steps to improve in the following year. A government listed on Tier 3 is not complying and is not attempting to comply with the US TVPA. Higher tier placements mean that governments are passing laws to suppress trafficking while lower tier positions signify less effort to address human trafficking.

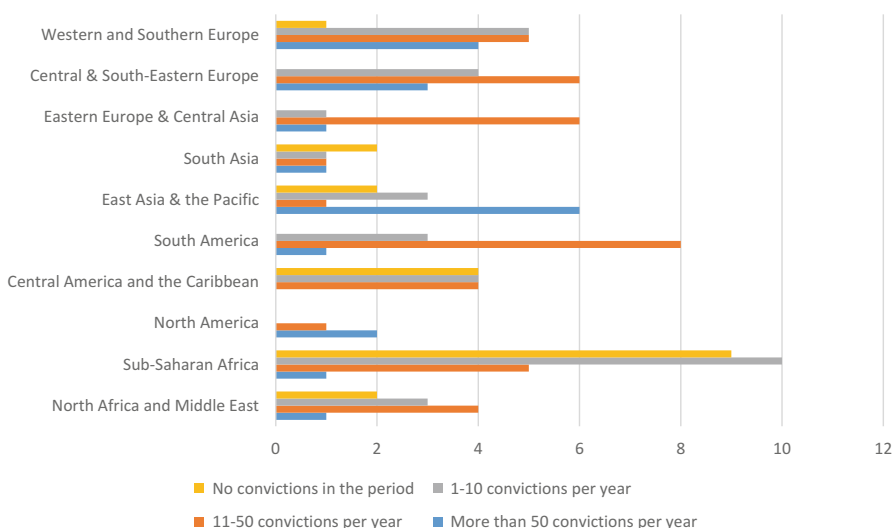


Source: US State Department. 2017. *Trafficking in Persons Report*.

Fig. 3 Tier placements by region: 2017 (Source: US State Department. 2017. *Trafficking in Persons Report*)

Figure 3 implies that in their most recent assessment of government compliance with the US TVPA, most countries are not fully complying, and thus fall into the Tier 2 category. Throughout Africa most countries are in Tier 2 – making efforts but failing to fully comply with the US TVPA. Southern Africa, East Africa, Sub-Saharan, and South Asia look similar in that a high proportion of countries in these regions are on the Tier 2 watch list. The largest concentration of countries in full compliance with the US TVPA is in Western and Central Europe.

Passage of anti-trafficking laws signals, at the very least, lip service, if not initial government commitment, to the importance of preventing human trafficking. Yet, the more significant indicator of progress to prevent trafficking is the extent to which these laws are used to prosecute and convict traffickers. The most recent UNODC report makes clear that there is a significant lag time between the passage of national anti-trafficking legislation and an uptick in the rate of national trafficking convictions (UNODC 2016, 50–53). For example, in countries that had anti-trafficking legislation in place before 2003 had, on average, 29 trafficking convictions in 2014 (UNODC 2016, 51). But for countries that introduced anti-trafficking legislation more recently, between 2003 and 2008, on average they had approximately 18 trafficking convictions per year. And for those countries that introduced anti-trafficking legislation after 2012, they reported zero trafficking convictions (UNODC 2016, 52). This suggests that there is a learning curve associated with investigating, prosecuting, and successfully convicting traffickers. When governments have had anti-trafficking laws in place for longer periods of time, they tend to get more accustomed to using these tools and successfully convict traffickers at higher rates.



Source: UNODC 2016, 52.

Fig. 4 Number of countries reporting trafficking convictions, by region and number of convictions, 2012–2014. (Source: UNODC 2016, 52.)

Figure 4 plots the regional rate of trafficking convictions by number of convictions illustrating an important relationship between Tier placements (Fig. 3) and conviction rates (Fig. 4). Sub-Saharan Africa has the highest concentration of countries on the Tier 2 watch list, meaning that they are not fully complying with the US TVPA, may have experienced a great increase in trafficking flows and/or are not working to aggressively combat trafficking. A high proportion of countries in this region have either not convicted a single trafficker between 2012 and 2014 (nine countries) or have convicted between one and ten traffickers during this period (10 countries). In contrast, the overwhelming majority of countries in Western Europe and Southern Europe are in Tier 1, and a majority of these countries have successfully convicted traffickers at high rates between 2012 and 2014.

Data Collection Challenges

Scholars, activists, and researchers have all lamented the challenges inherent in studying human trafficking (Guinn 2008; Brennan 2005; Laczko and Gramegna 2003; Tyldum and Brunovskis 2005). Striking political and empirical challenges to uncovering information arise in conducting trafficking research. These are discussed below.

Political Challenges

Human sex trafficking involves some of the most intimate and discomfiting human behaviors and victims may be unable or unwilling to report abuse to the police.

Governments in turn may feel cultural pressure to withhold the extent of the practice within and across their borders. Even where governments have sought to collect data, they often run up against limited capacity. Finally, since the passage of the US TVPA mandated that the State Department assess foreign governments' efforts to prevent trafficking, governments that receive aid from the US have a particularly acute need to demonstrate that they are tough on trafficking. In short, governments have incentives to underreport incidences of sex trafficking, potentially limited resources to collect data, and strong motivations to exaggerate their efforts to curb it.

There are a variety of reasons that a government might intentionally underreport sex trafficking within and across their borders. First, governments might not have accurate statistics because victims are unable or unwilling to come forward. Prevailing cultural attitudes can assign blame to victims implying that victims should have known better or are responsible for their enslavement, undermining the likelihood that incidences of trafficking will be reported (Buckley 2009). A powerful motivation inhibiting government reporting may derive from a state's share of GDP acquired through sex tourism. Between 1993 and 1995, the ILO estimated that between 2–14% of the Indonesian, Philippine, Malaysian, and Thai GDPs were earned through sex tourism (ILO 1998). With such a large share of national income earned through the sex industry, government officials will have greater incentives to overlook sex trafficking. Finally, government officials may personally benefit from permitting sex trafficking. In both India and Italy, law enforcement authorities patronized trafficking victims and collected bribes from pimps and madams in procedures so regular that they could be factored into the monthly operating costs of brothels (Kara 2009).

Even where governments endeavor to collect accurate data, they may be hampered by a lack of capacity and resources (Laczko and Gramegna 2003). Governments lacking the resources to provide public goods for their citizens are also likely to be countries of origin of human trafficking victims. Put simply, poor countries, from which victims are most likely to originate, are also least able to collect accurate data. There is perhaps no better example of this phenomenon than the dearth of data on Africa. We know comparatively little about trafficking routes within and from Africa yet, we know that Nigerians make up a large proportion of sex slaves in Italy and that they have been found in brothels as far away as Thailand (Carling 2005).

Though the US TVPA has been an important new tool in the global fight against human trafficking, it also generates perverse incentives for states. Tier placement in the annual Trafficking in Persons Report is dependent upon 11 criteria including how vigorously a state investigates and prosecutes traffickers, protects identified victims, shares trafficking data, punishes public officials accused of trafficking, educates the public about prevention, monitors itself, and improves upon these efforts from the previous year. Tier placement can be a serious issue for states that rely on the USA for economic and military assistance. If a country is placed on the third or lowest tier, the USA can withhold all aid and apply sanctions. For countries that show no improvement or whose numbers signal a significant trafficking problem domestically, the US TVPA incentivizes them to pass anti-trafficking laws and underreport the severity of trafficking.

Passing anti-trafficking laws is an important first step, but meaningful change requires that those laws are also vigorously enforced and that the numbers reported reflect reality. With the US government watching, demanding that something be done about trafficking and conditioning aid on consistent annual improvement, governments have powerful incentives to overstate the extent to which they are investigating and punishing traffickers and to understate the extent of the problem.

Empirical Challenges

These political challenges are one aspect of a broader data collection problem. Under the best circumstances, where cooperative governments collect data sincerely, fundamental empirical challenges can still undermine the accuracy of the data collected. Examining black market economies, like arms and narcotics trafficking or corruption, necessitates a reliance on secondary indicators. Because we cannot ever know the true amount of corruption in any given government with certainty, studies of government corruption employ the Transparency International Index, which measures *public perception* of corruption. Similarly, studies on human trafficking typically rely on prosecution and investigation rates to gauge the severity of human sex trafficking – again secondary and therefore imperfect indicators. The particular danger in relying on prosecution rate is that these rates are notoriously low and do not come close to approximating the scope of the problem in most countries. Moreover, the individuals examined in trafficking studies – traffickers, prostitutes, and trafficking victims are what Tyldum and Brunovskis (2005) refer to as “hidden populations.” A hidden population is a group of people for whom researchers do not know the size or boundaries of the group.

The Limitations of International Law

A critical weakness of current international law stems from the nature of transnational sex trafficking. The previous section identified the range of difficulties associated with obtaining accurate statistics – politicized incentives to underreport and empirical challenges owing to the intimate nature of the behavior studied. It is this second challenge, however, the truly intimate nature of sex trafficking, that makes international law such a blunt tool. The Palermo Protocol, for example, takes prosecution of traffickers as its focus, which Scarpa attributes to the preferences of governments and conflicts between NGOs during treaty negotiations (2008, 62–69). Rather than create strong specific obligations for states to assist victims or address the factors contributing to the prevalence of transnational sex trafficking, the protocol primarily obliges states to criminalize trafficking. Although Articles 6–8 of the treaty are devoted to protecting victims, these have been interpreted to be primarily discretionary rather than mandatory (Scarpa 2008, 65). In this way the treaty focuses on the observable elements of the behavior – namely, criminal prosecutions of traffickers. While prosecution and convictions remain a necessary element in an

international law approach to combating sex trafficking, protection and assistance for victims as well as attention to factors contributing to their plight should also be addressed (for a discussion on this point, see Dinan 2008, 74).

Nearly two decades after the passage of the Palermo Protocol and the US Trafficking Victims Protection Act 2000, it is important to ask what has been sacrificed by focusing on the criminal prosecution of traffickers as the gold standard by which the international community evaluates efforts to combat trafficking. As governments face intense pressure to not only pass anti-trafficking legislation but to also show that they are prosecuting and convicting traffickers, what has become of trafficking victims' rights? This chapter argues that while there are a variety of ways that this criminal justice focus has trampled the human rights of trafficking victims, three violations are of paramount concern: (1) the psychological toll of forcing victims to cooperate with authorities to prosecute traffickers, (2) the specter of deportation for foreign trafficking victims, and (3) the potential for re-victimization during the process of testifying.

In many countries, in order for trafficking victims to access services, benefits, and immigration relief they must cooperate fully with authorities in the prosecution of traffickers. At first glance, this might seem like a low threshold to access services. If a victim has been trafficked and enslaved against her will, what would inhibit her from cooperating with authorities? Trafficking research on Nigerian women and girls trafficked for sex slavery to Italy provides some answers (Aghatise 2004; Kara 2009). When Nigerian trafficking victims arrive in Italy, they are often immediately saddled with a €50,000 debt to repay the cost of their travel and "expenses." The women are motivated to repay the debt through a combination of fear that their families in Nigeria will be harmed and through a ritual voodoo oath, often performed by a village elder before they depart for Italy (Aghatise 2004, 1130). In this way, the traffickers engage the victim's religious beliefs and community back home to obtain her total obedience, which casts Italian authorities seeking to her help as the villains. If her religious beliefs and family's safety are both dependent upon her cooperation with traffickers, then the Italian authorities seeking to investigate and prosecute traffickers constitute direct threats to the victim. Further, if she testifies against traffickers and returns home, there is a very real possibility that she will be rejected by her family. Forcing trafficking victims to cooperate with authorities in exchange for benefits can put victims in an exceptionally challenging position, undermining their rights and safety.

An additional problem with the criminal justice focus on trafficking is that even in some of the more progressive countries, which have passed anti-trafficking legislation and enforce it thoroughly, when foreign victims refuse to testify they may be deported because the process of obtaining the special trafficking visas is so burdensome. For foreign trafficking victims to remain in the United States beyond the duration of their trafficker's trial, they must apply for the T visa, obtain a "certificate of severe trafficking," participate in the trafficker's prosecution, and demonstrate "extreme hardship involving unusual and severe harm upon removal" (US Congress (2000). As Rieger suggests, the "severe" standard means that foreign victims who are coerced or defrauded into sex slavery do not meet the statutory meaning of "severe." Only victims who have been kidnapped satisfy this requirement (2007,

248–249). In addition, demonstrating the hardship that would result from removal from the United States is similarly so difficult and burdensome that many trafficking victims have simply opted to apply for asylum outside the T visa process (Reiger 2007, 252–253).

Finally, though there are many additional ways in which a focus on convicting traffickers can undermine victims' rights, the prospect of re-victimization while providing testimony is also significant. As discussed above, women and girls are statistically most likely to be sex trafficking victims. Further, asking victims who have experienced severe sexual trauma to recount those experiences or risk being sent back to a dangerous situation at home is likely to re-traumatize them (Reiger 2007). Even if victims are able and willing to testify, questions have been raised about their ability to accurately recall the types of details needed during trial owing to the extreme trauma of the events (Hussein et al. 2005). What this means is that growing conviction rates are being obtained on the backs of already victimized women and girls – sacrificing their psychological well-being in exchange for higher rankings on TIP reports.

Conclusion

In recent years, there has been considerable global progress in the fight against human sex trafficking. A dramatic increase in the number of countries that have adopted anti-trafficking legislation in recent years and a proximate rise in the trafficking conviction rates provide good reason to believe that the international community is well on the path to finding effective ways to combat trafficking. And yet it is important to pause and ask what this global focus on anti-trafficking laws and conviction rates has not accomplished. This chapter contends that institutions responsible for monitoring the situation such as UNODC and the US State Department have yet to develop clear benchmarks in trafficking victim protection. Until these monitoring institutions treat victim protection in the same way they measure, monitor, and track criminal prosecution of traffickers, a system that routinely sacrifices the rights of trafficking victims in the name of prosecutions will become entrenched.

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Part VI

Human Rights, Gender, Culture, and Religion



International Law and Child Marriage

Ruth Gaffney-Rhys

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Abstract

This chapter examines the causes and consequences of child marriage and considers the practice from an international law perspective. It explores the international legal instruments that have an impact on child marriage and identifies the human rights that are breached when a child is required to wed. The chapter concludes that, in relation to child marriage, international law is not as clear as it could be and that the international community needs to adopt a more consistent approach to the issue. However, the role that international law plays in the campaign against child marriage should not be underestimated.

R. Gaffney-Rhys (✉)
University of South Wales, Pontypridd, Wales, UK
e-mail: ruth.gaffney-rhys@southwales.ac.uk

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Child marriage · International law · Human rights · Female · Discrimination

Introduction

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has defined child marriage as one “in which at least one of the parties is a child” (2014, 3), which according to the UN Convention on the Rights of the Child 1989 (CRC) is a person “below the age of eighteen years unless . . . majority is attained earlier” (Art. 1). The international community opposes child marriage because it is a harmful practice that violates human rights and is “linked to and perpetuate(s) other harmful practices and human rights violations” (UNGA 2016). This chapter examines the international legal instruments that have an impact on child marriage and identifies the human rights that are breached when a child is required to wed. It concludes by evaluating the approach taken by the international community to the issue of child marriage.

Context

Child marriage is a practice that predominantly affects females: 15 million girls marry before the age of 18 every year, which is approximately 1 girl every 2 s (Girls Not Brides 2014). If nothing is done to tackle the problem, almost 950 million women will have been married as children by 2030 (UNICEF 2016a). Although the rate of child marriage has declined in the last 30 years (OHCHR 2014, 7) due to the efforts of the international community, national governments, and charitable organizations, if progress continues at its present rate, the proportion of child marriages will fall, but the number of women married as children will remain the same due to population growth (Girls Not Brides 2014).

Child marriages exist in all parts of the world: they are prevalent in sub-Saharan Africa and Southern Asia but also take place in other parts of Africa and Asia, the Middle East, Latin America, and the Caribbean (UNICEF 2016a). The practice is also known to occur in Europe, not only among immigrants from countries where child marriage is common but also among other marginalized ethnic groups, for example, the Roma community in Serbia (Hotchkiss et al. 2016). Niger has the highest rate of child marriage with 76% of girls married before the age of 18. This is followed by the Central African Republic and Chad, where 68% of girls are wed before their eighteenth birthday (UNICEF 2016a). These countries also have a high rate of marriage among girls under the age of 15. In CAR and Chad, 29% of girls are married before their fifteenth birthday, while in Niger, 28% of girls are married under the age of 15 (UNICEF 2016a). In absolute numbers, India has the most child brides, followed by Bangladesh and Nigeria (Girls Not Brides 2014). It is thus evident that child marriage is most common in developing countries.

Causes of Child Marriage

According to Girls Not Brides, the global partnership to end child marriage, factors that cause child marriage include poverty, lack of education, gender discrimination, cultural and religious traditions, and concerns regarding security and the protection of girls (2016). Poverty is one of the root causes of child marriage. An impoverished family may regard a young girl as an economic burden; securing her marriage therefore enables the family to transfer the economic responsibility for her to others. The economic pressure to organize an early marriage is heightened if children are orphaned and left in the care of other relatives (Jenson and Thornton 2003) or if there is an emergency or natural disaster (Plan UK 2017). If the bride's family is required to pay a dowry, it is financially advantageous to organize a wedding earlier rather than later, as the younger the bride, the lower the dowry (OHCHR 2014, 7). In certain African countries, the family may receive a sum of money or goods as the bride price (or dower) for their daughter (UNICEF 2001, 6), and Levine et al. suggest that this can motivate poor families to arrange for their daughters to be married at a young age (2008, 43). Parents may also arrange for their daughter to marry a foreign national in return for financial security; child marriage can therefore be a form of trafficking (OHCHR 2014, 7). In light of the above, it is not surprising that marrying off a young girl has been described as a "strategy for economic survival" (UNICEF 2001, 1). However, it should be noted that wealthy families also practice child marriage in order to preserve their wealth (OHCHR 2014, 7).

Girls from the poorest families are least likely to be educated, and a lack of education is a factor that contributes to child marriage. Girls who have not been schooled to primary level are more likely to be married prior to their eighteenth birthday than girls who have received a primary education. Furthermore, girls who do not attend primary school are three times more likely to be married as children than girls with some secondary education (UNFPA 2012). Low levels of education and high levels of poverty are common in rural areas, and the practice of child marriage predominantly occurs in such environments (UNFPA 2012). In addition to this, traditional attitudes toward women and marriage, which also contribute to child marriage, are more deeply rooted in rural areas. Levine et al. explain that communities that practice child marriage define a woman's standing in terms of marriage and child bearing (2008). As a girl is destined to become a wife and mother, her family may see no reason to delay marriage. Indeed, early marriage is regarded as desirable because of the high value placed on a girl's virginity in traditional societies (UNICEF 2005). A female will thus be married at a young age to ensure that she is a virgin when she marries and to guarantee that she does not become pregnant before marriage, which would bring shame on the family. As a result of these factors, child marriage is viewed as "an acceptable cultural practice" in the communities within which it occurs (OHCHR 2014, 8). Added to this, personal religious laws may sanction child marriage, for example, the Sharia law contains no specific minimum age for marriage, and those subject to it may be exempt from civil laws that prohibit child marriage, such as Muslims in India and Nigeria.

In conflict-torn areas, for example, Uganda, parents have been known to allow their daughters to marry members of the militia in order to secure protection for the family (Jenson and Thornton 2003), or they may organize a marriage for their young daughters so that their husbands can protect them from sexual violence (Schlecht et al. 2013). Even in times of peace, child marriage is regarded as a means of protecting girls from sexual assault and the shame that this brings on the family (OHCHR 2014, 8). In fact, national legislation sometimes facilitates this, for example, Article 475 of the Moroccan Penal Code provides that a kidnapper or “seducer” of a minor girl may be acquitted of rape if he marries her. Similarly, Bangladesh recently enacted the Child Marriage Restraint Act 2017, which stipulates that marrying a child is not a criminal offence if it is in the girl’s interests and if her parents and the magistrate consent. Marriage is considered beneficial to a girl if she is the victim of rape or other sexual assaults, because the stigma attached to the girl is reduced. An assailant will thus be encouraged to marry his victim in order to escape punishment.

The practice of marrying children at a young age, often in contravention of national legislation, is enabled by the fact that many jurisdictions do not have a reliable system for registering births and marriages. According to UNICEF only 45% of births that take place in the least developed countries are registered (2016a). As the Innocenti Research Centre points out, “without a birth certificate, a child has no defence against age-related rights abuses” such as child marriage (UNICEF 2005, 15). Similarly, many countries with a high incidence of child marriage do not require marriages to be registered (e.g., customary marriages) or do not have a reliable registration system. This makes it easier for a family to marry off a child who has not reached the minimum age for marriage. If improvements are made to the birth and marriage registration system, the number of child marriages should decline.

Consequences of Child Marriage

There are various harmful consequences of child marriage, which explain why the practice is opposed by the international community. First, young girls are required to enter into a sexual relationship, which can be physically and psychologically damaging. They are likely to become pregnant at a young age, due to the pressure to demonstrate fertility and the fact that child brides are less likely to have access to contraception (UNFPA 2012). This is perturbing as complications in pregnancy are the leading cause of death among girls aged 15–19 (UNFPA 2012). The most common medical problem associated with young motherhood is obstetric fistula, which is caused by obstructed labor (Cook et al. 2004). The latter occurs because the girl’s pelvis is relatively small as she is not fully developed (and may also suffer from malnutrition). According to FORWARD, 50,000–100,000 women are affected by the condition every year, which involves perforations inside the vagina, bladder, or rectum causing urine and feces to leak uncontrollably (2014). Obstetric fistula is preventable and treatable and extremely rare in Western jurisdictions, even where

there are high levels of teenage pregnancy. This particular problem associated with child marriage could therefore be alleviated by improvements in medical care.

Early motherhood is also problematic because it can affect a girl's fertility, and children born to adolescents are more likely to die than infants born to older mothers. UNFPA reports that stillbirths and deaths during the first 7 days of life are 50% higher if the mother is an adolescent than if the mother is in her twenties (2012). In addition, research demonstrates that the children of adolescent mothers may suffer developmental problems (Yu et al. 2016). Of course, infant mortality and developmental issues are affected by living conditions and access to medical attention. Again, such problems associated with young marriage can be ameliorated by addressing other issues.

Entering into an unprotected sexual relationship can also affect a young bride's health due to the risk of contracting HIV, which is enhanced because their husbands are often several years older than they are and have had various sexual partners (UNFPA 2012). However, Bhattacharya's research suggests that HIV is a serious risk for all brides, as 75% of people living with HIV or AIDS in India are married (2004). Delaying the marriage of females will not therefore eliminate the problem if the men that they marry engage in unprotected sexual intercourse prior to marriage, but older brides do have greater access to protection (UNFPA 2012). Young brides, particularly those forced into marriage, are also known to suffer from depression, which has led to self-harm and suicide (CEDAW/CRC 2014, 6).

Research undertaken by UNICEF in 16 sub-Saharan jurisdictions revealed that the husbands of 15–19-year-old girls were on average 10 years older than their wives (2001). Bunting explains that this disparity occurs because girls are destined to be wives and are therefore deemed ready for marriage at an earlier age than men who need to complete their education or training and should be financially secure (2005). On the positive side, older husbands are often in a better position to provide for their wives and children (Westoff 2003). But on the negative side, the age difference (combined with the disparity that exists in terms of education) creates a power imbalance between spouses. As a consequence, a young wife is more likely to be beaten or threatened by her husband than an older woman is, and she is more likely to believe that such behavior is justifiable (UNFPA 2012). If the age difference between the spouses is significant, the wife is more likely to be widowed. A widow may lack the ability to financially support herself and her children, and there is evidence that widows are poorly treated in certain societies (UNFPA 2011). In some countries early marriage also regularly leads to early divorce (Tilson and Larsen 2000), and like widows, divorced women are sometimes ostracized and poorly treated in their communities.

Child marriage generally curtails a girl's education (UNICEF 2016a), which is potentially harmful because she may then lack awareness of basic reproductive health issues and because of the power imbalance that exists between the spouses. As Girls Not Brides point out, terminating girls' education also ends their opportunity to acquire "decision making roles in their communities" and to gain "better paid work outside the home" (2016). A child bride with little or no education is therefore likely to remain poor. Her children, in particular, her daughters, may not receive an

adequate education and are therefore susceptible to being married at a young age. The cycle is thus perpetuated.

Often, the role of the child bride is to serve her husband, and as a result, the Special Rapporteur on contemporary forms of slavery has declared that child marriage is a form of servile marriage, which constitutes slavery (Shahinian 2012). The position of a child wife is made even worse if the marriage is polygamous, which is common in some areas that practice child marriage. For example, UNICEF found that 40% of girls in Haiti who were married before the age of 18 are in a polygamous union (UNICEF 2005). This is because polygamy drives down the age of marriage in the communities that practice it (Heinrich 2010). The international community is generally opposed to polygamy because it violates a woman's dignity and her right to equality with men (CEDAW 1994). The violation of female dignity is particularly acute if a bride is young; as Mikhail explains, girls who are married into a polygamous union find that their principal role is to serve the other wives (2002).

The discussion above has demonstrated that girls can suffer significant harm if they are required to marry. Indeed, child marriage constitutes a violation of human rights, which will be considered in the following section of this chapter.

International Law Relating to Child Marriage

The earliest legal instruments adopted by the international community did not contain an express prohibition against child marriage, but several provided “men and women” with a right to marry, which indicates that marriage is regarded as an adult relationship. For example, Article 16(1) of the Universal Declaration of Human Rights 1948 (UDHR) states that “men and women of full age” have the right to marry, while Article 23(2) of the International Covenant on Civil and Political Rights 1966 (ICCPR), which implements the UDHR, grants the right to marry to “men and women of marriageable age.” On a regional level, Article 17(2) of the American Convention on Human Rights 1969 (ACHR) and Article 12 of the European Convention on Human Rights 1950 (ECHR) also confer a right to marry on “men and women of marriageable age.” The fact that the words “men and women” were utilized, rather than “males and females,” implies that the drafters intended to prevent child marriages. This has been confirmed by subsequent resolutions which aim to prohibit child marriage, for example, the UN General Assembly Resolution on International Day of the Girl Child (2012); UN Human Rights Council Resolution on Strengthening Efforts to Prevent and Eliminate Child, Early and Forced Marriage (2015); UN General Assembly Resolution on Child, Early and Forced Marriage (2016); and the Council of Europe Parliamentary Assembly Resolution on Forced Marriages and Child Marriages (2005).

The Arab Charter on Human Rights 2004 (Arab Charter) and the Charter of Fundamental Rights of the European Union 2007 (EU Charter) were adopted several decades after the instruments referred to above. The Arab Charter contains similar provisions with Article 33 stipulating that “men and women of marrying age have

the right to marry.” But interestingly, Article 9 of the EU Charter guarantees a right to marry but makes no reference to men and women. Article 12 of the ECHR, on which Article 9 of the EU Charter is based, was modernized and “neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex” (Official Journal of the EU 2007). It is thus designed to avoid the assertion that marriage must be heterosexual and should not be construed as permitting child marriage. Indeed, the EU’s commitment to child protection is evident in Article 24 of the Charter, which sets out the rights of the child and Directive 2011/92/EU which tackles sexual abuse and the sexual exploitation of children.

Consent to Marriage and the Right to Respect for Private and Family Life

Most human rights instruments not only provide a right to marry but also make it clear that marriage must be entered into with the free and full consent of both parties. Key provisions in this respect are Article 16(2) of the UDHR; Article 10(1) of the International Covenant on Social, Economic and Cultural Rights 1966 (ICESCR); Article 23(3) of the ICCPR; Article 1 of the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962 (Convention on Consent to Marriage); Article 16(1)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW); Article 17(3) of the ACHR; and Article 33 of the Arab Charter. All of the latter provisions require the parties to a marriage to provide free consent and in most cases full consent to the Union. However, the ECHR and EU Charter do not, although the articles providing a “right” to marry imply that the relationship should be consensual.

The provisions that require the parties to a marriage to give free and full consent are violated in most instances of child marriage. As Banda indicates, the age for marriage is generally lower than the age of legal majority in the jurisdictions where it occurs: the girl “will have little if any say in the choice of marriage partner and not having a legal veto cannot refuse to comply with the wishes of a parent or guardian” (2008, 64). Indeed, Erulkar and Muthengi’s study of rural Ethiopia found that 85% of married girls had not consented to the union and that younger brides were less likely to have provided consent than older girls (2009). The Human Rights Committee, which monitors the implementation of the ICCPR, emphasizes the link between marriageable age and the need for marriage to be consensual. General Comment 28 states that the minimum age for marriage should enable the individual “to make an informed and uncoerced decision” (1990, para 23).

The committees that uphold CEDAW and the CRC also recognize the nexus between child and forced marriage; they assert that “a child marriage is considered as a form of forced marriage given one or both parties have not expressed their full, free and informed consent” (CEDAW/CRC 2014, 7). The Special Rapporteur on Contemporary Forms of Slavery agrees that “a child cannot provide informed consent to marriage. The marriage is therefore considered forced” (Shahinian 2012, 5). However, the joint CEDAW/CRC comment recognizes that a mature, capable child who

has reached the age of 16 may have the capacity to consent (CEDAW/CRC 2014). Even if she does, she may lack the freedom to make her own decisions, as Banda acknowledges (2008). Child marriage and forced marriage are therefore inextricably linked and need to be tackled simultaneously. This approach is being adopted by the United Nations; in 2004 the OHCHR issued a report entitled *Preventing and Eliminating Child, Early and Forced Marriage*, which was followed by a UN General Assembly Resolution on Child, Early and Forced Marriage in 2016.

The fact that most instances of child marriage are forced marriages means that the right to respect for private and family life contained in Article 8 of the ECHR, Article 17 of the ICCPR, Article 16 of the CRC, and Article 10 of the African Charter on the Rights and Welfare of the Child (ACRWC), arguably, is violated. This is because the right to respect for private life is underpinned by the right to make autonomous decisions, which children forced into marriage are denied. They are also removed from their natal family and thus deprived of family life with parents and siblings. Although the right to respect for private and family life requires the state to refrain from interfering in family matters, it also involves positive obligations to protect individuals, particularly children (ECHR 2011). The state's failure to set an appropriate minimum age for marriage or to enforce legislation that establishes an appropriate age for marriage arguably constitutes interference.

Explicit Provisions on Child Marriage

The only global instrument that contains an express prohibition against child marriage is CEDAW, Article 16(2), which categorically declares that “the betrothal and the marriage of a child shall have no legal effect.” A child is not defined, and as a result, it is unclear which marriages are actually forbidden by the Convention. Article 16 (2) proceeds to stipulate that “all necessary action, including legislation, shall be taken to specify a minimum age for marriage” which replicates Article 2 of the Convention on Consent to Marriage. Neither convention prescribes nor suggests an appropriate minimum age for marriage, although in 1965, the UN General Assembly recommended that it “should not be less than fifteen.” This built on the UN General Assembly's earlier resolution (1951) which urged all states to eliminate “completely child marriages and the betrothal of young girls before the age of puberty” (Art. 1).

