Feminist Theories of International Law

I. Introduction

[1] The relevance and impact of feminist theories of international law in the field of human rights is a topic of ongoing debate. On the one hand, narratives of 'governance feminism' see feminist influence in various areas of international law and institutional practice such as anti-trafficking and → international criminal law (Halley [2006]; Halley [2008]; and Halley *et al* [2006]). On the other, many feminist analyses of international law and its institutions characterize their perspectives as marginalized and silenced (Otto [2010]). Still others have developed an account that situates the impact of feminist engagement with international law somewhere between these poles (Heathcote [2019]). This entry briefly summarizes these debates and particularly analyses the imprint – or lack thereof – of the feminist project in international law on human rights in five main areas: state-centric approaches in international human rights law; accountability models for → non-state actors; sources of international human rights law; recognition and scope of novel rights to ensure → gender equality; and new threats to gendered rights' protections. Within each area it identifies lines of future feminist inquiry on rights, before concluding with some reflections on next directions in this field.

II. Discussion

[2] A stocktake of feminist contributions to human rights reveals a series of watershed moments. Such moments include international law's recognition of women's rights as human rights particularly from the 1990s onward (Stark [2013]); increased attention to gender-based violence as a form of proscribed gendered discrimination (see also → Domestic Violence); adoption of a UN human rights treaty specifically to address women's discrimination (the → Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)); attention to gender concerns within the scope of other areas of rights' protections (for example, the → Right to Health); recognition of the → intersectionality of gender with other forms of discrimination and identity including race and class (→ Discrimination, Prohibition of); protecting women in conflict through the formal inception of the women, peace and security agenda at the UN Security Council in 2000 (→ International Peace and Security); new anti-trafficking frameworks through the adoption of the first international instrument to address trafficking in persons, with a particular focus on women and children, also in 2000 (→ Human Trafficking); and gender-sensitive developments in international criminal law which aimed to better address the experience of women in internal and international → armed conflicts.

[3] This narrative of feminist contribution to rights is often contested, however. Many have queried whether the transformative potential of feminist theories of international law has fallen short because in practice full gender analysis – including through gender mainstreaming – is often side-lined in favour of a narrower and often more performative focus on biological and binary categories such as 'sex' or → 'women' (Charlesworth [2005]). The watershed moments identified above can both confirm and perpetuate such biases. For example, the dedicated women's rights treaty and its implementation have been critiqued for focusing on a binarized definition of sex that *inter alia* precludes discrimination on the basis of a range of gender identities (Rosenblum [2011]; see also → Gender Identity and Expression). Some feminist approaches to international law have also queried how much these advancements have been stymied because they have unduly relied on notions of women's victimhood, particularly of women outside the Global North (Nesiah [2009]). Others have identified how feminist outcomes can be limited because thin versions of 'gender law reform' are advanced through gender experts instead of comprehensive gender mainstreaming in international institutions (Heathcote [2019] at 86), where such gender mainstreaming would encompass integrating analysis of how particular policies both integrate and impact gender, with a view to achieving gender equality. Another corrective to the narrative

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of feminist success in international law has been to point to gendered equality gaps in practice, despite formalist guarantees of rights in the dedicated women's rights treaty as well as other core human rights → treaties (and in some → soft law or non-binding instruments).

[4] Still others have gone further to identify when mobilization of feminist lenses in international human rights law may not just be ineffective, but is instead actively harmful to rights' protections and preclusive of broader perspectives. For example, a binary approach to sex that informed much of feminist engagement with international human rights law in the 1980s and 1990s (McNeilly [2019]) can be faulted as contributing to the exclusion of both men (Halley [2006]) and trans women (Otto [2015]). Some contemporary, ostensibly feminist approaches have amplified these exclusionary effects by contesting human rights law's focus on 'gender' – which refers to a social construct of attributes associated with masculinities and femininities – rather than 'sex,' which focuses only on biological differences. Commonly referred to as 'trans-exclusionary radical feminists', or TERFs, such actors join those conservative agendas that use a focus on 'sex' to oppose trans rights and to argue that 'gender' protections erase the unique experience of women and girls who require dedicated protections.

