

Opinion

Two Steps Forward, One Step Back?: The Field of Women’s Human Rights

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Abstract

This article offers an overview of the genesis of women’s human rights and some of the debates surrounding them. It argues that, despite the considerable international activity relating to women’s human rights, these rights have fragile protection. It begins by examining the development of women’s human rights, and then moves to how women’s rights are viewed today: with their articulation and expansion under Optional Protocols, regional Conventions and UN General Comments, and the critiques of general human rights norms from a feminist perspective. It ends with proposals for the future of women’s rights, particularly the need to counter the perceived conflict between “culture” and women’s rights, and to challenge conservative development via feminist methods to promote women’s rights.

Introduction

The field of women’s human rights has developed apace over the last quarter-century. The term “women’s human rights” is, at first sight, puzzling. Human rights, by definition, apply to all people: from old to young, from rich to poor, from virtuous to corrupt, to female, male and other sexual identities. The universality of application of human rights is indeed their most radical feature. To suggest there is a special category of women’s human rights may undermine the claim of universality by fracturing the field. At the same time, it has provided a powerful political platform for women to draw attention to continuing areas of inequality. This article offers an overview of the genesis of the area of women’s human rights and some of the debates surrounding them. It argues that, despite the considerable international activity relating to women’s human rights, these rights have fragile protection.

First, a note on terminology. Scholars and activists have debated whether what are at issue are women’s rights or women’s human rights. “Women’s rights” are sometimes understood as those particular to women’s lives, for example rights relating to reproductive choice and childbirth.¹ “Women’s human rights”, or the “human rights of women”, imply that women as a group should be beneficiaries of the human rights canon. Hillary Clinton’s famous rallying cry at the Fourth World Conference on Women in Beijing in 1995 that “human rights are women’s rights and women’s rights are human rights” illustrates the fluidity of this distinction by suggesting that “women’s rights” are both women-specific as well as general human rights applicable to women. The point of her slogan was that the human rights of women are violated on a much greater scale than the human rights of men.²

¹ For example, Noreen Burrows, “International Law and Human Rights: The Case of Women’s Rights” in Tom Campbell, David Goldberg, Sheila McLean and Tom Mullen (eds), *Human Rights: From Rhetoric to Reality* (New York: Basil Blackwell, 1986), p.85.

² Hillary Clinton, “Women’s Rights are Human Rights” (1996) *Women’s Studies Quarterly* 98.

The development of women's human rights

Two themes infuse the development of women's human rights. The first is the idea that women require special treatment, specifically protection. This theme characterises early international instruments that aimed to prevent some types of exploitation of women, for example International Labour Organisation conventions prohibiting women working at night,³ or in mines.⁴ These instruments were not cast in the language of rights, and their aim was primarily protective of ideals about womanhood, such as women's physical weakness and vulnerability outside their families.⁵ The protective strand with respect to women has not disappeared, emerging, for example, in a suite of Security Council resolutions on women, peace and security adopted since 2000.⁶ These resolutions depict women in conflict zones as particularly susceptible to sexual violence, requiring protection, rather than as potential agents in shaping their own futures.

The second theme in the area of women's human rights internationally is that of women's equality with men: the right to equal treatment and non-discrimination on the basis of sex. This principle was first signalled in the preamble to the UN Charter (1945) which reaffirms faith in "the equal rights of men and women". The purposes of the UN included promotion of human rights "without distinction as to race, sex, language or religion".⁷ The Universal Declaration of Human Rights (1948) and the two major human rights instruments, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both adopted in 1966, provide that the rights they recognise should be respected "without distinction of any kind" including sex,⁸ and, more specifically, that state parties should ensure the equal right of men and women to enjoy the designated rights.⁹ The ICCPR also offers a broad guarantee of equality before the law and a prohibition on discrimination on a number of grounds, including sex.¹⁰

The UN Decade for Women, 1976–1985, strung between three major UN conferences on women in Mexico City (1975), Copenhagen (1980) and Nairobi (1985), provided impetus for the elaboration of the concept of women's equality with men. A significant step was the adoption in 1979 of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention contains a broad definition of discrimination in art.1, covering both equality of opportunity (formal equality) and equality of outcome (de facto or substantive equality). It contemplates the need for special measures on a temporary basis to achieve equality,¹¹ and requires states to take legal and other measures to ensure the practical realisation of the principle of sex equality.¹² The Convention covers a broad range of areas where state parties must work to eliminate discrimination including political and public life,¹³ international organisations,¹⁴

³ Convention concerning Employment of Women during the Night, Washington, 1st ILC sess., November 28, 1919 (Night Work Convention).