Given that CEDAW was adopted after the General Assembly Recommendation, it can be argued that the former implicitly confirms the latter. Indeed, it is highly unlikely that the UN intended to prohibit the marriage of any person under the age of 18 when it adopted CEDAW, given that many jurisdictions that ratified it, including the UK and Canada, permit such marriages to take place (e.g., where the parents of a 16- or 17-year old consent). Furthermore, the fourth draft of the Women's Convention prohibited “child marriage and the betrothal of young girls before puberty,” which replicated the 1951 resolution and demonstrated that the primary focus was the prevention of *very* early marriage (Rehof 2000). But since then, the UN has adopted the CRC (1989), which defines a child as a person below the age of 18 unless majority is attained earlier and suggests that Article 6(2) of CEDAW should be interpreted to prohibit the marriage of a

person under the age of 18. Indeed, in 1994 the CEDAW Committee called for the minimum age for marriage to be 18 and made reference to the definition of a child contained in the CRC. However, in 2014 the Joint Recommendation made by CEDAW and the Committee on the Rights of the Child called for the minimum age for marriage without parental consent to be 18 but allowed exceptions to this provided that they are strictly defined by law; the absolute minimum age is not below 16; the child provides full, free, and informed consent; and a court of law approves the marriage (CEDAW/CRC 2014, 7, 14). According to the Committees, this “is a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life” (CEDAW/CRC 2014, 7), but UNICEF suggests that this “cautious evolution in the Committees’ approach to child marriage may be explained by pragmatism in the light of the sometimes difficult situations in which adolescents find themselves” (2016b, 17). More recently, the UN General Assembly Resolution on Child, Early and Forced marriage (2016) defined child marriage as one entered into before reaching 18 years of age and made reference to the CEDAW Convention. The extent of the prohibition contained in Article 16(2) of CEDAW is thus unclear, and this lack of clarity may undermine international efforts to delay marriage until a girl has reached 18.

Specific measures have also been adopted by the South Asian Association for Regional Cooperation (SAARC). Article VII (6) of the SAARC Social Charter 2004 obligates state parties to undertake steps to eliminate child and early marriage, but, like CEDAW, it does not actually define a child marriage. Nonetheless, SAARC member states participated in the Kathmandu Call for Action to End Child Marriage in South Asia 2014, which requires the legal minimum age of marriage to be set at 18. In addition, the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002) defines a child as a person under 18 (Art. I(1)) and declares that child marriage is a form of trafficking (Art. I(5)) which is prohibited by the Convention (Art. III). Given that this Convention was adopted prior to the Social Charter, it is suggested that the Social Charter implicitly prohibits the marriage of persons under the age of 18.

In contrast to the above, the instruments adopted by the African Union are more explicit and unambiguous. Article 21 of the African Charter on the Rights and Welfare of the Child requires state parties to enact legislation specifying 18 as the minimum age for marriage, while Article 7(b) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003) (hereinafter: Protocol to the African Charter) states that “the minimum age of marriage for men and women shall be 18 years.” The law in several African jurisdictions violates the provisions of the charters, for example, the minimum age for marriage in Niger, the country with the highest rate of child marriage, is 15 for girls, while in CAR the age for marriage is 18, but the marriage of a girl aged 13 can be approved by a court or the girl’s parents (Girls Not Brides 2016). On a more positive note, steps have been taken recently to bring national law in line with African international law. In June 2015, legislation was enacted specifying 18 as the minimum age for marriage in Chad, which currently has the second highest rate of child marriage. Similarly, the Marriage, Divorce, and Family Relations Act 2015 provided that the minimum age for marriage in Malawi should be 18. This was initially ineffective, as the

Constitution permitted the marriage of children; however, in February 2017 the Malawi Constitution was amended, and child marriage is now prohibited. This demonstrates the positive effect that international law can have on national law, but as noted earlier, national legislation is not always enforced.

Child Marriage as a Form of Unlawful Discrimination

Child marriage is “recognised as a form of gender-based discrimination” and “is perpetuated by entrenched adverse customs and traditional attitudes that discriminate against women or place women in subordinate roles to men, or by women’s stereotyped roles in society” (OHCHR 2014, 7). These deep-rooted attitudes are, in some jurisdictions, reinforced by national legislation, which permits girls to marry at a younger age than boys. For example, in Afghanistan, females can marry at the age of 16, whereas males must wait until they are 18. As explained above, in CAR 18 is the marriageable age for men and women, but an exemption exists for females. Banda points out that states attempt to justify the discrepancy in age for marriage on the basis that “girls mature faster than boys” (2008, 64). However, Banda contends that allowing girls to marry at an earlier age “reinforces ideas about their availability” and thus puts them at risk (2008, 65). UNICEF concurs that a lower age for marriage for females “conveys an official recognition that girls can legitimately be ‘sexualised’ earlier than boys and therefore contributes to feeding prejudices in relation to girls’ ownership of their lives” (2016b, 19).

Discriminatory provisions regarding the age for marriage violate the international human rights instruments that provide for equality, for example, Article 16(1) of the UDHR, but, in particular, those that expressly require equality within marriage, notably, Article 16(1) of CEDAW, Article 6 of the Protocol to the African Charter, and Article 23(4) of the ICCPR. The Human Rights Committee, which enforces the ICCPR, has stressed that the minimum age for marriage needs to be the same for men and women (2000). The Committee on the Rights of the Child has also criticized the law in several jurisdictions (e.g., Seychelles) for allowing girls to marry at a younger age than boys (CRC 2012).

Child Marriage as a Form of Slavery or Torture

All international human rights instruments prohibit slavery, for example, Article 8 of the ICCPR, Article 5 of the African Charter on Human and People’s Rights (African Charter), and Article 10 of the Arab Charter. These provisions are violated when a child is required to wed because child marriage is regarded as a form of, or practice similar to, slavery. The first instrument to make this connection was the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1957 (the Supplementary Convention) which requires States Parties to abolish certain practices associated with child

marriage. For example, Article 1(c) stipulates that contracting states shall take all measures to bring about “the complete abolition of any institution or practice whereby a woman without the right to refuse is promised or given in marriage in payment of consideration in money or in kind to her parents, guardian, family or other person or group.” As indicated earlier, the payment of bride price is a common feature of child marriage. Article 1(d) outlaws any institution or practice whereby a person under the age of 18 years is delivered by parents or guardians “to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.” This provision is violated if a girl is forced to marry, as she will be required to enter into a sexual relationship.

The nexus between child marriage and slavery is further evidenced by the fact that Article 2 requires State Parties to specify “suitable minimum ages of marriage” and “to encourage the use of facilities whereby the consent of both parties may be freely expressed in the presence of a competent civil or religious authority” in order to eradicate the practice referred to in Article 1(c). More recently, the Special Rapporteur on Contemporary Forms of Slavery has expressly declared child marriage to be a form of slavery. The Thematic Report on Servile Marriage states that “a child cannot provide informed consent to marriage. The marriage is therefore considered forced and falls under the slavery-like practices defined in the Convention” (Shahinian 2012, 5). The Special Rapporteur further suggests that “the idea that forced and early marriage are forms of slavery and therefore servile marriage, has been lost” (2012, 4) and that “reaffirming forced and early marriages as slavery-like practices is important as it provides an understanding of the violations that victims endure and the kind of interventions required to prevent, monitor and prosecute servile marriage” (2012, 6). The OHCHR agrees that “women and girls in situations of child and forced marriage may experience conditions inside a marriage which meet ‘institutional legal definitions of slavery and slavery-like practice’ including ‘servile marriage, sexual slavery, child servitude, child trafficking and forced labour’” (2014, 9). It is thus clear that child marriage breaches the general human rights instruments that prohibit slavery and the Supplementary Convention.

Like slavery, all general human rights instruments prohibit torture, cruel, degrading, or inhuman treatment, for example, Article 3 of the ECHR, Article 37 of the CRC, and Article 3(a) of the SAARC Convention on the Regional Arrangements for the Promotion of Child Welfare 2005. In addition, specific instruments have been adopted, such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and the Inter-American Convention to Prevent and Punish Torture 1985. The Committee against Torture considers child marriage to be a form of cruel, inhuman, or degrading treatment (CAT 2011). This is not surprising given that young girls are forced to enter into a sexual relationship (often with a much older man), endure unwanted pregnancies (and the consequences thereof), and are often the victims of domestic violence.

Child Abuse, Exploitation, and Trafficking

Child marriage is clearly a form of child abuse and child exploitation, both of which are outlawed by many human rights instruments, for example, Articles 19 and 34 of the CRC, Articles 16 and 27 of the ACRWC, Article IV(3)(a) of the SAARC Convention on Child Welfare, and Article VII(3) of the SAARC Social Charter. Each of these instruments also prohibits the sale and trafficking of children, as does the Arab Charter (Art. 10). More detailed provisions can be found in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000, the Council of Europe Convention on Action against Trafficking in Human Beings 2005, the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, and Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims. The preamble to the Directive recognizes forced marriage as a form of trafficking (para 11), as does the CEDAW Committee (1992). As most child marriages are forced, the majority of child marriages constitute trafficking. The SAARC Convention is more explicit, as Article 1(5) declares child marriage to be a form of trafficking. The Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography has also confirmed that child marriage may violate Article 35 of the CRC (which prohibits the sale and trafficking of children) and the Optional Protocol on the Sale of Children (UNGA 2012). A bride price may be paid when a child marries or a child may be given in marriage to a foreign national in return for financial security: these practices clearly amount to selling or trafficking children.

When the victim of child marriage is female (as most are), similar provisions contained in the women's human rights instruments are breached. For example, Article 3(4) of the Protocol to the African Charter requires State Parties to protect "every woman's right to respect for her dignity" and ensure "protection from all forms of violence, particularly sexual and verbal violence." Article 4 goes on to prohibit all forms of exploitation of women, including "un-wanted or forced sex" (Art. 4(2) (a)), while Article 6 of CEDAW requires states to suppress all forms of trafficking in women. It should be noted that specific instruments have been adopted to tackle violence against women such as the Inter-American Convention on the Eradication of Violence against Women 1994 and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011.

Harmful Practices and the Right to Health

Harmful practices are "persistent practices and behaviours that are grounded in discrimination on the basis of sex, gender, age and other grounds as well as multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering" (CEDAW/CRC 2012, 6). They are prohibited by Article 24 of the CRC and Article 5 of the Protocol to the African

Charter. None of these instruments specifically refer to child marriage as a harmful practice, but the UN General Assembly (Resolution 66/140), the CEDAW Committee, and the Committee on the Rights of the Child (2014) have declared this to be the case, which is unsurprising given the negative consequences of child marriage discussed earlier. Target 5.3 of the UN Sustainable Development Goals also refers to child marriage as a harmful practice.

The African Charter on the Rights and Welfare of the Child (ACRWC) is more explicit than other instruments as Article 21, which provides protection against harmful social and cultural practices, and expressly refers to child marriage. Both Article 21 of the ACRWC and Article 24 of the CRC make the link between harmful practices and the child's right to health. The latter is also contained in general human rights instruments such as the ICESCR (Art. 12) and the African Charter (Art. 16). As explained earlier, child marriage has many adverse physical and psychological health consequences, and in extreme cases, the child bride and/or her child may die. In such cases, the right to life, contained in all general human rights instruments, including Article 3 of the UDHR and Article 6 of the ICCPR, is breached.

The Right to Education

A right to education is provided by several international instruments such as the ICSECR (Art. 13), the CRC (Art. 28(1)), the African Charter (Art. 17), and the Arab Charter (Art. 41). UNICEF indicates that “child marriage represents a significant cause for school dropout” and therefore contributes to violating the child's right to education contained in the instruments above. UNICEF further points out that curtailing children's education has “significant implications for children's and especially girls' lives. It impairs their chances to earn a living independently, making them financially dependent on their spouse” (2016b, 15). As indicated earlier in this chapter, depriving a girl of education causes additional problems arising from the imbalance of power between a husband and wife and an inability to access health information and services, which contributes to the violation of other human rights, including the right to health.

The Requirement to Register Births and Marriages

Establishing a reliable system for registering births and marriages is a prerequisite for the enforcement of national laws on marriageable age. In fact, it is an obligation under several international conventions. For example, Article 7(1) of the CRC and Article 24(2) of the ICCPR state that every child should be registered immediately after birth. According to UNICEF nearly 230 million children under the age of 5 have not been registered: half of them live in Asia and one third of them live in India, where child marriage is prevalent (2013).

Article 2 of the Supplementary Convention was the first instrument to tackle the issue of marriage registration, but it merely “encourages” contracting parties to

register all marriages. Article 3 of the Convention on Consent to Marriage goes further as it stipulates that “all marriages shall be registered in an appropriate official register by a competent authority.” A similar obligation is contained in Article 21(2) of the African Charter on the Rights and Welfare of the Child, and Article 3(d) of the SAARC Convention on Child Welfare makes the civil registration of *births and marriages* compulsory “in order to facilitate the enforcement of national laws including the minimum age for marriage.” Unlike other instruments which deal with birth and marriage registration separately, the SAARC Convention unifies these requirements, which emphasizes the positive contribution that compulsory birth *and* marriage registration will make in reducing child marriage.

Toward a Minimum Age for Marriage

As discussed in this chapter, an inconsistent approach to child marriage has been adopted by the international community. The only global instrument that expressly forbid child marriage is CEDAW, but it does not provide a definition of a child or child marriage. The CRC defines a child as a person under the age of 18 but does not expressly prohibit child marriage and does not require State Parties to specify 18 as the minimum age for marriage. UN bodies consider a child marriage to be one involving a person under the age of 18; however the CEDAW and CRC committees have recently declared that the marriage of 16- and 17-year olds is permissible in exceptional cases. The fact that child marriage is not clearly and unequivocally addressed by international law might help to explain why some countries have not outlawed it. For example, the minimum age for marriage in Niger is 15, which complies with the UN General Assembly Recommendation and does not, on its own, violate any global human rights instrument, although the consequences of it do. Although Nigerian law does not technically breach any of the global human rights instruments, it does violate the African Charters, which require contracting states to specify 18 as the minimum age for marriage. Niger has signed, but not ratified, the Protocol to the African Charter. However, it has ratified the African Charter on the Rights and Welfare of the Child (ACRWC). Niger’s Periodic Report on the implementation of the African Charter unapologetically states that “the age of marriage for girls is lower than the matrimonial age contained in the CRC” (para 352). The drafters seem to have misunderstood Niger’s international obligations, as child marriage is not mentioned in the CRC: it merely defines a child as a person under the age of 18. In contrast, the ACRWC obligates state parties to specify 18 as a minimum age for marriage, but no reference is made to this instrument in Niger’s report. This suggests that international law is not as clear as it could be regarding child marriage and that a more consistent global approach is required. The African Alliance for Reproductive Health Rights argues that “an international standard for the minimum age for marriage” should be the starting point in the campaign against child marriage (IPAS 2006, 29). UNICEF agrees that “one

of the primary ways of preventing child marriage and promoting equity is to set a universal age for marriage” (2016b, 16). Given the explicit provisions contained in the African Charters, it is logical to set the universal minimum age for marriage at 18, but the international community would have to decide whether to allow the marriage of 16- and 17-year olds in exceptional cases as the CEDAW and CRC committees suggest. Doing so would arguably attract greater international support but may undermine efforts to delay marriage and prevent the harmful consequences thereof.

Establishing a universal minimum age for marriage cannot itself eliminate child marriage but would send a clear message that the practice is unacceptable and may prompt national legislative reform. The UNICEF Innocenti Research Centre has stressed that national “legislation on its own may have only a limited impact” (2001, 18). Stark agrees that “the use of law . . . is in no way sufficient” but asserts that “this does not mean that legal reform should not be sought” (2005, 25), for as Jenson and Thornton point out, “such laws signal the importance of the issue” (2003, 17). Unfortunately, this signal does not always reach the communities that it needs to, for as Bunting explains, the minimum age for marriage “may be virtually unknown by the majority of the population” (2005, 27). Lack of publicity is thus a problem but not an insurmountable one; indeed, awareness raising has been the focus of many programs designed to eliminate child marriage. In addition, national legislation that sets an appropriate minimum age for marriage needs to be coupled with a system to ensure that birth and marriage registration are compulsory, as these are prerequisites to the enforcement of a minimum age for marriage. Furthermore, legislation prohibiting forced marriage and discrimination on the ground of sex and age are required in order to “strike out the root causes of child marriage” (De Silva De-Alwis 2007, 6).

Conclusion

This chapter demonstrates that the practice of child marriage breaches a wide range of global and regional international law instruments. States that have neglected to set an appropriate minimum age for marriage or failed to establish a system for registering births and marriages are in direct contravention of their international obligations if they have ratified the instruments that require such measures. They are also responsible for the human rights violations that children forced into marriage suffer, because there is “a positive duty on the part of the contracting states to protect their inhabitants in a range of cases. . . . [including where] the state is not the primary violator of rights (i.e., it is not the state that beats, rapes, enslaves etc.) but rather the state has inadequate structures in place to prevent these kinds of abuse” (ECHR 2011, 4).

In terms of child marriage, the state has failed to protect the child from slavery, torture, inhuman treatment, sexual exploitation, etc., by neglecting to enforce the minimum age for marriage or by failing to establish one in the first place. According to de Silva de Alwis, “locating child marriage as a human rights

violation helps to raise it as a grave public concern rather than a private matter between families” (2007, 6). This in turn serves to justify the creation and funding of the numerous international programs aimed at delaying marriage, which have proved effective (Malhotra et al. 2011; UNICEF/HM Government 2015). Such projects, which have been extensively examined in the literature pertaining to child marriage, tend to focus on educating children, their families, and communities, improving economic opportunities for girls and providing financial incentives to delay marriage (Levine et al. 2008; Malhotra et al. 2011). If child marriage does not constitute a human rights violation, programs aimed at delaying marriage could be considered an imposition of Western values regarding marriage on non-Western societies (Gaffney-Rhys 2011).

As de Silva de Alwis also points out, labelling child marriage as a human rights violation helps to ensure that states are held accountable for failing to address the issue (2007, 6). If the treaty establishes a body to monitor compliance or hear complaints, a State Party that has failed to comply with its treaty obligations will have some sort of public statement made against it. The adverse publicity and political pressure that follows can induce a change of attitude on the part of the national government. According to Shelton, international enforcement bodies tend to “see their primary role as forward-looking, that is, as bringing the state into compliance with its obligations” (2015, 2). For example, in 2009 the Concluding Observations of the Committee on the Rights of the Child urged Malawi to enact legislation to prevent child marriage, and it has since done so.

Nonetheless, it is conceded that the enactment of national legislation that tackles these issues, even if well publicized, is insufficient to combat child marriage. First, the law needs to be properly enforced; several countries with a high incidence of child marriage have enacted legislation to prohibit it, but the law is not adequately enforced. For example, in Ethiopia, the minimum age for marriage is 18, but 41% of girls are married prior to their eighteenth birthday (UNICEF 2016a). Secondly, as Bunting argues, “the socio-economic conditions in which girls, adolescents and young women live and marry need to be examined and addressed” in order to reduce the number of child marriages (2005, 18). As noted above, poverty and lack of education are two of the main causes of child marriage, which, if addressed, will reduce its incidence. Equally, ending child marriage will contribute significantly to the battle against poverty, improving global health, the reduction of infant and maternal mortality, and enhancing the education of girls. It therefore contributes to the post-2015 Development Agenda and will help to achieve several of the UN Sustainable Development Goals, e.g., “no poverty,” “good health and well-being,” and “quality education,” as well as “gender equality,” which specifically refers to the elimination of child marriage. Eradicating child marriage should not therefore be viewed as an isolated goal. Culturally appropriate projects can specifically tackle child marriage and address the causes and consequence of it, but more of them are required. Such initiatives owe their existence to the fact that child marriage has been branded a human rights violation. The role of international law, therefore, should not be underestimated.

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Social and Cultural Implications of “Honor”-Based Violence

Aisha K. Gill

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Abstract

On August 3, 2012, Shafilea Ahmed’s parents were convicted of her murder, 9 years after her brutal “honor” killing. The case offers important insights into how “honor”-based violence might be tackled without constructing non-Western cultures as inherently uncivilized. Critiquing the framing devices that structure British debates about “honor”-based violence demonstrates the prevalence of Orientalist tropes, and so reveals the need for new ways of thinking about culture that do not reify it or treat it as a singular entity that can be tackled only in its entirety. Instead, it is important to recognize that cultures consist of multiple, intersecting signifying practices that are continually “creolizing.” Thus, rather than talking purely about culture, debates on “honor”-based violence should

A. K. Gill (✉)

Department of Social Sciences, University of Roehampton, London, UK

e-mail: a.gill@roehampton.ac.uk

explore the intersection of culture with gender and other axes of differentiation and inequality in the wider sphere of violence against women and girls (VAWG).

Keywords

Forced marriage · “Honor” crimes · Honor-based violence · Intersections of violence · Shame

Introduction

For decades, anthropologists and sociologists have been developing a rich body of research on the complex, multifaceted concept of honor. In his influential article, Pitt-Rivers (1966) describes honor as an individual’s claim to pride, as well as his or her right to be granted honor by others, which is realized through a system of symbols, values, and rules of conduct. Although this socially constructed system, known as the “honor code,” varies between cultures (Gill 2014), it nonetheless shares a number of common elements across cultures. While not usually considered honor cultures, contemporary Western cultures do value honor in relation to a person’s integrity, pride, and self-worth. Individuals view themselves as honorable to the extent that they feel pride in their own actions and beliefs. Western societies tend to consider honor cultures as those that place honor above all else, including the lives of female family members perceived to have committed actions of shame and dishonor, typically through sexual or other forms of disobedience.

This chapter draws on the specific case of Shafiea Ahmed, a British-born woman of Pakistani origin who was murdered by her parents because they believe she had committed myriad cultural transgressions, including refusing to enter into an arranged marriage in Pakistan. The chapter critically analyzes how the prosecution in this case, as well as the media, identified a culture of honor as the primary explanation for Shafiea’s murder without adequately exploring other contributing factors and, consequently, perpetuated harmful generalizations about ethnic minority groups in Britain.

The Prevalence of “Honor”-Based Violence

The United Nations Population Fund estimates that between 5000 and 12,000 women are murdered in the name of honor each year, primarily in the Middle East and Asia (HRC 2011, para 26; Gill 2014). According to women’s advocacy groups, the figure could be around 20,000. In general, given the difficulty surrounding the reporting of these crimes, official statistics are understood to be grossly underestimated (HRC 2012). It is impossible to determine the true number of honor killings or the incidence of “honor”-based violence (HBV) more generally. Reports to the police are rare and sporadic, not least because both male and female family members often try to conceal honor-related crimes, and many HBV victims

are abducted and never reported missing (HRC 2011). Western countries with large multiethnic immigrant communities, such as Britain, began recognizing HBV as a significant and growing domestic issue in the late twentieth century. Understandings and awareness of HBV shifted accordingly, prompting concerted national and international efforts to counter it. In Europe, most reported honor killings occur in South Asian, Turkish or Kurdish migrant communities; however, there have also been cases in Brazil, Italy, and the USA involving Roman Catholic perpetrators with varied ethnic backgrounds (Chesler 2010).

Perpetrators are often part of minority groups, even in countries where HBV is prevalent –this underscores the significance of economic and social marginalization as aggravating factors (Kulczycki and Windle 2011). For example, Sheeley (2007) surveyed a stratified convenience sample from Jordan, a nation with a strong tradition of honor. A third of respondents knew someone who had been threatened with HBV and 28% knew someone who had died as a result of it. While incidence data do not explain the mechanisms through which cultural concerns with honor or male dominance come to motivate HBV, media reporting of HBV cases too often treats such data as explanatory, attributing responsibility for HBV to specific cultures and minority groups.

Defining Honor

In a broad sense, honor is perceived as a social process that determines and designates social value to an individual or subgroup. When viewed as a whole, it contains distinct primary and secondary concepts that are referred to both within the literature and in common use (Stewart 1994). Honoring is an action involving two or more parties, occurring between individuals and within groups and subgroups. Any examination of the concept thus requires a broad analysis that extends from individual to state levels. This internally integrative process of socialization defines the formation and dynamics of relationships among individuals within subgroups and groups. It establishes behavior norms and disciplinary action to be taken against transgressors, such as expulsion from a group. Prestige, shame, saving face, esteem, and affiliated honor are the primary characteristics of honor. *Prestige* is the process whereby a group bestows honor on an individual or subgroup for attributes, characteristics, and actions the group values as “good,” elevating the individual’s hierarchical standing in relation to others in the group as a reward when he or she demonstrates a standard of excellence through their deeds and attributes (Stewart 1994).

Conversely, *shame* lowers an individual’s or subgroup’s standing within a group because of attributes, characteristics, and actions deemed “bad.” Shame and prestige are not mutually exclusive – one may be shamed without losing prestige, or gain prestige without losing shame. However, Stewart (1994) identifies an inverse relationship between shame and prestige, which together form the process of vertical honoring. Whereas prestige increases an individual’s social value, shame decreases it. The more shame a person has, the lower his or her social value to a group. When an individual is shamed, the group lowers that person’s value without requiring them

to leave the group. A shamed individual maintains utility within the group as an example of how not to act.

To maximize prestige and minimize shame, individuals or subgroups strive to maintain a position of honor in a group through *saving face* to preserve social identity and determine who is “first among equals” in the group hierarchy. “Saving face” refers to maintaining one’s claim to membership in a particular group by resisting the loss of either a specific identity or a less valued position within the group. An individual or group gains *esteem* by excelling in an honor system, even when the system is not necessarily agreed upon by both parties – the group bestowing esteem does not need to accept the values by which the individual is judged, but that individual recognizes that the group judging him or her follows a comprehensible honor system. Esteem acknowledges the social value an individual contributes as a member of the group (Stewart 1994).

When a group member assumes an honorable status based upon the reputation of the group with which they are associated, this is known as *affiliated honor*. The individual needs to do nothing more than maintain his or her status as a member by appearing to uphold the group’s values. However, deriving social value from groups is a double-edged sword: association with desirable parties can raise one’s status, while membership of disreputable or unacceptable groups can result in dishonor and shame. Essentially, honor acts as the glue that keeps the social contract intact. Honor is a more effective means of social control than violence because violence is never fully monopolized, and honor systems provide a substantial incentive in the form of internal social valuation.

Stewart (1994) articulates the division of honor into vertical and horizontal forms. Although the respect gained through possessing horizontal (or negative) honor can be lost, it cannot be increased – if one person has a right to more respect than others, that respect is not the kind that is due to an equal. Vertical (or positive) honor is the right to special respect enjoyed by those who are superior because of their abilities, rank, services to the community, sex, kin relationship, office, or some other factor. According to Stewart (1994), horizontal honor is akin to shame, forming a base from which one can only lose honor. Here, female chastity as a source of potential negative value to families is used as a point of comparison (Oner-Ozkan and Gencoz 2006).

Consequences of Losing Honor

In honor cultures, aggression is an acceptable reaction to insults and threats to honor. Ethnographic and sociological research on diverse honor cultures, such as Iraqi Kurdistan (Begikhani et al. 2015), Spain (Gilmore 1987), rural Greece (Safilios-Rothschild 1969), and Turkey (Oner-Ozkan and Gencoz 2006), suggests that members of honor cultures consider retaliation a duty when a particular individual or family is insulted. Failure to retaliate connotes acceptance of the insult and an admission of being unworthy of honor. The most effective way to restore tarnished honor is to repudiate the insult by demonstrating a willingness to engage in physical

aggression when necessary. Under certain circumstances, when the dishonoring insult is perceived by others as justified – such as when a female member of the family engages in a premarital or extramarital sexual affair with a man – aggression is directed toward the “wrongdoer” (in this example, the woman), rather than the party whose action has “insulted” the honor of the community (in this example, the man).

Intrafamilial honor killings embody the most extreme form of such aggression (Faqr 2001; Gill 2014). The willingness of people in honor cultures to take such radical measures, however painful and self-destructive, offers insights into the gravity of the consequences perceived by group members if action is not taken, because these retaliatory measures can include shaming, ridiculing, loss of respect and social resources, and even complete ostracism (Gill 2014). In traditional societies, where social mobility is limited and individuals’ social, psychological and material prospects are closely interwoven with those of their family, tribe, or clan members, ostracism not only means losing social support, but also the material resources necessary for survival. A group’s projection of aggression against the wrongdoer highlights the necessity of addressing honor problems directly rather than peripherally.

According to Pitt-Rivers (1966), losing honor by accepting humiliation cannot be repaired by demonstrating excellence. When someone has neither the ability nor the opportunity to take appropriate action, he or she will be subjected by the group to shame, which is acknowledged as the strongest emotional reaction to losing honor in honor cultures. Susceptibility to shame is considered a positive quality, as illustrated by phrases such as “having a sense of shame,” which are popular in honor cultures (Abu-Lughod 2011). In this respect, shame is not only an emotional consequence of losing honor, but also an important behavior regulator.

In these societies, words corresponding to shame are used in a way that makes them synonymous with dishonor (Abu-Lughod 2011). Dishonor differs from shame because it is antithetical to a group’s values, affecting the individual who committed the deed and threatening the foundation of the values upon which the entire system rests. Some honor cultures allow an individual to atone for “bad” deeds, while others allow for grace, depending upon the severity of the dishonorable action (Casimir and Jung 2009). More extreme honor cultures actively rid the group of dishonored individuals through ostracism, exile and capital punishment.

“Honor” Killing

Gendered violence encompasses HBV, “crimes of honor,” “crimes related to honor conflict,” “crimes of tradition,” and “culture-based violence.” The terms “honor killing” and “honor murder” are typically used interchangeably to refer to situations where violence results in a woman’s death. Some scholars and activists reject the use of these designations altogether, categorizing such crimes as “domestic violence” (Terman 2010), while others place the various types of “honor violence” under the umbrella of “violence against women” (VAW). Although most HBV victims are female, there is also evidence of HBV being committed against young men.

According to Chesler (2010), 7% of victims in a sample of 230 honor killings worldwide between 1989 and 2009 were male, and a German study on the prevalence of honor killings between 1996 and 2005 found that of the 20 cases unequivocally classified as honor killings, 43% of victims were male (Oberwittler and Kasselt 2011). Like women, young men must respect and heed the wishes of more senior, usually older, male relatives (Abu-Lughod 2011). Subordinate men are most likely to cause dishonor as a result of (1) their choice of dating or sexual partners, (2) refusing an arranged marriage, (3) coming out as gay, bisexual or transgender (Ozturk 2013), and/or (4) refusing to commit an act of HBV (Roberts et al. 2014).

Nevertheless, the majority of HBV victims are female and the majority of perpetrators male. Eisner and Ghuneim (2013) examined the attitudes of 15-year-olds in Amman, Jordan, demonstrating that the practice of brutal vigilante justice, predominantly against young women perceived to have committed slights against family “honor,” finds favor with a significant proportion of adolescents. The study revealed that almost half of boys and one in five girls believed that killing a daughter, sister, or wife who has “dishonored” or shamed her family is justified. A third of all teenagers involved in the research supported honor killings. These disturbing attitudes were connected more closely to patriarchal and traditional worldviews, including “moral” justification of violence and the importance of female “virtue,” rather than to religious beliefs. Women’s victimization is thus a consequence of broad cultural norms that legitimize gendered violence (Ertürk 2012).

An honor killing is a murder committed against a woman for actual or perceived immoral behavior deemed in breach of a household or community’s honor (Gill 2014), most commonly for intimate relations with a man, whether that (allegedly) involves adultery, sex outside marriage, or simply close companionship. Even women who have been rape and sexual assault victims become targets for honor killing. Honor killings also take place because a woman or girl is in the presence of a male who is not a relative; refuses to agree to an arranged marriage; falls in love with someone who is unacceptable to the family; seeks a divorce; tries to escape marital violence; or appears Western. In some cases, the mere perception that a woman has behaved disobediently has been reason enough to motivate an attack on her life. The norms of honor cultures exist to maintain women’s sexual “purity” and ensure that only certain bloodlines are allowed to blend, preventing wealth from becoming diluted by marriage or a woman from the landed class consorting with an individual of lower social status. Rumors and gossip serve as a community’s greatest weapons for instilling shame in male members of society who cannot preserve the purity and chastity of female relatives (Shalhoub-Kevorkian and Daher-Nashef 2013).

