

# A FEMINIST PERSPECTIVE OF WOMEN'S INTERNATIONAL HUMAN RIGHTS LAW AND THE U.N.

Gwendoline Alphonso\*

Human rights as it is perceived today, is a dynamic concept whose meaning expands as people reconceive of their needs in relation to it. Surprisingly, or not so surprisingly, the debates pertaining to the varying interpretations of human rights in response to global developments has till recently sidestepped or failed to address questions of gender. Almost half of the world's population are systematically and routinely subject to torture, starvation, terrorism, humiliation etc. in varying degrees simply because they are female. These and other gender related crimes, if against any other group, would be recognized as a civil and political emergency and a gross violation of a person's humanity. Yet despite staggering statistics of demonstrable abuse, women's rights are not commonly classified as human rights.

This is not to say that women do not suffer abuses similar to men. However in such situations, female victims are often invisible because the dominant image of the political actor is male. It is with respect to the "other" sphere, wherein violations of women's human rights are distinctly connected to being female that women are discriminated against and these violations (though just as abominable and deplorable) are not given its rightful place in the priorities of the human rights agenda.

This article seeks to explore the extent and consequently the reasons of gender bias in the concept of woman's international Human Rights as perceived by the international community in general and the U.N. and affiliated bodies in particular. The approach used to arrive at answers to the above is a feminist methodology. There is no monolithic homogeneous structure which can claim to be the sole school of feminist jurisprudence, conversely it is on a diversity of voices and experiences that the search to capture gender inequality is based.<sup>1</sup> Feminism is a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women.<sup>2</sup>

---

\* III Year B.A., LL.B. (Hons.), National Law School of India University.

1 For feminist jurisprudence based on diversity rather than universality : see Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 831 (1990); Scales, *The Emergencies of Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373 (1986); Rhode, *Feminist Theories*, 142 Stan. L. Rev. 617

2 See Rhode, *Gender and Jurisprudence, an Agenda for Research* 56 UCINN. L. Rev. 521, 522 (1987).

Thus rather than seeking concrete alternatives this article merely attempts to question the immunity of international human rights to feminist analysis and to destroy the insidious myth that women's rights are too trivial or secondary to life and death to be the primary concern of human rights jurisprudence as followed by the U.N. bodies.

Human rights is an essential component of that international legal order which is virtually impervious to the voices of women. Before endeavouring to address the issue of women's human rights the very organisational structure of International Law is analysed to portray the extent of masculinity (and blatant absence of the "female voice"<sup>3</sup>) in the world of International Law.

### ***THE ORGANISATIONAL STRUCTURE OF INTERNATIONAL ORGANISATIONS***

The striking invisibility of women in international organisations is indicative of the fact that the structure of the international legal order is reflective of a male perspective and ensures its continued dominance. In the U.N. where achievement of nearly universal membership is regarded as a major success of Art. 8 in the United Nations Charter, which was included to ensure the appointment of women as permanent staff members within the United Nations, is phrased in the negative: i.e.:-

"The United Nations shall 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."

It does not serve as an affirmative obligation to include women as the right to choose delegates and representatives to international organisations was thought to belong to nation states whose freedom of choice was not to be impeded in any way.<sup>4</sup> In 1946 the Commission on the Status of Women was established to promote the equal rights of women and to eliminate sex discrimination.<sup>5</sup> By 1975, the level of female participation in professional positions within the U.N. and its specialized agencies was so low that one of the goals of the U.N. Decade for Women (1975-1985) was to improve female representation in the sought after professional posts subject to geographic distribution.<sup>6</sup>

A few of the U.N. agencies may be perused - women despite being the primary suppliers of child care throughout the world occupied a meagre 4 (out of a total of

3 Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

4 Editorial, *The United Nations' Women at 40, Equal Time*, 40th Special Anniversary Issue, 1985. at 1 of, Charlesworth *et al.*, *Feminist Approaches to Intl Law*, 85 AJIL 613 (1991). (hereinafter Charlesworth *et al.*, *Feminist Approaches*).

