Chapter 18

Learning the lessons

What feminist legal theory teaches international human rights law and practice

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As the long term impact of 9/11 and the wars in Iraq and Afghanistan continue to shape and redefine international legal and political rules, this chapter reflects on the gendered elements which ground international legal norms in the contemporary international moment. As an international legal scholar I focus on how feminist legal theory can be applied in this moment, and how insights gleaned in the domestic legal context (significantly though not exclusively within Western states) are relevant to the experiences of women in multiple jurisdictional and cultural environments. Many of my observations are specifically drawn from societies emerging from war and repression and ruminate on the experiences of women in those contexts. The chapter starts from the reflection that the export of Western legal norms and ideas has often failed to engage with and address deeply entrenched gender discrimination, inequality, and violence as experienced in conflicted, post conflict, and repressive societies. Equally, there has been considerable tension between the universalism expounded by Western feminists and its reception within Southern gender discourses, as non-Western feminist scholars have cogently articulated (Gunning 1992). These strands of over-inclusivity, which are unresponsive to the local particularity of women, co-exist with the under-inclusion of a gender perspective in contexts where Western states and international institutions find themselves legally and politically embroiled in sites of conflict, repression and transition. There is often no easy co-existence between these two poles nor is negotiating a middle ground between them an easy task.

The chapter commences with an exploration of feminist theory's relevance by examining the gendered nature of the international human rights regime itself. While the reflections in this chapter have a general relevance to the international rule corpus as a whole, they are specifically aimed at the unique moments of change in societies moving towards democratization (or greater political liberty) as well as those societies moving from violent conflict to more peaceful kinds of co-existence. Human rights norms have been central in both the shaping and traversing of conversations concerning gender, as well as framing the way in which the transitional landscape, the moving from "war to peace" paradigm has been articulated (Bell 2000). These norms define the terms of the rhetorical

space in which international legal and political action is born. Identifying some specific fault-lines that constrict the ability of these norms to engage fully with gender disparities, I then proceed to explore how insight from feminist legal theory may enable us to move beyond these inherited limitations. Here the chapter will focus on the significance of the public–private divide. Substantive advances in dismantling the public–private divide have been made within many Western societies. Yet, those same societies support and further entrench the operation of the public verses the private when engaged in the politics and practice of international intervention in other (transitional or conflicted) states.

The chapter subsequently explores how ideas of dependency and autonomy are equally deeply entrenched in the international legal order. The genealogy of these constructs also finds a home in the historical pedigree of international human rights law. In turn, the long-term influence of foundational documents and structures reverberate in the inter-relationship of the national and international in a transitional setting. Two evident phenomena are departure points for this foray: first, is the evidence of a sustained pattern of retrenchment or limitation on women's rights and equality in many post-conflict/ post-repressive societies. These restrictions are all the more contradictory in places where the abrogation of women's rights has been used in constituting one of the texts (or pretexts) for intervention or political change (e.g. Afghanistan). Second, a pattern of post-modern colonialism in which domestic/native practices that are more communal or group oriented in nature are relegated to the sidelines as Western autonomy-based models of legal and social responsibility are introduced by the change process. Specific examples of this are found in contexts such as gender and reparation, institutional reforms, and constitution making in transitional societies. These examples point to new forms of contemporary neo-colonialism and come with significant disadvantages and limitations for women.

History and why it matters

As the introduction suggests, despite a lofty rhetoric of universality and equality, international human rights law requires close reading to assess whether it lives up to its own stated ambition. This chapter focuses on the impact of gender inclusions and exclusions in the drafting of the Universal Declaration of Human Rights (1948) as a means to illustrate a core proposition; namely that there is a foundational bias in the body of law that has been offered up *prima facie* as an important means for redressing gender inequality across multiple jurisdictions. Examining the Declaration's drafting history reveals the character and form of the gender concept as it is rendered in the document, as well as the long-term effects this conception has had on the normative character of human rights law. Following in the footsteps of other feminist international scholars, the chapter suggests that foundational documents matter to the construction of gender relations in ways that are difficult to dislodge. They create conceptual pathways