⁴ Convention concerning the Employment of Women on Underground Work in Mines of all Kinds, Geneva, 19th ILC sess., June 21, 1935.

⁵ The instruments, however, also contemplated some economic considerations trumping the protection. For example, in the case of the Night Work Convention, women were able to work at night in cases of force majeure, and when dealing with rapidly deteriorating materials: art.4.

⁶ For example, Security Council Resolutions 1325/2000, 1820/2008, 1888/2009, 1889/2009, 1960/2010, 2106/2013 and 2122/2013.

⁷ UN Charter art.1. The Charter also specified that the UN should "place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs": art.8.

⁸ International Covenant on Civil and Political Rights, December 16, 1966, 999 UNTS 171 (ICCPR) art.2; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 UNTS 3 (ICESCR) art.2.

⁹ ICCPR art.3; ICESCR art.3.

¹⁰ ICCPR art.26.

¹¹ Convention on the Elimination of All Forms of Discrimination against Women, March 1, 1980, 1249 UNTS 13 Women's Convention art.4.

¹² Women's Convention art.2.

¹³ Women's Convention art.7.

¹⁴ Women's Convention art.8.

education,¹⁵ employment,¹⁶ healthcare,¹⁷ financial credit,¹⁸ cultural life,¹⁹ the rural sector²⁰ and the law.²¹ It moves from an equality to a special treatment lens in some areas, for example in the case of healthcare during and after pregnancy.²²

In its wide coverage, the Women's Convention transcends the traditional divide between civil and political rights and economic, social and cultural rights, illustrated by the separate development of the ICESCR and the ICCPR. The Women's Convention, however, is concerned only with the position of women and its relationship to general human rights treaties is not fully articulated. By contrast, the Vienna Conference on Human Rights in 1993 explicitly brought together the worlds of human rights and women's rights, declaring that "the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights".²³ The Fourth World Conference on Women, held in Beijing in 1995, reaffirmed and developed this account, combining aspects of both the special treatment/protection and the equality approaches to women's human rights.²⁴

Women's human rights today

This collection demonstrates the breadth of the field of women's human rights. In many ways, the arena of women's human rights seems secure. Today, courses on women's human rights are standard offerings in many—but by no means all—universities and the literature is considerable.²⁵

The subject of women's human rights contains elements of articulation and expansion as well as those of critique. In the first mode, it identifies and elaborates the various norms relating to women at the international level, for example through cases brought under the Optional Protocol to the Women's Convention, introduced to strengthen the implementation of the Women's Convention in 2000. The Optional Protocol allows for both individual communications to the Committee on the Elimination of Discrimination against Women (CEDAW) and an inquiry procedure in cases of systematic and widespread violations of the treaty. These mechanisms have, however, been invoked much less frequently than comparable provisions in other human rights treaties. CEDAW has adopted views on 36 communications since 2000, and, of these has found 16 breaches of the Convention.²⁶ It has completed one inquiry under art.8 of the Optional Protocol (in July 2004 dealing with violence against women in Mexico).

Another example of articulation and expansion is the preparation of regional instruments such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 1994 and the Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence of 2011. The UN's human rights treaty bodies have also adopted general comments that have broadened the traditional human rights canon to encompass women's lives. The most explicit is General Comment 28 on art.3 of the ICCPR, adopted in 2000, which examines each of the rights set out in the Covenant and analyses the way in which they might affect women's lives.²⁷

¹⁵ Women's Convention art.10.

¹⁶ Women's Convention art.11.

¹⁷ Women's Convention art.12.

¹⁸ Women's Convention art.13(b).

¹⁹ Women's Convention art.13(c).

²⁰ Women's Convention art.14.

²¹ Women's Convention art.15.

²² Women's Convention art.12(2).

²³ "Vienna Declaration and Programme of Action", World Conference on Human Rights (Vienna, June 14–25, 1993) UN Doc. A/CONF 157/24 (1993), s.I, para.18. See also s.II, paras 36–44.

²⁴ "Beijing Declaration and Platform for Action" Fourth World Conference on Women (Beijing, September 4–15, 1995) UN Doc. A/CONF.177/20 (1995), paras 210–233.

²⁵ For example, Dianne Otto (ed.), *Gender Issues and Human Rights*, Vols I, II and III (Edward Elgar Publishing, Human Rights Law Series, 2013).

²⁶ Simone Cusack, "All Communications", Optional Protocol to CEDAW, September 1, 2014, available at <http://opcedaw.wordpress.com/communications/all-communications/> [Accessed November 14, 2014].