5 ESC Res 2/11 (June 21, 1946) *c.f.* *The UN and The Advancement of Women 1945-1995*, The Blue Book Series, Vol. VI.

6 A/RES/3520 (XXX), 15 Dec 1975, *cf.* *The UN & Advancement of Women*, *ibid.* at 204.

29) of the senior offices in the United Nations Children's Fund in 1990 which is the international agency responsible for the welfare of children. Health issues, especially infant and child mortality rates, are a major concern of women, yet in 1989 the World Health Organisation employed at most four senior female officials out of 42 overall.<sup>7</sup> The Group on Equal Rights for women in the United Nations has observed that "gender racism" is practised in U.N. personnel policies "every week, every month, every year".<sup>8</sup> This invisibility of women U.N. personnel obviously implies the exclusion of women from all major decision making by the U.N. on global policies, despite the often disparate impact of those decisions of women. Further illustrative of this point is the under representation of women in U.N. human rights bodies. Ironically, the one committee that has all women members, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), the monitoring body for the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention),<sup>9</sup> has been criticized for its 'disproportionate' representation of women by the United Nations Economic and Social Council (ECOSOC), which while considering the CEDAW Committee's sixth report called upon state parties to nominate both male and female experts.<sup>10</sup> Hence it remains symbolic of the practiced 'gender racism' in the U.N. that in the one committee dedicated to women's interest which is well represented by women, efforts are to be made to decrease female participation. However the more common place phenomenon of dominance of men in other U.N. bodies goes unnoticed and unremarked.<sup>11</sup>

The significance in unearthing the imbalances in the representations in the U.N. is that the long term domination of men in such international offices wielding political power and decision making authority results in the inevitable fact that it is men who determine what issues may be deemed, 'human rights concerns'. As such, this generally means that issues traditionally concerns of men are human rights concerns while issues concerning women are 'women issues'. For example men are generally not victims of domestic violence, sexual degradation, sex discrimination etc. These issues may be isolated, consigned to the sphere of 'women's issues' and ignored. (Further, analysis of other illustrative examples is attempted in the next section.) In all U.N. concerns efforts are underway to accommodate interests of developing as well as developed nations and most regional groups. This sensitivity could well be extended to the gender of those representatives in order that human rights issues become truly human.

---

7 Charlesworth *et al.*, *Feminist Approaches* 623.

8 *Id.*

9 G.A. Res 34/180 (Dec 18, 1979).

10 *Supra* n. 631.

11 Apart from the CEDAW Committee in 1989, there were a total of 13 women out of 90 'independent experts' in the UN human rights system, *id.*

### ***GENDER SENSITIZING INTERNATIONAL HUMAN RIGHTS LAW***

What constitutes discrimination against women is not a universal concept i.e. one on which every person and state concurs. One way of arriving at a consensus of what is discrimination, is through the development of General Comments and General Recommendations by the various international human rights conventions. For example the Human Rights Committee, the monitoring body of the Political Covenant has issued General Comment 18 on non discrimination which states that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”<sup>12</sup> This criteria, like that of our very own Art. 14 - reasonable - classification model, is based on a similarity and difference model of, in this case, discrimination. Using the liberal theory of feminism,<sup>13</sup> this model of similarity and difference may be criticized as using a male standard of equality and rendering women copies of their male counterparts i.e. women must argue either that they are the same as men and hence should be treated the same or that though different they should be accorded special treatment.<sup>14</sup> This model ignores systemic disadvantages and discrimination and fails to understand the ways in which laws, cultures and traditions have construed and maintained the disadvantage of women and the extent to which the institutions are male defined and built of male constructs of harm. Thus a test of discrimination based on powerlessness, exclusion and disadvantage seems to be the only solution to the problem of delivering substantive equality through international human rights law, which requires a look at women as they are located in the real world in order to determine whether a systemic abuse and deprivation of power that they experience is due to their place in the sexual hierarchy.<sup>15</sup>

### ***THE GENDER BIAS OF HUMAN RIGHTS LAW***

International law assumes and reinforces two dichotomies between public and private spheres of action. One is the obvious distinction between the international jurisdiction (public sphere) and that of the nation states (private sphere). The other dichotomy is the more subtle one, which is more fundamental and has a greater significance for women, namely that all international law is almost exclusively addressed to the public, or official activities of the states which are not held responsible for the ‘private’ activities of those within their jurisdiction.<sup>16</sup>

---

12 U.N. Doc CCPR/C/21/Rev. 1/Add. 1 para 13 (1989) c.f. Advancement of Women.

13 Liberal feminism seeks to work within the parameters of the existing law and realize the equal treatment guaranteed by it – thus it discounts intrinsic differences between men and women and fails to address the structural imbalance of power. See Kersten, *What Do Women Want? A Conservative Feminist Manifesto*, Policy Review, 1991, 4.

