The Human Rights of Minority and Indigenous Women

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Contents

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

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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 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 – delegitimates 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 sovereigntistes [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 "intrapsychic 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" (Stamatoupolou 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 (Swepston 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 the Human Rights of Women in Malaysia
- ▶ The Indivisibility of Rights and Substantive Equality for Women

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