²⁷ *General Comment No.28: Article 3 (The Equality of Rights Between Men and Women)*, Human Rights Committee, 68th sess., UN Doc. CCPR/C/21/Rev.1/Add.10 (March 29, 2000); see also *General Comment No.16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art.3 of the ICESCR)*, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/4 (August 11, 2005).

In the second mode, critique, the notion of women's human rights operates as a technique of scrutiny and criticism of the traditional canon of human rights. Critiques of international human rights law from a feminist perspective first emerged in the 1980s to explain the lack of force of international human rights law. These critiques take many forms, drawing on a variety of feminist theories, and they are sometimes inconsistent with each other.

One example of critique is claims that many apparently general human rights codified in international treaties have been defined with reference to men's lives and public spheres of activity. The lives of women, often associated with the private realms of home and family, do not come readily within the standard accounts of rights which focus on public realms of activity. Issues that have a particular significance for women are not covered in the traditional human rights canon. For example, the issues of illiteracy, development and sexual violence are dealt with in "soft" law instruments but are not addressed by legally binding norms. Moreover, international law focuses on states as primary violators of human rights, while non-state actors, including families, are more likely to threaten women's human rights. The lop-sided concerns of the traditional human rights canon are associated with the absence of women in the processes of defining human rights standards and in implementing them.²⁸

Another critique focuses on the notions of equality and non-discrimination in international human rights law. The claim is that these ideas are limited in the sense that they promise equality on male-defined terms. They require that women be treated in the same way as a similarly situated man, without recognising the effects of structural discrimination against women. Moreover, women's rights centre on non-discrimination with respect to men. But the fundamental problem for women is not simply discriminatory treatment compared with men. Women are in an inferior position because they lack economic, social and political power in both the public and private worlds. For this reason, even the comparatively broad definition of discrimination contained in the Women's Convention may not have much effect on the problems women face worldwide.

The field of women's human rights has tended to accept that the category "women" is biologically determined. During the 1990s, the category "gender" gained popularity at the international level as a way of distinguishing the cultural norms and expectations associated with biological sex.²⁹ One effect of the distinction between sex and gender has been to reinforce a fixed idea of womanhood onto which traits such as women's physical vulnerability or maternal roles have been readily mapped. The woman imagined by international human rights law is, typically, a mother, heterosexual and susceptible to male violence. I should note that the language of gender has now become rather mangled. One reason is that the term "gender" is regularly used in international institutions as a synonym for women. Another reason is the fear by some states that the concept of gender is a tool to destroy traditional sex roles, an anxiety expressed in the garbled definition of gender in the Rome Statute as a reference to "the two sexes, male and female, within the context of society".³⁰

A striking feature of women's human rights is the intense internal critique of the field. Feminist scholars who identify with the global South have criticised the Western framework of human rights law as applied to women. For example, Ratna Kapur has scrutinised the disempowering effect of the images of women as victims she identifies with women's human rights, particularly in relation to violence and trafficking.³¹ Karen Engle has made a similar argument about international criminal law, contending that it positions women as passive victims of sexual violence and presents a one-dimensional picture of the ways women

²⁸ In the context of the ECHR, see Marie-Bénédicte Dembour, *Who Believes in Human Rights?* (Cambridge: Cambridge University Press, 2006), pp.188–231.

²⁹ See fn.24 above, Annex IV.

³⁰ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, art.7(3).

³¹ See, e.g. Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics" (2002) 15 *Harvard Human Rights Journal* 1.

suffer in conflict.³² Another type of critique questions the asymmetrical attention to women and men in the Women's Convention. Thus Darren Rosenblum has pointed to images of men and women created in the Convention and argued that the focus on one sexed identity group is incapable of addressing sexual inequality generally.³³

The future of women's human rights

Women's human rights have made precarious progress in the international arena. Although there is now elaborate scaffolding for these rights in terms of treaty provisions and jurisprudence, they are constantly eroded. One example is the raft of reservations entered to the Women's Convention. The Convention has 188 parties, but many states have made broad reservations to provisions of the treaty, which undermine their commitment to it.³⁴ Most of these reservations are based on assertions of culture and religion. Some states have objected to wide reservations,³⁵ and CEDAW has probed reserving states on this issue. Under the international legal regime governing reservations, however, no more direct sanctions can be used to pressure states to withdraw their sweeping reservations.³⁶

Another example of an attack on women's rights is the initiative launched in the UN Human Rights Council to establish a category of "traditional values of humankind".³⁷ These values include dignity, freedom and responsibility, but not equality. The apparent rationale for the concept was to be a bulwark against assertions of women's rights, which some states identify with the breakdown of traditional family structures and social dysfunction.

