

Feminist Critiques on the Theory of Rights in the Jurisdiction: Towards Gender Equality

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Abstract

This paper examines whether 'rights', as a legal subject, is gendered. I argue that the term 'rights', which denotes a claim, power, liberty, immunity, choice and interest does not discriminate against anyone, or specifically, women. However, it depends on the application of the term as a product of laws, as to whether it is impartial or biased, kind or cruel. For Smart (1989), rights languages, if properly defined and employed, would empower women as rights could be claimed by everyone irrespective of gender; they could also be extended to claim gender equality and they could construct laws as the centre of political campaigns. Proper definition of 'rights' is particularly important for an analysis of how could rights inform equality. One of the most important aspects of 'rights' talk to explore is feminists' perceptions of rights, such as those of Charlesworth (1994) on male-biased rights, of Kingdom (1991) on correlative rights and duties, and of Kiss (1997) who proposed to construct an affluent understanding of rights to ensure that people understand rights and that they work for gender justice. Generally, rights have been criticised by cultural feminists as too abstract and impersonal, reflecting and endorsing a selfish and atomistic vision of human nature and an excessively conflictual view of social life (Fox-Genovese, 1991). I examine whether the feminist and Islamic human rights discourses share similar principles justifying human rights. I argue that it is important to understand rights as a positive instrument, provided that the term 'rights' is refined to a non-gendered product of laws which consider collective interest. I argue that the feminist and Islamic human rights discourses on subject and object of rights and rights' coverage share similar principles justifying human rights.

Key words: rights, women, gender, equality, male-biased rights, rights and duties

1.1 Rights as Product: Gendered or Neutral?

Contemporary feminisms have felt that rights might not be the best 'instrument' to protect women from discrimination. According to Kiss (1997: 1-2), international women's movements have even reached a consensus that human rights are subordinating women. Even though the social and legal benefits women derive from rights cannot be totally denied, a few feminists have argued that rights do not have a positive image at all (Fox-Genovese, 1991; Rifkin, 1993) and may even be detrimental (Smart, 1989: 139). I trace that feminists from legal backgrounds have argued that rights obscures male dominance, while other theorists have alleged that the rights approach reinforces a patriarchal status quo and abandons women's rights. Charlesworth, (1994: 65) for instance, has alleged that many feminists have claimed that laws are part of male domination and patriarchal institutions. Here, I explore the criticism that rights are a sexist or gendered product within the compass of laws and language.

Two phases of reflection of feminist theory to identify the development of the idea of how laws on rights are gendered could be understood from Smart's statements 'law is sexist', and 'law is male' (Smart, 1992). To support her position, Smart (1995: 187) argued that laws are sexist because they disadvantage women. Therefore, while applying to laws on rights, such as human rights laws, 'rights' do indeed disadvantaging women. Finlay (1989) has examined how laws are characterised by maleness from their claim to be authoritative, objective and rational¹.

¹Many feminists have argued binary opposites such as objective/subjective, rational/emotional, good/bad and active/passive construct an understanding of difference. See Smart, C. 1995. *Law, Crime and Sexuality: Essays in Feminism*. Sage Publication

She stressed that, even though law presents itself as gender-neutral, analysis reveals that law is far from that. Interestingly, what is regarded as objective in society reflects a set of assumptions that are valued above competing considerations and are considered by many feminists to be ‘*masculine*’ (MacKinnon, 1987) and reproducing bias in favour of men (Lacey, 1995). Thus, it is perhaps easy to say that this analysis suggests that objective criteria applied in laws are masculine and feminists consider it essential to reject these criteria in order for a legal system to work.

Dawson (1993) highlighted that the objective masculine criteria of laws is due to the fact that they interact differently with women than with men. However, Smart (1989) was involved in a rather different engagement slanted at the level of theorising the ‘*malevolence*’ of both legal method and the institutions of laws. Although feminists reject the notion that ‘*objective*’ rules are important in the legal system (Scales, 1993: 53-54), I would concede that legality has certain qualities of fairness in the system but they do not necessarily depend on objectivity. Rather, Scales’s (1993) suggestion to discard the habit of equating most noble aspirations with objectivity and neutrality is a rather important way of departing from ‘*male-mirror neutral law*’; however, as I mentioned above, the quality of the legal system is not compromised. Smart (1992: 31) rightly discovered that laws ‘*can be put right such that all legal subjects are treated equally*’.