that can substantially limit theoretically open-ended visions of international human rights law. Thus, achievements typified as advances in their time may actually be better understood as generating long-term baggage that will be difficult to discard. I suggest a more skeptical view of the "gains" made for women in the Universal Declaration might contribute to the broader project of defining gender dignity, violation, and accountability in ways that consistently reflect and respond to the experiences and needs of women. This would better serve our interests than an accommodationalist model, which tries to "fit" the experiences of women into an existing and constrained framework. In the broader project of feminist definition, I draw from a wide set of feminist insights into the character and operation of the legal.

In the opening paragraph of the United Nations Charter (1945: Preamble) signatory states espouse their determination to "reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." This commitment is further supported by a specific reference to the prohibition of discrimination on the basis of sex. In institutional terms, these structural commitments were followed when the Economic and Social Council established a Sub-Commission on the Status of Women which was to "submit proposals, recommendations, and reports to the Commission on Human Rights … " (Humphrey 1983). Both Commissions played a pivotal role in the adoption of the Universal Declaration in the post-war period (Morsink 1991).

Some evaluations of the Universal Declaration laud its lack of sexism, seen as manifested in the repetition of specific phrases such as "all," "everyone," and "no-one" (Morsink 2000). Others are more circumspect in their praise. Adamantia Pollis (1982: 1) has argued that the Declaration is informed by "[t]he notion of man as an autonomous, rational, calculated being … a notion of man but not of woman, and not even of all men but only of some." If we take seriously the claim that "[t]he structure of the international legal order reflects a male perspective and ensures its continued dominance" (Charlesworth et al. 1991: 621) then paying close attention to the words that implicate social structures is particularly important. In this view, a nod to non-discrimination may not be sufficient to identify and fully reveal the multiple ways in which women experience discrimination and exclusion. What the drafters may have understood to constitute impermissible discrimination arguably left intact (and endorsed) a social and political ordering that de facto functions to entrench the discriminations experienced by women. Three particular sections notably illustrate this implicit adoption of sex-based ordering—they include first, the Preamble and Article 1; second, Article 16; and finally, Articles 23 and 25 (Ní Aoláin forthcoming).

Specifically, in the drafting debates as to whether the term "human beings" should be substituted for "men," Bodil Begtrup (the Chair of the United Nations Council on the Status of Women (CSW)) sought an addition to be made to the Declaration's Preamble stating that "when a word indicating the masculine sex is

used in the following Bill of Rights, the provision is to be considered as applying without discrimination to women" (Morsink 2000: 118). The proposal was not taken up, which meant the CSW had no choice but to seek to protect the status of women in the Declaration article by article. In addition, Articles 23 and 25 are notable in their emphasis on the male breadwinner and his right to seek remuneration "for himself and his family," as well as the affirmation of the male right to "a standard of living adequate … for himself and his family." In Article 25, motherhood is singled out for "special care and assistance." As I have explored at greater length elsewhere, the inclusion of this language was a reflected understanding of social role and social ordering at the time the Declaration was drafted (Ní Aoláin 2009). Its tone may not be surprising per se, in that the post-war human rights' treaties were conceived in a context of evident and multiple social and political inequities. However, with the passage of time and the status advancement of these foundational documents, we cannot forget that the fundamental formulae continue to have traction and shape social realities even as they promise transformation.

What do the drafting history and outcomes tell us? In thinking about their significance, it is important to pay attention to the manner in which the term "woman" or "women" can be mentioned in policy-making contexts without bringing the concept of gender into play. As feminists have long argued, we need to be cautious about whether or not the use of the term "women" or "woman" actually does real work for real women in legal contexts. We need to be clear about the entrenchment of stereotypes that the use of such terms can have and their effect in undermining, rather than advancing, the needs, priorities, and rights of women. Equally, when the term woman is entirely absent, we should not assume, as many of the Universal Declaration's drafters did, that "neutral" phrases deliver gender friendly outcomes. In fact, the opposite is likely to be true. The Declaration is not simply important on its own terms in this regard but should be understood as having had (and continuing to have) wide influence on the inclusion of human rights norms within domestic legal systems, in addition to framing the manner in which subsequent and more specific rights-based international treaties were and are agreed upon.