[5] Feminist harms have also been located in how promoting 'women's rights' and the women's rights movement itself can facilitate 'the establishment of security regimes and the unleashing of military and "civilizing" missions in developing countries in the name of women's rights' (Kapur [2018] at 16). Indeed, concerns about gain reversal in women's rights have at times led to either feminist silence or acquiescence in the invocation of women's rights discourse in such state-led carceral and/or coercive projects; the feminist war on terror is a case in point (Huckerby [2016]). To illuminate such harms, → Third World Approaches to International Law (TWAIL) and post-colonial feminist critiques (Kapur, *The Tragedy of Victimization Rhetoric* [2002]; Kapur, *Un-Veiling Women's Rights* [2002]; D'Costa [2016]) are also essential for identifying how some feminist engagements on rights can themselves be imperialist and intertwined with, or derived from, colonialist projects in ways that essentialize and oppress the rights of some women (trans women and women in the Global South) and not others (see also → Colonialism). For example, such analysis usefully reveals a through line from 'trans-exclusionary radical feminism' to those British imperial policies that were enacted 'to enforce heterosexuality and the gender binary, while simultaneously constructing the racial "other" as not only fundamentally different, but freighted with sexual menace; from there, it's not a big leap to see sexual menace in any sort of "other," and "biological realities" as essential and immutable' (Lewis [2019]).

[6] Indeed, there are a number of areas where feminist legal approaches to human rights have either not (yet) delivered on their normative promise, or normatively promised something that was itself exclusionary. One example of the former is the impact of feminist theories of international law on → sovereignty and the implication of such observations for enforcing rights. On the one hand, feminist theories of international law have provided a framework of re-thinking state sovereignty (Knop [1993]) and recognized the inherent challenges that arise when the state is positioned as the mechanism for guaranteeing rights when it regularly undermines gendered protections through its own acts or omissions and/or failure to sufficiently prevent private actors from perpetrating gendered harms. On the other hand, feminist takes on sovereignty and the models of accountability that have been developed from these observations have so far fallen short (Heathcote [2019]). In the field of 'governance feminism' this failure is identified as being of such a degree that feminist successes are said to replicate and reify rather than challenge state-centric models through 'top-down, sovereigntist feminist rule preferences' (Halley *et al* [2006] at 341). And in practice, feminist approaches are also increasingly facing the same reckoning that is occurring elsewhere in human rights spaces (such as on police brutality and race, see Callamard [2020]) about why in the face of egregious state violence, theories of change have focused on reform rather than abolition efforts. In many ways, this is a call to move forward by returning to early feminist theories of international law that called for a fundamental reassessment rather than just reform of international law's norms and institutions (Charlesworth, Chinkin and Wright [1991]). This would involve disrupting those feminist perspectives that continue to centre the state in ensuring gendered equality, as well as encouraging greater reflection on intra-state and transnational mechanisms for feminist organizing and rights protection, as well as the complex interplay between local, national, regional and international governance sites in defining and enforcing rights (see also → Local and Regional Governments and Human Rights Cities).

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[7] Another related example of where feminist critiques of rights have had an impact that could nonetheless go further is in developing accountability models for non-state actors. One of the key and early contributions of feminist theories of international law was its structural critique of international law's private/public divide (Charlesworth, Chinkin and Wright [1991]; Charlesworth [1999]). Emphasizing how the human rights regime's focus on the state as the core threat to rights excluded women's experience in the private sphere and reinforced gender inequality, such critiques informed the development of the regulatory standard of → 'due diligence' – the idea that states have an obligation to exercise 'due diligence' to prevent, investigate and punish human rights abuses by non-governmental stakeholders (see also → Respect – Protect – Fulfil). Yet, to date, outside of the trafficking and violence against women contexts there is still little to no concrete guidance on what the content of due diligence means or even how to best use feminist methodologies to help further develop its content. Additionally, feminist efforts have rarely gone beyond addressing this issue of how to get states to regulate non-state actors to the more ambitious – and consequential – question of when non-state actors themselves might have human rights' obligations. Instead, some of the most significant normative content on how non-state (particularly armed) actors might themselves have obligations under human rights law has come from fields outside the traditional focus of feminist inquiry, such as the field addressing → extrajudicial killings. Moving forward, alongside this re-thinking about the full consequences of scepticism of governmental authorities and how to meaningfully fill the gap on non-state actors, there is also a need to develop a fuller account of how to identify and redress squeezing – when those suffering gendered harms are caught between non-governmental actors and state responses that fail to address such harms, or even make things worse.