I trace that the subordination of women in the eyes of the law has proved that laws may be gendered and can be used to deny women their rights. Daly (1991), for instance, has examined the laws of female foot-binding, suttee and circumcision to provide evidence revealing the extent to which women’s rights to choose have been denied and they have traditionally been controlled by men using laws. Meanwhile Barnett (1997), in her analysis of the relationship between feminist theories on rights and the laws, asserted that the maleness of every field of laws and legal practices are established when the laws are themselves gendered and that they reflect the sexual characteristics of men, who have created them, regardless of whether they are developed through the courts under common laws or enacted in legislative provisions.

Feminists who have proved that laws are sexist and gendered also rest their analysis on the question of ‘*legal personhood*’ or ‘*sui juris*’. Dawson (1993: 47), while discussing legal personhood based on the case of *The Queen v. Crosthwaite*², has stressed that ‘*women*’ were not included within the meaning of ‘*persons*’ entitled to hold public office under the Towns Improvement (Ireland) Act 1854. In addition, Donovan and Wildman (1980), who analysed the idea of the ‘*reasonable man*’ in the criminal laws context of self-defence of provocation, discovered that the standard of the ‘*reasonable man*’ applies only to white middle-class male techniques for self-defence and reactions to provocation. According to Donovan and Wildman, the standard fails to account, for example, for any behaviour that may be described as culturally female.

Similarly, Bender (1992), while reviewing the standard of care required in tort laws for the ‘*reasonable person*’, found that this is another example of male naming and acceptance of the implicit male norm. Since the laws have been crafted ‘*patriarchally*’, the way they frame issues and define problems and the speech they credit, according to Busby (1993) and Chen (1997), clearly excludes women. Thus, women were not considered ‘*legal persons*’ in legislation and were not recognised as having rights as subjects in law. Who the laws recognise as being capable of having rights and duties is defined by the concept of the legal person or legal subject (Cotterrell, 1992: 123-124). Therefore, from this point of view, women were not recognised as having rights and obligations as subjects in laws.

In the sphere of international laws, Stamatopoulou (1995: 36) has stressed that, for feminists, the United Nations (UN) have failed to declare all women’s human rights concerns to be part of international human rights laws and have failed to integrate women’s human rights into the mainstream human rights agenda. Women’s rights issues have been considered insignificant in international laws’ responsibility for human rights due to the failure of covenant makers to recognise the normative male model of traditional human rights formulation (Charlesworth, Chinkin and Wrights, 1991: 613). Because of this failure to include women’s lives, feminist analysis has proceeded to explore the tacit commitments of obviously so-called ‘*neutral*’ principles of international laws and how male perspectives are established in them (Charlesworth, 1993: 1). Charlesworth demonstrated the way states institutionalise the patriarchal family both as the qualification for citizenship and public life and also as the basic socio-economic unit.

²(1867) 17 Irish C. L. R. 463

Based on her analysis, men have dominated in the public sphere of citizenship and political and economic life because the formation of the state depended on a sexual division of labour and the relegation of women to the domestic sphere. As a result, the functions of the state were identified with men.

If the state is patriarchal, the international and national laws codified for human rights protection may also be patriarchal. The major sources of international laws as set out in Article 38 of the Statute of the International Court of Justice, conventions and customs are the product of state action (Charlesworth, 1993). I will not deny Cook's (1993: 93) contention that women's exposure to disadvantages originated through acts of private persons and institutions but this social construction of discrimination could be removed by human rights laws as instruments of societal change. However, if the law itself also disadvantaging women, expressly or implicitly, then this is the most crucial aspect that women's movements need to deal with.