Foundational documents and feminism

Although passed by General Assembly resolution in 1948 with eight abstentions, there is broad agreement that the Universal Declaration constitutes a foundational document for the modern international human rights regime. Foundational documents are relatively new phenomena for the international human rights movement. The regime itself is largely a product of the post-World War II renewal, although many domestic legal systems have similar status documents (usually national constitutions or bills of rights). Foundational documents are an important conceptual and legitimating category for legal systems. They provide security and a sense of longitude to the norms they validate.

They perform important symbolic functions by giving rise to myths (and realities) of universal buy-in, validation by the body politic as a whole, and long-term legitimacy to the values they contain. The legitimacy factor allows for repeat play of the document without the need for repetitious justification; this substantiation further affirms the validity of the starting point.

There are pitfalls in reliance on these documents, of course. Foundational documents, whether domestic bills of rights or international declarations, are indisputably accompanied by gender snares as feminist scholars have long demonstrated in the domestic context. Some do better than others in this regard. The Universal Declaration makes significant attempts to engage with the pernicious effects of gender inequality. Nonetheless, I suggest that the Declaration (among other international norms) validates not only deeply problematic gender distinctions in the arena of the private (family) and the public (work), but its neutrality cloaks a deeply gendered vision of the world. Precisely because the foundational document contains, elevates, yet obscures these damaging gender dimensions an odd paradox arises. As the political worth of the document has risen, and its symbolic significance has grown, it becomes difficult to "knock down" the Universal Declaration on the grounds of its gendered failings. There is broad political and legal investment in the document by multiple constituencies. This investment is evidenced by the invocation of the Declaration as a touchstone on fundamental principles in multiple political contexts, including its use by women's advocates. It has also been imported into the domestic realm, as it affirms the validity of rights-protecting systems in the domestic contexts (whether in constitution writing, adding bills of rights, or the broader field of judicial interpretation).

Feminists find themselves reluctant to criticize the Universal Declaration, wary of the costs that such adversarial engagement might bring and cornered by a chorus of validation. Conceptually, foundational status makes an argument against the Declaration's preeminent status a difficult one to make. In many ways, the Universal Declaration presents a concise way to make a broader human rights argument. It requires much greater dissection of the Declaration to reveal its gender limitations. These "picky" arguments do better retail than wholesale. One consequence to those offering a gendered critique of the Declaration (or other human rights documents) may be to experience delegitimization, be marked as hostile and out of the mainstream view of human rights. As a result, feminist criticism of the Universal Declaration has been subdued. This parallels (albeit imperfectly) the plight of equality feminists who seek to augment the gender equality gains for by women by utilizing imperfect constitutional instruments as a "means to the end." Here again, the compromises and implicit upholding of the status quo may be too high a price for the utilitarian gains made in such contexts, as Martha Fineman (1991a, 1995, 2004) has consistently documented over the decades. The overall containment of feminists in both circumstances, I suggest, results from the particular confluence of the silencing that a foundational document can produce along with the difficulty

articulating why a gender-neutral vision fails to deliver transformational outcomes when it comes to addressing the conceptual, material, political, and social perniciousness of gender discrimination. While there have been strong feminist voices in the international legal arena articulating and asserting such structural biases, the knock-on and insidious effect that these deeply seated partialities have at the domestic level have been less well traced. As international legal norms grow in their domestic weight and authority, gaining momentum and shaping domestic legal norms, feminists need to remain attuned to the sober reality that such influence is not linear and not necessarily transformative.