Honor killings form part of a larger category of violence against women, though this generally takes many different forms and names. For example, bride burning in India (Ahmad 2008), crimes of passion in Latin America (Brinks 2008), and honor killings in Islamic nations (Hellgren and Hobson 2008) all share the same dynamic: women are killed by male family members in an act deemed as socially acceptable, “understandable” or “excusable.” Although crimes of passion, bride burning, and honor killings share this dynamic, there are key distinctions. In a crime of passion, the woman’s husband or lover ostensibly commits the murder in a heated response to

a sense of personal betrayal or anger (Sen 2005), whereas a male family member carries out an honor killing on a premeditated basis as a symbol of rejecting a perceived dishonorable action and preventing the family from being shamed by the group (Sen 2005).

This chapter applies these concepts to the murder of Shafilea Ahmed to examine how the case’s prosecution and mainstream media coverage presented culture as the overriding explanation for this crime. A critical analysis of racialized interpretations of such murder cases is presented to advance an appeal for greater vigilance against the acceptance of “honor” as a justification for brutally murdering young women who are perceived to have shamed family members (Gill 2014).

The Murder

The eldest of five children, Shafilea Ahmed was born in Bradford on 14 July 1986, shortly after her parents emigrated from Pakistan. She attended Great Sankey High School in Warrington until her father removed her from school in February 2003 for a trip to Pakistan; Shafilea was murdered in September 2003. In the year prior to her death, tension over clashing “traditional” and “Western” values had intensified between Shafilea and her parents, Farzana and Iftikhar. One of her parents’ complaints was that Shafilea’s wide circle of friends consisted of mostly Caucasian peers from school, with only a small percentage from minority ethnic backgrounds.

Shafilea’s case was first referred to Warrington social services on 3 October 2002, after another pupil told teachers that Shafilea’s parents had physically assaulted her and prevented her from attending school. Shafilea’s social services file notes a mark on her face and the fact that she believed she was going to be sent to Pakistan for an arranged marriage. When Shafilea returned to school 5 days later, she revealed to her best friend that her mother had threatened a forced marriage. According to the friend, Shafilea’s mother said, “I can’t wait till you go to Pakistan to teach you a lesson” (Gill 2014), prompting school staff to refer Shafilea to social services again several weeks later. This time, Shafilea’s social services file noted that her father had forced Shafilea to withdraw savings from her bank account, indicating an attempt to exert control over his daughter.

Late in November 2002, one of Shafilea’s friends saw her in a park, carrying her belongings and wearing only a “thin sari.” Shafilea indicated that she was running away from home “because her parents would not let her be.” Although the school reported the incident to social services, there is no record on file. In a meeting subsequently arranged between Shafilea and her parents by her teacher, Joanna Code, Shafilea spoke “quite openly” about wanting “to be able to work and have money and go out.” By the end of the meeting, Iftikhar had agreed that Shafilea would be allowed more freedom. However, things did not improve and teachers continued referring Shafilea to social services and suggesting that she should contact Childline (Gill 2012). From the age of 15, Shafilea frequently reported suffering from domestic violence.

On 18 February 2003, Shafilea's parents drugged her and took her to Pakistan. The trip was cut short in May, when she swallowed bleach, or a similar caustic liquid, and required treatment at a local hospital. Farzana later told the police that Shafilea had accidentally ingested the bleach, mistaking it for mouthwash. Medical practitioners reported that the mouth injury was inconsistent with the action of gargling mouthwash, but was consistent with a deliberate act of swallowing. The most likely explanation is that this was a conscious act of self-harm by Shafilea to frustrate her parents' plans of forced marriage. As a result of this injury, she was no longer considered "marriageable," thus shaming her family.

Despite her illness, Shafilea was determined to continue her education and become a lawyer. In September 2003, she commenced a series of courses at Warrington's Priestly College. On the evening of 11 September, she worked at her part-time job until 9 p.m., when another employee observed her leaving at the end of her shift. She spent the evening at her family home in Warrington with her parents and four siblings. Her father claims that she was alive, though asleep, when he and the rest of the family went to bed at 11 p.m. Although Shafilea was due for treatment at the hospital the following day, she was not seen alive again after that night.

Shafilea's former teacher reported her missing on 18 September 2003, prompting an extensive police investigation into her disappearance. At the time, the primary sources of information were Shafilea's family, friends, and teachers; significant inconsistencies soon emerged. The investigation also revealed the history of school, social services, and law enforcement involvement with Shafilea and her family as early as her entry into secondary school right up until her disappearance. In December 2003, Shafilea's parents were arrested on suspicion of abduction. They denied any involvement in their daughter's disappearance and were released on police bail. They gave a number of press interviews in March 2004, including one broadcast on the British television program *Newsnight* on 2 March. Whereas Farzana remained silent throughout the interview, Iftikhar appeared attentive and focused, distancing himself from Shafilea by referring to her as "the daughter" or "the girl." When asked about Shafilea's suicide attempt, he contradicted the medical evidence, stating that his daughter "took a sip" of poisonous liquid. He claimed, "I'm not a strict parent in any way [...] I'm as English as anybody can picture me, right. But obviously the police portrayal of me is different [...] [W]e have not been treated fairly" (Gill 2014). He complained that his family was misunderstood by the police and the public and feigned being hurt by suspicion that they were responsible for the death of "the girl."

His response focused less on the loss of his daughter and more on what he perceived as unfair treatment directed at him and his family. Rather than making a plea to those responsible for his daughter's death, he defended his "Englishness," illustrating the importance he placed on saving face and maintaining honor in the eyes of others. Iftikhar used the word "normal" many times in the *Newsnight* interview when describing Shafilea, his family, the "holiday" to Pakistan during which Shafilea swallowed bleach and the night of her disappearance (Gill 2014). He continuously sought to present his family in a positive light.

Building A Legal Case

In September 2004, the police submitted a file of evidence to the Crown Prosecution Service to determine whether to pursue a case against Shafiea’s parents. Six months later, Mr. Robin Spencer QC advised the police that there was insufficient evidence to demonstrate guilt beyond a reasonable doubt and secure a conviction. On 11 January 2008, a coroner’s inquest into the circumstances of Shafiea’s death found that she had been “unlawfully killed” (Warrington Guardian 2009). The situation changed in August 2010 when “Alesha” (a pseudonym) Ahmed, Shafiea’s sister, was taken into custody on suspicion of having arranged a robbery at her parents’ home. Having requested to speak to officers about another matter, she was interviewed in the presence of her solicitor. During the interview, Alesha claimed that, as a 15-year-old, she and her three surviving siblings had witnessed their parents killing Shafiea on the night of 11 September 2003. “Both of my parents were very controlling and tried to bring us up in the Pakistani Muslim way,” she said, before explaining that Shafiea was the one who was “picked on” most by their parents (Gill 2014, 185).

One of Alesha’s earliest childhood memories was of seeing her mother hitting Shafiea. She stated that her parents attacked her and her sisters countless times, both verbally and physically, and that her parents’ abuse of Shafiea escalated over time. Between the ages of 14 and 17, her sister was attacked virtually every day for the most trifling reasons – if Shafiea received a text message or phone call from a boy, wore “inappropriate” clothes or associated with white friends at school, Farzana would claim that Shafiea had shamed the family. Alesha described one incident in which her mother hit Shafiea and then shut her in a room without food for 2 days, only allowing her out to use the toilet. “They knew that they could control us completely through fear” (Gill 2014, 186). Alesha’s testimony presented the “missing piece” of evidence, allowing the Crown Prosecution Service to advance a convincing case against Shafiea’s parents. In September 2011, both parents were charged with murder. Their trial commenced on 21 May 2012 at Chester Crown Court.

The Trial

As a witness for the prosecution, Alesha was called on to describe the night of Shafiea’s disappearance. She recalled going with her mother and brother to collect Shafiea from work just after 9 p.m. on 11 September 2003. When Shafiea reached the car, they saw that she was wearing a lilac t-shirt and white trousers made from stretchy material, with ties at each hip. As soon as Farzana saw Shafiea, she complained that her clothes were too revealing.

Alesha stated that when they arrived home, the whole family assembled in the kitchen, Farzana demanding that they collectively search Shafiea’s bags; this practice was not unusual. Finding some money in Shafiea’s handbag increased Farzana’s anger and she accused Shafiea of hiding the money and pushed her, with both hands on her chest and shoulders, onto the settee. Alesha stated that Shafiea, still weak

from her illness, had a small frame of not much more than five or six stone (31–38 kgs.). Alesha then heard her mother say “*Etay khatam kar saro*,” Punjabi for “just finish it here.” Iftikhar went to Shafilea and pulled her into a lying position on the settee. Shafilea began to struggle as both parents hit her and held her down. One of them said, “Get the bag.” Alesha saw her mother grab a thin white carrier bag from the stool next to the settee; she and Iftikhar then both forced the entire bag into Shafilea’s mouth. Each placed a hand over her mouth and nose. Shafilea’s legs kicked, but Iftikhar put his knee on the settee to pin her down until she stopped struggling (Gill 2014, 186–187).

Alesha then explained that, despite having seen her sister die the night before, the following morning, she asked her mother where Shafilea was. She and her siblings were sternly instructed that if anyone asked, they were to say that Shafilea came home from work, went to bed, and then ran away in the night. The day after Shafilea’s murder, all the children were sent to school. Alesha recalled breaking down and telling some friends what had occurred. She described being very upset and confused at the time and, as a result, spontaneously blurted out that her father had killed her sister. When her teachers asked her about this, Alesha recanted from fear of reprisal from her parents, and the matter was not pursued until 2010, when she was questioned for the robbery. Questions remain as to why those who witnessed Alesha’s breakdown at school did not take further action to investigate Shafilea’s disappearance. Why did the teachers only contact the police on 18 September 2003?

During the trial, Shafilea’s parents insisted that they had not been involved in their daughter’s disappearance, and denied claims that they had repeatedly beaten her over a prolonged period. Eight weeks into the trial, Farzana changed her defense in what the judge described as a “significant” development (Gill 2014, 187). On 8 July 2012, she admitted that an incident of “violence” involving Shafilea took place on 11 September 2003 (Gill 2014, 187). Shafilea had confided in her friends that her mother was particularly abusive toward her while she was growing up, and perhaps the most damning evidence for Farzana’s complicity in her daughter’s murder came from the installation of a covert listening device in the Ahmed home in November 2003. In conversations with her other children, Shafilea’s mother can be heard warning them not to say anything at school, and saying to her son, “If the slightest thing comes out of your mouth, we will be stuck in real trouble. Remember that.” These recorded conversations further suggest that Farzana may have been complicit in what happened to Shafilea. She exclaims to Iftikhar: “You’re a pimp. You’re shameless. I’m going to say it to you clearly, I swear to Allah, everything happened because of you” (Bhagdin 2012). In other recorded conversations, she remarks on the mileage of their family car: “Yeah, so this means they will look at the mileage of our car as well to see how much it is” (Bhagdin 2012). In the year of Shafilea’s disappearance, Farzana scolded her children:

That’s what I’m saying. That slut is acting as if she is relieved. The face is getting puffed up. And you behave *bandeh di ti ban* [become the daughter of a human] yourself, as well. Today is not a day to be beaten up, okay. Are you listening to me? I’m talking to you. (Bhagdin 2012)

Farzana's treatment of her daughter could be explained using Kandiyoti's seminal 1988 study, which describes the phenomenon of abuse by mothers against daughters as a culturally specific form of "patriarchal bargain" between the mother and the extended household. Kandiyoti's discussion of "classic patriarchy" explains how family dynamics between younger and older women in South Asian familial systems are structured by a model of patriarchy that stresses "corporate male-headed entities rather than more autonomous mother and child units" (Kandiyoti 1988, 275), and that "[d]ifferent forms of patriarchy present women with distinct 'rules of the game' and call for different strategies to maximize security and optimize life options with varying potential for active or passive resistance in the face of oppression" (ibid., 275).

Ultimately, the men make the rules, but if women are able to play by them, they gain a form of symbolic capital. Specifically, they can present themselves as conforming women, enabling their survival in the field of patriarchy (Kandiyoti 1988). With the honor schema, one woman's misbehavior dishonors the entire patriarchal familial unit, male and female; to ensure their survival and security, women, as much as men, monitor one another's behavior.

Up until the trial in May 2012, Shafilea's mother denied that she had any knowledge of what happened to her daughter. The defense counsel stated that, on the night in question, Iftikhar was very angry, "hitting [Shafilea], slapping her with his hands toward the facial area and punching her two to three times to the upper part of her body. [Farzana] tried to intervene but she was told to go away" (Gill 2012). When she tried again to help her daughter, she was "pushed away by both hands and also punched with a clenched fist" (Gill 2014, 187). Contrary to Alesha's account, Shafilea's mother claimed that only her third eldest daughter, "M" (then aged 12), was present. "Extremely scared" and fearing for M's safety, Shafilea's mother took her upstairs. Some 20 minutes later, she heard a car leave and came downstairs to find Shafilea and Iftikhar gone, along with her car. At 6:30 a.m. the next day, her husband returned without Shafilea (Gill 2012). In response to these allegations, Shafilea's brother, who was 13 at the time of her disappearance, told the jury: "I think it's a lie what she's saying but that's her account to give." He also said: "It's a whole pack of lies that [Alesha's] told and I don't believe a word of what she's saying" (Gill 2014, 187). He described the Ahmed household as a "happy family" before Shafilea disappeared and told the jury that "nothing out of the ordinary" happened on 11 September 2003, claiming that he only knew his sister was missing the next morning (Gill 2012).

Ultimately, the jury accepted Alesha's version of events. On 3 August 2012, Shafilea's parents were convicted of her murder, and both received life sentences. While the true facts of the case may never be known, all the accounts of what happened on 11 September 2003 circle back to the key role of "honor." Simultaneously, they demonstrate how cultural explanations for Shafilea's death are insufficient; it was a product of many factors, including the relationship between "honor," gender, and power inequalities within the Ahmed household.

Cultural Predicaments

The Ahmed family lived in a context that was both British and Pakistani, in what Homi Bhabha (1994) refers to as a “third space.” This applies to both generations, albeit in different ways. Shafiea’s social location was determined partly by her being born in the 1980s in postcolonial Britain, and partly by the fact that her parents had migrated from a rural area of Pakistan. The patriarchal gender system in which Shafiea was ensnared did not derive simply from the Ahmeds’ “backward” rural roots in opposition to enlightened British culture. Instead, Shafiea lived under the constraints imposed by both the British patriarchal values to which all British women are subject, and the patriarchal values of her parents’ rural Pakistani upbringing.

Iftikhar’s defense of his “Englishness” is particularly interesting in this context, since it reveals how his own implicit claims that he was sufficiently influenced by local cultural practices to consider himself English indicate that his actions were not simply caused by cultural conflict (Brah 1996). Indeed, Iftikhar had been married before to a Danish woman with whom he had a child (Keaveny 2012) and led a “creolized-Western” lifestyle (Grillo 2003). It is not only immigrant parents, but also their children, who must negotiate their intersectionally configured “third space.” Thus, while families may share a common ethos, individual members often express and experience this ethos differently. The fact that the various members of the Ahmed family did not occupy a single, shared intersectionally configured space helps explain why the Ahmed children reacted to Shafiea’s murder in different ways. Writing in *The Guardian* about the Ahmed trial, Jacqueline Rose (2012) argued that:

Missing in the court room, in pretty much any court room, is the idea of fantasy, of how we make our lives bearable by elaborating stories about ourselves. For both Alesha and [her sister] lying was a way to survive. If, in the judges [sic] own words, this case has been “extraordinary,” it is not least by bringing these contortions of the inner world, the agonies of attachment and belonging, so painful [sic] to life.

As a domestic violence victim herself, Alesha had nowhere to go in August 2010 when she disclosed to the police that her parents were responsible for her sister’s murder. Her situation was complicated by the fact that giving evidence against her parents had serious repercussions for her within Warrington’s tight-knit Pakistani community. Alesha told the police that for many years, she had been too afraid to discuss Shafiea’s disappearance. Although her testimony proved crucial to securing her parents’ conviction, Alesha was too afraid to attend court again afterward and was not present to hear the verdict on 3 August 2012.

In comparison with their white counterparts, for whom shame tends to have a more personal character, black and minority ethnic victims often see themselves as responsible for their families’ and their own “honor,” causing them to experience heightened feelings of shame (Feldman 2010). South Asian women are socialized to believe that they are primarily to blame for any violence they experience, especially

when it is triggered by dishonor perceived to stem from their own actions. In struggling to make their own life choices, Alesha and Shafilea were continuously confronted with the internalized need to conform to their family’s values and, in doing so, avoid bringing “shame” upon them. Shame creates feelings of humiliation, indignity, and exposure to debasement in the eyes of others, which, in turn, increases victims’ sense of vulnerability (Gill 2009); the wish to conceal this vulnerability lies at the heart of many women’s silence about the violence they have experienced. For example, South Asian women are socialized not to discuss private matters with outsiders – such discussion is seen as shameful, and this disinclination to speak out often creates difficulty when it comes to articulating their experiences of violence, even with trained professionals. Further confounding the situation is Pakistani society’s emphasis on behavior that encourages harmony in the home, rendering many women reluctant to complain for fear of being perceived as “troublemakers.” However, just as negative family and community responses encourage these women to remain silent about abuse, positive responses can often be integral to enabling them to discuss their experiences of violence (Gill 2014).

Shafilea’s Case and The Media

The ways in which Shafilea suffered violence within the confines of her own home, and the circumstances of her murder, offer a striking representation of how Western nations point to domestic cases of “honor”-related crimes as indicating a growing threat to dominant cultural norms and, by extension, maintaining security within society. Consequently, the discourse surrounding Shafilea’s murder supports Hellgren and Hobson’s contention that:

honour killings are boundary-making arenas [...] intended to be public statements, to restore honour to a family [...] [but] are also public dramas re-enacted in the courts and media [...] arenas for boundary marking beyond the family and local community. (Hellgren and Hobson 2008, 386)

Media coverage of Shafilea’s “honor killing,” and those involved in it, provides a convenient opportunity not only to make sweeping generalizations about the Muslim and South Asian migrant population based on the experience of a single Muslim Pakistani family, but also underlines the implications of the generalizations for the British nation. Shafilea’s death embodies a complicated, symbolic battlefield for an entire discourse about national inclusion and exclusion. Shafilea is “othered” as a victim to be saved by Western culture, while the act of claiming her as “Western” makes her a “worthy” victim. On a secondary level, Shafilea was also sacrificed for her family’s “honor”; her “Westernization” thus makes her a martyr for the British nation and the ideal migrant citizen. However, we must not overlook the extreme costs that such a positioning has upon the lives of Shafilea and women like her, as they vacillate between cultures within the discursive no-man’s land described in Anzaldúa’s (2007) concept of borderlands.

Representations of honor killings that construct South Asian culture as the key causal factor are permeated with discursive strategies associated with moral panic. The perpetrators of these crimes are labeled “deviant,” with the HBV problem seen as pervasive among such deviants – in this case, all Muslims. Specific forms of domestic violence common in minority communities tend to be depicted as the norm in these “deviant” communities. Whereas “mainstream” forms of domestic violence are generally represented through rhetoric focused on the individuals involved, the majority of news stories about HBV employ framing devices centered on the cultural differences of those who perpetrate this form of violence. The media’s framing of honor killings thus contributes to the perception that culturally specific forms of violence are more abhorrent than “normal” forms of domestic violence and that they are rightfully subject to media-driven moral crusades (Anitha and Gill 2011).

Conclusion

The police refused to call Shafilea’s murder an “honor killing” precisely because they wanted to stress that no license should be granted to those who claim that their cultural rights excuse acts of brutality, and in so doing marked a step in the right direction. At the same time, those charged with protecting the public must be able to identify and understand the risk factors associated with all forms of VAW in order to respond effectively. Such an understanding is only possible if, instead of talking purely about culture, debates about HBV and VAW explore culture’s intersection with gender and other axes of differentiation; tackling violence against females in society is not just a question of culture, but also of equity. In sentencing Shafilea Ahmed’s parents to life imprisonment on 3 August 2012, the judge, Mr. Justice Roderick Evans, described Shafilea as a determined, able and ambitious girl “squeezed between two cultures, the culture and way of life that she saw around her and wanted to embrace and the culture and way of life her parents wanted to impose upon her” (Gill 2014, 195). However, the causal factors behind Shafilea’s murder were far more complex than was suggested by Justice Evans and the British media’s tale of backward parents acting against modern Britain’s progressive society. Understanding the forms of violence experienced by minority ethnic women in Britain requires an approach that not only considers the links between all forms of gender-based violence, but also addresses the specificity of particular forms of VAW, such as HBV. A distinction must be drawn between condemning the culture of a specific social group and condemning a particular cultural practice.

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Islam, Law, and Human Rights of Women in Malaysia

K. Steiner

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Abstract

Malaysia has been struggling with the officially endorsed system of legal pluralism whereby Islamic and civil law coexist as perceived independent niches of the legal system causing significant legal, political, and social tension. One of the areas where those tensions between the different legal systems are apparent is in the area of human rights and in particular the rights of women. The two legal systems are vying for normative dominance as to what system prevails in cases of conflict. As human rights are enshrined in the constitutional framework of Malaysia, one might assume that the constitution prevails over religious laws. Yet, this is not necessarily the case. All three branches of government –

K. Steiner (✉)

Law School, La Trobe University, Melbourne, VIC, Australia

e-mail: K.Steiner@LaTrobe.edu.au

legislature, executive, and judiciary – are not only at odds with each other but also conflicted within. This chapter considers the different communities that shape the discourse on the relationship between Islam, law, and the human rights of women in Malaysia. Civil society organizations have contributed significantly to the debate voicing in particular their concerns that human rights are threatened by the implementation of various Islamic laws, in particular Islamic family law and Islamic criminal law. The focus of this chapter is on how the human rights enshrined in CEDAW fare in the context of Malaysia, a country that is renegotiating its identity between a secular and Islamic state.

Keywords

Islam · Malaysia · Human rights · Women

Introduction

Malaysia has struggled to develop strategies to accommodate religious law in a democratic, plural society of almost 30 million people. Malaysia is a multiracial and multireligious country in which Muslims comprise about 60% of the population, while Buddhists account for about one fifth, and Christians and Hindus form significant minorities (Government of Malaysia 2010).

In this multireligious context, Islam plays an important role in Malaysia's social, cultural, political, and legal framework. Article 3 of the Constitution states that "Islam is the religion of the Federation, but other religions may be practiced in peace and harmony in any other part of the Federation." Ever since there have been difficulties in the application and interpretation of this article. The discourse is over normative hierarchy or, to phrase it differently, which system the religious legal system or civil law system prevails. The answer to that question is significant for human rights as they are enshrined in the civil legal system.

This chapter is divided into different sections. The first section provides a short overview of the debate as to what role Islam plays in the legal framework of Malaysia. The second section focuses on the implementation of women's human rights in Malaysia. It analyzes the challenges that Islam and its dominant role pose for the realization of those rights in Malaysia. After introducing the different actors involved in the discourse, it will use the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) as an example to illustrate certain key themes such as family law and criminal law and women's participation in public life.

Islam and Law in Malaysia

Malaysia has a plural legal system, rooted in the country's history in which civil and religious laws coexist. When Islam arrived in Malaysia and what route it took exactly are the subject of scholarly debate (Aun 1990). The impact of Islam in

Southeast Asia and pre-colonial Malaya can be summed up as the gradual and varied absorption of elements of Islamic traditions by native cultures in which Islamic elements coexisted or blended with local elements (Hooker 1978, 49).

Given the historical importance of Islam, it was given a special status in Article 3 of the Federal Constitution, which stated that “Islam is the religion of the state.” The consequence of this provision – whether Malaysia is indeed an Islamic or a secular state – is heavily disputed. This question has significant impact as to which system, civil or religious, is supreme over the other. The first Prime Minister Tunku Abdul Rahman declared that “this country is not an Islamic state as it is generally understood, we merely provide that Islam shall be the official religion of the State” (as quoted in Ahmad 1985, 217). In 1983, Abdul Rahman reiterated that his country should never become an “Islamic state” because of its multiracial society, because “this would violate the understandings held in trust with the largely non-Muslim Chinese and Indian communities” (as cited in Mauzy and Milne 1983/1984, 631). This position was endorsed by Malaysia’s third Prime Minister Tun Hussein bin Dato’ Onn (1976–1981), who said that the “nation can still be functional as a secular state with Islam as the official religion” (as cited in Mauzy and Milne 1983/1984, 631). Prime Minister Tun Dr. Mahathir bin Mohamed changed the established narrative when he declared in 2001 that Malaysia was an Islamic state on the grounds that significant elements of the country’s legal and administrative system already had Islamic foundations (Mahathir 2002). In 2007, the sentiment that Malaysia was indeed an Islamic state was indirectly reasserted by then Deputy Prime Minister Najib Razak, who declared that Malaysia was never a secular state (as cited in Bernama 2007). Several opposition parties have contested this assertion as irreconcilable with the Constitution with Islam merely as the official religion of state as provided in Article 3 of the Federal Constitution (Lim Kit Siang 2012). This position is supported by various judicial decisions, for instance, in the leading case of *Che Omar bin Che Soh v Public Prosecutor* (1988, 56), which concluded that Syariah (Islamic law) only applies to the personal laws of Muslims.

This debate carries over into the legal sphere especially the division of the jurisdiction between the civil and religious courts (Steiner 2013). The dual legal system has been at the forefront of the concerns raised for the implementation of women’s human rights. The UN Committee on the Elimination of Discrimination against Women (UNCEDAW 2006a, 13) commented:

[The Committee] is concerned about the existence of the dual legal system of civil law and multiple versions of Syariah law, which results in continuing discrimination against women, particularly in the field of marriage and family relations. The Committee is also concerned about the State party’s restrictive interpretation of Syariah law, including in the recent Islamic Family Law (Federal Territories) Amendment Act 2005, which adversely affects the rights of Muslim women. The Committee is further concerned about the lack of clarity in the legal system, particularly as to whether civil or Syariah law applies to the marriages of non-Muslim women whose husbands convert to Islam.

While the civil courts originally tried to hold on to as much jurisdictional power as possible, they have more recently been accused of giving up ground. As Faruqi

(2005) describes it, “with the slightest whiff of Islamic jurisprudence, our superior court abdicates in favor of the syariah courts even though momentous issues of constitutionality may be at stake or even if one of the parties is a non-Muslim.”

This assertion of dominance of Islam has a significant impact on human rights. In 2014, Najib Razak, then Prime Minister, was quoted as saying that:

‘Humanrightism,’ a liberal way of thinking that places secular law above religion, has to be addressed swiftly as it is against Islamic teaching.

[He said such way of thinking, which had been accepted as a new ‘religion’ and was being spread rapidly in the country and abroad, was a threat to Muslims, as it rejected Islamic values and continued]:

‘[Those who describe to such liberal thinking] do everything, claiming to be championing human rights.

‘This is a deviant [way of] thinking and a threat, which is dangerous to Islam. (as cited in Alagesh 2014)

This perceived incompatibility of Islam and human rights is not a unique argument by the Malaysian government. In fact, it taps into long-standing debate on cultural-religious reservations about or even rejection of international human rights (see, e.g., Ali 2000; An-Na’im 1990, 2001; Black et al. 2013b, 20–22; Mayer 2013; Moussalli 2001; Neo 2003; Safi 2003; Sharma 1987). The situation in Malaysia is further complicated by the fact that it has a federal system of government. In continuance of British colonial policy, the legislative prerogative over Islamic matters was left to each individual state. This means that there is no single system of Islamic law in Malaysia, but there are significant differences in the interpretation of Islamic law. Further, as seen below regarding the appointment of female Syariah court judges or polygamous marriages, it is even more difficult to evaluate the implementation of women’s human rights as on-the-ground implementation might face different challenges from state to state.

Women, Islam, and Human Rights in Malaysia

There are numerous laws, national policies, and international conventions relating to women’s human rights in Malaysia (for a detailed list, see Suhakam 2014, 2). In August 1995, in conjunction with the Fourth World Conference on Women, Malaysia ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In general, governments of countries with plural legal systems face the challenge of how to reconcile their obligations under Islamic law and international law and how such norms should be implemented in their national context. Thus it is not surprising that Malaysia – like several other Muslim majority countries where Islamic law is applicable – stipulated several reservations (see: <http://indicators.ohchr.org/>) declaring that:

Malaysia’s accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shariah law and the Federal Constitution of

Malaysia ... further, the Government of Malaysia does not consider itself bound by the provisions of articles 2 (f), 5 (a), 7 (b), 9 and 16 [of CEDAW] ...

In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

Malaysia has since lifted several of its reservations. Even more important was a 2001 amendment to the Federal Constitution to include gender as a basis for nondiscrimination. Still, Malaysia maintains its reservations with regard to nationality (Article 9(2)) and matters relating to marriage and family relations (Article 16). The following sections provide analyses of the discourses surrounding the reporting mechanism of CEDAW, the main actors involved, and the material and arguments presented by them. The government's and NGO's reports, issues, and questions raised by the CEDAW Committee, as well as the government's responses and the concluding comments by the Committee, are considered.

The Actors in the Discourse: Jockeying for Influence

The main actors in this debate are political parties, UMNO (United Malays National Organisation, *Pertubuhan Kebangsaan Melayu Bersatu*) and PAS (Pan-Malaysian Islamic Party, *Parti Islam Se-Malaysia*), institutions such as the National Commission of Human Rights (*Suruhanjaya Hak Asasi Manusia Malaysia* or *Suhakam*), as well as civil rights organizations, especially Sisters in Islam (SIS) and EMPOWER (*Persatuan Kesedaran Komuniti Selangor*), both of which have taken up issues on women's human rights.

Muslim or Islamic interests are represented by the two main political parties in Malaysia, UMNO and PAS, Malaysia's leading opposition Islamist party. UMNO is the dominant party in the coalition that had been in power from independence up until 2018. As the dominating government party, UMNO has been instrumental in shaping national and international politics.

While it took some time for UMNO to develop its Islamic credentials and for Islam to take center stage in the party's policies, the role Islam played in PAS was quite different from the beginning. PAS sought to enforce its conservative interpretation of *Syariah* in Malaysia, with the ultimate objective of creating a state where Islam – no longer confined to a ceremonial role – displaces secular law to become “the law of the land” or as Nasharudin Mat Isa, then PAS Deputy Minister, suggested to “distance” itself from Common Law (as cited in Shankar 2010). By 1959, PAS had control of Terengganu and Kelantan, constituencies that were predominantly Malay-Muslim (Chin 2004, 361). These victories meant that PAS became the first Islamist party in modern Southeast Asia to form its own government via constitutional means (albeit at state and not national level) and, according to Noor (2004, 155), one of the earliest Islamist parties in the Muslim world to actually come to power. However focusing solely on the Malay-Muslim, voters would not guarantee continuing electoral victories. As such PAS softened its Islamist discourse,

attracting some non-Malay votes with promises to give equal rights to all citizens and to promote government transparency and accountability (Stark 2004, 58).

Over time, both parties, UMNO and PAS, have risked alienating their coalition partners over the status of Islam in Malaysia. Yet this has not deterred them in the race to “outbid” each other’s Islamic credentials to the detriment of constitutionalism, civil law, religious tolerance, gender rights, and nation building to name a few casualties in this power struggle (Rahim 2013, 8).

In the 2018 general election, UMNO and its coalition partners lost power for the first time since independence. This is partially a result of a new political Islam in Malaysia as reflected in some of the parties of the victorious Pakatan Harapan (PH) coalition. It is too early to comment as to whether PH will pursue the same strategy of trying to outbid the Islamic credentials of UMNO and PAS at the expense of human rights and those other issues.

Although “political football” has been played with human rights and Islam, some positive developments occurred in the establishment of the National Commission of Human Rights (Suhakam) in 1999 (Whiting 2003). Suhakam’s function is to promote awareness of human rights, to advise government in relation to human rights and international human rights instruments, and to enquire into complaints about human rights infringements. Whiting (2003) observed that those objectives were based on the Paris Principles which were endorsed by the United Nations General Assembly in 1993, yet it was doubtful whether Suhakam would be able to deliver on those promises. Concerns were raised over Suhakam’s independence from the government, resources and investigative power, as well as the definition of human rights (Liu 2014; see also Tan 2001).