[8] The salience of feminist legal critiques of the sources of international human rights law also requires further exploration (Nesiah [2019]; see → Sources of International Law). Feminist engagements with international law have usefully shown how a reliance on formalist protections can be to the detriment of ensuring gender equality (Engle [1992]; Cook [1993]; Ní Aoláin [2009]). This happens for a variety of reasons, including because the norms themselves might be gender discriminatory or gender-neutral but nonetheless applied in ways that are antithetical to gender equality, or because through → reservations to treaties and other manoeuvres states have weakened the human rights treaty that is dedicated to addressing discrimination against women. Additionally, in practice, purported rights conflicts between sets of formal guarantees (such as the right to non-discrimination and the right to → freedom of conscience, thought and religion) are not always resolved in favour of gender equality, despite normative guidance that makes it clear that non-discrimination and equality guarantees cannot be so undermined. Further, rights discourse and instruments can be newly or freshly appropriated to fortify these informal hierarchies that in turn can serve to deny rights along gender lines. One obvious example of this is the 'protection of the family' agenda that has been recently advanced in multiple international arenas. Ostensibly this effort involves enhancing those provisions of international human rights law that pertain to the protection of the family. In practice, however, it has been critiqued as a conservative push to entrench a heterosexist definition of the family and to protect the family unit as a whole at the expense of its members, particularly women.

[9] Despite these pitfalls of formalist approaches, a reliance on soft law as an alternate site for defining gender-based rights – while presenting some opportunities for feminist engagement – also has limits as a feminist strategy. These include risks of creating norm fragmentation and limiting and defusing enforceability mechanisms (Charlesworth [1999]; O'Rourke [2020]). More recent scholarship has even further complicated this debate on the merits of hard versus soft law in feminist norm-making by identifying how processes of 'everyday lawmaking' on women's rights involve cross-over of the regimes through the hardening of soft law norms (Davidson [2021]). Alternate approaches that interrogate international human rights law's foundations and the complex interplay of hard and soft law regimes are warranted, including efforts to queer rights in order to show how the processes of defining and enforcing rights are not always led by states and treaties, based on binaries (such as local versus international), or static (McNeilly [2019]).

[10] Another relevant topic for identifying the contributions and gaps in feminist inquiry on rights is the issue of what rights should be recognized and the criteria for so doing. Deploying the feminist method of searching for and mapping of 'silences' (Charlesworth [1999]; Brooks [2002]), feminist legal critiques have long shown the androcentricity of the definition of rights and the system for enforcing them. Under such analysis, this bias in

both the normative content of rights and enforcement regimes privilege state violations against men's civil and political rights over state and non-state harms against rights that have particular gender purchase, such as women's rights or even economic, social and cultural ones (Charlesworth, Chinkin and Wright [1991]; Charlesworth [1999]). This androcentricity means, for example, that men's civil and political rights are seen as more readily justiciable and capable of enforcement than those rights with strong gender dimensions (e.g., the right to reproductive health (→ Reproductive Rights)) and also that women's accounts of human rights violations are overlooked or characterized as episodic rather than linked to structural causes, which in turn compromises the enforcement regimes that are then put in place to remediate such violations.