From the compass of language, Poovey (1992) has argued that feminist post-structuralists have accused rights language of being bound up with '*socio linguistic hierarchies of gender*' and with the '*outdated patriarchal fiction of a unitary self*'. According to Kiss (1997: 2), feminists have contended that the rights language cannot adequately express women's experience, be it from moral or political parts of life. This might be due to the exclusion of women's experience and recognition in the rights debate. Consider, for instance, the application of rights for gender equality, even though not generally approached as a problem of language, there is a connection between language (Jong, 1993: 74-75), male domination, gender and the suppression of women (Busby, 1993: 76-77). According to Busby, in the early development of the English language, the pronoun '*he*' referred to both female and male because there was no separate pronoun for female and '*he*' did not signify either the female or the male gender. When the word '*she*' was introduced, it referred only to female, but the pronoun '*he*' continued to refer to both female and male. Later, the ambiguity of '*he*' was resolved by formulating two principles of grammar; that a pronoun must be in the same gender as the noun to which it refers, and when a referent is either of indeterminate sex or of both sexes, it shall be considered masculine (Busby, 1993: 77). Busby has shown that it is more natural to place the male before the female, as man could be first in the natural order or more important. This '*unintended language priority*' given to males in the language of rights and statutes, denotes that the term '*rights*' used in the legal sphere is gendered.

Therefore, a commitment to gender corrective language³ in all UN works would be a way of reducing the overtly masculine culture of international law-making (Charlesworth, 1995: 110) if women's rights laws are to be transformed into a single universal legal instrument shared with men. This means that '*man*' must not be taken to represent '*human*' (Charlesworth and Chinkin, 2000: 17). As pointed out by Hevener (1987), this will address situations that will not victimize men, allow a women-centred solution without referring to male actions and standards and prescribe an active public policy to achieve fairness.

2.1 Subject, Object and Coverage: Towards Gender Equality

Even though feminists have criticised liberal rights, their idea is to invite women's rights debaters to rethink rights, not to reject them, so that rights will not marginalise women's choices and interests. This is due to a few feminist writings on rights debates, as I analysed earlier, which seem to criticise the role that rights play rather than the term '*rights*' itself. I note that limiting the nature, character and potential of rights in ensuring justice to each and every different human being could be the basis of criticisms of rights. In fact, I trace, there are pieces of evidence which denote that struggles for the right '*rights*' have helped women to achieve significant gains over the past centuries. For instance, from Mary Wollstonecraft to the drafters of the Women's Convention, feminists have made demands for rights to ensure gender equality and justice (Kiss, 1997: 1).

Therefore, I argue that it is important to understand rights as a positive instrument, provided that the term '*rights*' is refined to a non-gendered product of laws which consider collective interest. Even though rights have been criticised by feminists in terms of the meaning, nature and use of rights, here I focus my analysis on the feminists critique of rights from three perspectives; subject of rights, object of rights and rights' coverage. In this analysis, I consider the subject of rights as individual and collective and the object of rights as choice and interest which interrelated with the absolute and non-absolute power of rights.

³ Designed to address specific practices that oppress women but not men or that are of much greater importance to women than to men

I argue that the feminist and Islamic human rights discourses on subject and object of rights and rights' coverage share similar principles justifying human rights. While discussing these, there are points that might overlap due to the correlative nature of the subject and object of human rights that I analysed.

2.1.1 Image of Rights' Subject: Choosing Agent or the Value of Interest?

The subject of human rights, according to Lacey (2004: 34), depended on whether rights operated in terms of an image of freely choosing an agent capable of asserting claims or an image of accommodated groups in which their interests or the benefits to them are valued. In simple terms, subject of human rights is either an individual or a community (Jones, 1994). It was during the 19th century, after collective political rights were enlarged, that a genuine concern for the rights of the individual developed internationally (Luard, 1967: 9-10).

In the feminist debate on the critique of rights, Lacey (2004: 38) explained that '*individualism*' is the key criticism. According to Lacey, the danger of individualism is when the subject of human rights is only the individual and not the community; thus the object of rights could be conceived of as individual property and therefore collective interest or goods would be disregarded. As feminists have argued, individual might only be constrained to man or to certain class of people. For instance, within the familial relationship, individualism might conceal men's superiority over women. To reconstruct rights from this perspective and to ensure that rights do not favour just one person or class, I therefore, agree with Lacey (2004: 48-50) that both the individual and collective interest be considered as the objects of rights.