While Suhakam has been seeking to fulfill its role and prove the concerns wrong, its effectiveness has been questioned. None of its reports have been debated in parliament, and civil society groups have boycotted it numerous times to protest against the government’s lack of engagement with Suhakam’s recommendations (Liu 2014, 297). Indeed human rights lawyer Ramdas Tikamdas called the first 10 years of Suhakam “the lost decade” due to the missed opportunities (as cited in Liu 2014, 298; see also Thio 2009). Moreover, international organizations and the opposition parties – for example, the Asian NGO Network on National Human Rights Institutions (ANNI) (2011) – have commented on this lack of parliamentary attention toward the reports and recommendations of Suhakam (Human Rights in ASEAN 2016).

To give women’s human rights more political clout, the government established the Ministry of Women Affairs (now Ministry of Women, Family and Community Development) in 2001. In 2004, this was complemented by the creation of a Cabinet Committee on Gender Equality chaired by the Prime Minister with the aim to ensure that gender considerations are taken into account by the government. Neo (2013, 537) observed that there is “strong women’s rights activism in Malaysia” with some of the “best-organized” and “most effective civil society groups in the country.” These include Women’s Aid Organisation (WAO), All Women’s Action Society Malaysia (AWAM), Women’s Centre for Change (Penang) (formerly Women’s Crisis Centre), Tenaganita, Good Governance and Gender Equality Society Penang

(3Gs), and the Islam-focused advocacy group Sisters in Islam. According to Neo (2013, 537), they can be categorized into two groups, one conducts general human rights advocacy for women and some that are specializing in gender quality issues and Islamic law.

EMPOWER, registered as a society in 2008, is another NGO that is advocating women's human rights with a particular focus on women's political participation. It is seeking to broaden the scope provided in CEDAW including to address the needs of noncitizen groups, such as refugees, as well as LGBT people, and to focus on matters such as women's empowerment, i.e. political participation and rights in the informal workforce sector (Elias 2015, 230, 231). Notably, EMPOWER developed modules on women's political participation and offered those programs to both, UMNO and PAS, in order to train women in political leadership roles. According to a founder of EMPOWER, Maria Chin Abdullah (n.d), those initiatives with UMNO stopped when the group joined a broader CSO coalition, BERSIH, which had been advocating for clean and fair elections.

Sisters in Islam (SIS) is one of the most influential and effective women's Islam-focused advocacy group. They have been described as a group of "Muslim feminists" (Lindsey and Steiner 2012, 298). As such their focus is to advance women's rights from within an Islamic legal framework in order to ensure that Muslim women are not denied "the same legal rights and protections granted to their non-Muslim sisters" (Anwar 2001b, 244). SIS uses alternative interpretations of the Qur'an and alternative juristic positions in Islam in order to point out discrimination against women or violations of fundamentals rights based on restrictive interpretations of Islam. Anwar (2001b, 229) describes the thought process in detail using the example of interpreting the verses on polygamy (Sūrat an-Nisā 4:3) which state "if you fear you shall not be able to deal justly with women, then marry only one." Anwar (2001b) observes that half of the verse seems to be ignored in most conversations about polygamy – that is, the part that places restrictions on polygamy. This criticism of the selective interpretation of Islamic law through a patriarchal lens is a major focus of the activities of SIS. Yet their interpretation of Islam and human rights, as will be seen later on, is at best only partially compatible with UMNO's or PAS's reading of Islam (for more discussion on this point, see Lindsey and Steiner 2013). SIS also educates on matters where a particular reading of Islamic law causes a conflict with the civil laws. This material is made available widely – through memoranda and letters to the government, publications on their website, or contributions in mainstream media. SIS also provides free legal service on matters pertaining to Islamic family and criminal law (Lindsey and Steiner 2012, 302–303).

The discourses on Islam, gender, and human rights between those actors focus around three key themes: (1) the relationship between Islam and family law, (2) Islam and criminal law, and (3) Islam and social behavior. The following section will look at selected examples to show how these themes are being debated in the context of the obligations and reporting mechanism of CEDAW. Malaysia submitted its first and second periodic report under CEDAW in May 2004 (Government of Malaysia 2004), which were considered in 2006. Several Malaysian NGOs prepared a shadow report for the 2006 review session (NGO Shadow Report 2005). Malaysia's third

report was due in August 2004 and the fourth report in August 2008. As the reports were not forthcoming, several of those NGOs decided to prepare an Alternative Report in April 2012 (WAO 2012), and Suhakam (2014) prepared also a report. In September 2016, the Malaysian government submitted its combined third to fifth periodic report (Government of Malaysia 2016, hereinafter called the Government Report 2016). A list of issues was subsequently published (UNCEDAW 2017) and several additional comments submitted (Human Rights Watch 2017a; Suhakam 2017; Joint NGO Submission 2017). While not focused on CEDAW, a coalition of NGOs submitted a report under the Universal Periodic Review (UPR) process which covered gender issues in 2016 (COMANGO 2016).

Islamic Family Law and Women's Human Rights

The perceived incompatibility of Islamic family law and international human rights obligations has been raised in numerous contexts including child marriage, divorce matters – right to divorce, custody of children, and maintenance – or inheritance law. This section focuses on the example of polygamy, illustrating how the issue plays out in the context of Malaysia.

CEDAW Articles 5 and 16 and the Case of Polygamy

Since the 1980s, SIS (1996) comprehensively campaigned publicly on polygamy in particular by providing an alternative analysis of the classical Islamic sources referring to polygamy. Islamic family law before the 1980s hardly regulated matters of polygamy; new state legislation introduced in the 1980s imposed new restrictions on the practice of polygamy (Lindsey and Steiner 2012, 63). For example, Section 23 of the Islamic Family Law Act (No. 303) of 1984 (Federal Territories) allowed for the permission to marry an additional wife to be granted by the kadi (judge) after an in camera hearing with the husband and existing wife or wives present. The kadi had to be satisfied that all requirements were fulfilled. Still, acceptance of those enactments was patchy at best. Kamali (2000, 71) observed that Departments of Religion ignored those new restrictions. In Selangor, for example, religious authorities even conducted a religious course called “My Husband, Your Husband” promoting polygamy in 1996 (Anwar 2001b, 245). In addition, it was difficult for women who insisted on those protections to claim them in court. Anwar (2001b, 245) provides the example of a woman who objected to her husband's application and was asked by the judge whether she “wanted to obey the laws of Aishah Ghani, minister of women's affairs at the time, or the laws of God.” Following the interview, the husband was granted permission to take another wife without evidence that he could fulfill the obligations.

In the case of *Aishah Abdul Rauf v Wan Mohd Yusof Wan Othman* (1990), the application for another marriage was refused as it might have been necessary but was not deemed just. Interestingly, the man then circumvented those rules by crossing

state borders and getting married in Terengganu, where such strict rules did not exist (NGO Shadow Report 2005, 5.2.2). “Retrogressive” amendments to Islamic family laws meant that those protections, even if they just existed on paper, were removed (SIS 1996). For instance, Section 25 (2) of the Islamic Family Law Enactment (Selangor) 2003 was changed from requiring that the additional marriage is “just *and* necessary” to “just *or* necessary.”

It is thus no surprise that Malaysia recorded reservations to Article 16 CEDAW upon ratification, which calls for the elimination of discrimination in all matters relating to the family and marriage. In 1998, Malaysia withdrew its reservations to Articles 16 (b) requiring free choice of spouse and consent to marriage, 16 (d) declaring equal rights and responsibilities as parents, and 16 (e) safeguarding the right to family planning. The reservation to Article 16 (a) – recognizing equal rights to enter into marriage – however remains subject to the continuous practice of polygamous marriages, which contradicts this provision. In the first Government Report (2004, 405), the government briefly commented that polygamy was permitted for Muslims but closely regulated and restricted by legislation. In fact, the CEDAW Committee (UNCEDAW 2006b, 29) requested more information on this matter and pointed out that recent legislative initiatives in practice counteracted the aforementioned restrictions. As a result, in 2005, the then Prime Minister Abdullah Ahmad Badawi directed then Attorney-General Abdul Gani Patail to hold discussion on the suggested amendments to the Islamic Family Law (Federal Territory) and to include SIS in the discussion (Star 2006). The CEDAW Committee (UNCEDAW 2006a, 14) recommended exactly this that the government engages with Islamic jurisprudence research organizations, civil society, and women’s nongovernmental organizations in order to gain more support for law reform in Islamic family law and to look into “more progressive interpretations” of Islamic law. In the course of these conversations, women’s rights organizations were able to convince the government to abandon planned changes to the Islamic Family Law Enactment (Federal Territories), in particular the intended softening of restrictions on polygamy along the lines of the Selangor revisions of permitting polygamy if it was “fair *and* just” to “fair *or* just” (WAO 2012, 169 emphasis added by author).

Polygamy is a documented practice in Malaysia, and between 2010 and 2016, 8,808 applications for polygamy were granted by the Syariah courts in Malaysia (Malay Mail 2017). Despite this, the Government Report 2016 does not mention the matter of polygamy at all, nor do Suhakam’s reports (2014, 2017) mention polygamy or appear to have any activities on this matter. This was picked up by the CEDAW Committee (UNCEDAW 2017, 22), which requested further information. The matter was also commented on by civil society groups in their Joint NGO Submission (2017). Civil society groups have continued their campaign against polygamy. They did not only engage with the government in order to provide input for law reforms, but they engaged the broader public into the discourse. SIS has spearheaded this public campaign, releasing general information (Sisters in Islam n.d.), a report (Hamzah and Othman 2010), and developing a short video on common misconceptions of polygamy (Sisters in Islam 2015).

The discourse surrounding matters of polygamy illustrates the challenges when it comes to implementing women's human rights. On the one hand side, the civil society groups have been successful in lobbying to prevent the loosening of restrictions on polygamy. On the other hand, not all states in Malaysia have been willing to cooperate, showing the limitations in a federal system where Islamic law is a matter of individual states. Furthermore, polygamy is arguably an accepted cultural practice in Islam – and in the context of Malaysia was even practiced among non-Muslims. Indeed, there have been calls by non-Muslim groups to return to the pre-1982 conditions where it was allowed for non-Muslims (NGO Shadow Report 2005, para 5.2.1). Given the ongoing Islamization of law and politics in Malaysia, at the moment, maintaining existing restrictions on polygamy is indeed a success, while lobbying in states that have loosened those restrictions on polygamy continues to be an uphill battle.

Islamic Criminal Law and Women's Human Rights

There is significant scholarship on the (in)compatibility of international human rights and Islamic criminal law, in particular surrounding aspects of *hudud*, which criminalize perceived breaches of “moral” codes, especially involving sexual behavior (see Black et al. 2013a; Mayer 2013; for a discussion in the context of Malaysia, see Faruqi 2005; Lindsey and Steiner 2012). While clearly relevant in the context of women's human rights, these concerns are applicable to women and men alike. For the purposes of this chapter, the following sections focus on women's experiences of two key issues in this context: corporal punishment and marital rape. Violence against women is not explicitly mentioned in CEDAW. Yet the CEDAW Committee (UNCEDAW 1992) comments that: “family violence is one of the most insidious forms of violence against women . . . [and] is prevalent in all societies” tasking state parties to ensure “that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women.” As such it requires state parties to report on those matters (UNCEDAW 1989).

CEDAW General Recommendations 12 and 19 and the Case of Corporal Punishment

Caning is a long established practice in Malaysia, dating back to British colonial enactments (Amnesty International 2010, 6). Indeed, it is even an accepted form of discipline in the education system where boys – not girls – can be caned for disciplinary offences. It appears that its practice is widespread and has been causing issues to the extent that in 2016, then Education Ministry, Director General Khair Mohamad Yusof, published a 2003 circular permitting caning (Department of Education 2003) on his Facebook page (Malaysiakini 2016). Despite increasing pressure to abandon caning in schools, there are no immediate plans to abandon this practice (Bernama 2017).

Corporal punishment is treated differently in the different Malaysian legal systems. In the civil legal system (Criminal Procedure Code, Section 289) – like in the case of education – women are exempt from judicial corporal punishment. Yet the individual state Islamic legislation allows for women to be caned. The practice of caning women for offences under Islamic law is relatively new – despite being an option for decades. In 2010, women were caned for the first time, when three women were convicted under Section 23 (2) of the Federal Territory Sharia Criminal Offences Act 1997 for having illicit sex (Neo 2013, 510). Also in 2010, another Muslim woman was spared caning for drinking beer. It is also noteworthy that drinking beer is only punishable by canning in three states, Pahang, Perlis, and Kelantan. The other states impose a fine for this offence. The CEDAW Committee (UNCEDAW 2017, 4) picked up on this discrepancy between the civil and Islamic legal when the Committee requested the government to provide further information on the matter. It states:

It is indicated that section 289 of the Criminal Procedure Code prohibits the whipping of women (annex, pp. 2–3). However, according to information received, Sharia criminal law can override this clause, allowing Muslim women convicted of certain offences to be punished with up to six strokes of the cane in public. Please explain this discrepancy and clarify what measures are being taken to ensure that there are no exceptions to the prohibition of whipping.

More recently the debate has heated up again with Kelantan not only announcing plans for public caning for Syariah offences such as *zina*, false accusation of *zina*, sodomy, and alcohol consumption but also going through with this plan. Previously, such punishments had to be carried out in private (Star 2017). In recent years Kelantan has also been trying to push for highly controversial plans on implementing *hudud*. Between 2010 and 2017, there were no reported cases of women being caned – unlike in Aceh, a province in neighboring Indonesia, where women and men are caned in public for committing offences under Islamic law (Kine 2017). However, since 2018, canning has been taken up again. In late 2018, two women were caned for same-sex activities, and another woman was sentenced to canning for prostitution (*zina*, extra-marital sexual intercourse) in the state of Terengganu (Timbuong 2018).

CEDAW Article 16 and General Recommendations 12 and 19 and the Case of Marital Rape

The issue of marital rape is a highly contentious issue where the different views on women's human rights and Islamic law held by the government on the one hand, and the CEDAW Committee and human rights organizations on the other, come head to head. Indeed criminalizing marital rape in any form has been a long and windy road in Malaysia. There are two laws that protect women against violence: (1) the Domestic Violence Act 1994 which aims to protect victims of violence at home pending investigations or criminal proceedings in court and (2) the Penal Code which covers violence against women including rape but stipulates that sexual intercourse between a husband and wife is not rape.

In the Government Report (2004, 380), the Malaysian government set the scene by stating that “in all cultures in Malaysia, a wife is expected to obey her husband who includes the husband’s family and to behave according to their wishes,” thus explaining in brief why marital rape cannot be considered a crime.

The discourse surrounding the Domestic Violence Act shows how far entrenched this opinion is. When the Act was first proposed, conservative Muslims stated that the violence criminalized under the act was acceptable under Islamic law. Furthermore they pointed out that domestic violence was a family legal matter, and since Islamic family law was a state matter, the individual states should consider this and not the federal government (Anwar 2001a, 180). As such they proposed that Muslim women should be excluded from the, arguably already minimal, protection of women in cases of marital rape. SIS engaged in 5 years of negotiations to ensure that Muslim women were included in the jurisdiction of the Act (Anwar 2001a, 179), publishing a booklet entitled *Are Muslim Men Allowed to Beat their Wives?* (Anwar 2001b, 236). The campaign proved successful, and the law did include protection for Muslim women, but objections from religious authorities meant that it took another 2 years before it was gazetted and implemented (Anwar 2001a, 179).

This is however only a partial success for Muslim women; on the issue of marital rape, the government stands firm. In the course of discussing the Government Report 2004, the Malaysian representative Mr. Ahmad Razif Mohd Sidek stated that “after thorough consideration, the Parliamentary Select Committee had concluded that marital rape could not be made an offence, as that would be inconsistent with Sharia law. As a compromise, the Select Committee had proposed that hurting or threatening to hurt a wife in order to compel her to have relations would constitute an offence” (UNCEDAW 2006c, 54). As such in 2007, the Penal Code was amended in order to address the issue of marital rape. A new section 375A was introduced making it an offense for:

Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years.

This new provision was criticized by the CEDAW Committee (UNCEDAW 2006a, 21) because it was “narrowly tailored to criminalize sexual assault based on use of force and death threats by the husband, rather than marital rape based on lack of consent of the wife.” Moreover it is unclear how this provision will interact with Islamic law where a woman is required to be subservient to her husband’s wishes, for instance, Section 129 of the Islamic Family Law (Federal Territories) Act (1984) makes it an offence if a woman willfully disobeys a husband’s lawful order.

Human rights organizations have continued to point out the flaws in the system and lobby for change. The Alternative Report (WAO 2012, 28) observed that the exclusion of marital rape from the definition of rape still stands. Indeed the explanation to Section 375 Penal Code states that “sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in

force, or is recognized in Malaysia as valid, is not rape.” Suhakam (2014, 3.5.1–3.5.2) aptly summarized the flaws in the current legal system stating that marital rape is a “violent and degrading act” regardless of who the perpetrator is and to not criminalize it endorses the opinion that a woman should be subservient to a husband’s wishes, thus contravening numerous provisions in CEDAW.

The Government Report (2016: 2.10–2.11) glosses over those issues by acknowledging that the definition of marital rape does not exist in Malaysia but that it “pays due attention to the issue of ‘marital rape’ and is committed to provide sufficient protection for victims.” The CEDAW Committee (UNCEDAW 2017, 10) appeared to be not impressed by this statement requesting further information as to what steps will be taken to repeal the exception in the Penal Code and to explicitly prohibit marital rape. It furthermore demanded more statistics on cases that involve marital rape. Indeed there appears to be no indication by the government to change their position on marital rape (Carvalho 2015). In 2017, amendments to the Domestic Violence Act were introduced. Women’s human rights organization had been involved in the process and viewed those positively (JAG 2017); yet the Act still does not include a reference to marital rape. This is a strong indication that changes in the law will not appear any time soon, if indeed at all.

Islamic Law, Stereotypes, Participation in Public Life, and Women’s Human Rights

When Malaysia ratified CEDAW in 1995, it initially made reservation to CEDAW Article 7(b) and the responsibility to eliminate discrimination against women to hold public office. Malaysia’s concern was regarding the limitations it placed on women to hold certain positions based on Islamic law.

CEDAW Articles 7 and 11 and the Case of Female Syariah Court Judges

In 1982, a National Fatwa prohibited women from being appointed as judges (Zin 2017, 156). Since then the attitude toward female Syariah court judges has slowly changed. In 1998, the government of Malaysia modified its initial reservations to Article 7(b) stating that “the application of said Article 7(b) shall not affect the appointment to certain public offices like the Mufti Syariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic Syariah law” (see: <http://indicators.ohchr.org/>).

While the modification was referred to in the Government Report 2004, it did not specifically address the issue of women qualifying for the position of Syariah court judges. The NGO Shadow Report (2005, 6), however, observed “a resistance by the government to fully submit to the spirit of the CEDAW Convention.” It went on to

explain that “[t]hrough practice and convention, the environment is hostile towards any women holding formal positions as judges, *muftis* (State chief authority on Hukum Syarak), or *ulamaks* (Islamic intellectual scholars)” (NGO Shadow Report 2005, para 5.1.2). In fact, the NGO report described the proportion of women holding a position as a female judge as “dismal” with women only being 5 out of 16 Judicial Commissioners, 3 out of 36 High Court judges, and 2 out of 6 Federal Court Judges and moreover no female judges in the Syariah court system (NGO Shadow Report 2005, para 7.4.2). This was despite the fact that the government had previously announced that women would be appointed as judges to the Syariah courts and deputy muftis (Ahmad 2005, 16). While women were appointed as arbitrators (*suhl* officers) in Kelantan in 2007, women were not appointed as Syariah court judges until 2010, when two women were appointed to the Syariah court in the Federal Territories (Zin 2012, 126, 127). The slow progress was pointed out in the Alternative Report (WAO 2012, 28), which commented that “little change has taken place to enable the fulfilment” of this right in a “meaningful way.” Indeed in 2012, women represented 35.5% of judges in the federal court system, while only 3.7% of all judges in the Syariah courts were female (Ministry of Women, Family, and Development 2012, as cited in Zin 2017, 154).

One of the challenges that the government is facing in implementing changes and allowing women to become female Syariah court judges lies in the federal system. As discussed above, there is no monolithic system of Islamic law, and every state has its own regulation regarding the appointment to the bench, the required qualifications, and even gender restrictions. The National Fatwa Committee in 2006 issued a *fatwa* allowing women to be appointed as Syariah court judges provided that they met the qualification requirements, thus overruling its own previous 1982 fatwa. In order for the fatwa to take effect in the individual states, it had to be passed by the respective states. Yet not all individual states followed suit. Initially the states of Kelantan, Sarawak, and Kedah declared that they would not pass the *fatwa*, while other states remained silent (Department of Islamic Affairs within the Prime Minister’s Department, as cited in Zin 2017, 158, 159). By early 2016, only the states of Malacca, the Federal Territories, Kelantan, Perlis, and Sabah allowed Muslim women to become Syariah court judges (Mayuri 2016). Since then, there has been an increase in Muslim women being appointed to the bench. History was made when in mid-2016, Selangor appointed two women to the Syariah high court for the first time in Malaysia (Malay Mail 2016). In 2017, Terengganu appointed the first female Syariah court of appeal judge and appointed also the first three female judges to the lower Syariah courts for this state (David 2017).

It is noteworthy that this progress was not mentioned in the recent Government Report 2016 nor was it picked up by the Committee in its list of critical issues and questions (UNCEDAW 2017) or submissions by the national human rights organizations/institutions including the Joint NGO Submission (2017) or the submission by Suhakam (2017). The latter is interesting as it had been the civil society in particular who had continuously lobbied for change (see Zin 2017 for an overview of some of those initiatives). Sisters in Islam published a pamphlet “Women as Judges” in 2002 and revised it in 2009. In it, the group analyzed Islamic law showing

Table 1 Number of women in the Syariah judiciary

	2012		2013		2014		2015		2016	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Director General/ Syarie Chief Judge JKSM	1	0	1	0	1	0	1	0	1	0
Judges of the Court of Appeal JKSM	5	0	6	0	5	0	5	0	5	0
State Syarie Chief Judge	14	0	14	0	14	0	14	0	14	0
Chief Registrar of the State Syariah Court	13	1	14	0	11	3	12	2	12	2
Syarie Judge	103	4	143	5	131	5	66	8	66	8
Sulh Officer	40	44	44	22	28	20	24	20	26	20
Syariah Officers	44	26	33	11	58	32	52	32	52	32

Source: Statistics provided by the Ministry of Women, Family and Development, Government of Malaysia, <https://www.kpwkm.gov.my>

that “interpretations that discriminate against women were influenced mostly by cultural practices and values which regarded women as inferior and subordinate to men” and that they are qualified to hold the position of a judge (Sisters in Islam 2009). The data from 2012 to 2016 (see Table 1) illustrates the gradual change that has been taking place in the Syariah courts.

In summary, the initial progress has been extremely slow, but given the developments since mid-2016, one can be cautiously optimistic that this progress will continue. Initially the pathway opened for appointments of women was to the lower Syariah judiciary, but now appointments have been made to higher courts. Moreover, female judges are now also being appointed to the higher courts in the civil court system. With the appointments in 2017, the majority of judges in the Court of Appeal are now women – 14 out of 25 judges – and there is a record number of 4 female judges in the Federal Court (Anbalagan 2017).

Conclusion

Implementing women’s human rights in Malaysia has been impeded by several factors, including Malaysia’s subscription to the dualist tradition when it comes to international law. This means that international law, including ratified conventions, must be incorporated by a legislative act in order to be directly applicable in a domestic setting. In recent years this approach has softened especially through judicial activism where judges are incorporating international human rights

obligations into cases of constitutional relevance – compare *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun*, et al. and *Indira Gandhi* – with the latter touching directly on issues of Islam and human rights.

As shown above, the role Islam has within the legal and political framework of Malaysia is heavily debated. It comes as no surprise that the evaluation of women's human rights in Malaysia has been evaluated very differently depending on the source. Then Prime Minister Najib Razak (2012) commended Malaysia's women's human rights record saying that:

[I]n some developed countries, the men were allowed to vote before women but, in Malaysia, women had the right to vote from the start. Don't think that everything is better (in the developed nations) as we are way ahead especially in terms of women's rights. Women in Malaysia are different to [sic] those in other countries. There is no need for a women's rights movement as we have from the start acknowledged equal rights for women.

Quite to the contrary, in 2016 Andrew Khoo, then chairperson of the Bar Council Human Rights Committee, commenting on Malaysian efforts regarding the implementation of international human rights gave it a "D," for "deficient." Khoo (2016) summed up the government's position on CEDAW by saying that:

The Malaysian Government acceded to CEDAW on 5 July 1995, also with a slew of reservations, again some of which have been withdrawn while others remain. All it did as a consequence of accession was to amend Article 8(2) of the Federal Constitution to insert the word "gender" as another ground disallowed for the purposes of discrimination. The amendment came into force on 28 September 2001, nearly 6 years and 3 months after accession. Despite numerous and repeated calls for legislation to outlaw gender discrimination and mandate equality, none has been forthcoming by the Malaysian Government.

In regard to the issue of Islam and women's human rights, the CEDAW Committee (UNCEDAW 2006a) flagged that it was "particularly concerned at the State party's position that laws based on Syariah interpretation cannot be reformed." This observation still holds true over a decade later. While NGOs, in particular SIS, have been lobbying hard to provide alternative interpretations of Islamic law that are more compatible with international law, this has resulted in them being labeled "deviant" by religious authorities. It is a label that SIS has been vehemently rebutting and is challenging in court (Sisters in Islam 2017). A progressive interpretation of Islamic law is even more unlikely given the ongoing competition between political parties to "out-Islamicize" each other.

Malaysia has made minor progress in certain areas, such as the appointment of female Syariah judges, yet overall progress has been hindered by conservative interpretations of Islamic law. In early 2016, Freedom House placed Malaysia as one of six countries to watch out for in 2016 as the government started to "enforce conservative societal norms, targeting religious minorities, women, transgender Malaysians, and the LGBT community more generally" (O'Toole 2016). Human Rights Watch (2017b) observed a similar deterioration of human rights, a sentiment that was also echoed nationally by Suhakam (2016, 1).

Malaysia's performance regarding CEDAW was under review by the CEDAW Committee in early 2018. As mentioned above, the CEDAW Committee (UNCEDAW 2017) had asked the Malaysian government to explain quite a few of its shortcomings. The CEDAW report was not a "D" – as was the one given by the Bar Council – but Malaysia still has a long road ahead to a form of compromise between Islam and international human rights obligations and expectations.

Cross-References

- [Human Rights Responses to Violence Against Women](#)
- [International Law and Child Marriage](#)
- [The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children](#)
- [The Convention on the Elimination of All Forms of Discrimination Against Women](#)
- [Women Human Rights Defenders](#)

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Part VII

Gender and Human Rights of Women in Conflict-Affected Contexts

Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence

Valorie K. Vojdik

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Abstract

For nearly 30 years, military and civilian peacekeepers across the globe have engaged in rape, sexual assault, forced prostitution, trafficking, and sexual exploitation of women and children. The mechanisms for policing and punishing peacekeeper SEA have been inadequate, creating a culture of impunity. Rather than treat sexual exploitation and abuse as a crime committed by individual peacekeepers, as the UN has done, the international community must situate peacekeeper SEA within the gendered structures of power that help perpetuate conflict-related violence against women and girls. Peacekeeper SEA is rooted in unequal gender relations and poverty, exacerbated by the social and economic dislocations of war. Peacekeeping troops often engage in masculinized social practices that encourage sexual exploitation and gender violence against women and children. With the rise of new peacekeeping economies, peacekeepers often

V. K. Vojdik (✉)

University of Tennessee College of Law, Knoxville, TN, USA

e-mail: vvojdik@utk.edu

fuel the growth of prostitution and survival sex, harming the individual victims while reinforcing the inequality of women in post-conflict societies. To address peacekeeper SEA requires dismantling the structures of gender inequality and empowering women. It also requires transforming the institutional norms and practices that encourage and enforce masculinized violence by peacekeeping troops.

Keywords

Sexual exploitation and abuse · Peacekeeping · Militarized masculinities · Gender inequality · Post-conflict

Introduction

The United Nations deploys peacekeeping forces to provide security and protection to societies devastated by the atrocities of armed conflict. For nearly 30 years, however, peacekeeping missions have engaged in widespread and persistent sexual abuse and exploitation (SEA) of women and girls. In numerous missions around the globe, military and civilian peacekeepers have engaged in rape, sexual assault, forced prostitution, trafficking, and sexual exploitation of women and children. The mechanisms for policing and punishing SEA by peacekeeping troops have been inadequate, creating a culture of impunity. The UN has focused its attention on improving the accountability for individual violations, framing SEA as a crime committed by individual peacekeepers that will be deterred if punished.

While the UN has sought to improve the investigation and prosecution of individual perpetrators, it has failed to address the underlying causes of peacekeeper SEA in post-conflict societies (Vojdik 2007). Sexual abuse and exploitation of women and girls by peacekeepers is not merely a crime committed by individual peacekeepers. Rather, it is a human rights violation, part of the larger continuum of conflict-related violence against women. To eliminate peacekeeper abuse, the international community must situate SEA by peacekeepers within the gendered structures of power that help perpetuate conflict-related violence against women and girls.

Peacekeeper SEA is rooted in unequal gender relations and poverty, which enable and exacerbate gender violence and the social, economic, and political disempowerment of women and girls, before, during, and after conflict (Vojdik 2007). Most refugees and internally displaced persons are women and children, forced to flee their families and communities. Uprooted from traditional means of support and protection, they are particularly vulnerable to sexual abuse and exploitation. Much of the peacekeeper abuse, for example, has occurred in or near camps for refugees and internally displaced persons, which fail to provide women and children adequate support and protection.

Arriving at or near the end of armed hostilities, international peacekeeping missions often reinforce and perpetuate unequal gender relations and the subordination of women in the post-conflict state. In conflicts marked by the widespread use of sexual violence as a weapon of war, sexual abuse and exploitation of women may be normalized, especially in societies that lack a functioning legal system necessary

to punish perpetrators and protect survivors. International peacekeeping troops often engage in masculinized social practices that encourage sexual exploitation and gender violence against women and children who struggle to survive (Vojdik 2007). With the rise of new peacekeeping economies, peacekeepers often fuel the growth of prostitution and survival sex, which not only harms the individual victims but also reinforces and perpetuates the inequality of women in post-conflict societies.

The economic, social, legal, and political empowerment of women in post-conflict societies is essential to break the cycle of sexual abuse and exploitation. In 2017, UN Secretary-General António Guterres explicitly recognized that SEA is rooted in unequal gender relations and that empowerment of women is necessary to eliminate post-conflict gender violence against women (UNGA 2017). Shifting the focus from the punishment of SEA to the larger context of post-conflict gender violence and inequality is an important first step. Rather than focus primarily on punishment of individual perpetrators, the UN must help dismantle the structures that perpetuate gender inequality, in both the host nation and in peacekeeping missions. The elimination of peacekeeper SEA requires transforming the structures of gender inequality to empower women and addressing the challenges of poverty in nations devastated by war. It also requires addressing and transforming the institutional norms and practices that encourage and enforce masculinized violence by peacekeeping troops, which helps perpetuate gender inequality in the post-conflict state.

