

ADDRESSING THE SEX/GENDER DIFFERENCE: AN INCLUSIVE APPROACH TO HUMAN RIGHTS

Dr. sc. Ivana Radačić, viša asistentica
Institut društvenih znanosti Ivo Pilar
Zagreb

UDK: 342.7 – 055.2
Ur.: 8. veljače 2010.
Pr.: 10. svibnja 2010.
Izvorni znanstveni rad

Sažetak

RJEŠAVANJE PITANJA SPOLNE/RODNE RAZLIKE: INKLUZIVNI PRISTUP LJUDSKIM PRAVIMA

Ženska iskustva kršenja ljudskih prava dugo su bila marginalizirana u međunarodnom sustavu zaštite ljudskih prava. Glavni koncepti ljudskih prava – osobnost, ravnopravnost i sloboda, bili su definirani na temelju iskustava muškaraca, dok je okvir međunarodnog prava – podjela na privatno/javno, bio koncipiran na rodni (muški) način. Stoga ideal o univerzalnosti ljudskih prava još nije dosegnut.

Ovaj članak predlaže pristup interpretaciji ljudskih prava koji nastoji riješiti problem nedovoljne uključivosti. Inkluzivni pristup, utemeljen na feminističkim teorijama razlike, zahtijeva da se pažnja posveti spolnoj/rodnoj razlici, u doticaju s ostalim identitetskim odrednicama, te da se bori protiv nepovoljnosti koje se vežu na razliku. Pristup tako traži da se “žensko pitanje” postavlja pri konceptualizaciji i interpretaciji ljudskih prava. To bi rezultiralo rekonceptualizacijom subjekta, ravnopravnosti i slobode na način koji prepoznaje spolne (i druge) razlike. Nadalje, promijenile bi se granice podjele na privatno i javno čime bi se pitanja rodno uvjetovanog nasilja, reproduktivnog samoodređenja i ženske ekonomske podređenosti čvrsto postavila na agendu ljudskih prava.

Ključne riječi: *ženska prava, sloboda, ravnopravnost, podjela na privatno i javno, žensko pitanje, rodno utemeljeno nasilje, reproduktivna sloboda, ekonomska podređenost žena.*

1. Introduction

Women's experiences of human rights abuse have long been marginalised in international human rights law. Despite the high claims of inclusiveness and fundamental rights protection of all human beings, international human rights law has been under-inclusive. Obstacles to inclusiveness are found both in theory and in practice. Under-inclusive (and gendered) definitions of the concepts underlying human rights such as personhood, equality and freedom account for the fundamental problem on the theoretical level. In international law on the other hand, the problem remains the conceptual framework of international law, i.e. the gendered nature of the public/private divide in addition to the gender politics of the state and international community.

Nevertheless, the issue of under-inclusiveness can be resolved. There is nothing inherent in either human rights theories, or in the framework of international human rights law which would preclude the inclusiveness of international human rights law. It is argued in this paper that inclusiveness and therefore universality of human rights can (only) be achieved if greater attention is paid to sex/gender difference¹ and if efforts are made to remove disadvantages attached to difference. Therefore, this paper proposes an inclusive approach to human rights based on difference feminism theories.

2. Theoretical underpinnings of international human rights law

International human rights instruments do not tackle the philosophical foundations of human rights in detail, but rather focus on the dignity and worth of human beings and equality of all humans. However, they very much build on the liberal human rights theories connected to the natural law philosophy.²

According to Kantian ethics which underlies these theories, rights flow from an individual's autonomy to choose his or her ends, consistent with an equal freedom of others.³ Accordingly, the central focus of liberal human rights theories is personhood,

1 The term gender has traditionally been used to describe the socially constructed identity of women and men, while the term sex has traditionally been used to refer to their biological characteristics. I prefer the term 'gender discrimination' since it is the most commonly used term. When referring to the Court's jurisprudence on sex discrimination I use the term 'sex' in compliance with the Convention. It is important to note that women are discriminated both on account of sex and gender, which are not easily separable categories. For a critique of the binary view of sex/gender see e.g. J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York 1990), and *Bodies that Matter: On the Discursive Limits of "Sex"* (Routledge, New York 1993).

2 J. Shestack, 'The Philosophical Foundations of Human Rights', in J. Symonides (ed.) *Human Rights: Concepts and Standards* (Aldershot, Ashgate 2000).