Arkoun (1994) was of the view that Islamic thought always included a discourse on the rights of God (public or collective rights) and the rights of man (individual rights), with the former having priority over the latter. According to Arkoun, postclassical jurists defined the rights of God as those that are for the collective interest and the rights of man as those of the individual interest. According to Islamic faith, the respect for human rights is an aspect of, and a basic condition for, respecting the rights of God, as Islam does not separate any aspect of life from religion (Arkoun, 1995; Weeramantry, 2007). As the division between rights of God and rights of man clearly indicates, the jurists have used '*haqq*' or rights for tangible and intangible property as well as benefits and interests owned by a particular person whereas it is only used to imply conceptual interests if the Lawgiver has validated them (Moosa, 2004: 5).

By looking at the relationship between the individual and the state, even though Islam consider collective rights, Schacht (1959: 139-140) argued that human rights in Islam are also individualistic in their entire structure, which I trace is similar to the Western practice of human rights. To be individualistic is not simply to resist relationships of domination but also shows a '*capacity for action that specific relations of subordination create and enable*' (Mahmood, 2005: 18). Ali (2000: 33) has explained that Schacht challenged the view of many scholars of *Shariah*, who contended that there is strong element of anti-individualism in Islam, by claiming that the scholars had failed to look at the individual character of *Shariah* on laws of inheritance⁴, *waqf*⁵, contract and private property, which are well in line with the trend of contemporary Western legal thought. Moreover, the Former Minister of Religious Affairs of Islamabad, Dr. Ghazi, has also pointed out that *Shariah* is a complete system based on fundamental instructions which covered all aspects and details of individual and collective interests of the people⁶.

Hence, the content of international and Islamic human rights have focused on individual and collective rights, the relationship between the individual and the state, and the highest level of organisation in a society with the ability to control the lives of the members of that society. In the atmosphere of human rights, I argue that collective rights balance the rights of all individuals as human beings, that no person (or man) will be prioritised over the other (or woman) and that no persons will be given rights as human beings that are denied to others. As Krishnadas (2007: 155) contended, '*a collective identity which is based on basic needs and rights reflects a collective agenda for men and women against oppression and exploitation*'. Therefore, I argue that to build the concept of equality among human beings, collective rights must be considered as the subject of legal rights.

⁴ Similar to the concept of succession in English law

⁵ Similar to the concept of charitable trust in English law

⁶ Dr. Ghazi said so in his talk entitled '*Islamic Shariah and the World Today*' presented at the Eight Day Lecture Series on 01/12/2008, Islamabad. See Online: <http://www.ips.org.pk/whats-new/76-lecture/488-islamic-shariah-and-the-world-today.html>. Retrieved on 10/12/2010

2.1.2 Can 'Choice' be an Instrument to Discriminate against Others?

Here, I find that there is a strong relationship between individualism and collective rights (subject of human rights) and choice and interest (object of human rights). Choice or autonomy or '*self-rule*' is a similar concept to '*agency*', a capacity to realize one's own interest without being weakened by other obstacles (Mahmood, 2005: 5-17). However, choice is not unconditional. The term that I shall be using to define unconditional choice and independence is '*absolute choice*'. This is a definite independence that prevents one from being influenced by others and allows one to refuse to be under obligation. I note that unrestricted rights cannot be possessed because social conditions need to be considered. As stressed from the feminist point of view by Kingdom (1991: 56-57), there is '*nowhere in the real world that absolute rights can be enjoyed*'.