Sexual Abuse and Exploitation by UN Peacekeeping Troops Is Widespread and Persistent

For the past 30 years, UN peacekeeping missions have been rocked by highly publicized accusations of sexual abuse and exploitation of women and children across the globe. Peacekeeper SEA has been documented in Bosnia and Herzegovina, Kosovo, Cambodia, East Timor, Liberia, the Democratic Republic of Congo, South Sudan, Haiti, and the Central Africa Republic, among other places. With each new scandal, the UN has responded by declaring a policy of “zero tolerance” for SEA, investigating allegations, and seeking expert recommendations to address and prevent SEA. Despite adopting various reforms, the UN has failed to eradicate peacekeeper SEA. This repeated cycle of scandal followed by ineffectual efforts at reform illustrates the persistence of the problem and the inadequacy of focusing primarily on punishment of individual perpetrators.

Peacekeeper SEA is committed by both civilian and military personnel, employed by the UN as well as its member nations. The UN does not solely rely on its own staff and personnel to conduct peacekeeping missions. It also relies on member nations, called “troop-contributing countries” or TCCs, to contribute troops and civilians. Peacekeeping missions can be composed of UN staff, experts, UN civilian police and military observers, UN volunteers, as well as members of national militaries from TCCs (Defeis 2008). Peacekeeping missions engaged in SEA thus have included UN staff and personnel engaged in humanitarian missions, as well as military troops and civilians under the control of TCCs from around the globe.

In 2002, the UN High Commissioner for Refugees (UNHCR) and the Save the Children Fund documented widespread allegations of sexual abuse and exploitation of children in refugee camps by UN peacekeepers in West Africa. The abuse occurred in Liberia, Guinea, and Sierra Leone and was perpetrated by the UNHCR aid workers, international peacekeepers, and local staff employed by national and international NGOs. An investigation by the Office of Internal Oversight Services (OIOS) reported that SEA included sex with a 15-year-old refugee girl in exchange for the payment of her school fees, the rape of girls and boys by peacekeepers and NGO staff, and the exchange of sex for food by NGO staff (UNSG 2003, 9–11).

Following a report documenting the abuse, the UN General Assembly in 2003 requested the secretary-general to take measures to prevent and punish sexual exploitation and abuse in humanitarian and peacekeeping operations. The secretary-general subsequently promulgated a bulletin in 2003, applicable to all United Nations staff, prohibiting sexual exploitation and abuse (UNSG 2003). The bulletin is considered to embody the UN's "zero tolerance" policy that seeks to protect women, children, and others who are particularly vulnerable in post-conflict situations from abuses of power.

The bulletin specifically defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including but not limited to profiting monetarily, socially or politically from the sexual exploitation of another" (UNSG 2003, 1). Sexual abuse is defined as "actual or threatened intrusion of a sexual nature, whether by force or under unequal or coercive conditions" (UNSG 2003, 1). The bulletin specifically prohibits sexual activity with children, "regardless of the age of majority or age of consent locally," as well as prostitution in general (UNSG 2003, 2). The bulletin also prohibits the "exchange of money, employment, goods or services for sex, including sexual favors or other forms of humiliating, degrading or exploitative behavior," including exchange of assistance (UNSG 2003, 2). The definitions of sexual exploitation and abuse are not limited to traditional notions of rape or assault. Instead, the bulletin broadly focuses on abuse of power or trust for sexual purposes.

While the bulletin is not legally binding on military troops and civilians from troop-contributing countries, it requires all non-UN entities and individuals who are working in cooperation with the UN to accept its standards. Troop-contributing countries (TCCs), however, are responsible for the investigation and punishment of allegations of SEA committed by their own troops and personnel in host nations. As a condition of sending their military forces to host countries to keep the peace, TCCs require host nations to sign agreements, called status-of-forces agreements or SOFAs, which typically exempt troops from contributing countries from criminal prosecution by the host nation. The UN Model Status-of-Forces Agreement, for example, provides that military personnel from TCCs are immune from criminal prosecution by the host nation. Consequently, the troop-contributing country retains criminal jurisdiction over its military personnel for crimes committed while in the host nation.

Despite the UN's "zero tolerance" policy, sexual abuse and exploitation by peacekeeping missions persisted. In 2004, over 150 women accused UN peacekeepers in the Democratic Republic of Congo of rape, sexual assault, forced prostitution, and sexual exploitation (UNGA 2005a). The secretary-general of the UN appointed Prince Zeid Ra'ad Zeid al-Hussein, the permanent representative of Jordan, to investigate the allegations. In 2005, Prince Zeid submitted his report, "A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations." The report determined that it was likely that UN peacekeepers had engaged in both rape and widespread sexual exploitation of women and girl children (UNGA 2005a, paras 6, 7, 8, 13). Sexual exploitation often included prostitution and survival sex, the exchange of sex by women and girls for money (\$1 to \$3 per encounter), food, or jobs to survive (UNGA 2005a, para 6). An investigation by the UN Office of Internal Oversight Services (OIOS) corroborated many of the allegations, finding that peacekeepers engaged in sex with girls, aged 11–14, in exchange for small sums of money or small bits of food, such as two eggs or chocolate (UNGA 2005b, paras 11, 12–16). One senior member of the DRC peacekeeping mission allegedly made pornographic films of sex with refugee and displaced women and girls.

The Zeid report observed that "[s]exual exploitation and abuse by military, civilian police and civilian peacekeeping personnel is not a new phenomenon" (UNGA 2005a, para 3). Similar abuses had previously occurred in Bosnia and Herzegovina and Kosovo in the early 1990s and Cambodia and Timor-Leste in the early and late 1990s. The report concluded that sexual exploitation and abuse is widespread, underreported, and undeterred by the rules designed to prevent such activity (UNGA 2005a, para 8).

The Zeid report made numerous recommendations to improve the accountability of troop-contributing nations for the investigation and prosecution of alleged SEA committed by their troops (UNGA 2005a, paras 27, 36, 62–65, 91). For example, the report recommended training programs for all peacekeepers and outreach into local communities. Other recommendations included the establishment of conduct and discipline units, staffed by senior-level experts, and a permanent and professional investigative body, independent of the peacekeeping missions, to investigate and address complaints. To improve accountability, the report also recommended that TCCs establish on-site, military court-martial tribunals in the host country to prosecute wrongdoing. It concluded that on-site court-martials would send an important and visible message to the host nation and abuse victims, facilitating and encouraging the participation of the victim and other witnesses.

The UN adopted some but not all of the recommendations. UN peacekeeping operations have established Conduct and Discipline Units, an important step in holding perpetrators accountable (Defeis 2008). Other recommendations have not been adopted, including the recommendation for on-site military court-martial tribunals (Defeis 2008).

Despite the changes, peacekeeper abuse and exploitation has continued, with successive waves of well-publicized scandals followed by additional attempts at reform. For example, in 2007, UN peacekeeping missions on Haiti, Cote d'Ivoire, and southern Sudan were accused of SEA, including abuse and exploitation of children. As a result, UN ordered the return of 100 Sri Lankan peacekeepers from Haiti and briefly suspended 800 peacekeepers stationed in Cote d'Ivoire (Ndulo 2009). In 2015, allegations of SEA arose in the Central Africa Republic, accusing UN personnel and French military forces operating under the UN Security Council of sexual abuse and exploitation of displaced children in IDP camps. An independent review panel appointed by the secretary-general concluded that the UN failed to adequately respond to the allegations, perpetuating a "culture of impunity [which] undermined the integrity" of the peacekeeping mission in the Central African Republic (UNGA 2016, 8). In 2016, the UN received 145 allegations of SEA by peacekeepers around the world, including 80 allegations against uniformed personnel and 60 against civilians (UNGA 2017, 5/82). The vast majority of the victims were women and girls, though males were also victims.

Accountability remains elusive. For example, none of the peacekeepers with the DRC mission were criminally prosecuted (Ní Aoláin et al. 2011). While the UN has taken steps to incorporate its code of conduct into MOUs with TCCs, it has been largely ineffective in encouraging TCCs to investigate and punish violations. In 2015, the UN's Office of Internal Oversight Services (OIOS) concluded that SEA remains a serious problem and that current mechanisms for prevention and enforcement are ineffective (UNOIOS 2015).

Frustrated by the continued persistence of peacekeeping abuses, the UN Security Council in 2016 adopted Resolution 2272 recognizing the continued impunity of peacekeepers engaged in SEA and calling on the secretary-general to take additional steps to impose accountability, including the repatriation of entire troops upon a finding of SEA in a host nation (UNSC 2016). While improving accountability is important, it does not address the underlying causes of SEA. Rather than focus on SEA as a crime committed by individual peacekeepers, the international community must situate SEA within the larger context of conflict-related gender violence.

Situating Sexual Abuse and Exploitation by Peacekeepers Within the Context of Conflict-Related Gender Violence

Gender-based violence and sexual abuse and exploitation of women post-conflict is not merely a criminal act by individual peacekeepers but a form of conflict-related sexual violence (Westendorf and Searle 2017; Deschamps et al. 2015). It is rooted in poverty and unequal power relations between men and women, exacerbated by the social and economic devastation of conflict. The arrival of international peacekeepers, including military troops from other nations, interacts with and often exacerbates the existing gender inequalities.

Poverty and Gender Inequality Put Women at Risk

Across the world, women are disproportionately poor and lack equal access to political, social, and economic power. War exacerbates and intensifies this inequality, rendering women and girls particularly vulnerable to sexual abuse and exploitation post-conflict by peacekeepers who wield enormous power and resources in the new peacekeeping economies (Vojdik 2007).

The UN Security Council recognized in Resolution 1325 that women are negatively impacted in distinct ways by the economic disruption and gender violence that occurs in armed conflict (UNSC 2000). War ordinarily results in the economic devastation of society and this impacts women in gender-specific ways (Rehn and Sirleaf 2002). Ordinary means of subsistence are often destroyed. Women living in rural communities are particularly affected. Villages may be burned, land and cattle stolen, and crops destroyed. Members of the community may be tortured, killed, or conscripted. Many times, women in these communities are widowed and often left bereft of any property, expropriated from their homes, and forced to live without any means of support (UNDAW 2001).

Women's social, cultural, and political powerlessness exacerbates the economic effects of wartime (Hynes 2004; Plümper and Neumayer 2006). In many societies, women live under legal systems that deny them access to legal, political, or economic power or rights. Local and customary laws often prohibit women from owning land or inheriting property (Hynes 2004). Women often lack access to opportunities for wage labor. In these communities, war is particularly devastating.

The economic loss that society in general suffers is particularly felt by women, typically the primary caretakers of children, who lack the opportunity to earn money through wage labor (Hynes 2004). Without access to land, money, or employment opportunities, women are left without the necessary resources to provide for themselves or their families (ICRC 2015). Traditional social support structures in society are often destroyed during war, leaving women without an important means of survival and at risk for sexual violence (ICRC 2015). The violence and lawlessness in general that flourishes during wartime also make it difficult for women to protect themselves or to earn money to feed themselves. As a result, women's health, economic, and social status decline during and after conflict (ICRC 2015; Hynes 2004).

Women and children constitute the majority of refugees and internally displaced persons. Displaced women and girls are vulnerable to a range of sexual violence including forced sex/rape, sexual abuse by an intimate partner or family member, and sex trafficking (Vu et al. 2014). Women who are displaced and forced to leave their communities often wind up in refugee camps or camps for internally displaced persons (IDPs), which often fail to meet their needs for subsistence and security (ICRC 2015).

Women have experienced high levels of violence in these camps. For example, women are often responsible for collecting food and wood fire, requiring them to travel away from the camp where they are often physically or sexually attacked. In addition, there is evidence that gender-based violence increases during and after conflict and occurs in refugee and IDP camps (Vu et al. 2014). A recent study by Vu

et al. suggests that one in five refugees or displaced women in complex humanitarian settings experiences sexual violence, defined as rape, molestation, sexual abuse, genital mutilation, gang rape, marital rape, sexual violence related to exploitation, and sexual harassment (Vu et al. 2014). Male refugees and IDPs also suffer sexual and gender-based violence, which has been largely ignored and under-reported (Vu et al. 2014; Vojdik 2014). Because sexual violence against both men and women is under-reported due to social stigma and other reasons, the actual number is likely higher. As a result, women, men, and children victims may suffer long-lasting damage to their physical, reproductive, and mental health (Vu et al. 2014). This in turn increases their vulnerability and risk of social and economic ostracism, which perpetuates existing structures of gender inequality in the post-conflict state.

Armed conflict results in the destruction of other critical social structures, including the justice system, which increases women's vulnerability and security post-conflict. During and after conflict, civil and political rights are often suspended. The elimination of functioning legal, political, and civil society institutions denies women access to alternative means of protection and empowerment (Vu et al. 2014). This in turn fosters a sense of lawlessness and impunity in the post-conflict society, which can encourage the sexual exploitation and abuse of women (Vojdik 2007).

The scourge of wartime sexual violence does not disappear when hostilities end. In places where sexual violence has been widely used as a weapon of war, gender violence often becomes normalized (Awori et al. 2013). The level of rape often remains high, even following the end of conflict. The breakdown of the rule of law and legal systems means that women are unable to secure redress or protection and perpetrators go unpunished. Transitional justice mechanisms often fail to punish military troops who committed acts of sexual violence during the conflict. In Sri Lanka, for example, rape was widely used by the military and police during its recent civil war and sexual violence against women has continued in IDP camps following cessation of the conflict (Davies and True 2017). Out of 325 complaints against sexual violence filed between 2007 and 2012, Sri Lankan authorities have investigated only 39 and secured one conviction against four soldiers for gang rape of two Tamil women (Davies and True 2017). Impunity for sexual crimes committed by military officers, including the rape of girls, is extremely pervasive, especially for state security forces. Witnesses have been harassed or forced to leave the country, and women fail to take action because they fear reprisals and lack of support (Davies and True 2017). The social, economic, and health needs of survivors are often unaddressed, compounding the harms of the original violence. The refusal or inability of societies to remedy the harms caused by wartime sexual violence reinforces the post-conflict sense of impunity and disregard for the needs and rights of women and children.

Peacekeeper SEA occurs more frequently in humanitarian assistance missions involved with vulnerable local populations experiencing hunger, displacement, and desperation, and where public safety and the law are ineffective or absent (UNGA 2017, para 11). As a matter of survival, women in conflict and post-conflict situations often feel they have no recourse but to exchange sex with peacekeepers for money or sex for food, engaging in survival sex (Awori et al. 2013). An independent

expert report prepared for the Secretary General in 2013 examined the prevalence and causes of SEA in UN peacekeeping missions that have experienced a high proportion of SEA allegations – the DRC, Haiti, Liberia, and South Sudan. Each of these countries post-conflict faces “extreme social and economic disintegration”; among 187 countries on the Human Development Scale, they rank 161 (Haiti), 174 (Liberia), and 186 (Congo) (Awori et al. 2013, 6). The report concludes that in each nation, poverty provides the context for transactional or survival sex: “[w]ith few alternatives for livelihood, women and girls risk finding no alternative but sex for food or pay” (Awori et al. 2013, 6). A recent survey of women under the age of 30 in Monrovia, Liberia, for example, showed that half of the women have engaged in transactional sex and that nearly one in four had engaged in transactional sex with UN peacekeepers (Beber et al. 2017).

Focusing on peacekeeper SEA, primarily as a crime committed by individual peacekeepers, ignores the gendered context of post-conflict societies. Peacekeeping does not occur in a vacuum. The goal of achieving peace and security requires addressing the social and economic structures that subordinate and disadvantage women and girls – before, during, and after conflict (Deschamps et al. 2015; True 2014; Vojdik 2007). Reframing SEA as post-conflict gender violence recognizes its roots in poverty and gender inequality. It also reveals the ways in which SEA perpetuates those gender inequalities, as discussed in the next section.

Reproducing Gender Inequality: Peacekeeping Mission Masculinities in Post-conflict Societies

The arrival of UN peacekeeping troops into post-conflict societies introduces foreign military troops who have been trained in warfare but are deployed to protect peace. As members of national military institutions, peacekeeping troops bring their own institutionalized cultures, typically organized around militarized masculinities and masculinized power (Ní Aoláin et al. 2011; Higate 2007; Vojdik 2007). Approximately, 95% of peacekeeping troops are male, making the peacekeeping troops effectively segregated by gender (Ní Aoláin et al. 2011). The arrival of international peacekeeping troops thus introduces new, gendered structures of masculinized power into post-conflict societies in which women and children are particularly vulnerable and destitute, which can result in the sexual exploitation and abuse of local women and children and reinforces existing gender inequalities.

As Joshua Goldstein argues in *War and Gender*, military institutions typically reflect and reinforce practices of masculinity that denigrate and subordinate women (Goldstein 2001). As RW Connell explains, masculinity is not a fixed category of identity but a social practice within particular social institutions, including the military, the workplace, and the state (Connell 1995). Masculinities create, enforce, and reproduce relations of power on multiple levels: between individual men, between groups of men, between men and women, and within larger social institutions such as the military, the workplace, and the nation-state (Connell 1995).

As Connell explains, masculinity is “simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily experience, personality and culture” (Connell 1995). Masculinities also intersect with other identities and social positions, including but not limited to race, nationality, ethnicity, and sexual orientation (Vojdik 2007). Within any institution or social space, there may be one form of masculinity that is hegemonic but typically there are multiple masculinities, reflecting differences between groups of men.

As Goldstein and others observe, military institutions typically reflect and embody practices of masculinity. Through a range of social and institutional practices, military institutions tend to construct warriors as aggressive, violent, and dominant, considered as necessary to inculcate the ability to kill in ordinary citizens. This militarized version of masculinity is defined in opposition to the notion of femininity (Goldstein 2001). To prove their identity as men, soldiers typically engage in institutionalized rituals, symbolically and actually enacting a violent form of masculinity that denigrates women, as well as some men who are perceived to fail to conform to masculine norms (Goldstein 2001). During military training, for example, troops may engage in misogynistic drill chants and homophobic and hazing rituals that involve both actual and symbolic rape and sexual violence (Vojdik 2014; de Albuquerque and Paes-Machado 2004).

During wartime, military groups often use sexual violence as a gendered tool of war that symbolically feminizes the enemy as weak and powerless, while constructing the military perpetrators as dominant, powerful, and masculine (Vojdik 2014). Sexual violence also functions as a gendered means to attack the larger ethnic, racial, religious, or political collective to which the individual victim belongs. While not every military institution engages in sexual violence, the construction of this form of militarized masculinity tends to encourage and legitimize the domination of women, including through sexual violence, exploitation, and abuse (Vojdik 2007).

The arrival of peacekeeping troops, typically socialized in these institutionalized practices of masculinity, necessarily intersects with existing structures of gender and power in the host nation (Ní Aoláin et al. 2011). Trained to engage in war, military troops assigned to peacekeeping missions arrive in post-conflict nations having been socialized in the masculinities of their military institutions. They are assigned to protect the peace in places “where the social fabric has been torn apart by civil strife, where the rule of law is absent, where family structures have disintegrated, and where the local population endures severe economic and psychological hardship” (Defeis 2008). Some peacekeeping troops hail from militaries that have engaged in sexual violence during other conflicts; others may come from societies in which sexual abuse or coercion of women is acceptable (Deschamps et al. 2015).

As compared to the local population struggling with the devastation of war, peacekeeping troops wield enormous power in the post-conflict nation which is often abused. The rate of SEA by peacekeeping troops likely varies according to both the particular vulnerability of the host population and the discipline and command structures of TCC troops (Moncrief 2017). It is true that not every peacekeeping mission engages in SEA. Moreover, SEA is committed not only by

military troops but also by humanitarian and civilian workers. Still, the role of militarized masculinities combined with the vast disparities between peacekeepers and those they are assigned to protect often results in SEA.

In countries devastated by the economic and social devastation of war, the establishment of peacekeeping missions creates “peacekeeper economies” which impact the social, economic, and political structures of post-conflict society (Jennings 2014; Enloe 2000). Peacekeeping missions create a demand for goods and services in the local economy, as well as opportunities for economic development and profit, which can reproduce structures of gender inequality in post-conflict societies. Peacekeeping missions create employment and business opportunities for local business and military elites who are typically men, which enhance local male power, ownership, and influence (Jennings 2014). At the same time, peacekeeping missions fuel demand for work typically performed by women, such as domestic, hospitality, and sex work (Jennings 2014). While this may improve the economic position of some women, the demand for prostitution and survival or transactional sex by peacekeepers results in the sexual abuse and exploitation of women and children who trade sex for money or food to survive (Ní Aoláin et al. 2011). In Cambodia, for example, peacekeeping troops were associated with a rise in a cottage sex industry of prostitution serving US military and foreign military customers. In Bosnia and Herzegovina, UN peacekeepers engaged in sex trafficking of women; soldiers were regular customers in the brothels in Bosnia, which relied on women who had been sold into forced prostitution (Jennings and Nikolić-Ristanović 2009; Rehn and Sirleaf 2002). Children may also be victims of prostitution. A study of 12 nations with peacekeeping forces found that in half of those countries, the arrival of peacekeeping troops was associated with a rapid rise in child prostitution (UNGA 1996, para 98).

A culture of impunity within the UN and member nations has long existed (Vojdik 2007). In response to allegations of sexual abuse and misconduct by peacekeeping troops in Cambodia, the top UN official in Cambodia responded, “boys will be boys” (Crossette 1996). A culture of silence persists (Defeis 2008). Sexual violence and exploitation of women by military forces in conflict or post-conflict situations is rarely prosecuted, which encourages peacekeeping troops to feel that they may engage in such violence with impunity, free from prosecution or accountability (Ní Aoláin et al. 2011).

While UN has adopted a “zero tolerance” policy toward SEA, these rules do not apply to civilians or members of national military forces contributed by UN member nations. When allegations of serious misconduct are made, the UN may repatriate the individuals concerned or, in certain circumstances, repatriate the TCC’s entire national contingent, make recommendations to the troop-contributing country, and/or ban the individual(s) from future peacekeeping operations. However, the UN is powerless to prosecute individual troops under the command of TCCs. Under agreements between the UN and TCCs, TCCs have exclusive jurisdiction to investigate and punish SEA by their troops (Deschamps et al. 2015). Under the Model Status-of-Forces Agreement with the host nation, the troop-contributing country similarly has exclusive jurisdiction to criminally prosecute and discipline the

conduct under its own laws or military disciplinary codes. Immunity from prosecution in the host nation serves as an important inducement for troop-contributing countries, who otherwise fear having their personnel subjected to criminal prosecution in post-conflict states where there is often no operational justice system.

Allocating enforcement authority to the troop-contributing nations, however, has failed to punish or hold peacekeepers accountable for these violations. Military institutions and TCCs often have turned a blind eye toward sexual abuse or misconduct by their troops and failed to prosecute perpetrators (Ní Aoláin et al. 2011). Conduct that would fall under the UN's definition of sexual exploitation may not be prohibited under national laws or military codes, such as prostitution and survival sex (Vojdik 2007). Even if the TCC is willing to investigate and prosecute, there are serious logistical problems with prosecuting a crime in the contributing country that are difficult to surmount. The witnesses to the crime or the abuse, as well as most of the evidence, are in the host country. Even if the TCC does prosecute or discipline its troops at home, it remains invisible to the victims and host nation, who are left to believe that complaints about peacekeeper SEA are futile (Deschamps et al. 2015).

Recommendations for Change

Rather than consider sexual abuse and exploitation by UN peacekeepers as an isolated occurrence, we need to conceptualize it more broadly as part of a continuum of conflict-related gender violence that is rooted in gender inequality and exacerbated by the devastation of war. It is not enough to merely punish individual perpetrators. To prevent SEA, the international community must focus on concrete ways to improve women's socioeconomic and legal position in the wake of conflict (Awori et al. 2013).

In his 2017 report, the secretary-general acknowledged that "unequal gender relations lie at the heart of sexual exploitation and abuse" (UNGA 2017, para 9). The report acknowledges that the UN must do more to empower women to eliminate inequality and prevent the conditions that can give rise to violence. While the plan states it will focus on putting victims first, it does not recommend specific steps to empower women as a means to eliminating their vulnerability. The report instead continues to focus primarily on eliminating impunity through improving education and training and pressuring TCCs to better respond to allegations of peacekeeper abuse in their national systems. This perpetuates the UN's narrow focus on SEA as a failure of discipline and punishment for individual violations, rather than as conflict-related gender violence that arises from gendered structures of social and economic equality (Westendorf and Searle 2017; Deschamps et al. 2015).

Eliminating women's social and economic inequality is essential to reduce the vulnerability of women and children to sexual abuse and exploitation in post-conflict situations (Vojdik 2007). The international community must provide sufficient resources and funding for programs that advance women's economic and social equality and empowerment in post-conflict societies (Awori et al. 2013). The UN

Security Council has recognized the distinct impact of conflict on women, including the violation of women's human rights. Security Council Resolution 1325, for example, emphasized the need to include women as equal participants in the maintenance of peace, security, and conflict resolution (UNSC 2000). It did not, however, address the causative role of gender inequality or the need to eliminate the social and economic inequalities post-conflict (True 2014). More recently, the Security Council has begun to acknowledge the need to eliminate socioeconomic gender inequalities post-conflict. Resolution 1889 emphasizes the need to "ensure systematic attention to and mobilization of resources for advancing gender equality, and to encourage the participation of women in [the peacebuilding] process" (UNSC 2009). Resolution 2122, adopted in 2013, recognizes the need to integrate the socioeconomic development and empowerment of women into its peace and security programs. Sustainable peace requires an integrated approach that combines 'political, security, development, human rights, including gender equality, and rule of law activities' (UNSC 2013, para 1).

The resolutions have not translated into more resources on the ground, however. Peacekeeping missions and post-conflict reconstruction have largely ignored women's socioeconomic inequality and empowerment, focusing instead on security sector reform; demobilization, disarmament, and repatriation; justice reform; and humanitarian assistance (True 2014, 246–247; UNDP 2010, 35). In 2010, the UN Development Programme (UNDP) examined the extent to which post-conflict financing addresses women's social, economic, and political equality. Analyzing post-conflict reconstruction in four post-conflict countries (Timor-Leste, Sierra Leone, Kosovo, and South Sudan), the UNDP found that post-conflict initiatives "did not allocate resources to promote gender equality or address women's needs to any significant degree" (UNDP 2010, 35). Women were markedly underrepresented in the processes and decision-making strategies that determine funding priorities and budgets (UNDP 2010, 31). In the wake of Security Resolution 2122, little has changed.

Increasing funding is critical to eradicate the legal, cultural, social, and economic barriers to women's equality. Support for IDP and refugee camps, for example, is necessary to meet the basic needs of those who seek refuge, including adequate food, protection, and health care. Programs that expand employment and small business opportunities for women provide access to basic services like health and education, address the harms of wartime rape and sexual violence, and restore the rule of law are essential to eliminating women's socioeconomic inequality and vulnerability to SEA.

It is also critical to address the institutionalized masculinities within peacekeeping missions that encourage the sexual abuse and exploitation of women. Massive cultural or institutional change requires a strong commitment at the command level. The secretary-general has announced that the UN will now disclose the national identities of peacekeepers alleged to have committed SEA, reversing its prior policy that facilitated impunity. Employing "naming and shaming" improves transparency and may pressure on TCCs to begin to transform the military and peacekeeping cultures that encourage sexual exploitation and abuse.

It is also possible to focus more specifically on changing the gendered culture of peacekeeping missions. One option is to increase the number of female peacekeepers. Zeid and others advocate the inclusion of more female peacekeeping troops as a means to reduce SEA and transform the culture of peacekeeping missions. The number of female peacekeepers is extremely low, ranging from 1% to 3% of the military personnel in peacekeeping missions (Carreiras 2010). Some experts are optimistic that the presence of female peacekeepers, including all-female peacekeeping groups, can be effective (True 2014; Ní Aoláin et al. 2011). The presence of women in peacekeeping troops and in the public security sector appears to have some positive outcomes, including: the improvement of access and support for local women, increased reporting of gender-based violence, some reduction in SEA, and positive impacts from the visible empowerment of women, such as an increase in girls' school attendance and belief in future employment opportunities (True 2014; Ní Aoláin et al. 2011). Other experts are skeptical that simply adding more women will significantly change the deeply masculinized culture of military peacekeeping operations (Alchin et al. 2018; Simić 2010). Female members of national militaries, for example, have been socialized in the same militarized masculinities as men. Assuming that female peacekeepers will transform military masculinities both essentializes notions of gender (women as peaceful, men as violent) and ignores the power of institutional norms and practices that may limit their own agency.

Another option is to better integrate gender into peacekeeping missions. Ní Aoláin, Haynes, and Cahn advocate the adoption of "gender-positive peacekeeping," which means "plac[ing] gender at the center of the deployment, organization, and role assumptions of peacekeepers" (Ní Aoláin et al. 2011, 118, 129). At a minimum, this would require: increasing the representation of women deployed and local women employed with the mission; incorporating gender into the priorities of the mission at every stage; and ensuring that peacekeepers are aware that they interact with women in post-conflict societies who are not afforded equal rights or status and are excluded from social, economic, and political opportunities (Ní Aoláin et al. 2011, 118, 129).

A more robust version of gender-positive peacekeeping would seek to reconstruct the role of national military troops in peacekeeping, focusing less on traditional combat values and incorporating and valuing humanitarian goals and skills (Carreiras 2010). Paul Higate and Marsha Henry posit that peacekeeping missions lead to a clash between the identity of male soldiers as aggressive warriors trained for combat, and peacekeepers expected to exhibit impartiality, sensitivity, and empathy (Higate and Henry 2004). Because masculinities are multiple and fluid, peacekeeping missions could take concrete steps to redefine peacekeeping masculinities and roles. These include screening peacekeepers with preexisting commitments to gender equality, selecting senior mission heads who demonstrate a solid commitment to promoting gender equality and prohibiting SEA, and requiring mission heads to meet benchmarks that demonstrate knowledge of, and compliance with, SEA rules.

Conclusion

The sexual exploitation and abuse of women and children suffering from the devastation of war is not merely criminal conduct by individual peacekeepers but conflict-related gender violence. While improving accountability is essential to end the impunity that has enabled SEA to continue for decades, it is not enough. To eliminate peacekeeper abuse, the international community must situate SEA by peacekeepers within the gendered structures of inequality that render women and children vulnerable to sexual exploitation and abuse by peacekeepers. The international community must prioritize and fund programs to eliminate the social, economic, legal, and political inequalities, empowering women to overcome the distinct disadvantages caused by conflict. At the same, it is time to transform military and peacekeeping cultures rooted in militarized masculinities that perpetuate sexual abuse and subordination of both women and men. The UN and troop-contributing nations should explore alternatives that encourage gender-positive peacekeeping, putting gender at the center of peace and security.

Cross-References

- ▶ [Female Forced Migrants: Accountability Gaps in International Criminal Law](#)
- ▶ [Human Rights Responses to Violence Against Women](#)
- ▶ [UN Security Council Resolution 1325: The Example of Sierra Leone](#)
- ▶ [Women's Human Rights and the Law of Armed Conflict](#)

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Women's Human Rights and the Law of Armed Conflict

Judith Gardam

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Abstract

This chapter examines the extent to which the Law of Armed Conflict (LOAC) has developed in its approach to the protection of women in the post-1993 Vienna Conference era. At that time although the topic of women and human rights law was assuming prominence, there was a vast “silence” on the adequacy of LOAC to address women’s distinctive experiences of armed conflict. This chapter identifies and analyzes the significant areas of change, namely, the recognition of the gendered impact of armed conflict on women; the developments in the criminalization of sexual violence in armed conflict through international criminal law; the work of the United Nations, in particular Security Council Resolution 1325 on Women, Peace and Security; and the changing approach of the military establishment of states and the International Committee of the Red Cross to women and LOAC. Finally, the discussion identifies the ongoing challenges for further progress.