[11] Yet, feminist critiques of rights have often played it safe when it comes to filling these normative gaps. Of the two paths to identifying novelty in human rights – deriving or implying new rights from existing rights' guarantees and/or recognizing separate or stand-alone new rights (von Arnauld, von der Decken and Susi [2020]) – the dominant feminist strategy has been the former. In other words, the preferred approach has been to read protections for gender-based rights into existing rights' guarantees by targeting certain areas of international law for 'feminization' (Edwards [2006]). Efforts to elevate the status of the prohibition of domestic violence by including it within the definition of torture and cruel, inhuman and degrading treatment or punishment, is one example (Davidson [2021]; Davidson [2019]). Another is the right to → abortion where advocates have sought to imply the right from a range of existing guarantees such as the → right to life, the right to health, the right to non-discrimination and equality and also the → prohibition of torture and cruel, inhuman and degrading treatment or punishment. Yet this piecemeal derivative approach to filling silences on rights is by definition ultimately limited by the scope of these existing rights' guarantees and their accompanying gaps. This means that existing loopholes in protection – such as a permissive stance toward individual medical providers who seek to refuse to provide an abortion under certain circumstances for religious or other reasons – are preserved. In contrast, recognizing abortion or other new rights of similar import to gender equality as stand-alone or freestanding rights would prevent these gaps and underscore the rights' significance in ways that protect against those efforts that seek to de-emphasize them in rights' hierarchies.

[12] Ultimately, too, it is important to address how broader features of global governance have structured the spaces in which feminist critiques of rights operate, as well as created new challenges for fields of feminist inquiry. While there are a number of features that can be addressed here (such as the rise of populism and global health crises), the contemporary terror/counter-terror landscape has particularly presented a series of unique challenges to feminist critiques of rights that require further exploration (→ Terrorism). What does it say, for example, about feminist approaches to international law that some states have seen the projects of gendering law and promoting human rights in this space as interchangeable, with gender reform viewed as the less demanding undertaking (Ní Aoláin and Huckerby [2018])? Or that approaches that have tried to connect gender to human rights by arguing, for example, that gender equality itself should be a national security tactic, have actually undermined women's rights (Huckerby [2020])? How helpful too are the narratives of feminist successes versus marginalization in these spaces, or might a new approach to calibrating understandings of both feminist irrelevance and governance be warranted? (Huckerby [2016]). Indeed, an analysis of how gender has been taken up in national security spaces suggests that the problem may not so much be that feminists are speaking to themselves (they often do) or that when they speak they are mainly heard in 'soft' areas of international law rather than in core policy-making areas (they often are), but rather that some feminists are speaking amongst themselves while core gender projects proceed in prominent spaces of rule-making such as national security under the guise of advancing gender equality or gendering rule-making in ways that actually delink gender from human rights.

III. Conclusion

[13] This entry takes as a start point that feminist contributions to, and critiques of, rights are critical for showing both how rights are informed by gendered stereotypes and hierarchies, but also how the enforcement for rights in turn can adversely shape these assumptions and hierarchies, as well as differently impact persons of different genders. By exploring both the opportunities and the limits of feminist theories of international law, as well as distinguishing between the different feminist takes on rights and the consequences of such different perspectives, the chapter also aims to contribute complexity to ongoing analyses of where, and to what extent, feminist perspectives and methods

contribute to ensuring gender equality in practice. A number of future lines of feminist inquiry have been identified, ranging from extending existing analysis (such as to develop more robust accountability models for non-state actors), to being more ambitious (such as by road-mapping a way to securing new rights protections that is not primarily based on deriving protections from existing rights' guarantees), to being more circumspect (such as by recognizing when feminist agendas and women's rights are co-opted or deployed for carceral or conservative agendas) and ultimately to being more pluralistic in incorporating additional lines of inquiry and critique that can provide alternative bases for ensuring that the concept of gender equality as advanced through rights is neither thin, exclusionary, nor oppressive but instead fundamentally re-thinks the role of rights and institutions in the ongoing reform of norms and structures that are antithetical to gender equality claims.

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