On one side, I argue that, as rights holders, human beings are indeed autonomous and their individuality must be protected from infringement by others, by the family or by the state. Without autonomous capacity, the rights of human beings cannot even be addressed. As stressed by Mookherjee (2011: 62), even though feminists are suspicious with the idea of autonomy because of its male and individualistic value, '*it is plausible to retain a focus on autonomy in a feminist and multicultural theory of rights*'. Thus, non-absolute autonomy which considers individual as well as collective interest as discussed earlier might inform how the value of autonomy could be reconstructed for gender equality. Mookherjee argued that for the '*well-being of all human beings*', there are forms of self-determination which seems essential. Both individuals and family units must be given independence rights to provide for the needs of their members. Yet, justice is not only for an individual or a family, but also for the interests of the community and social institutions as a whole.

Because the aim of equality, as stated by Fredman (2003: 43) is '*to give all people, regardless of their sex, race or age an equal set of alternatives from which to choose and thereby to pursue their own version of a good life*', everyone must have equal autonomous rights according to their own interpretation of happiness and a good life. Therefore, even though individual autonomy is recognised and could be legally entertained, it must not be unconditional, as it has to consider the arrangement of the state and its regulation of relationships with other societal institutions for the public good. In fact, individual choice is only possible when one is able to share the benefits and burdens with society at large. Certainly, absolute individual choice could jeopardise equality. In other words, one cannot be independent if it means disadvantage others. The very existence of an organised society is itself a benefit to the individuals living within that society (Sheriff, 2007: 9). Once the value of individual choice is recognised, a reason not to deny other people's interests will also be recognised (Griffin, 2008: 134). As Safi (1998: 5), in his research on '*Human Rights and Islamic Legal Reform*' pointed out, the individual is recognised in Western society as a member of '*homogeneous*' community which denotes that individual rights depend on the non-violation of others' rights.

Fineman (2004), in talking about gender in general, has stressed that non-autonomy (non-absolute choice) or dependency is congruent with equality as it is one of the societal circumstances under which gender justice can be achieved. Fineman did not mention absolute autonomy in her analysis of the myth of autonomy; she referred to autonomy as unconditional independence, which is why she asserted that only '*dependency*' is compatible with equality without taking into consideration a conditional autonomy. However, Fineman's proposal that '*the goal of autonomy must be supported through an understanding of collective responsibilities for basic needs*' (Fineman, 2004: 30) means that Fineman has to agree that autonomy (but not absolute autonomy) is also comparable with equality. Having said that individuals are entitled to what might be called moral autonomy, I agree with Hoffman, David and John (2003: 10-12) that individuals can rarely achieve such goals by themselves but need to have some form of government because cooperation between individuals is often required. For instance, Malaysia's laws, as those of a state, have the ultimate say on what citizens are or are not allowed to do based on individual autonomy, yet they consider the public good. The reason is, if suitably conceived, autonomy can be a tool for equality, as correctly stated by Mookherjee (2011: 73), a commitment to autonomy '*plays a special role in protecting the interests of potentially vulnerable individuals*'. Bearing in mind that in the Islamic human rights jurisprudence and feminist discourse rights can be extracted from individual choice as well as public interests, another issue which it is important to address is the feminist critique of rights' coverage.

2.1.3 Rights' Coverage: Only Public Sphere?

Other than as a biased legal product, feminists criticise the application of the term '*rights*' from the perspective of its coverage.

Even though I categorise the coverage into three types; public and private sphere, individual choice and community interest, and formal and substantive equality, my analysis under this scope only covers the first category. I trace that, while examining the effect of laws on the lived experience of women, feminist legal scholars have found that laws have restricted women's rights and freedom by limiting their participation in the public sphere. Rights talk from the legal aspect, for instance, wrote Rifkin, (1993: 416-417) relegated women to the '*private world of the home and family*'. It has been said that women's freedom and equality are persistently compromised by customs and laws, which does not happen to men (Peters and Wolper, 1995: 2). This is due to women's huge involvement in the domestic sphere, which is highly regulated by customs and laws; men are not subject to the same degree of regulation.

The meanings of the terms '*public*' and '*private*' depend on the purpose for which they are employed, and in this paper, the private sphere is associated with managing household activities, acting as a wife, reproduction and the raising of children. In all societies, these activities have been treated as inferior and to be managed by women (General Recommendations No. 21, 13th Session, 1994: Comment para 11). By contrast, a broad range of activities outside the domestic sphere or public life are dominated by men, who historically have exercised the power to confine and subordinate women within the private sphere (General Recommendations No. 23, 16th Session, 1997: Comment para 8). Hence, men's failure to share private tasks with women is among the most significant factors inhibiting women's ability to participate in public life.