Public and private

A persistent dimension of the international human rights regime is that it has functioned to buttress rather than to dismantle the public—private divide. International law scholars of the feminist hue have long articulated a notion of the way in which the "public—private" divide manifests itself in international law. As Hilary Charlesworth has noted,

> Historically, the formation of the state depended on a sexual division of labour and the regulation of women to a private, domestic, devalued sphere. Men dominated in the public sphere of citizenship and political and economic life. The state institutionalized the patriarchal family both as the qualification for citizenship and public life and also the base socio-economic group. The functions of the state were identified with men …
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> (Charlesworth 1993: 9–10)

These characteristics include strong validation of the family as being at the heart of the societal contract; the articulation of work and wage as a male domain to which specific kinds of guarantees are offered; and the special status offered to motherhood. All are illustrated by the example of the Universal Declaration.

This clear-cut distinction between public and private sphere is at the heart of the traditional notion of the state. It has had a defining influence on international law and demonstrated tenacity in international legal doctrine. Accordingly, both the United Nations Charter and the Universal Declaration make the (public) province of international law distant from the (private) sphere of domestic jurisdiction. That distinction continues to maintain its hold, visible even in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) through the practice of states with regard to reservations, particularly in respect of Articles 2 and 16 of the Convention.

The public–private distinction perpetuates and validates women's oppression on a global level. As feminist theorists have long articulated, the most pervasive harms to women tend to occur within the inner sanctum of the private realm, within the family. As the private realm in international law has stayed effectively off limits for regulatory efforts, the message is that the private is legitimately left

only to self-regulation. This ultimately translates into the shoring up of patriarchy, accomplished through the prism of supposedly transformative norms. I now turn to some of those legacies as they appear in the transitional justice context.

Complimentary national and international patriarchies

The absence of a gender dimension in the establishment, revision, and operation of new legal and political institutions in transitional societies has been acknowledged (Bell et al. 2004). The genealogy of institutional gaps for women traces back to omissions from peace-making and transitionary "deal-making." These negotiating exclusions compound the normative legal gaps, thereby facilitating further exclusions down the line. I explore here why women remain structurally excluded and why they remain excluded as the processes of transition has become increasingly internationalized.[1] Such internationalization leads us to presuppose, at least in theory, that the outcomes will be better for women. Practice to date suggests otherwise, however.

A key element in the perceived success of many transitional accountability mechanisms is the support of international organizations and other states in their establishment.[2] The "transitional moment" is usually only one point on the continuum of a protracted legal and political engagement between the transitional state and the international community. The transitional state is captured between the multiple interests of other states, their willingness to articulate views about a regime or conflict, and the moments of their formal or informal interaction with key actors at key change moments. While much could be said about this complex interaction in general, this part of my analysis will focus on two particular aspects: first, the relationship between the international community's previously articulated views on human rights compliance during a conflict or a period of authoritarian rule; and second, the complex role that the international community can play in compounding gender inequality and unaccountability once entangled with a transitional society.

First, many transitional societies have been the subject of substantial international scrutiny prior to any settlement. Transitioning societies typically have been repressive or violent (or both), and international oversight may have "named and shamed" systematic and significant human rights violations in the pre-transition phase. For example, international non-governmental organizations such as Amnesty International, Human Rights First, and Human Rights Watch may have been active through sending investigative missions, producing numerous reports, and providing a large range of supports for their domestic NGO counterparts. In the settlement phase of a conflict or a regime handover, such prior interventions are critical to framing the way in which accountability is sought, articulated, and constructed. This frame comes from intact Western conceptions of human rights hierarchies, and these conceptions are imbued with the inability of such organizations to consider the own patriarchal nature and unwillingness

to recognize it at work in an exportable form (Rees 2002). Equally the frame emanates from an intact patriarchy that has been translated into the foundational documents of the international human rights regime and validated. The specific culturally exported patriarchies and an overarching legal patriarchy compliment and reinforce one another in this context. As a result, it is important to recognize that the narrative constructed about the nature and form of violations in transitional societies has as much to do with the demands for accountability at the transitional moment as it has to do with the prior narrative of violence and causality. This narrative is significantly constructed by the watchful and deeply involved international community.