As these instances of backlash indicate, violations of women's rights are often justified on the grounds that they are an aspect of particular religious or cultural practices, and rights to religious freedom or cultural integrity are often invoked to "trump" women's rights. While concerns of cultural diversity arise with respect to human rights generally, it is striking that the concept of "culture" is much more frequently invoked in the context of women's rights than in any other area. This issue has arisen in many conflict environments, such as Afghanistan and Iraq. Resistance to women's rights comes from local male political elites and religious leaders. For their part, international actors attach little priority to engaging women in peace processes and protecting women's rights. Indeed, women's rights are often traded in political settlements to achieve an apparent stability.

The respect accorded to culture by the international community is based on a monolithic view of culture, as though it had no internal diversity. It also ignores the fact that all social values and hierarchies in their own time frames can be described as forms of culture. Dominant political cultures tend to be conservative and few promote the participation of women in arenas of power. This is why it has been possible for women's rights to be undermined by assertions of local culture, while such an argument would be considered unacceptable if racial discrimination were at issue.

If culture becomes a protected zone, resting on values that cannot be investigated, it is difficult to make any assessment from an international perspective of the significance of particular concepts and practices for women. Feminist scholars have called for the investigation of the gender of the "cultures" privileged in international law, which are, among other things, almost invariably constructed from male histories, traditions and experiences. Arati Rao has described the notion of culture favoured by international actors

³² For example, Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting" in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005), p.47.

³³ Darren Rosenblum, "Unisex CEDAW, or What's Wrong with Women's Rights" (2011) 20 *Columbia Journal of Gender and the Law* 1.

³⁴ The text of reservations is available at UN Women, "Convention on the Elimination of All Forms of Discrimination Against Women: Declarations, Reservations and Objections to CEDAW", available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [Accessed November 14, 2014].

³⁵ The text of the objections to the reservations is available at UN Women, see fn.34 above.

³⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, art.19.

³⁷ *Human Rights Council Resolution 12/21: Promoting human rights and fundamental freedoms through better understanding of traditional values of humankind*, Human Rights Council, 12th sess., UN Doc.A/HRC/RES/12/21 (October 12, 2009).

as “a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top”.³⁸ Rao has proposed a series of questions to assess claims of culture, particularly those used to counter women’s claims of rights: whose culture is being invoked? what is the status of the interpreter? in whose name is the argument being advanced? and who are the primary beneficiaries of the claim? These are essential inquiries in international law.

The sense that the area of women’s human rights is under constant siege has meant that much energy goes into preservation of a limited status quo and that there is a reluctance to develop new standards. Thus, 20 years after the Beijing Conference, UN Women has decided not to hold another conference on women in 2015 because of the anxiety that even the modest gains contained in the Beijing Declaration and Program for Action might be wound back by coalitions of religious influences; in other words, the fear is that for each step forward, it may be two steps back.

The future of the field of women’s human rights depends, however, on a bolder approach. As this special issue shows, women’s human rights remain a contentious category and reducing their profile as an international issue may lead to further, deeper, inroads into their coverage. One way ahead is to devise feminist methods to promote women’s human rights. Examples include creating forums for women in particular contexts to identify the rights that are important for their lives and, in Sally Merry’s term, to vernacularise them.³⁹ Vernacularisation involves local translations and adaptations of international standards. Another feminist strategy is to broaden the field of women’s human rights by scrutinising the concept of “woman” at its heart. Dianne Otto has explained that the emphasis on the contrast “women/men” as a fixed dualism in human rights sustains images of women as passive and vulnerable and of men as active protectors.⁴⁰ This can be challenged by investigating, along with constructions of femininity, the masculinities at stake in gendered roles that are foisted on men and gender-based harms affecting men. Acknowledging the human rights implications of gender norms on all sexual identities will allow the field of women’s human rights to emphasise inclusiveness, agency and humanity.

³⁸ Arati Rao, “The Politics of Gender and Culture in International Human Rights Discourse” in Julie Peters and Andrea Wolper (eds), *Women’s Rights, Human Rights: International Feminist Perspectives* (Routledge, 1995), p.174.

³⁹ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006). See also Sari Kouvou, “A ‘Quick and Dirty’ Approach to Women’s Emancipation and Human Rights” (2008) 16 *Feminist Legal Studies* 37.

⁴⁰ Dianne Otto, “International Human Rights Law: Towards Rethinking Sex/Gender Dualism” in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013), p.199.