Historically, Western-educated propertied men who first advanced the cause of human rights most feared the violation of their civil and political rights in the public sphere, which is the reason why this area of violation has been privileged in human rights work, unequal with the private sphere (Bunch, 1995: 13). Human rights work has traditionally been concerned with '*state-sanctioned or condoned oppression*' which has taken place in the '*public sphere*', or civil and political rights, away from the privacy to which most women are relegated, which is in economic and social rights (Peters and Wolper, 1995: 2). Although international human rights laws have challenged the discipline's traditional public and private dichotomy between states and individuals and are regarded as a radical development in international laws, Charlesworth and Chinkin (1993) have argued that they have in fact retained the profound gendered, public and private distinction. International laws seem to use the public-private divide as a convenient screen to avoid addressing women's issues (Engle, 1993: 143).

Other than that, feminists have argued persuasively that the '*public/private distinction is a false one and that the real question is not whether laws should apply to the private as well as the public, but rather, what types of private acts are and are not protected*' (Gunning, 1991-92: 238). Even though Gunning's idea may be right, however, to determine the area in private life that has yet to be protected without proposing that all private spheres be regulated is complicated in terms of upholding justice to for women. It seems to recognise that laws do not have to intrude on certain areas in private life. This, too, might be correct. Again, however, we might ask which private life does not need to be protected? And who will decide that?

I argue that women's disadvantages would be endlessly neglected in those unregulated areas by reason of '*private life*'. For instance, women might be disadvantaged due to the denial of collective interest in the familial relationship. In this paper, I argue that collective interest could balance every person's choice, women and men to uphold gender equality. In polygamous marriages among Muslims, for instance, the practice is permitted with certain conditions, among which is the stipulation, that the existing wife and husband are guaranteed equal happiness and justice and that the possible disadvantages of the existing wife (or wives) will not be neglected. Also, as the lives of Muslims are governed by laws, be they public or private, laws cover not only the application for polygamous marriage, but also the rights and duties of wives and husbands. Therefore, to determine whether the husband is following the rules or not, there must be, in the first instance, rules that regulate the husband's rights and duties, which could be considered as the rules that regulate private life. Indeed, abolishing the distinction between public and private will not help if the public world of rules and rights comes to dominate everything (Campbell, 2006: 76). Women's rights strategy at this point should be to demand that laws intervene in the private realm and to propose greater public regulation of the private sphere of home and family.

In this paper, I argue that the experience of those who will be affected by rights must be taken into account. Krishnadas (2007), in her analysis of the roles of rights in governing and shaping women's relationship with the reconstruction process, has argued that women's rights to determine their lives' patterns are dependent upon the process of recognition.

In fact, Krishnadas (2007: 139) has argued that *'the act of recognising local women's identities was dependent upon the different cultural, material and spatial frameworks in which women were recognised'*, which broadens the understanding of the rights and recognition relationship. For instance, the prohibited working hours applied to women in industrial and agricultural undertakings between the hours of ten in the evening and five in the morning might ignore women's disadvantages, even though this *'patriarchal rule'* is intended to protect women's rights to safety. It is due to the need to work and earn salaries, as given to male workers. One can see that working in an industrial and or agricultural undertaking at night might not be suitable for women, but, at the same time, their right to work cannot be denied. Here, an alternative must be offered to women who are supposed to work in industrial and agricultural undertakings during those hours; they could be moved to another area which is more suitable for them. In regard to the aforementioned points, if the experiences of female workers and women's autonomy are not taken into account, I would argue that a *'male's presumption'* that women's rights to safety are more important than their rights to work could be called amiss and wrong. For women, both rights are equally important and must be guaranteed by laws. Indeed, recognition is accorded not only by the local community which governs social structure but also by the laws, policies, administrative decisions and programmes.

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