J. Gardam (✉)

Law School, University of Adelaide, Adelaide, SA, Australia

e-mail: judith.gardam@adelaide.edu.au

Keywords

Women · Armed conflict · Law · Sexual violence · International criminal law

Introduction

The 1993 United Nations World Conference on Human Rights held in Vienna was a pivotal event for the recognition of women's human rights and particularly the issue of violence against women. The Vienna Declaration and Programme of Action for the first time recognized violence against women as a human rights issue (WCHR 1993). Henceforth, the undertaking of examining the extent to which international human rights law (HRL) takes account of the lives of women has gone from strength to strength, although there are concerns as to what has actually been achieved for women by this project (Chinkin 1997; Charlesworth 2011).

The Vienna Declaration also made reference to the legal regime that regulates the conduct of armed conflict known as international humanitarian law (IHL) or LOAC in the following terms: “[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response” (WCHR 1993, section II, para 38).

The aim of LOAC is to protect persons who are not or are no longer directly participating in the hostilities and to restrict the means and methods of warfare available to the warring parties. Its provisions cover both international and non-international armed conflicts. This ancient, complex, and highly detailed set of rules deals with such diverse topics as air, sea, and land warfare, weapons, prisoners of war, civil defense, and the protection of civilians in occupied territories, to name just a few. Although LOAC is the most codified part of international law, the majority of its provisions are nowadays also reflected in customary international law (Henckaerts and Doswald-Beck 2005). Such a status is significant for those conventional rules that do not enjoy widespread acceptance among states actively involved in armed conflict.

Subsequently the focus on violence against women by the United Nations and human rights agencies, and the parallel developments in HRL, naturally led to consideration of these activities in armed conflict as so much of the violence against women occurs during such times. It remained the case, however, that the process of identifying women's particular experiences of armed conflict and demonstrating the failure of the law to acknowledge them has become significantly more advanced in human rights bodies than in organizations focusing solely on armed conflict. Given the endemic nature of armed conflict and the appalling treatment of women during such times, LOAC was arguably even more in need of examination than HRL as to how well it served the needs of women (Gardam 1997).

The purpose of this chapter is to determine the extent to which this relative “silence” on the topic of women, armed conflict, and LOAC has been lifted in the

last two decades, and in what ways, and whether it has led to fundamental change for women in that regime. Certainly there have been developments which can be usefully categorized as follows: first, overall the topic of women and armed conflict has moved out of the shadows and now attracts a significant amount of scrutiny from a range of stakeholders. A great deal is now known about the effects of armed conflict on women including the particular challenges they face in the so-called new wars of the twenty-first century (Chinkin and Kaldor 2013). Second, an intensive focus on some aspects of the effects of armed conflict on women, namely, sexual violence against women during such times, has seen the enforcement of both customary and treaty norms of LOAC through ad hoc and hybrid international courts (Chinkin 2014). The jurisprudence and practice of these bodies has had a profound impact on LOAC and has led to considerable progress in terms of the development, reinterpretation, and implementation of some of its provisions. Third, the United Nations has adopted a widespread and ambitious program to address the issue of women, peace, and security. Accountability for crimes of sexual violence and the protection of women during times of armed conflict have been an aspect of this agenda. Finally, the two powerful and influential stakeholders in the development, implementation, and interpretation of LOAC, the military establishment of states and the International Committee of the Red Cross (ICRC), have also responded in their own way to this changing international mood.

These initiatives on women and armed conflict and the form they have taken have not been without their critics. There are, for example, those who argue that the vision of women as simply passive victims in need of protection, which is the basis of the LOAC rules relating to women, has been reinforced by these developments (Engle 2008). Not only that but also the attention on sexual violence against women has masked the issue of such violence against men and boys in such times (Sivakumaran 2010). Commentators also disagree as to whether the existing provisions of LOAC are adequate to meet the demands of the changing social and political landscape (Oosterveldt 2009).

The discussion that follows is based on the loose categories identified above, namely, the impact of armed conflict on women, the developments in international criminal law (ICL), and the work of the UN and its agencies. Although the focus of this chapter is LOAC, any accurate picture of the international “legal landscape” for women in times of armed conflict requires the consideration of other relevant areas of international law including HRL, ICL, and refugee law (Henckaerts and Doswald-Beck 2005). This increasing proliferation of norms that may apply simultaneously in any given context has led to concern about the increasing fragmentation of international law with constant challenges arising as to the interaction of the various norms. One author describes the current system for women in times of conflict as a “scattered landscape of international legal regulation [. . .] in which there is no evident hierarchy, a lack of substantive enforcement capacity, disjointed expertise, and ongoing norm splintering” (Ní Aoláin 2012, 68).

The Effect of Warfare on Women

At the time of the Vienna Declaration and Programme of Action (WCHR 1993), not a great deal of information was available about the distinctive effect of armed conflict on women. The 1995 Beijing Platform for Action (FWCW 1995) was the first international instrument to draw attention to a number of aspects of armed conflict of particular significance for women. These included the incidence of gross and systematic violation of the human rights of women that occurs in armed conflict and the disregard that exists in relation to LOAC and HRL.

Generally speaking, however, there was little broader recognition that there was in fact a difference between men and women's experiences of armed conflict. One of the major difficulties over the years has been a shortage of sex-differentiated data on the impact of armed conflict. Although statistics on sexual violence against women in warfare were becoming increasingly available, the same was not true for the many other distinctive ways in which women suffered as a result of armed conflict. Traditionally it has been men who have provided the reports and documentation associated with armed conflict. In this process invariably women were subsumed under general categories such as civilians. As a consequence the numerous aspects of the lives of women that are detrimentally affected by armed conflict remained for many years largely undocumented in mainstream accounts.

In the early part of this century, efforts have been made to better understand the way in which armed conflict impacts on women. For example, three detailed studies of women in times of armed conflict have been undertaken at the international level. In 2001 the ICRC published *Women Facing War* (Lindsey 2001). This study had as its major objective the identification of the particular needs of women during periods of armed conflict so as to improve the quality, relevance, and impact of ICRC services. Significantly, there is acknowledgment that the specific needs of women during times of armed conflict are derived from gender, which is defined in the study as "socially defined or constructed sex roles, attitudes and values [...] ascribe[d] as appropriate for one sex or the other" (Whittington 1999, cited in Lindsey 2001, 35).

The United Nations has also taken an active role in identifying the ways in which armed conflict impacts on the lives of women. The landmark Security Council Resolution 1325 (UNSC 2000), establishing the United Nations women, peace, and security agenda, invited the Secretary-General to "carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution" (*ibid.*, para 16).

Two major United Nations studies were undertaken in response to the Council's request. The first "desk" study, presented to the Security Council by the Secretary-General in 2002, was carried out under the supervision of the United Nations Division for the Advancement of Women (now UN Women) (UN 2002). A parallel field study was undertaken by the United Nations Development Fund for Women (UNIFEM). The organization appointed two experts with a mandate to carry out an independent "assessment on the impact of conflict on women and women's role in peacekeeping," the result of which was published in 2002 (Rehn and Johnson Sirleaf 2002, vii).

With the advent of the so-called new wars, the face of armed conflict has changed and with it the ways in which women experience armed conflict. It is argued that not only do men and women experience war differently but also that this experience depends on the way in which gender is constructed in the particular type of conflict (Chinkin and Kaldor 2013). As the 2015 Global Study on the Implementation of United Nations Security Council Resolution 1325 explains, when Resolution 1325 was adopted in 2000, the major issues facing women in situations of conflict were sexual violence, the loss of family members, becoming displaced or refugees, or being forced into the role of combatants. Nowadays the theater of armed conflict more often than not is the family and community environments in which women live out their lives and this subjects them to different stresses (UN Women 2015).

The 2015 Global Study further describes the impact of new forms of weaponry such as unmanned aerial weapons on women's experience of armed conflict. It notes: "This is a decade where brutal 'in your face' beheadings of individuals co-exist side by side with the clinical targeting of places and individuals where women are mere numbers in what is termed 'collateral damage'. So, women in this century can be brutally gang raped and mutilated in one continent, requiring individual survivor assistance, while being treated as merely an anonymous, clinical number in another" (UN Women 2015, 21).

In summary, the last two decades has finally seen the recognition at the international level of women's distinctive experience of armed conflict. Moreover, the root cause of this difference, namely, gender, is now part of the mainstream. It is now accepted that the extent to which victims cope with the disintegration of societal structures, which is an accompaniment of all armed conflict, largely depends upon the position that they occupy in society (UN Women 2015). Those who are vulnerable are the most detrimentally affected. The endemic discrimination that women experience in virtually all societies is the most significant contributing factor to their vulnerability to the impact of armed conflict. The dominant role that men play in society generally equips them to cope with the deprivations associated with armed conflict more effectively than women. In this way armed conflict exacerbates existing inequalities experienced globally by women and, moreover, may lead to new forms of discrimination against them.

Despite this recognition of the root cause of women's experience of armed conflict, it has been primarily articulated in the context of rape and other categories of sexual violence. Parts of the United Nations system have been a little more robust in their approach, and there have been a number of broadly focused initiatives encompassing women and armed conflict, some of which place sexual violence against women in armed conflict in a wider framework of structural inequality (Otto 2010).

It has also been acknowledged that justice in conflict "must be transformative in nature, addressing not only the singular violation experienced by women, but also the underlying inequalities which render women and girls vulnerable during times of conflict and which inform the consequences of the human rights violations they experience" (UN Women 2015, 15).

Developments in LOAC and Women: The Era of International Criminal Law

In order to fully appreciate the current international legal position in relation to sexual violence against women in times of armed conflict, a mosaic of sources are relevant, namely, customary and conventional LOAC and HRL and the statutes and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). The focus of this section is on how the provisions of LOAC have been applied and interpreted for the purpose of assessing individual criminal responsibility by the international criminal courts.

Over the years there have been references to LOAC and women in various quarters, primarily in the context of sexual violence, but rarely did they go beyond a call for better implementation of its provisions. It seemed that sexual violence against women was regarded as an inevitable accompaniment to armed conflict, and there was little that could be done to prevent it. The 1995 Beijing Platform for Action, however, added accountability as a strategic response and called not only for the upholding and reinforcement of the norms of LOAC and HRL in relation to offenses against women but also the prosecution of all those responsible (FWCW 1995).

There was a paradigm shift in the mid-1990s in relation to the criminal punishment of conflict-related sexual violence. This became a reality in 1993 with the establishment of the ICTY by the Security Council as a response to the events in the former Yugoslavia (Harbour 2016). This was closely followed in 1994 by the establishment by the Security Council of the ICTR, and in 1998, states adopted the statute of the International Criminal Court (ICC). Prior to these developments, sexual violence against women in times of armed conflict was not prohibited directly by LOAC, and it was not at all clear that rape was a war crime and punishable as such. The statutes and jurisprudence of these bodies, however, have brought a decisive end to the prevailing impunity in relation to conflict-related sexual violence and radically altered the traditional scope of what constitutes war crimes in customary and conventional LOAC (Brammertz and Jarvis 2016).

The ICTY spearheaded these developments. Its statute refers only once to sexual violence in Article 5(g), which lists rape as a crime against humanity. Despite this paucity of specific provisions, the jurisprudence of the ICTY has been truly groundbreaking in its conceptualization of the more general war crimes provisions of LOAC such as torture, inhumane treatment, and willfully causing great suffering or serious injury to the body or health so as to include conflict-related sexual violence. Moreover, rape is now regarded as specifically prohibited in customary LOAC and a war crime in both international and non-international armed conflict (Henckaerts and Doswald-Beck 2005). Sexual violence against women in times of armed conflict can nowadays also constitute the crime of genocide under the 1949 Genocide Convention given the presence of other factors and a crime against humanity in customary international law (Henckaerts and Doswald-Beck 2005). The jurisprudence of the ICTR has also made a profound contribution in relation

to matters such as the elements required to prove the crimes of humiliating and degrading treatment, rape, and indecent assault.

Overall, these changes have been nothing short of remarkable in terms of their reinterpretation and development of the provisions of LOAC relating to sexual violence against women or, as the ICRC describes it, in terms of their “clarification” and “evolution” (Cameron et al. 2015). These developments culminated with the adoption by states of the statute of the ICC – “the most progressive and comprehensive legal framework on gender-based crimes to date” (UN Women 2015, 103) – with its explicit recognition of rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization, and other forms of sexual violence as war crimes, crimes against humanity, and constituent acts of genocide.

Despite this progress, as the 2015 UN Global Study observes, there is still much to be achieved: “[w]ith regard to sexual violence, despite the comprehensive normative framework, there are very few actual prosecutions, particularly at the national level. Though some argue that the normative frameworks have deterred future crimes, others claim that there has been no significant difference for women on the ground” (UN Women 2015, 14; see also Jarvis and Vigneswaram 2016).

The United Nations

Through the efforts of decades of activism by women's organizations and advocates, the United Nations has adopted a comprehensive agenda on women, peace, and security expressed in the adoption by the Security Council in 2000 of Resolution 1325 and a range of related resolutions subsequently. Although a human rights document, its ambit includes women and armed conflict. This section discusses these developments.

Security Council Resolution 1325 has four major foci, two of which relate specifically to armed conflict, namely, the need to protect women from conflict-related violence and the increasing of accountability of perpetrators of sexual violence. The resolution “[e]mphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions” (UNSC 2000, para 11). Four subsequent resolutions, 1820 (2008), 1888 (2009), 1960 (2010), and 2106 (2013), have been adopted by the Security Council dealing with the obligations to protect women in conflict situations including from sexual violence. In particular, Security Council Resolution 1820 “[n]otes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide [...] and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence particularly women and girls, have equal protection under the law and equal access to justice and *stresses* the importance of ending impunity for such acts” (UNSC 2008, para 4). Following this, Security Council Resolution 1888 also created the

position of Special Representative of the Secretary-General on Sexual Violence in Conflict (UNSC 2009). In addition since 2013, the Secretary-General of the United Nations reports annually to the Security Council on the status of conflict-related sexual violence worldwide.

There has been a range of follow-up activities to Resolution 1325 by the United Nations, its agencies, NGOs, and governments. Given the emphasis of the terms of Resolution 1325, these have primarily focused on the inclusion of women in peace-building, demobilization, and reconstruction of societies after conflict, fostering gender perspectives in peacekeeping, and addressing gender-based violence in conflict and post-conflict situations. Of particular interest in the context of armed conflict and LOAC are the National Action Plans (NAPs) of states, which are designed to implement their obligations under Resolution 1325 (UNSC 2004, 2005). These have included the mainstreaming of gender considerations into military operations (Prescott 2013). It is the case, however, that Resolution 1325, the basis of the women, peace, and security agenda, is very much a human rights-based document and has prevention of conflict as its main priority (UN Women 2015). Certainly there has been a focus on obligations to protect women in conflict situations, but this has translated in practice into the issue of sexual violence and accountability therefor. There is little evidence so far that this will involve any major change in the way states perceive their LOAC obligations in relation to women over and above sexual violence (Prescott 2013).

The Role of the ICRC and the Military in Developments of LOAC

The military establishment of states, the members of whom are responsible for implementing its provisions, plays an integral part in the development of and compliance with LOAC. It is a regime that has been created primarily to serve the purpose of conferring rights on states that are designed to further military efficiency (Af Jochnick and Normand 1994). Consequently the military has considerable input into determining the extent to which warfare is regulated and the content of the rules. There appears to be no other area of international law where the influence of a group with such a vested interest is so strong.

The Swiss-based association, the International Committee of the Red Cross (ICRC), with a mandate recognized by states, also plays a unique and influential role in LOAC. As the promoter and guardian of LOAC, it disseminates, monitors compliance with, and contributes to its development. The relationship between the military establishment of states and the ICRC is complex and multifaceted, but one thing is clear – without the support of both these entities, little can be achieved in terms of the improvement of the legal protections available to those caught up in armed conflict. The discussion that follows assesses the extent to which these bodies have responded to the changing climate in relation to women and armed conflict and in what ways this has impacted on the relevant provisions of LOAC.

The military has responded in a number of ways to the changing times. First, they have had to adapt themselves to the continued expansion of HRL into what was

previously seen as the exclusive domain of LOAC. Since the adoption of the United Nations Charter, human rights have slowly but surely become an important source of protections during periods of armed conflict and as supplementing existing human rights protections in IHL. Nowadays, it is well established that HRL operates not only within the territory of the state concerned but in extraterritorial areas over which it exercises “effective control” (Doswald-Beck 2011). Consequently in circumstances where military forces exercise the necessary level of control over the territory in question, they must ensure that their members comply with both the provisions of LOAC and HRL, some of which will have relevance to women (Gaggioli 2014).

Second, the focus on armed conflict by human rights bodies has also led to numerous initiatives at both the international and national level designed to address the prevalence of sexual violence against women by armed forces and to address the level of compliance by the military with the norms of LOAC and HRL. These include the launch in 2009 of the UN Action Against Sexual Violence in Armed Conflict (UN Women [n.d.](#)), the establishment in the same year of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (UN [n.d.](#)), and in 2012 the Preventing Sexual Violence in Conflict Initiative (UK [n.d.](#)).

All the above developments have occurred in the context of that part of LOAC that deals with the victims of armed conflict. However, the so-called operational aspect of LOAC, that is, the norms that concern command decisions in the field and regulate the means and methods of warfare, has remained impervious to gender insights. As LOAC is a regime that will always reflect the demands of military necessity and national security, it is to be expected that states have traditionally concentrated on the protection of combatants and negotiated comprehensive and detailed rules for their protection. Underlying the application of important LOAC norms in the field, however, there is an unspoken assumption that the lives of combatants, the vast majority of whom are men, are more important than those of civilians, who remain predominately women. This prioritizing of combatant lives by LOAC can be demonstrated by considering one of the fundamental principles of the system, that of proportionality. This conventional and customary norm requires a balance to be struck between the anticipated military advantage of a particular attack and the anticipated number of incidental civilian casualties thereof (Protocol I [1977](#)). Over the years proportionality has been a hard-fought legal norm to attain, and it is intended to function as a real restraint on the conduct of armed conflict so as to control civilian losses. As things currently stand, however, a state has considerable liberty in planning its campaign, including its preferred method of warfare, so as to reduce its combatant casualties – so-called force protection – without infringing the requirements of proportionality. States are under no legal obligation to consider the effect of such a policy on the civilian population of the opposing side and to choose the method of attack that will result in the least or lesser civilian casualties. Consequently if force protection is a priority of those making the calculation required by proportionality, it will assume more significance in the assessment of the military advantage component of the rule and the consequent downplay of the risk of collateral (or civilian) casualties.

The possible effects on the civilian population of a particular choice of method of warfare are apparent from the Persian Gulf conflict (1990–1991). The coalition allies in that conflict opted for a campaign of aerial bombardment rather than a ground assault. That choice was dictated to some extent by the perceived need to keep their own combatant casualties to a minimum. Not surprisingly proportionality failed to mitigate ensuing widespread immediate and long-term civilian casualties (Gardam 1993). This preference accorded to the combatant over civilians became even more marked with the adoption of such strategies as “zero casualties” campaigns (Rogers 2000). As one US official observed, “[d]uring peace operations of the 1990s, force protection effectively became part of the mission, privileging the Soldier over the civilian” (Sewall 2007, xxix).

Although there were some critical reactions to these policies on the choice of campaign, it was not until the advent of a new approach to counterinsurgency (COIN) warfare, as exemplified in the US Army/Marine Corps Counterinsurgency Field Manual (Petraeus and Amos 2007), that force protection was rethought. COIN underpinned the efforts of US forces in both Iraq and Afghanistan. Of particular interest in the context of protections for women is the balance between civilian casualties and force protection explicit in COIN and the philosophy that underpins it. The policy calls for the increased assumption of risk by combatants in order to better protect civilians against the impact of counterinsurgency operations. This new approach to force protection in counterinsurgency warfare, as one might expect, is based on pragmatism. Under COIN, it is argued that the assumption of increased tactical risk will lead to a reduction in strategic risk. In other words, lowering force protection in the short term, although it may lead to more immediate military casualties, is more likely to result in winning the war. That outcome is measured less in terms of insurgent casualties than in a reduction of civilian casualties and a correlative investment in the legitimacy of the host government (e.g., see Khalili 2011).

It is not suggested that COIN was underscored by an appreciation of the differing impact of operational decisions on women. In fact the US 2007 so-called surge in the number of troops in Iraq that implemented the COIN strategy relied on the co-option of local tribal leaders to achieve its military success. It is reported that such a strategy led to increased violence and discriminatory acts against the local female population (Otto 2011). Moreover, there is no suggestion that this type of approach will become the norm as its effectiveness relies heavily on its particular context (Gardam and Stephens 2014).

Finally, the process by states of developing NAPs in response to Security Council Resolution 1235, although focusing primarily on the mainstreaming of gender into the policies and practices of military establishments, may lead to broader reflections on LOAC generally. An indication of how far we have progressed in the last two decades is illustrated by the following comments of one former US military lawyer with a broad background in operational assignments. Against the background of a tour of Afghanistan as a legal officer with the International Security Assistance Force, he has discussed his realization that women and gender issues were not just about human rights but had relevance to core LOAC operational tasks, such as the

application of proportionality. Furthermore, “sex and gender were directly relevant to the core norms of LOAC in deciding when to engage in the use of armed force and against whom,” in other words, in the assessment of proportionality (Prescott 2016, 196). This is just one voice, but such an observation from this quarter would have been unthinkable two decades ago.

The ICRC has also responded to changing times. Despite initial reluctance to embrace the concept of gender, for some time the organization has recognized the structural disadvantages of women during times of peace that lead to their particular vulnerability to the impact of armed conflict (Lindsey 2001). Two major legal initiatives of the organization illustrate this evolving understanding. First, the recently updated authoritative ICRC Commentaries on the first and second Geneva Conventions of 1949 reflect this recognition of the impact of gender on the way in which women experience armed conflict (ICRC 2016, 2017). There is no doubt that the forthcoming two other new Commentaries on the third and fourth Geneva Conventions, respectively, will carry on this process. The Commentaries are based on a comprehensive analysis of state practice and *opinio juris* and provide the ICRC's current understanding of these conventional provisions. As such, they are highly influential although not binding on states.

The change in approach from the earlier Commentaries of the 1950s and 1960s is marked and addresses many of the criticisms by feminists of the provisions of LOAC relating to women. The new Commentaries, for example, take a progressive approach to interpretation of some key phrases. For example, Article 12(4) of the first and second 1949 Geneva Conventions reads “women shall be treated with all consideration due to their sex.” The original Commentaries define this concept as “the consideration which is accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect” (ICRC 1952, 1960). In the updated Commentaries, this description of women is no longer considered appropriate. Moreover, the obligations this requirement imposes on parties to an armed conflict are for the first time spelt out in some detail as follows: “[t]he distinct set of needs of and particular physical and psychological risks facing women, including those arising from social structures, have to be taken into account” (ICRC 2016, 2017) in order to meet the obligations contained in Article 12(4).

The recognition of the outmoded concept of women's “honor” is significant as it is a notion that informs the whole regime and perpetuates and reinforces a stereotype of women, the defining characteristics of which are derived from their socially determined sexual and reproductive identity. It will not be an easy task, however, to undermine this vision of women that is so entrenched in this ancient regime and will require a major change in perceptions (Doswald-Beck 2011).

There are several other novel references throughout the updated Commentaries as to the need to recognize and take into account the different ways in which men and women experience conflict, for example, in the interpretation of the meaning of what constitutes the fundamental requirement of LOAC of humane treatment. There are also references to the need to include persons of mixed gender in various representative meetings and negotiations between parties (ICRC 2016, 2017).

The ICRC has also embraced the reinterpretation and development of the provisions of LOAC dealing with sexual violence by ICL. In 2005 the organization published a detailed and comprehensive analysis of state practice and *opinio juris* in order to determine the rules of customary international humanitarian law (Henckaerts and Doswald-Beck 2005). In reaching its conclusions, the ICRC study adopts and confirms the jurisprudence of the case law of the ICTY, ICTR, and their statutes and the statute of the ICC on sexual violence against women in times of armed conflict.

Apart from these important developments, the ICRC resists calls for assessing the adequacy of LOAC for women beyond sexual violence. The organization resolutely maintains the view that the situation of women in times of armed conflict does not result from a lack of humanitarian rules to protect them but from a failure to interpret and implement existing rules (Lindsey 2001).

Ongoing Challenges

As we have seen, there have been major developments in terms of the reinterpretation of existing provisions of LOAC through the statutes and jurisprudence of the ICTY, ICTR, and ICC in the case of sexual violence against women. “[R]ecognition of sexual violence crimes might well be considered as one of the most significant advances of this phase of international justice” (Jarvis 2016, 112). Nevertheless, the concept of honor that has been subjected to intensive criticism by scholars and activists maintains its hold. It has caused and continues to cause considerable difficulties in ensuring successful prosecutions of sexual violence crimes. The assumption has been and continues to be that rape and sexual violence are personal to the victims and sexual in nature rather than violent criminal acts (Jarvis and Vigneswaram 2016).

There are other challenges to maximizing the protections that LOAC provides for women caught up in armed conflict. The intense focus on the prevention and punishment of sexual violence in times of armed conflict has diverted attention from the more mundane, less high-profile but fundamental issue of the role played by endemic discrimination in determining the ways in which armed conflict impacts on women and from attempting to have this reality reflected in LOAC. The developments in ICL and the follow-up to Security Council Resolution 1325 also disguise the many other ways in which women experience violence during such times (Ward 2016). Moreover, criminal law is an unlikely means of changing the status quo.

It may be that in the case of sexual violence, the ICRC is correct in its assessment that LOAC as it stands is adequate to protect women. It is not at all clear, however, that this is the case with the totality of its provisions. On only one occasion has there been a suggestion that more needs doing in terms of assessing the overall adequacy of LOAC to address the ways in which women experience armed conflict. The UNIFEM/UN Women 2002 study in response to Security Council Resolution 1325 called for the appointment of “a panel of experts to assess the gaps in international and national laws and standards pertaining to the protection of women in conflict and

post-conflict situations” (Rehn and Johnson Sirleaf 2002, 140). Nothing came of this suggestion that would presumably have included LOAC.

There are other significant negative consequences for women from this single-issue approach to addressing their needs in times of armed conflict. It has the effect of ensuring that the image of women reflected in LOAC remains one-dimensional, that is, they are visible only as victims of sexual violence (Engle 2008). To be continually portrayed as helpless victims not only fails to reflect the reality of women's roles in armed conflict as combatants and perpetrators of war crimes; it also serves to undermine their potential to serve as agents of change and impedes the major goal of United Nations efforts in this century, namely, the empowerment of women. The so-called progress on the prosecution of sexual violence during armed conflict also gives credence to the claim that women are now being taken seriously by the legal regime. But are they? As has been observed in the context of the inclusion of women in human rights institutions, it is easy to be “dazzled” by appearances (Charlesworth 2011).

The high profile at the international level of violence against women including sexual violence in times of armed conflict has had another side effect. There has been a reaction from certain quarters that the centering of women and girls in humanitarian action over gender-based violence had adverse consequences for a recognition of sexual violence against men and boys. This concern spread into the field of operation of LOAC with increasing suggestions that the focus on the punishment of sexual violence against women in times of armed conflict has in some way contributed to preventing an appreciation of the extent and ways in which men experience such violence during these times (Dolan 2014). Indeed it is suggested that Resolution 1820 (UNSC 2008), dealing with sexual violence against civilians, had been framed and implemented in a manner that “had the impact of contributing to the relative silence through the exclusion of male victims from its framework” (Sivakumaran 2010, 265).

The advent of gender, gender equality, and gender-neutral framework as the preferred terms in international initiatives relating to women has proved to be somewhat of a mixed blessing for women and LOAC, as is the case in other areas (HRC 2014). In the 1990s when the issue of the adequacy of LOAC in terms of its protections for women was first raised, the term gender was primarily used to explain why women's experience of armed conflict was distinctive and that this had implications for LOAC. The vulnerability of women in times of armed conflict, and consequently their needs in terms of the law, was based to a large extent on the unequal power relations of men and women deriving from their socially constructed gender roles. It was argued that LOAC failed to reflect this reality. Gender equality and gender neutrality have slowly but surely come to replace the term “women” in international parlance. Nowadays discussion of gender in international fora considers the position of both men and women.

Rashida Manjoo, United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences, has criticized the perceived need for gender equality or neutrality which: “suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims, thereby ignoring

the reality that violence against men does not occur as a result of pervasive inequality and discrimination” (HRC 2014, 17). The effect has been to blunt gender’s radical edge in terms of a tool to address the structural disadvantages that exist in all societies for women (Ward 2016). In the case of LOAC, gender is now often used to argue that men have been overlooked in either the implementation of LOAC or its provisions.

Much is made of the silence on sexual violence against men and the “special” and extra provisions of LOAC for women and why these are not also applicable to men (e.g., ICRC 2007). For instance, it is said that: “There are myriad other issues found within IHL that could benefit from a gender examination. For example, the obligations found in the 1977 Additional Protocols [to the 1949 Geneva Conventions] relating to the prohibition of the death penalty for ‘mothers having dependent infants’ and ‘mothers of young children’ raises a range of questions in relation to situations when fathers are exclusively raising young children” (Durham and O’Brien 2010, 51). This completely overlooks the gender reality of this provision. It is designed primarily to protect children and given sufficient passing time would lapse. Moreover, how often do men exclusively raise children? As for sexual violence against women in times of armed conflict it remains endemic and is experienced differently by men and women with that of women determined primarily by unequal gender relations.

It seems unfortunate that discussions of gender and LOAC have moved away from acknowledging the global unequal gender relations of men and women. The focus has become more about women as combatants and perpetrators of breaches of IHL (without an acknowledgment of how rare these latter are), the failure to recognize and act on sexual violence against men and boys (without any acknowledgment that such violence against women is vastly more widespread than that against men and boys), and finally the so-called extra protections of LOAC for women.

Conclusion

Looking back over the years that have passed since the 1993 Vienna Conference and its Declaration and Programme of Action, there have been significant developments in LOAC and women. Undoubtedly the work of human rights agencies and activists has been a major influence on these changes. Historically, LOAC has been the sole province of the military and, since its establishment in 1863, the ICRC. The increasing attention to the human rights of women has been no respecter of the existing boundaries of international law between peace and armed conflict. As a consequence LOAC has moved into discussions in a considerably wider range of venues than was the case in earlier times, and the result has been increased pressure for accountability for what happens to women in armed conflict. There has also been no lack of recognition that women’s experience of armed conflict is unique, as indeed is the case with all categories of victims.

The letter of the law as it stood two decades ago, however, has remained unchanged. There are no new provisions of LOAC of relevance to women. What

has taken place are quite radical reinterpretations of existing provisions of LOAC in the statutes and jurisprudence of international criminal tribunals so as to more accurately reflect the ways in which women experience armed conflict. This progression remains limited to sexual violence against women. There now is a precedent, however, for a more active approach to the interpretation of other provisions of LOAC relating to women. The revised ICRC Commentaries to the 1949 Geneva Conventions have started this process.

There has also been a recognition in many military establishments and the ICRC that gender is relevant in their operations. It is important, however, that the indirect discrimination that women continue to experience in all societies continues to be recognized in ongoing debates about gender and LOAC. It is still true to say in the words of an impeccable source: “the requirement under IHL to ensure respect without adverse distinction means that indirect discrimination must be equally prohibited. This can only occur by taking into account a better understanding of the effect of gender discrimination in armed conflict, and this has occurred primarily in the context of the UN and human rights law” (Doswald-Beck 2011, 503).

Cross-References

- ▶ [Female Forced Migrants: Accountability Gaps in International Criminal Law](#)
- ▶ [UN Security Council Resolution 1325: The Example of Sierra Leone](#)
- ▶ [Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence](#)

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Female Forced Migrants: Accountability Gaps in International Criminal Law

Jaya Ramji-Nogales and Danielle DerOhannesian

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Abstract

Many commentators have celebrated international criminal law's progress on gender issues, focusing on decisions that include serious forms of sexual violence within the scope of the law. Though these updates to the doctrine may be commendable, this chapter raises a broader ongoing concern: the gendered structure of international criminal law that diverts attention from other significant harms that women endure as a result of violent conflict. The chapter examines the accountability gaps suffered by female forced migrants fleeing situations of widespread violence to expose the gendered nature of the international criminal law framework. It walks through potential avenues to address and prevent violence against forced migrant women, describing the promise and peril of relying on international criminal law and offering alternative approaches.