14 Cook, *Women's International Human Rights Law: The Way Forward*, 15 Human Rights, Cluar, 1993, 230.

15 Human Rights, Cluar (1993), 63 Sec.

16 Charlesworth *et al.*, *The Gender of Jus cogens*.

It is the latter dichotomy which according to feminist scholars accounts for male dominance in all areas of power. It is simply because what constitutes the areas of power i.e. the public realm is the work place, the law, politics, intellectual and cultural pursuits which have long since been regarded as the natural province of men (i.e. spheres which are traditionally dominated by men are described as the public realm which wields power and authority). However the realm of the home, hearth, children and 'domestic' concerns are regarded as 'private' to which women must be relegated. Traditionally, the two spheres are accorded asymmetrical value; greater significance is attached to the public, male world than to the private, female one.<sup>17</sup> The "naturalness" and perpetuation of this public/private distinction rests almost absolutely, on social psychology which dictates beliefs about gender and social behaviour and holds out the bench marks of what is considered "normal" behaviour for men on one hand and "normal" behaviour for women on the other. In the sense it is this public/private distinction that determines the operation of law, as law primarily operates in the public realm and its intervention into 'family' matters has long been considered inappropriate. The same applies, more so in fact, to international law generically and international human rights law specifically.

The grip that the public/private distinction has on international law, and the consequent invisibility of women's voices form the discipline can be seen in the international prohibition of torture. The right to freedom from torture and forms of cruel and degrading treatment is included in all international catalogues of civil and political rights,<sup>18</sup> and has become a central focus of the United Nations.<sup>19</sup> The defining provision (Art. 7(1)) in the Convention on Torture is considered broad because it is inclusive of physical and mental suffering and behaviour at the instigation of "a public official". This description of prescribed behaviour is founded upon the canons of the above stated public/private distinction which results in silencing women's voices and experiences. The condemned behaviour amounting to torture would extend to gender-related sexual violence and psychological coercion if the perpetrator has official standing. All other acts violating the bodily integrity of women just as severely, however outside the defined 'public sphere', would be conveniently overlooked. Some (if not most) forms of violence are perpetrated on women merely because they are women and can be attributed to cultural tradition - as Charlotte Bunch argues,<sup>20</sup> the message of violence against women is domination.

---

17 *Supra* n. 7, at 626.

18 E.g. Art. International Covenant on Civil and Political Rights 1966; Art. 3 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; Art. 5 American Convention on Human Rights, 1969.

19 United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. Res. 39/46 (Dec. 10, 1984) in 23 ILM 1027 (1984), and 24 ILM 535 (1985). (hereinafter torture convention).

20 Bunch, *Women Rights As Human Rights*, 12 Hum. Rts Q 486 (1990)

Contrary to the argument that such violence is only personal or cultural it is profoundly political. It results from the structural relationships of power, domination and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work and in all public spheres.<sup>21</sup>

A feminist perspective would hence challenge not only the characterization of male perceived issues as human rights issues but the most basic assumptions of international law, its scope and sphere of application. If violence against women shocked the international conscience as much as persecution for political expression. The international community may be awoken from its inertia to consider the same a gross violation of human rights. Bunch however attempts to describe violence and oppression against women not as a separate entity deserving a human rights status but describes the political connotation of the same.

Failure to see the oppression of women as political, results in the exclusion of sex discrimination and violence against women from human rights agenda. If violence and sex discrimination are understood as a politically constructed reality, it is possible to imagine deconstructing that system and building more interactions between the sexes. The importance and control over women can be seen in the intensity of resistance to changes in laws which put women in control of their bodies - denial of reproductive rights and homophobia, which are political means of maintaining control over women and perpetuating sex roles.<sup>22</sup>

Apart from the political colour of the denial of women's rights of the human rights status it may be understood as an ideological construct which makes possible the maintenance of repressive systems of control over women which transcend the narrow vision of international law. For example, coercive population control techniques, such as forced sterilization, may amount to coercion by states to achieve national goals,<sup>23</sup> - as well as more ordinary situations like denying women adequate education or employment which makes them susceptible to abusive marriages, coerced commercial sex work and other exploitative work. Thus the economic connotations of the oppression of women becomes evident and further relegates women and their concerns deeper into the 'private' sphere to be untouched by the international human rights institutions. In the international context Catharine Mackinnon's observation regarding women's "material desperation which is connected to violence against women",<sup>24</sup> becomes even more powerful. The economic benefits, she further argues, of pornography and trafficking are immense and have not been replaced despite technological advances.<sup>25</sup>

---

21 *Id.* at 490.

22 *Id.* at 487.

23 *Supra* n. 7 at 630.

24 Mackinnon, *Feminism Unmodified, Discourses on life and law* 40 (1987).

25 *Id.* at 179.