International interface and influence is further compounded in the role played by such key international actors as the United Nations (UN). So, where the UN has paid particular attention to a conflicted or authoritarian society in the form of resolutions, mandated Special Rapporteurs,[3] Special Representatives, and inclusion in thematic oversight in addition to review by treaty bodies, a substantive narrative already exists in the international–national context about the form and nature of violations that have taken place. This narrative process evidences a fundamental structural problem, namely that certain kinds of bodily harms are elevated over others in terms of their perceived seriousness. Thus, violence to women often fails to "fit" the narrow legal categories that dominate general understanding of serious human rights violations (Ní Aoláin and Hamilton 2009; Radacic 2008), and "normal" pervasive sexual and physical violence against women is simply not counted in the overall narrative of conflict or regime change. Equally relevant is the importation of the public—private divide as part of the legal solutions offered by Western states and international organizations to defunct and dysfunctional legal systems in post-repressive and post-conflict societies (Ní Aoláin and Hamilton 2009). Such "neutral" devices have the quality of taking us "back to the future" in such societies. Despite being discredited or at least under considerable legal stress in the dominant legal cultures which export them, they are imposed on divided societies with little or no attention to their gendered effects. An array of cultural difference is recognized between the local and the international, but frequently overlooked are the fundamentally similar patriarchal views that internal and external elites share. These shared views operate in tandem to exclude, silence, or nullify women's needs from the transitional space. As feminist scholars of war and conflict have identified, the loosening of rigid gender roles occurring as a result of the social flux that conflict inevitably creates is not necessarily sealed off at conflict's end or transition by national male leadership. Rather this role in closing down the possibility of gender change is taken up by the male international development community, "whose own sense of patriarchy-as-normal is quite intact" (Bennett et al. 1995). This intact patriarchy has demonstrated itself as distinctly capable of reproducing the legal strictures in transitional societies that would generate significant (and likely hostile) scrutiny if suggested in their home states. Thus, this chapter highlights the essential point of the dangers of export.

Conclusion

The discussion above potently illustrates how the shape of transition for women is tremendously influenced by the role and stance of the international community and the international norms it brings to the localized situation. It also potently illustrates the extent to which human rights violations experienced by women can continue despite the claims of transition in the public—political spaces of post-conflict and post repression societies. The continuity of gender exclusion, violence, and oppression should trigger deeper questions about the quality of the transitional experience for women and the meaningfulness of accountability measures that may only scratch the surface of women's needs. It should also raise significant questions about the shortcomings and inadequacies of international legal instruments that are lauded as the means whereby to address the harms and injustices which women experience. Finally, it should encourage us to understand that despite considerable inroads on the patriarchal meta-structure in many Western states, the success or failure of patriarchy to survive and thrive is not jurisdiction dependent. Rather, globalization, as it reproduces itself and assists in the entrenchment of patriarchal norms in societies where legal transformation is promised, also works to the benefit of patriarchy, frequently in the very terms of liberal Western promise. For women, it turns out that the transformation of a society is only partial and largely exclusionary. Transformation may frequently operate to cloak their ongoing repression and inequality with the rule of law and the embrace of international legal instruments. The wise course may well be for feminists to be cautious and wary of the promises made in regard to what change will bring.

Notes

1 These exclusions remain despite UN Security Council Resolutions 1325 (2000) and 1820 (2008).
2 High Commissioner's Office in Bosnia; the International Force (IFOR) and the Stabilization Force (SFOR) in Bosnia; Interim Authority in Kosovo; UN Transitional Authority in Cambodia (UNTAC).
3 See the United Nations interface with Guatemala, where between 1982 and 1986 the Commission on Human Rights mandated a Special Rapporteur to study the human rights situation in the country, followed in 1987 by a replacement mandate—a Special Representative of the Commission to receive and evaluate information from the government on the implementation of human rights protection measures included in the new Constitution of 1985.