J. Ramji-Nogales (✉)
Temple University, Beasley School of Law, Philadelphia, PA, USA
e-mail: jayarn@temple.edu

D. DerOhannesian
Philadelphia, PA, USA
e-mail: danielle.derohannesian@temple.edu

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Introduction

Since the *Akayesu* decision expanded international criminal law to include rape as one of its most serious crimes (*Prosecutor v. Jean Paul Akayesu* 1998), women's rights advocates and feminist scholars have celebrated the field's progress on gender. While the doctrinal developments are laudable, this chapter raises a broader concern: the gendered structure of international criminal law that diverts attention from other significant harms that women endure as a result of violent conflict. Using the situation of female forced migrants fleeing situations of widespread violence, the chapter challenges international criminal law's gendered framework and the ways in which it constructs invisibility. The law sets out a hierarchy of harm that prioritizes planned over random acts, state over non-state perpetrators, political over private violence, and a conflict over a harm locus (Ramji-Nogales 2011, 463).

International criminal law elevates crimes that are committed as part of a plan or pattern by state actors, across political groups tied closely to a conflict, above equally serious forms of harm perpetrated randomly by non-state actors and, at times, within political groups that result from conflict, for example, by men against their wives in refugee camps. Violent conflict exacerbates vulnerability; women who flee to escape such violence suffer substantial insecurity that goes unrecognized by international criminal law. To illustrate the shortcomings of this approach, this chapter examines the serious harms suffered by female migrants that fall outside of the framework of international criminal law. These harms include physical violence that is not part of a policy or perpetrated by a state actor but rather are private and opportunistic harms enabled by situations of displacement.

The chapter begins by describing the harms suffered by forced migrant women in transit, in urban settings, and in refugee camps at the hands of husbands, family members, cartels, gangs, *coyotes*, and strangers, none of whom is acting at the behest of a state or militia or fulfilling an organizational master plan (Charlesworth 1999, 387–388). It next examines the relevance of the Rome Statute of the International Criminal Court (2002) to these crimes. Though neither the language of the statute nor contemporary interpretations offer a sound legal basis for prosecuting opportunistic crimes against female forced migrants, recent developments offer a potential avenue forward for the subset of these women held in detention centers. International refugee law also provides some guidance as to how the ICC might interpret international criminal law to cover such crimes, though the parallel has limitations. The chapter then examines the accountability gaps that female forced migrants face in transit, in camps, and in urban settings. These women cannot rely on their home governments, their host governments, and at times even international humanitarian organizations to protect them against opportunistic violence.

Given the deeply gendered structure of international criminal law, the chapter carefully weighs potential avenues to address and prevent violence against forced migrant women. One purpose of international criminal law is to end impunity by providing accountability for serious harms related to conflict that are not addressed at a national level. Given that violence suffered by female forced migrants often falls outside of any legal accountability mechanisms, the prosecution of those crimes appears to further this goal of international criminal law. Another key goal of international criminal law is to ensure accountability for crimes so severe that they rise to the level of crimes against all humankind. Violence against forced migrant women in transit, in camps, and in urban settings is so widespread and destructive that prosecution again fulfils the aims of international criminal law. Despite this alignment of goals, crimes against forced migrant women do not fit neatly into the gendered structure of international criminal law. As a result, prosecution would require substantial expansion of the scope and restructuring of the focus of international criminal law.

A structure designed specifically to prevent opportunistic violence against female forced migrants might be a more effective option. Alternative approaches include positive complementarity, which would focus on capacity building in national legal systems. A solution focused on the needs of forced migrant women might even step away entirely from criminal accountability towards a human rights law approach or an entirely different mechanism drawn from the preferences of female forced migrants themselves. In the meantime, until a solution is crafted to include opportunistic private violence perpetrated by non-state actors against women who have fled conflict, the serious and frequent harms suffered by these women will continue to be overlooked, relegated to the bottom of international criminal law's gendered framework.

Harms to Female Forced Migrants

Migrants forced to flee their homes are pushed into precarious situations. Lacking sufficient societal support structures, their extreme vulnerability renders them susceptible to exploitation and abuse. Female forced migrants suffer a broad range of mistreatment during both their flight to and stay within countries in which they seek protection (see Ager et al. 1995; Matlou 2008, 133–136; Pickering and Cochrane 2012, 33–34; Ní Aoláin et al. 2011, 428–429). This chapter focuses on the particular harms faced by these women – harms that often differ from those faced by cisgender male forced migrants. Though the popular imaginary most commonly associates harms to women with sexual and gender-based violence, migrant women are also harmed by patriarchal social and economic structures that enable this violence. This chapter engages with a third deeply gendered structure – international criminal law – that fails to support migrant women.

Large-scale movements of migrants have dominated the news and the political imaginary in recent years (Ramji-Nogales 2017a, b). These journeys are most

commonly depicted through images of hordes of migrants streaming through borders or drifting ashore on overcrowded vessels. Taking a global migration law approach, this chapter opens up the geographic and temporal scope of this inquiry (see Ramji-Nogales and Spiro 2017). Female migrants start their journeys well before they reach a border and suffer harms well after they enter the country in which they seek protection. This chapter draws from three recent situations of large-scale movement, involving migrants from Central America, Syria, and Myanmar, to explore the harms suffered by female migrants in three distinct settings: in transit, in urban settings, and in camps. Women fleeing Central America move between countries and shelters on their way through Mexico. The physical insecurity of the transit setting exposes these women to exploitation and abuse at the hands of men with whom they interact and on whom they depend to reach their destination. Having settled into urban areas in Turkey, Jordan, and Lebanon, Syrian female migrants are similarly stripped of security by patriarchal economic structures within the local societies. In Bangladesh, Rohingya women from Myanmar face extreme vulnerability due to the precarious nature of life in a refugee camp and suffer frequent violence at the hands of a variety of actors.

Female forced migrants face a range of harms across and within different migration settings: in transit, in camps, or in urban areas. The common thread of vulnerability stems from the loss of individual and societal resources these women possessed in their home countries but abandoned in their flight, and the absence of support structures in the new societies in which they find themselves (Fineman 2010, 269). The vulnerability of migrants has been described as a structural condition that is formed “by his or her location in a hierarchical social order and its diverse networks of power relationships and effects” (Quesada et al. 2011, 341). Levels of vulnerability range within and across migration settings, but all female forced migrants face new and deeper types of vulnerability as a result of their flight (ibid.). Although every woman has a unique experience and situation, this chapter explores the commonalities among female forced migrants within the locations of in transit, in camps, and in urban settings, and posits that there are vulnerabilities shaping their shared experiences that expose them to certain harms. Each migrant woman also faces different types and levels of vulnerabilities that expose her to different harms as she changes settings (see, e.g., Kojima 2011, 156).

The experiences of women in transit, in urban areas, or in camps reveal female migrants’ vulnerabilities and how these settings translate into related yet distinct harms. Along the migrant trail, many women flee Central America to escape violent gender-based crimes that are perpetrated against them with impunity. Most of these women seek to enter the United States, while a few wish to reach Mexico (Bolter 2017; Lesser and Batalova 2017). The majority of Central American migrants arrive in the southern Mexican state of Chiapas on the Guatemalan border. Prior to a crackdown by Mexican authorities in 2014, migrants could take a direct path north via the dangerous “la Bestia” freight train. Since then, the journey has become longer, more complicated, and more treacherous (Wilkinson 2014). Female migrants rely heavily on *coyotes* to navigate the trail north (UNHCR 2015, 42–44; see also Hathaway 2010), via a mixture of foot, vehicle, and boat travel (Ahmed 2016;

Lakhani 2016). Migrants walk for days at a time and mostly during the night. A handful of shelters are accessible to migrants en route (WOLA n.d.).

On the migrant trail in Mexico, female forced migrants from Central America suffer numerous serious harms, ranging from abduction to sexual and physical abuse (Schmidt and Buechler 2017, 140, 143, 147–151). These violent acts are perpetrated by a variety of actors, from smugglers to gangs to corrupt officials (ibid., 142; UNHCR 2015, 42–44). Because these Central American women do not have lawful migration status in Mexico, they have no legal recourse for harms they suffer on Mexican soil (Amnesty International 2010, 7). This legal gap magnifies their vulnerability substantially (IACHR 2013, chap 2).

Female forced migrants face violence at the hands of border officials, local authorities, *coyotes*, gangs, and cartels along their journey (UNHCR 2015, 43, 4). Most female migrants from Central America are raped on their journey north. While accurate figures are difficult to obtain due to reporting challenges, estimates range from 60% to 80% of women (Parish 2017). The risk of rape along the trail is so high that many women take contraceptives as a precaution before embarking on their journey (Amnesty International 2010, 16; IACHR 2013, 90). Mexican cartels are known to abduct migrant women and hold them captive, raping them daily. One Honduran woman subject to such captivity described being raped repeatedly in the presence of her two daughters, one of whom was under 3 years old and the other a newborn (IACHR 2013, 90). As Mexican police stop buses to collect fines, they reportedly pull migrant women off the buses to rape them (Diaz and Kuhner 2007; Jordan 2004; UNHCR 2015, 43). Border officials demand sex from undocumented migrants to allow them to cross the border (ibid.). In one reported case, a Mexican migration official offered to legalize a 15-year-old Honduran girl's immigration status in exchange for sex. When the girl denied his request, he sexually assaulted her (IACHR 2013, 90). Even the *coyotes*, who are paid to assist migrants on the journey, perpetrate physical and sexual violence against many female migrants (UNHCR 2015, 6). One woman reported that her *coyote* raped her every day during her 20-day trip through Guatemala (ibid., 44). In July 2014, under pressure from the United States, the Mexican government introduced Programa Frontera Sur, a program that increased apprehensions of migrants at Mexico's southern borders and on common migration routes (Castillo 2016). Particularly since then, authorities have arrested and detained many female migrants from Central America due to their irregular migration status (WOLA 2015). Once detained, state officials perpetrate violence, particularly sexual violence, against many of these women (Amnesty International 2010, 15).

Female forced migrants fleeing Syria who have settled in urban settings similarly suffer from physical and financial insecurity. Although they reside in one location, these women lack sufficient structures to mediate their deep vulnerability. Since 2011, nearly 2.5 million women have fled Syria and registered as refugees (UNHCR n.d.-a, c, 2017b). Most Syrian refugees have settled in the neighboring countries of Turkey, Lebanon, and Jordan (Freedman et al. 2017, 1; UNHCR n.d.-d), in predominantly urban settings (UNHCR n.d.-b; Erdoğan 2017; Amnesty International 2014).

A qualitative study of Syrian women and girls living in urban settings in North Jordan and South Lebanon in 2015 found that these women suffered a variety of

physical and sexual violence (Spencer et al. 2015). Neighbors were the most common perpetrators of sexual and physical violence. Although it was less common, the more serious types of physical violence perpetrated against women ranged from beating to assaults at gunpoint or knifepoint. Syrian forced migrant women in these urban areas reported a broad range of perpetrators, including their husbands, local aid workers, and local men (UN Women 2013). A small number of women in Lebanon reported their husbands forcing them to engage in sexual acts with other men in exchange for money (Spencer et al. 2015). As is unfortunately common in post-conflict situations, domestic violence was a new development for many women, whose husbands became violent in response to the traumas of refugee life (ibid., 28–29; IRC 2014). Women suffering domestic violence had little recourse, because they did not believe that local authorities would assist them and even feared abuse at their hands (Baklacioğlu 2017, 45; Spencer et al. 2015, 46).

Syrian women migrants also appear to be more vulnerable to forced marriage in urban settings in Jordan and Lebanon. Although forced marriage was practiced in Syria before the conflict, one-third of respondents to a 2012 empirical study believed that Syrian migrant girls in Jordan entered into forced marriage at younger ages in Jordan than they had in Syria (UN Women 2013, 32). Of the women interviewed, 51.3% said they had been married before the age of 18 (ibid., 29). A 2016 study found that 47% of married Syrian women in Western Bekaa, Lebanon, were married before reaching age 18 (UNFPA 2017). Some Syrian parents have sold their daughters into marriage to alleviate financial hardships (Higgs and Rudzite 2016). Other parents prohibit their daughters from leaving the house because they cannot protect them at school or at work (ibid.).

In contrast to urban refugees, who must locate their own food, shelter, health care, and educational opportunities, refugee camps provide at least some of these basic necessities (UNHCR 2017a). Camp life creates an insular environment and a culture of dependency that exposes women to different vulnerabilities. For Rohingya migrants settling in camps in neighboring Bangladesh, the camps have not yet caught up to the influx, and even food and water are hard to come by (Galinski 2017). Since late August 2017, more than 600,000 ethnic Rohingya have fled violent attacks at the hands of the Myanmar military (ibid.; Gettleman 2017). Many of these refugees have settled in camps in Bangladesh, such as Cox's Bazaar and Kutupalong.

While the influx is new, the camps are not (Galinski 2017). Thus, some of the harms facing women, such as trafficking, were commonplace well before the influx. Arrivals to the camp face a dearth of economic opportunities and are eager to take whatever work they can find. In particular, women become vulnerable to traffickers (ibid.; UN News 2017). Women who agree to work are often mislead (UN News 2017). Some women and girls who agreed to do domestic work report being forced into prostitution instead (ibid.). Once women agree to work for a trafficker, they are deprived of sleep, overworked, not allowed to leave the work premises, and prohibited from contacting family (ibid.). Women and girls in these positions are often physically and sexually abused (ibid.). Women who end up in the sex trade, either voluntarily because they needed the income or through coercion or force, are exposed to various risks (Galinski 2017). Sex work is taboo, which means that

women have few means of receiving proper health care or emotional support. Most sex workers are unaware of the few services that do exist (*ibid.*).

Furthermore, sex work and other forms of physical and sexual abuse may be interconnected. Forced and early marriages are common among the Rohingya refugee population. Many families view marriage as a means of stability for girls facing an otherwise perilous and uncertain future (UN News 2017). But these marriages are often very harmful to girls whose parents are trying to protect them. In just one example, a 16-year-old Rohingya girl who had lived in the camp for 10 years was forced to marry a man who turned out to be an alcoholic. Her husband physically abused her and then abandoned her. Without another means of support, she turned to sex work to survive.

Harms such as these are perpetrated and enabled by a myriad of actors including relatives, acquaintances, and strangers, whose actions are not part of a state or organizational policy. Perpetrators of sexual violence, in particular, include fellow refugees, family members, cartels, gangs, local residents, and aid workers (UNHCR 1995, sec 1.3(b)–(c); UNHCR 2003, 14–15).

International Criminal Law

International criminal law's deeply gendered structure includes only crimes committed during war or as part of a plan to destroy a national, ethnic, racial, or religious group. The law's framework fits uneasily with private harms, which are generally not perpetrated during war or as part of a plan promulgated by a state or organization. On its face, international criminal law does not encompass opportunistic violence against female forced migrants. Moreover, the different settings in which female forced migrants suffer these harms – in transit, in camps, and in urban environments – fall under the authority of states and organizations over whom it may be challenging to extend jurisdiction. Though the customary international law definition of crimes against humanity arguably does not contain a state or organizational policy requirement (*Prosecutor v. Kunarac* 2002), the Rome Statute appears to represent a shift towards a state-centric approach to international crimes. In contrast, in recent years, refugee law has dismantled similar requirements, thus extending its protections to cover “private” harms. International criminal law should follow this lead of refugee law.

The Rome Statute defines crimes against humanity as acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (Rome Statute, art 7(1)). These acts “must be pursuant to or in furtherance of a State or organisational policy” (*Ibid.*, art 7(2)(a)). While this definition may not reflect customary law, the Rome Statute will provide the dominant model going forward. Moreover, many domestic codes will mirror this language. ICC jurisprudence explains that the existence of a State or organizational policy can be found when there are “repeated actions occurring according to a same sequence [...] orchestrated and coordinated by the State or organisation” (*Prosecutor v. Katanga* 2014). Furthermore, systematic attacks refer to repetitious conduct and

repeated acts of connected, nonrandom violence (*ibid.*, para 1113). Although perpetrators need not be motivated by the policy, the violence must occur in this context (*Prosecutor v. Bemba Gombo* 2016, para 161).

At first glance, gender-based violence that occurs while in transit, in camps, or in urban settings does not appear to further any organizational policy; by definition, it is random and opportunistic. Following the reasoning of legal scholars like M. Cherif Bassiouni and William A. Schabas, who have argued that crimes against humanity should embrace violations of human rights perpetrated only by states or organizations, this violence does not fall within the scope of international criminal law (Bassiouni 2005, 151–152; Schabas 2008, 959). The violence perpetrated by Mexican officials against Central American women in immigration detention centers comes closest to fitting within the state or organizational policy requirement. Although these men are state actors, challenges remain in proving that they acted according to a state policy in committing such attacks. Domestic violence sits even further from the standard, as the men perpetrating these attacks are not even state or organizational actors.

Over 15 years have passed since the International Criminal Tribunal for Rwanda issued the *Akayesu* decision that first found rape to be a crime against humanity. While this development was much lauded, international criminal law doctrine has not expanded in ways that would protect female forced migrants from the opportunistic acts of violence perpetrated against them in transit, in urban settings, or in camps. Last year, the International Criminal Court issued its first sexual violence-related conviction, finding Jean-Pierre Bemba Gombo guilty of rape as a war crime and a crime against humanity (*Prosecutor v. Bemba Gombo* 2016, paras. 313–359, 364). Bemba, a politician from the Democratic Republic of Congo, had sent his Congolese Liberation Movement troops into the neighboring Central African Republic at the invitation of its president in order to quash a coup; his militia perpetrated widespread human rights violations, including rape. Though the decision solidified prior case law finding sexual violence to be an international offense, it focused on harms perpetrated in the political sphere by an organized militia during a violent conflict. The *Bemba* Court did not expand the narrow framework of international criminal law in a direction that could encompass harms suffered by female forced migrants.

Two recent developments indicate some potential for expanding the scope of international criminal law. The two communiqués to the Prosecutor of the International Criminal Court allege that the Australian government is responsible for crimes against humanity through its offshore immigration detention policies (Barklem et al. 2016; Achiume et al. 2017; see also Moores 2015; RAC 2016). They argue that, pursuant to official Australian policy, government agents and their corporate contractors have perpetrated crimes against refugees and asylum seekers, including deportation, imprisonment, torture, and persecution, in detention centers in Nauru and Manus Island, Papua New Guinea (Barklem et al. 2016, 9–12, 21–34; Achiume et al. 2017, 59–96). The communiqués raise abuses particular to women, including sexual assault (Barklem et al. 2016, para 109, Annex E, para 12; Achiume et al. 2017, 29, 29n200).

These submissions suggest a type of international criminal responsibility that moves a step closer to the problems faced by migrant women in camps as well as women detained along the migrant trail. The communiqués allege that Australia’s practice of offshore detention “is central to the state’s migration policy and may be understood as an overall plan” (Achiame et al. 2017, 98) and that harms perpetrated by Australian government agents in the offshore detention centers “constitute the systematic and deliberate infliction of harm toward this vulnerable population” because the government ignored numerous reports detailing the harms and continued to send migrants there (RAC 2016). This analysis could be extended to, for example, abuse of Central American migrant women in detention centers in Mexico as part of Programa Frontera Sur. The extension to refugee camps is a bit more strained. There is a key difference in purpose between the camps, which are created to provide shelter and sustenance to refugees, and detention centers, which are more akin to criminal punishment. Questions of authority are also more complicated in refugee camps, which are often governed by the United Nations High Commissioner for Refugees and run in coordination with other international organizations and non-governmental organizations. While some camps such as those in Turkey are run by national governments, the ICC might understandably hesitate to extend international criminal jurisdiction over states and organizations that aim to assist refugees in need. Moreover, the submissions identify state agents as the relevant actors, but many of the harms suffered by female forced migrants in camps are perpetrated by non-state actors.

In May 2017, Fatou Bensouda, the Chief Prosecutor of the ICC, told the United Nations Security Council that her office was determining whether it would be feasible to open an investigation into “serious and widespread” crimes against migrants transiting through Libya as well as migrant smuggling and human trafficking in the country (ICC 2017). She cited reports that “thousands of vulnerable migrants, including women and children, are being held in detention centres across Libya in inhumane conditions,” noting that murder, rape, and torture were “commonplace” (ICC 2017, para 26). The Prosecutor’s description does not identify whether the perpetrators are state or non-state actors and whether they are acting in accordance with a plan. The detention center focus may imply the involvement of state actors and the existence of a policy or at least state responsibility. These harms may be private rather than political harms, and the locus of the harms is within a conflict situation but relates to migrant in transit. An investigation could hold promise for female forced migrants who suffer harms in transit, particularly those held in detention centers. Again, it remains to be seen whether the ICC would be as willing to extend jurisdiction over a relatively stable and powerful state like Mexico as it is to investigate these crimes in Libya – and that investigation has not yet gone forward.

Refugee law offers a different route to expanding the scope of international criminal law. In this body of law, the failure to protect women from sexual and gender-based violence, in all contexts, can be viewed as a state policy undergirded by discrimination against women (UNHCR 1992). As Lord Hoffman explained in 1999, in the House of Lords’ seminal asylum case, *Islam and Shah*:

First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. (*Islam v. Secretary of State for the Home Department and Regina v. Ex Parte Shah*, 1999)

It is this failure to protect that enables widespread criminal behavior; the state's decision or policy not to address these crimes creates a culture of impunity in which sexual and gender-based violence is acceptable and even encouraged.

Of course, the parallel between international criminal law and international refugee law is not perfectly apt. The text of the UN Refugee Convention (1951) requires only that a refugee be "unable or unwilling" (art I(A)(2)) to seek protection from her state – not that persecution be perpetrated pursuant to state or organizational policy. The UN Convention against Torture (1984), which does contain a state consent or acquiescence requirement, has generally been interpreted more strictly; nevertheless, police failure to protect has been interpreted as state acquiescence by the Committee against Torture in at least one individual submission (*Dzemajl v. Yugoslavia* 2002). Moreover, the idea that state policy plays out not only through commission but also through omission has deep roots in international law. To cite the landmark Rwanda Tribunal judgment on the crime of sexual violence, even Jean-Paul Akayesu was not found guilty of committing but rather of endorsing mass rape (*Akayesu*, Section 6.2, 7.7). It is the gap between state actors endorsing sexual violence and those actors enabling sexual violence through impunity that international criminal law needs to bridge.

Accountability Gaps

Female forced migrants face a dearth of social and institutional structures to combat their vulnerability. The violence they suffer is perpetrated with impunity, due to widespread accountability failures – in national legal systems in their transit and host countries, as well as in refugee camp justice systems, both traditional and camp-administered (Carlson 2005, 30; see also UNHCR 2016; Da Costa 2006; Amnesty International 2010, 15; MacTavish 2016). This gap in accountability suggests the need for an international legal solution.

For forced migrant women in transit and in urban settings, host states bear primary responsibility for their protection (Purkey 2011, 122n4). However, laws prohibiting violence against women may not exist or may not be enforced. Even if they do exist, they may be incomplete or contain loopholes, such as creating impunity for perpetrators of sexual assault who marry their victims or mitigated sentences for men who murder a spouse who has committed adultery (UNHCR 2003, 48, 34n67; UN Women 2012; Buscher 2014, 14). Even in countries that maintain and enforce laws against such violence, police and courts may be inaccessible for women with limited financial means and cultural knowledge, whether they are trying to move through the country, eking out survival in an urban center, or

living in remote camps (UNHCR 2003, 22; Da Costa 2006, 6, 22; see also Harding et al. 2008). Serious enforcement efforts are rare. The vast majority of refugees are hosted in countries in the Global South that generally do not have sufficient financial resources to protect their own female populations, let alone forced migrant women (UNHCR 2016). Simply ensuring that women will report gender-based violence requires significant resource allocation in training local law enforcement authorities and building the trust of refugee populations (Women's Commission 2002, 24–25). In the worst cases, local authorities may be hostile to refugee populations for political and economic reasons (ibid., 65; UNHCR 2003, 22; also see Francis 2017; Čulík 2017). And in many situations, local police or military may themselves perpetrate rape and sexual exploitation of forced migrants, rendering any hope of local protection moot (Women's Commission 2002, 34; Mwangi 2012, 22).

For forced migrant women in camp settings, these communities may replicate the traditional justice systems of their home states (Crisp 1999, 5). These systems may be more powerful within camp communities than any other system of justice because they reflect social norms with which the refugees are familiar and comfortable. These norms, of course, may accept or even enable violence against women and therefore fail to provide adequate recourse for female forced migrants (ibid., 6; UNHCR 2003).

Also within the camps, international organizations (IOs) and nongovernmental organizations (NGOs) charged with camp administration – namely the Office of the UN High Commissioner for Refugees and its implementing partners – have repeatedly failed to prevent sexual abuse. While UNHCR has promulgated quite thorough guidelines to protect refugees against sexual and gender-based violence, protection gaps remain (UNHCR 2003, 48). Despite the guidelines, some camp administrations fail to plan the camp's physical structure, systems of aid disbursement, and accountability mechanisms in a manner geared towards preventing sexual abuse. In part, this problem is due to UNHCR's and NGOs' continued failure to grasp that gender-based violence can take a myriad of forms (Women's Commission 2002, 22–23). For example, in the case of a woman who had to barter sex for food (and consequently kept getting pregnant), UNHCR and its implementing partners determined that she had too many children and the solution was for her to stop having children (ibid., 27). In other cases, UNHCR protection officers view asylum determination, rather than violence against women, to be their primary realm of responsibility (ibid., 22–23). Failures of outreach compound these protection gaps. In many cases, women do not understand that UNHCR is there to protect them; rather, they view the organization as responsible solely for the disbursement of humanitarian aid (ibid., 25). In the most egregious circumstances, some officials from IOs and NGOs have benefitted from sexual abuse of forced migrants.

Solutions

Female forced migrants in transit, in urban centers, and in camps suffer serious violence that is not adequately addressed by existing national or informal justice systems. An international solution appears to be in order, but such a solution might

take one of many directions. The obvious arguments given the focus of this chapter's critique are those focused on enabling prosecution of violence perpetrated against forced migrant women before the International Criminal Court (ICC) as a violation of international criminal law. A more locally grounded solution might entail capacity building within national criminal justice systems through positive complementarity. Another perspective would critique criminalization, preferring a noncarceral approach to protecting forced migrant women. The issue of violence against forced migrant women raises larger questions about international criminal law and feminist approaches to accountability.

The ICC is arguably the most powerful and resource-rich contemporary mechanism for securing accountability for harms perpetrated against individuals in violation of international law. One might argue that feminists should harness this power, particularly its expressive dimension, by shaping international criminal law in a feminist direction. While this approach has some appeal, it may not be effective to graft women's issues onto a patriarchal structure (see, e.g., Lorde 1981; Ní Aoláin et al. 2011). Following this concern, feminists might reject the ICC as excessively focused on public harms and recommend the creation of a more feminist mechanism of accountability. Though such an approach might address the needs of women more fully, it risks ghettoizing women's issues by failing to include them within the dominant power structure.

Several factors weigh in favor of expanding the coverage of the Rome Statute to include private harms perpetrated by non-state actors in the absence of a plan or policy or a conflict, including violence perpetrated against forced migrant women, and subjecting such crimes to prosecution before the ICC. First of all, criminalization sends a powerful and important expressive message that the international community recognizes violence against forced migrant women as abhorrent and will hold perpetrators accountable (Meyersfeld 2010, 266–269; Charlesworth et al. 1991, 635). Moreover, were the ICC to prosecute only public but not private violence, this would create a skewed account of harms suffered by forced migrant women (Ní Aoláin et al. 2011). Finally, expansion of the ICC's jurisdiction to incorporate private harms could lead to greater recognition that not only women, but also men, are harmed by private violence and that not only women, but also men, will benefit from international efforts to end impunity for such harms.

These rationales for prosecution of private harms before the ICC may be stymied by the reality of the Rome Statute. The court would have to interpret broadly the requirement of state or state-like action, an approach possibly at odds with statutory text. Even if the ICC circumvents the state action requirement, the very difficult question of who will be held accountable remains. Were the ICC to prosecute individual perpetrators of one or more acts of violence, these men would have to be transported to The Hague for trial. Questions of resource allocation and effectiveness – that is, prioritizing prosecutions that shift incentives for those most able to put an end to such violence – render this a poor choice. The ICC might instead prosecute officials of host or transit states that fail to take steps to protect forced migrant women against violence (Meyersfeld 2010, 225) or the principals of international and nongovernmental organizations that fail to protect women in camps. In

both cases, prosecution seems a counterproductive and dangerous response to actors that in many cases are trying to assist refugees, and may in future be chilled in their humanitarian response. The prosecution might instead focus on those responsible for the conflict that caused the women to flee. While the locus of moral culpability may lie with these actors, the thread of liability is fairly tenuous, from conflict to displacement to legal impunity to violence. These options lead to the conclusion that the ICC, as currently structured, is an inappropriate mechanism to account for violence against forced migrant women that is private, opportunistic, committed by non-state actors, and/or perpetrated outside of a conflict setting.

The concept of positive complementarity presents a potential way forward (Burke-White 2008). The ICC, perhaps with support from the international community, might step in by providing capacity-building assistance to local justice systems. Reports from Kampala suggest that the ICC is not eager to get involved in funding such efforts (Bergsmo et al. 2010). International criminal law could be used as a stick to provoke prosecutions of violence against forced migrant women in national courts or in the creation of justice systems within refugee camps (Women's Commission 2002, 73). Alternatively, this problem might point to the need for a new international legal instrument focused on crimes against forced migrants, creating accountability and enforcement obligations for host states (thanks to Beth Van Schaack for this suggestion).

Though this approach might resolve the question of who should be prosecuted, concerns about the appropriateness of a criminal solution to private violence remain (Engle 2015). Criminal law, international or otherwise, might not be effective in constructing norms that oppose violence against forced migrant women (Ramji-Nogales 2010, 12–16). Such efforts, if not grounded in local norms, may be rejected as manifestations of cultural imperialism or simply irrelevant. Moreover, any long-term and effective solution to the problem of opportunistic violence against forced migrant women requires a change in social norms, which depends upon the engagement of men (Buscher 2010, 14). Criminal prosecution may work at cross-purposes with efforts to redress gender-based power imbalances by including men. Perhaps more importantly, criminalization is arguably inadequate in addressing the needs of forced migrant women who have suffered violence (Meyersfeld 2010, 160–164). Feminist scholars have contended that international criminal law is excessively focused on sexual violence rather than on harms that women deem to be primary (Ní Aoláin et al. 2011). Criminal prosecutions are not likely to have any real impact in altering political and economic inequalities (Charlesworth et al. 1991, 645). Criminalization is a particularly fraught approach with respect to victims of domestic violence; these women may not want criminal sanctions brought against their spouses or domestic partners but could also be coerced into withdrawing complaints that they would prefer to prosecute.

A feminist approach, then, might suggest an entirely different route to accountability for violence against forced migrant women. Given that domestic violence to date has most often been viewed as a human rights issue, rather than as a question of international criminal law, arguing in favor of strengthened enforcing of international human rights law might be more appropriate. The UNHCR has promulgated

comprehensive guidelines aimed at protecting displaced women from sexual and gender-based violence; it lacks only the resources to implement its recommendations (UNHCR 2003). Indeed, the lack of effective complaint mechanisms, codes of conduct, and access to justice are raised repeatedly in the literature as serious gaps in addressing gender-based violence against forced migrant women. A rights-based approach has its own set of problems, including that legal rights may be excessively masculine in form, interpretation, and access to enforcement (Charlesworth et al. 1991, 634–638; Ramji-Nogales 2014). A more responsive approach to violence might include forced migrant women’s perspectives in the process of formulating accountability mechanisms (Ramji-Nogales 2010).