The Women's Convention is unique in respect to its recognition of the special concerns of women and goes further than simply requiring equality of opportunity and covers the more often ignored concept of equality of result<sup>26</sup> (and hence prohibits even indirect discrimination). It however conforms to the male standard in its underlying assumption that women and men are the same (on the basis of equality of men and women) - its promise of equality is hence a very limited one, one that is defined as being like a man. The Women's Convention establishes weaker implementation procedures than that of other human rights instruments of apparently universal application such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Civil and Political Rights Covenant.<sup>27</sup> Moreover the specialized mission of the Women's Convention provides leeway to other 'mainstream' human rights bodies to justify their minimal concern over women's issues as they can assure themselves that these are scrutinized elsewhere. Further the Women's Convention allows for perpetuation of the public/private distinction which shrouds the oppression of women with the cloak of justifiability: Art.28(1) permits ratification subject to reservations (by the state member) provided that the reservations are not 'incompatible with the object and purpose of the present conventions',<sup>28</sup> Lack of foresight is evident in the absence of criteria for determination of incompatibility - resulting in 40 out of the 105 parties to the Convention making a total of almost a hundred reservations.<sup>29</sup> The pattern of reservations, predictably include: those incompatible with the Islamic law, customs and interpretations of sexual equality; national religious or customary laws that restrict women's inheritance and property rights; nationality laws that do not accord women the same rights as men to acquire, change or retain their nationality on marriage; and laws limiting women's economic opportunities.<sup>30</sup> Thus the public/private distinction categorization and recognition of its limits is far from challenged by Women's Convention, rather is indirectly perpetuated, suggesting therein that discrimination against women is endemic and natural as opposed to the practice of racial discrimination.

#### ***MAKING 'JUS COGENS' GENDER SENSITIVE***

The doctrine of jus cogens asserts the existence of peremptory norms accepted by the international community from which no derogation is permitted.<sup>31</sup> The importance of jus cogens lies in its symbolic significance in the international legal

---

26. Art. 1 *supra* n. 9 which defines discrimination.

27. *Supra* n. 7 at 633.

28. Art. 28(2).

29. For Discussion on the reservations see Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination against Women*, 85 AJIL 281 (1991).

30. See *supra* n. 14 at 696-702.

31. For a formal definition see Art. 53 of the Vienna Convention on the Law of Treaties, 1969.

process, it assumes that decisions with respect to normative priorities can be made and that certain norms can be deemed to be of a fundamental significance.<sup>32</sup>

Jus cogens norms reflect a male perspective of what is fundamental to the international society that may not be shared by women or be reflective of women's experiences of life. Thus the fundamental aspirations attributed to communities are male and the assumptions of the scheme of world order assumed by the notion of jus cogens are essentially male.<sup>33</sup>

It is this gendered symbolism of jus cogens which is also reflected in human rights which is often designated as norms of jus cogens and which at a deeper level, is replicative of the gendered development of international law generally. The silences on the list of typical jus cogens norms indicate the absence of direct contributions of women. It cannot be denied that women as well as men suffer from the same violation of traditional canons of jus cogens norms however the manner of construction of the same, ignores the most pervasive harms done to women.<sup>34</sup> An example which is the most important of all human rights, namely the right to life set out in Art. 6 of the Civil and Political Covenant which is concerned with the arbitrary deprivation of life through public action and thus fails in two ways to address the various ways by which being a woman itself is life threatening. On one hand it clearly reinforces the public sphere as the only realm of applicability and reinstates the "other" experiences, mostly of women, in domestic issues as one not to be tampered with. On the other hand it ignores the various gender related abuses of female foeticide, female infanticide, sex discrimination in nutrition and health care - all leading to disproportionate number of female deaths. The doctrine of jus cogens has not responded at all to the massive evidence gathered by the U.N. and other bodies with respect to violence, injustice and aggression against women - simply because of the obsession of the legal system with the "public" actions of the state.

Thus the very priorities asserted in the norms of jus cogens, are male-oriented and their operations are further gendered by male interpretations.<sup>35</sup> Taking women's experiences into account would require a fundamental rethinking of every aspect of this doctrine.

## **CONCLUSION**

This article has sought to emphasize the need for a study of human rights in international law from a perspective that takes gender into account as well as other variables. To retain solely a male perspective of the fundamental assumption of

---

32 Charlesworth *et al.*, *The Gender of Jus Cogens*, 15 *Hum. Rts Quar.* 63 (1993).

33 *Id.*

34 *Id.* at 67.

35 *Id.*

international law moulded by the U.N., the leading international institution, is to discredit human rights claim of universality. The skewed concept of human rights as it exists today can never hope to be truly 'human' without a deeper, gendered understanding of the very foundations on which it rests, such that the now silenced voice of women may be heard and women's experiences could be taken out of the deep freeze of the "private" sphere into the domain of international law applicability. The apparent renaissance of the U.N. will continue the same priorities as the old world order, as the gendered nature of the international legal order is not yet on the agenda in the discussion of any truly new world order, without which the male orientation of international law is bound to be perpetuated.