Conclusion

The skeptical reader might be left with the question of whether the failure of international criminal law to address violence against forced migrant women is really a problem. One might argue that the present system — in which international criminal law addresses crimes committed in the political sphere by state or state-like actors according to a policy or plan and humanitarian organizations tend to the needs of displaced women — is working correctly. But it is not. International criminal law renders invisible and pulls moral outrage and scarce international funds away from the problem of violence against forced migrant women (Ward 2002; Silk 2014). An exploration of this framework is crucial, in Hilary Charlesworth’s words, “to identify and destabilize the unspoken gendered assumptions of international law and politics” in order to “begin to be able to imagine broader and more durable solutions to our most pressing problems” (Charlesworth 2002, 102). Only then will we be able to address all of the significant harms suffered by women as a result of violent conflict; only then will we begin to dismantle international criminal law’s gendered structure.

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UN Security Council Resolution 1325: The Example of Sierra Leone

Josephine A. Beoku-Betts

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Abstract

Fifteen years after the Sierra Leone civil war and 7 years after the adoption of the Sierra Leone National Action Plan (SILNAP), achievements have been modest. While progress has been made in legislation and policy to advance women's rights and protections under UNSCR 1325 and 1820, sexual violence continues to be a serious problem and women still face challenges that undermine their capacity to effectively influence tangible policy reforms advocated in SILNAP. This chapter will examine the accomplishments and challenges of domesticating SILNAP since its adoption in 2010. Mechanisms employed to ensure the sustainability of the SILNAP agenda will be assessed as well as the engagement of activist women NGOs in advancing the goals of this agenda. Informed by

J. A. Beoku-Betts (✉)
Center for Women, Gender, and Sexuality Studies, Florida Atlantic University,
Boca Raton, FL, USA
e-mail: Beokubet@fau.edu

feminist political economy analysis, I argue that legislative and policy initiatives of SILNAP have had limited impact because of the failure to link sexual violence during civil conflict with structural violence underlying women's subordination prior to and under postwar conditions and an underlying culture of patriarchy and patronage which impact forms of violence against women in the public and private spheres. This trajectory of violence against women must be linked and incorporated into framing and implementation of national development plans such as SILNAP, if significant transformations in the empowerment of women are to be realized during war and peacetime.

Keywords

UNSCR 1325 · National action plans · SILNAP · Sierra Leone · Sexual violence · Gender-based violence · Women's political activism

Introduction

During the January 1999 invasion, I was captured by a group of AFRC/RUF armed men. I was with them for [one] week and I was raped every day, either two or three [times]. I felt sick and unable to walk. One day, the ECOMOG attacked the place we were based, they all ran away and I alone stayed because I was sick. Luckily for me, I was saved by one man who took me to his home and I was able to see my sister again. She took me to the hospital for treatment. Comfort Ballie (cited in Thorpe 2006, 111)

Fifteen years after the Sierra Leone civil war and 7 years after the adoption of the Sierra Leone National Action Plan (SILNAP), achievements have been modest. While progress has been made in legislation and policy to advance women's rights and protections under UNSCR 1325 and 1820, very few prosecutions and convictions of perpetrators of crimes of sexual violence during war are reported (Seelinger 2014). Sexual violence, particularly that experienced by women and girls, continues to be a serious problem (Denney and Fofana Ibrahim 2012; MSWGCA 2015; Williams and Opdam 2017). Data from the Family Support Unit of the Sierra Leone Police show that for the period from 2012 to 2013, domestic violence constituted 60.8% of all cases reported (Women Count 2014, 22). Interviews with survivors of sexual violence reported a lack of safety and confidence in the legal system in Sierra Leone (Basini and Ryan 2016; MSWGCA 2015).

This chapter examines the accomplishments and challenges of domesticating SILNAP since its adoption in 2010 and assesses mechanisms employed to ensure the sustainability of this agenda. The purpose is to understand how efforts of UN member states to comply with UN conventions they have ratified are conceptualized and implemented locally. The study builds on feminist discourse on sexual violence and political economy to explain conceptual and structural limitations in addressing sexual violence through international human rights instruments such as UNSCR 1325 and 1820 (e.g., True 2012). These studies posit that such legislative and policy initiatives have limited impact, because they are conceptually inadequate and

emphasize sexual violence during civil conflict while overlooking structural violence underlying women's subordination under postwar conditions. Forms of structural violence include poverty, illiteracy, income disparity, persistent violence against women in private and public spheres, and lack of political will. In the case of Sierra Leone, I will show that although advances in women's rights have been made legislatively and through policy initiatives, women still face many challenges that undermine their capacity to effectively influence tangible policy reforms advocated in SILNAP. One of the key challenges is resistance from legislators to pass the Gender Equality Act, which requires 30% representation for women in elected office and other leadership and decision-making positions. Other interacting factors that weaken the capacity of SILNAP to significantly influence gender equity issues are persistent forms of structural violence sustained by an embedded culture of patriarchy and patronage, and limited budget allocations to the Ministry of Social Welfare, Gender and Children's Affairs (MSWGCA) which spearheads state initiatives for the implementation of SILNAP. First, I will review key issues in the literature about national development plans and UNSCR 1325 and 1820. This is followed by a brief description of the study's methodology and contextualization of violence against women in Sierra Leone. The last section examines in relation to sexual violence, the accomplishments and challenges in implementing the plan, and the engagement of activist women NGOs in advancing the goals of this agenda.

UN 1325 and National Action Plans

UNSCR 1325 on women, peace, and security was unanimously passed on October 31, 2000, by the UN Security Council. It is a major tool to legally empower women to bring their voices and perspectives to decision-making structures when issues of war, peace, and post-conflict reconstruction are addressed (Anderlini 2007). It has contributed to inclusion of women's concerns in global norms of peace and security and to the development of international law. It recognizes the different experiences of women and men in conflict and peace building and calls for an awareness of these differences informed by a feminist analysis of conflict and sustainable peace building. It was the culmination of many years of activism and visionary leadership by women from around the world who demanded an end to the encroachment of violent civil wars into their daily lives, and their right to be recognized as equal participants in the prevention and resolution of conflicts, and the maintenance and promotion of peace and security.

Since 2004, the UN Secretary General and the Security Council have encouraged member states to develop national action plans (NAPs) to implement the resolution. The plans spell out the actual activities that governments will undertake at the domestic level to translate it into policies and program objectives. By the end of 2015, 55 countries and 4 regional organizations (including the Africa Union) had developed and launched NAPs, leaving a majority of 133 states still to adopt action plans (True 2016). True (2016) points out that for those countries that have adopted NAPs, the emphasis has been on the process without fully setting up mechanisms for

accountability and budget allocation. She also states that implementation strategies have been varied. Some countries like Norway have focused on a gender-responsive humanitarian aid program within their foreign aid and security policy, while Australia has emphasized more integration of women into security sector institutions, and others like the Philippines have addressed gender-based and sexual violence in regulating their arms trade agreements.

For a variety of reasons, scholars argue that UNSCR 1325 while strengthened by other resolutions like SCR 1820, 1889, and a new resolution, UNSCR 2242, designed to correct gaps in the implementation of the women, peace, and security agenda, has failed to live up to expectations in the context of its global and national implementation (True 2012, 2016; Basini and Ryan 2016; Hoewer 2015; Olonisakin et al. 2011; Otto 2009; Shepherd 2010; Swaine 2010).

A common criticism of UNSCR 1325 is that it lacks enforcement measures to compel member states to implement their national development plans. While other resolutions such as UNSCR 1612 on children and armed conflict or UNSCR 1372 on counterterrorism either have established monitoring, reporting, and accountability mechanisms or used strong language that force security institutions to take it seriously, the women, peace, and security agenda lacks the enforcement power of “hard law.” As a result, many governments lack the incentive and political will to carry through the expectations of this resolution (Hoewer 2015; Otto 2009; Swaine 2010). According to True (2016), regardless of a country’s experience of conflict or nonconflict or its status as global North or global South, the key conditions which seem to influence their development and implementation of a NAP are the degree to which they have embraced democratization, prior normative commitments to women’s rights (e.g., unreserved ratification of CEDAW), and presence of women in positions of political power (2016, 319).

Another set of criticisms focuses on the use and influence of language as it informs policy and academic debates (Shepherd 2008, 2010). Shepherd (2010) posits that the meanings we attach to these concepts are never fixed and vary over time and place, depending on prevailing social, political, and economic norms which mediate how policy documents and strategic plans will be interpreted and understood. Denney and Fofana Ibrahim (2012) show in the case of Sierra Leone how changes in the justice system resulting from passage of new laws can create different understandings and lead to negative outcomes for the beneficiaries who might be uncertain about how to interpret the new meanings in terms of their established relationships. For example, in rural areas where many women may be more acquainted with customary laws than with the formal justice system, accessing the latter to report violations of their rights such as rape might prove daunting and confusing. They may also be subject to social stigma in their communities if they report to the formal legal system, particularly if resolution of such cases runs counter to established practices under customary law. In other words, program interventions to combat gender-based violence under these circumstances are likely to fail if they are not grounded in locally relevant understandings of that new policy (Abramowitz and Moran 2012).

The language of UNSCR 1325 is also seen as reflecting neoliberal economic and political policies which are seemingly transplanting the values and institutions of global

North democracies to politically and economically unstable countries. The conceptual framework and design of these NAPs are presented as a blueprint which these countries are expected to comply and participate in. They in turn have limited options to avoid or choose alternatives from what is favored by the international community (Basini and Ryan 2016). As such, even when the idea of the NAP is presented as something to be “locally owned” or reflecting “indigenous” strategies, the emphasis on technocratic and institutional solutions as well as quantifiable results-based outcomes make it difficult to question who exactly are the intended beneficiaries and whether the underlying causes of structural and gender inequalities will be transformed. As Basini and Ryan (2016, 393, citing Donais 2012) emphasize: “NAPs frame post-conflict states as the targets of intervention rather than the architects of transformation.”

Feminist Political Economy

“Feminist political economy” is a conceptual framework employed by a growing body of feminist scholars and practitioners in their analysis of the linkages between violence against women during conflict situations and during peacetime and “the local and global contexts in which violence against women occurs” (True 2012, 7). This approach contextualizes violence as a continuum of violence women experience irrespective of war, economic prosperity or impoverishment, political empowerment or political repression (Hoewer 2015; True 2012). It considers the historical and structural contexts within which violence is located and examines the interaction between all these processes and how they impact one another. The spaces where they intersect are key to identifying entry points for structural, institutional, and attitudinal change (Denney and Domingo 2013). Feminist political economy is therefore holistic in approach and avoids disconnecting the problem from the underlying structural causes and consequences. It takes into account individual costs to women in the private and public spheres and the degree to which they have access to opportunities and benefits. It reveals the collective costs to society in the public and private sectors when preventive measures to combat violence against women are not instituted (True 2012). The following section will briefly discuss the study’s methodology, followed by a situated analysis of violence against women in Sierra Leone.

Methodology

This chapter is based on a review of various supporting documents addressing SILNAP. These include monitoring, strategic planning, and evaluation reports on SILNAP, reports on violence against women, and reports on mainstreaming gender in security sector reform and governance. Other sources are UN reports, African Development Bank reports, newspaper articles, dissertations, and published articles. Semi-structured qualitative interviews conducted by the author as part of a larger study on women’s civil society organizations in Sierra Leone since the 1990s are also used in this study.

Situating Violence Against Women in Sierra Leone

Violence against women in Sierra Leone is not a new phenomenon given the unequal structure of power relations and an embedded patriarchal culture that governs societal norms and values about gender roles. Sierra Leonean women have an established tradition of political activism and leadership and the power to influence social, political, and economic decision-making in a variety of communities (Day 2012; Hoffer 1971; Steady 2006, 2011). However, the power structure governing relations between men and women at all levels of society prioritizes men in contexts of family, community, social, political, and economic institutions. This can be seen in socialization processes that privilege men over women as household heads, women's secret societies which teach adolescent girls that to be good women, wives, and mothers they must obey their husbands and make their interests a priority (Bledsoe 1984), and customary laws that until the past decade failed to protect women's rights to property and inheritance, and relegated abusive relationships towards women as matters to be dealt with privately. Such practices are institutionalized into the norms, values, and attitudes of the society and render women and girls vulnerable to structural violence (Denney and Fofana Ibrahim 2012; Reilly 2014).

Another key factor shaping understanding about the structure of violence against women in Sierra Leone is the system of patronage which is a long-standing tradition. Denney and Fofana Ibrahim (2012, 6) describe this as meaning "everybody 'stands for' someone else in a hierarchy of dependence and obligation, based loosely on age, wealth and status." This system is prevalent in political institutions at national and local levels, through membership of formal and informal kinship and political organizations, as well as the traditional institution of chieftaincy. Even recently, patronage was evident in the preparation for the 2018 presidential elections, whereby the outgoing head of state denied registered presidential candidates from the governing party the right to a democratic election within the party by imposing his choice of successor from the registered candidates. This system of patronage is hierarchical and gendered and women are usually at a disadvantage to gain privileges and sanctioned when perceived as transgressing gendered boundaries. Fofana Ibrahim (2015) provides a concrete example to show how male secret societies are used by the patronage system to bar women political aspirants from parliamentary elections in Sierra Leone. She states:

It is this sense [sic] of competition and the need to keep women in their 'proper place' that the country has seen a surge in the use of traditional secret societies to bar women from the public sphere. Many elite men belong to secret societies such as the Porro, an all-male secret society where many important decisions are made. [...] Women are not allowed to see the Porro masquerade and therefore cannot be outdoors when the Porro and its members are out in the community. Intrinsically, what has often happened is the outing of the Porro masquerade on the dates that political women plan campaign rallies or meetings. (Fofana Ibrahim 2015, 79)

Sierra Leonean women were severely impacted by the civil war which took place from 1991 to 2002 with approximately 275,000 women and girls sexually assaulted

by means of rape, kidnapping, sexual slavery, or used as spies, carriers, and cooks (Human Rights Watch 2003). According to the Truth and Reconciliation Commission, the Revolutionary United Front (RUF) which started the war had a deliberate strategy to violate women as a way to humiliate their male relatives or to force them to marry male combatants (UNECA and ACGSD 2010). An estimated half of the population was displaced, with families, kinship and social networks and existing infrastructures breaking down, leading women and girls vulnerable to violence (Denney and Fofana Ibrahim 2012; Beoku-Betts 2016). Transformations occurred in gender roles in the family and community as women assumed new financial, decision-making, and social responsibilities in the absence of men involved in or affected by the war. For example, opportunities for women to engage in micro credit programs might create tension and marital violence in cases where as a result of the war men had lost their social and economic status in the family and community (Horn et al. 2014). Since the end of the war, sexual and domestic violence are still prevalent. In the first half of 2013, 6500 cases were reported, and in 2014, following the Ebola outbreak, sexual violence increased by another 40% (Williams and Opdam 2017). Evidence also suggests that while there are variations among the regions, due to media coverage and gender sensitization programs, more people are reporting cases of sexual and domestic violence and seeking redress (Women Count 2014).

In closing, violence against women during the civil war from 1991 to 2002 was part and parcel of an institutionalized system of structural inequality and power imbalances prior to, during, and after the war. This trajectory of violence against women must therefore be linked and incorporated into the framing and implementation of national development plans such as SILNAP, if significant transformations in the empowerment of women are to be realized during war and peacetime.

SILNAP and Gender-Based Violence

Prior to launching SILNAP and immediately after taking office, Sierra Leone's democratically elected president, Ahmed Tejan Kabba, made an official apology to all the survivors of sexual violence, recognizing its prevalent and adverse effects on the society (True 2012). Many of the legislative and policy reforms which followed to address gender-based violence and promote gender equality were in line with international conventions and frameworks to which the government was a signatory (e.g., CEDAW). The role of civil society organizations in keeping the government accountable to these commitments was also significant in setting the stage for legislative and other reforms to advance gender equality. As stated by a member of the 50/50 Group: "We realize that Sierra Leone has national treaties like CEDAW they were doing nothing about. We pulled together other women's groups to get the government to domesticate these laws" (50/50 Group member #2 2012).

Among noted achievements are: the three gender justice acts which domesticated requirements of the CEDAW treaty; the African Union Women's Protocol in 2003; the Sexual Offences Act in 2012; the appointment of gender specialists assigned to the Office of the President; the Ministry of Social Welfare, Gender and Children's

Affairs; gender mainstreaming and affirmative action initiatives in security and justice sector institutions; increases in the enrollment and graduation of female students; and the inclusion of Pillar 8 on gender equality and empowerment of women that are aligned with SILNAP (e.g., the section on violence against women) in the government's third-generation poverty-reduction strategy, Agenda for Prosperity, launched in 2013 (Government of Sierra Leone 2012; Women Count 2014; MSWGCA 2015).

Notwithstanding these achievements, prevailing experiences of gender-based violence continue to permeate the society, ranging from intimate partner violence to other structural forms of violence that make women vulnerable economically, socially, and politically (Barnes et al. 2007). These problems are exacerbated by health epidemics and natural or man-made disasters such as the Ebola outbreak in 2014 which left an estimated 700 people dead, many of them being women who were first responders and primary caretakers. In addition, the deadly mudslide and torrential floods in the capital, Freetown on August 14, 2017, killed over 400 people with over 3000 thousand left homeless.

The Ministry of Social Welfare, Gender and Children's Affairs was responsible for formulating and implementing SILNAP in partnership with a nationwide consultative task force comprised of representatives from the security sector, various ministries, civil society, and international organizations. At the plan's inception, the task force mapped out the goals and conducted a survey to establish a baseline data base. Six hundred and ninety-seven civil society organizations were interviewed to determine their knowledge of the resolution and capacity to undertake activities that related to its priority concerns. The survey revealed that 67% of organizations had worked with victims and survivors of gender-based violence, helping in some cases to bring perpetrators to justice. Based on this baseline survey, SILNAP established violence against women as its top three pillars (Government of Sierra Leone 2010). Highlighting violence against women in the SILNAP as a key area for intervention and evaluation established a clear framework by which to hold the government accountable in fulfilling its obligations to UNSCR 1325.

Legislative Measures

Four key legislative measures undertaken by the government to advance the rights of women were the Domestic Violence Act (2007), the Registration of Customary Marriage and Divorce Act (2007), the Devolution of Estates Act (2007), and the Sexual Offenses Act (2012). The Domestic Violence Act outlines that physical, sexual, economic, emotional, verbal, or psychological abuses, including sexual harassment and intimidation, are criminal acts and subject to a maximum of 2 years imprisonment. This law also requires the government to provide temporary shelter to victims of domestic abuse. The Customary Marriage and Divorce Act protects children from early marriage by stating that children cannot marry under 18 years of age and that both parties must consent to the union. Women have the right to acquire, own, and dispose of property, and in the event of divorce or

separation, a woman need not return her dowry. Customary marriage under this law permits registration in the same way as marriage under statutory law and requires a minimal fee. The Devolution of Estates Law criminalizes customary practices whereby a widow or child can be evicted from the marital home after the death of the male spouse, thus depriving a woman from inheriting her husband's property (Center for Accountability and Rule of Law 2009; IRIN 2012). The Sexual Offences Act criminalizes cruelty to children, domestic violence, sexual assault, sexual harassment, and rape. This law carries a maximum sentence of 15 years in cases of rape and entitles survivors to free medical treatment and a free medical report that is required for prosecution (Denney and Fofana Ibrahim 2012; MSWGCA 2015). Law enforcement agencies were provided a standard operational procedure to assist with handling sexual offences and domestic violence and family support units and Saturday fast-track sexual and gender-based violence/family courts were instituted to assist with reporting and prosecution of domestic and sexual violence (Women Count 2014).

Although each of these laws has set a legal framework to ensure equal protection of women and elimination of discriminatory practices against women and girls, there are structural or logistical problems which make it difficult to enforce the full intention of these laws. For example, the language of the law may not be interpreted in the same way by everyone, especially where particular crimes may have different or less severe consequences under customary law and local understandings of social relationships. Seelinger (2014) points out that prior to Sierra Leone's civil war, the concepts of "sexual and gender-based violence" and "rape" were not used in the legal and political vocabulary and there was no infrastructure in place to address these abuses. Denney and Fofana Ibrahim (2012) similarly show that even though the Sexual Offences Act stipulates that marital rape is a crime, because in many parts of the country married women are commonly viewed as the property of their husbands, rape is rarely seen as a crime since consent is not considered necessary. While customary marriages can now be registered, for many women living in rural areas, especially those in long-established marriages, making the journey to the district headquarters to register their marriage would be difficult without adequate transportation or income to finance the entire process.

The practice of early marriage is also a constraint on the effective enforcement of the Customary Marriage and Divorce Law and holds adverse implications for the education and health of women and girls. While this law criminalizes marriage before the age of 18 years, it is difficult to enforce because of the institution of female genital cutting (FGC) which is widely practiced. FGC takes place between the ages of 6–16 years among 80–90% of women in the provinces and is not prohibited under the law (US Department of State 2016; Denney and Fofana Ibrahim 2012). Part of the problem is that this practice takes place when a girl has reached puberty and perceived as ready for marriage. Lower income families are more likely to marry off their daughters at an early age and older men are willing to underwrite the costs in return for marriage. Enforcement of the Sexual Offences Act extends to parents who can be prosecuted for arranging the marriage of their child to a perpetrator who has sexually violated their daughter. A culture of silence, however,

surrounds this practice and also a lack of political will, even on the part of the government. Although efforts have been made by MSWGCA to get women who conduct FGM “Soweis” and other traditional leaders to sign a memorandum of understanding not to initiate girls under 18 years, a 2016 US State Department human rights report states that the Family Support Unit only recorded six cases of underage girls undergoing FGM between January and August and that only four were investigated and no charges were filed (US Department of State 2016). For fragile economic and political systems, as in the case of Sierra Leone, while they may be committed to the spirit of international treaties, structural inequalities exacerbated by a culture of patriarchy and patronage make it difficult to follow through new legislation to advance gender equality. As pointed out by Abramowitz and Moran (2012) and Denney and Fofana Ibrahim (2012) failure to ground new measures in local understandings, particularly the balance of power between men and women in households and communities can lead to resistance in acceptance of program initiatives to combat violence against women and to promote gender equality.

Discriminatory provisions embedded in the constitution of Sierra Leone also impact the citizenship rights of women in Sierra Leone. For example, the Customary Marriage and Divorce Act and the Devolution of Estates Act cannot be effectively implemented unless the constitution which is currently under review is revised. Among the key recommendations are that section 27 (4d and 4e) of the 1991 Constitution be expunged. In its present form, the constitution recognizes Statutory and Customary laws. Although Section 15 guarantees the human rights of all Sierra Leoneans regardless of gender, discriminatory practices are excluded in cases of adoption, marriage, divorce, burial, and devolution of property on death. These flaws in the constitution impact women negatively and represent forms of structural violence. In the case of the Customary Marriage and Divorce Act or the Devolution of Estate Act, women have no legal recourse under the traditional land tenure system which does not recognize individual rights to land. Traditional rulers or families who stand to lose customary rights and privileges tend to ignore the legislation and apply customary laws to these lands in order to maintain them as communal or family property. As a result, some women end up marrying into their late or divorced husband’s family as a way to survive and gain access to land for farming (Cooperazione Internazionale [COOPI], cited in IRIN 2012).

The Ministry of Social Welfare, Gender and Children’s Affairs

MSWGCA is the lead ministry responsible for overseeing implementation of SILNAP. Although it has strong support from the Office of the President, this is not accompanied by sufficient budget allocations or active involvement of other policy makers and the private sector. Most of the funding for SILNAP has been through independent, partially coordinated donor projects (MSWGCA 2015, 49). Between 2005 and 2010, the annual budget of this ministry ranged from 1.1% to 2.7% of sectoral allocation and constituted 0.2–0.7% of the national budget. It is

among the weakest and least influential ministries in national politics (AfDB 2011, 15). Given these challenges, the ministry has been unable to effectively deliver and disseminate the SILNAP agenda throughout all the ministries, with the exception of the security sector where some progress has taken place. Basini and Ryan (2016) explain that competing demands on the time of a limited number of staff at the MSWGCA led to few meetings and the lack of coordination and short notice of meetings to partner ministries such as health, education, and justice. This led to perceptions of the MSWGCA as having exclusive ownership of the SILNAP agenda. They also report that national action plans such as SILNAP often get subverted or ignored if they do not align with the interests of local elites. This lack of attention to power relationships among ministries or with local elites in targeted communities, and the uncertainty regarding whether documented achievements are the result of SILNAP or simply reflecting general trends in the advancement of policies and programs to promote gender equality, make it difficult to fully assess the ability of this ministry to effectively implement the SILNAP agenda (Basini and Ryan 2016).

The Justice and Security Sectors

Women's representation in the justice and security sector is pertinent for effective implementation of legislation on violence against women. Women constitute 25.4% of the judiciary, 18.3% of the police, 10.1% of commissioned ranks, and 7.2% of noncommissioned ranks in the military (Women Count 2014). There has been progressive change in the number of women represented at the senior levels of the judiciary, but they remain underrepresented at the lower levels of the court system. Some advancement has also been made in building the capacity of the local court system. Court chairpersons are no longer dependent on political patronage as they are now appointed by the chief justice on the recommendation of local court service committees. This development has opened up opportunities for women who are eligible to apply for these positions and are doing so (Women Count 2014, 14–15). Although the proportion of women at the lower levels of the police system continues to increase, fewer women are represented at the senior levels. This is attributed to the requirement of a university degree for such positions and women constitute only 15% of degree holders in Sierra Leone (Women Count 2014). Under the guidance of the National Gender Policy, there has been gender mainstreaming and affirmative action programs to recruit and accelerate the promotion of women in the police and military. The police force and military have made strides in providing gender sensitivity training to personnel on sexual exploitation, sexual abuse, and sexual harassment. Women's representation in peacekeeping operations has also increased, although not at the senior levels. These efforts though commendable, characterize what Basini and Ryan (2016) describe as “technocratic and institutionalized solutions to women equality,” meaning that they are following prescriptions that legitimize the international 1325 agenda of what gender equality should look like while overlooking the particular concerns of targeted communities. For example, the 2015

SILNAP end of plan evaluation report states: “It emerged that international donors often focused on the short term, which occasionally led to prescriptive attitudes, a results driven approach, and a lack of trust in local partners. This led to inadequate strategic planning on women’s longer term needs” (MSWGCA 2015, 49).

Based on these observations, there is clearly more room for direct local involvement in shaping the structure of transformative program initiatives such as training and gender sensitization programs. There is also more room for close monitoring of embedded power imbalances and understanding of the complex ways in which they operate to negatively impact women’s ability to advance professionally in security and justice sector institutions. The following section will discuss the role of women’s civil society organizations in keeping SILNAP agenda accountable to the people.

Women’s Civil Society Organizations

These organizations have been actively engaged as advocates for a wide range of issues affecting gender equality in Sierra Leone. It was the grassroots activism of organizations such as the Women’s Forum and the Women’s Peace Movement to end the war and force the military to hold multiparty elections that brought about the democratically elected government of President Ahmed Tejan Kabba. They spearheaded the movement for democracy, which was a network of civil society organizations intent on electing a government that would be accountable to citizens. These organizations were recognized for their activism to promote peace when the Mano River Women’s Peace Network (MARWOPNET), a regional movement of Sierra Leonean, Liberian, and Guinean women peace activists, was awarded the United Nations Prize in the Field of Human Rights in 2003.

Since the end of the war, many women activist organizations have emerged. An interview with a member of the 50/50 Group, an organization formed to promote more representation of women in elected office and decision-making positions, stated that:

What we see in postwar Sierra Leone is an increase in women’s movements, organizations, and associations engaged in providing needed services and advocating for democratic principles, good governance, justice and security sector reforms. They advocate for gender equity, bodily integrity, access to resources, property rights, and more representation of women in parliament. (Beoku-Betts and Day 2015, 93)

Successive governments have recognized these efforts by appointing women to ministerial, judicial, civil service, and para-state board positions. Women NGOs like the 50/50 Group have been instrumental in raising public awareness about issues critical to the advancement of women such as promoting implementation of the gender justice acts. They translated the gender acts into four of the local languages and organized media campaigns to teach people about their rights under these laws. They have spearheaded coalitions of women civil society and other human rights organizations to promote women’s participation in the constitutional review process

and demand for a Gender Equality Act that ensures 30% participation of women in leadership and decision-making positions. Likewise, organizations like MARWOPNET have been in strategic partnership with the MSWGCA in drafting, implementing, and monitoring SILNAP which is in line with their goals of peace building and conflict resolution.

Women's organizations are also active in ensuring that national and local elections remain nonviolent. In the 2012 electoral process, a women's situation room was set up to advocate and educate citizens about the need for a peaceful and violence-free election process. The civil society monitoring report states that over 300 women were trained and deployed as national observers. The increased visibility of women as credible agents led to more people registering to vote and participating in the election process (Women Count 2014, 13).

Although women's organizations are still actively engaged in advocacy to advance gender equality as well as peace and security in Sierra Leone, they are not as vibrant as in the past. They have fewer volunteers for campaigns but many more available as paid consultants for gender and development projects (Beoku-Betts and Day 2015; Women Count 2014). Since many of them lack independent funds to finance their programming and administrative operations, they rely on the support of government, international organizations, and international NGOs. An issue of concern that arises from this dependency on government or outside funding is whether there is enough distance between them and state or international donors to exercise an independent status in the monitoring process. For example, the agendas of international donors who work with local NGOs are primarily guided by specific goals that are fundable and achievable within a limited period set by the donors. The demands to comply with these expectations often limit the ability of the local organization to pursue more flexible and independent agendas that represent the interests of their stakeholders, such as raising public awareness about the new laws, training law enforcement agencies and traditional leaders, and effectively lobbying parliament and allies to advocate for the implementation and enforcement of laws. An understanding of these power dynamics between women civil society organizations and government or international NGOs fosters clearer understanding of structural inequalities and political tensions which should be disentangled to appreciate the particular needs and concerns of local organizations and their ability to effectively monitor and evaluate SILNAP.

Conclusion

Feminist scholars have argued that the focus of UN Security Council resolutions on armed conflict, as opposed to other structural forms of violence, marginalizes how the latter types of obstacles also impact on women's lives (True 2012; Shepherd 2008). An emphasis on process, technocratic and institutional solutions also limits the extent to which local concerns and initiatives can effectively shape the implementation of UNSCR 1325 in NAPs (Basini and Ryan 2016). In Sierra Leone,

commendable efforts were made by the MSWGCA to implement SILNAP, though with mixed results. Structural inequalities of poverty, illiteracy, income disparity, lack of skills and resources, and a persistent culture of patriarchy and patronage continue to fuel violence against women and militate against the capacity of women's organizations to confront the state to effectively address their strategic gender interests. Because state revenues are prioritized according to perceived national needs, budget allocations to the MSWGCA, which spearheads SILNAP receives a low placement in the national budget, thereby weakening its capacity to significantly influence the agenda for gender equality. When connections are not made across the continuum of violence – or about the specific ways in which women are impacted at various stages of the process of implementation – the ability to fully assess the effectiveness of SILNAP is curtailed. One thing that is clear and consistent in examining SILNAP's impact nonetheless is the active engagement of women's civil society organizations in their advocacy and involvement in implementation at all stages. As Basini and Ryan (2016) point out, the engagement, capability, and capacities of women civil society organizations are often underestimated because of primacy given to the state in the implementation of NAPs. However, as this chapter has shown, many of the indicators of programs like SILNAP, which are implemented at the micro level, are undertaken through the activities of these organizations.

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