3 While some theories define autonomy as the central interest necessary for our wellbeing that needs to be protected through human rights (will-based theories), other theories (interest-based theories, theories based on equality of respect and concern)

i.e. the capacity to take responsibility as a free and rational agent for one's systems and ends; and the related ideas of freedom and equality. However, these concepts are defined abstractly, in terms of our common, abstract humanity, rather than in terms of our particular human experiences of suffering and disadvantage influenced by our particular identity characteristics and power positions. Differences, including gender-based ones are deliberately neglected in liberal theories of human rights and deemed as "less relevant...than our shared characteristics of rational and moral personhood."⁴

As liberal human rights theories proceed from the commonality of human experience and the universally shared human nature of rational agency, they define the right holder in an abstract manner. Moreover, due to a liberal individualistic political and philosophical orientation, they define the right holder in an atomistic manner as a 'genderless', 'disembodied' person of reason (whereby reason has traditionally been interpreted as excluding emotions), free from social and emotional ties and thus not restrained by its personal status and social position and relationships.⁵

Since the right holder is defined as an autonomous, atomistic individual, freedom is defined primarily as a negative freedom, in other words, the freedom to be left alone.⁶ It is assumed that the best way to secure a free development of an individual's personality and to protect his or her autonomy is to secure the protection against interference. The state and other duty bearers have primarily negative duties to abstain from interfering in our freedom, rather than positive obligations to make our freedom more meaningful by redressing social inequalities and structuring relationships in a manner that fosters our autonomy. Hence, the focus of human rights is put on restraining the political power and regulating the 'public sphere.'

This view of freedom influences the conceptualisation of equality as equal treatment. In accordance with the centrality which provides us with equal capability to choose our ends, liberal human rights theories assert that we should all receive equal treatment, assuming that any other type of treatment would undermine the duty of the state to respect all choices and freedoms equally.⁷ Likewise, inequalities attached to these differences that affect our ability to choose and express our agency are neglected.

To a great extent, international human rights law still operates on these concepts. In addition, the public/private divide, i.e. the central operating framework of international human rights law obscures women's interests.

define it as one of the many fundamental interests that human rights should protect.

4 M. Nussbaum, *Sex and Social Justice* (Oxford University Press, New York 1999) 146.

5 This is less valid for interest theories of human rights. See N. Lacey, 'Feminist Legal Theory and the Rights of Women' in K. Knopp (ed.). *Gender and Human Rights* (Oxford University Press, New York 2004).

6 Not all liberal theories of human rights adopt this view of freedom. However, it can be said that the negative conceptualisation of freedom is the dominant conceptualisation.

7 Some theories, most notably Dworkin's theory of equal concern and respect, however, have a more substantive understanding of equality. R. Dworkin, *Taking Rights Seriously* (Duckworth, London 1986).

3. *The public/private divide and the gendered conceptualisation of rights, freedom and equality*

The public/private divide is visible at many levels in international human rights law. It has been the main focus of the feminist critique, which has claimed that beneath the various public/private dichotomies in international human rights law lie divisions based on sex and gender.⁸ The first level at which the public/private distinction appears is the question of what should come under the purview of international supervision (be 'public'), and what should remain exclusively under the state's sovereign powers (be 'private'). In other words, the principal question here is which interests should be defined as human rights. At the second level, this distinction manifests itself in determining the types of relationships that come under the purview of international human rights law; i.e. it answers the question whether international human rights law regulates relationships between the individuals themselves. Both of these questions have been answered in a gendered manner as can be seen in the conceptualisation of rights, state obligations and the principle of equality and non-discrimination.

Furthermore, the public/private divide is most visible in the conceptualisation of the civil and political rights, which are still given primacy in international human rights law. These rights go hand in hand with the liberal view of the right holder as an abstract, pre-social person of reason. As predominantly negatively defined, these rights aim at safeguarding individuals from direct governmental interference with personal and political freedoms. Thus, the rights to freedom from torture and the right to liberty and security of the person are primarily concerned with the protection from arbitrary deprivation of life, ill-treatment and arrest and detention by the state agents.⁹ However, women's lives, physical integrity and liberty are most often at risk of domestic and sexual violence, trafficking, FGM and denials of reproductive self-determination (such as the prohibition of abortion) and inadequate reproductive and sexual healthcare (such as inadequate maternal health care).

Women's experiences of human rights abuse do not easily translate into the state vs. individual paradigm as 'for most women, most of the time, indirect subjection to the state will always be mediated through direct subjection to individual men or

8 H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613; C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in R.J. Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia 1994); K. Engle, 'International Human Rights and Feminism: When Discourses Meet' (1991-92) 13 *Michigan Journal of International Law* 517; D. Sullivan, 'The Public/Private Distinction in International Human Rights Law' in J. Peters and A. Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York 1995).

9 H. Charlesworth and C. Chinkin, 'Human Rights' in *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester 2000).

groups of men.¹⁰ While women need to be protected from the state's interference into their private and political freedoms, very often they need the state to interfere in order to protect them from their intimate partners and members of their family.

However, the fact that women's rights are most often violated in the family has only recently been recognised, since the right to respect the family and the private sphere has been conceptualised as a duty of non-interference in these spheres. The question has thus been not whether the right to privacy in terms of self-determination has been respected regardless of the implicated sphere, but whether 'a governmental interference' in the family sphere existed. As Eisler argues, the conventional use of discretion has served as 'a means of preventing the application and development of human rights standards in the relationships between women and men'.¹¹ Furthermore, the tenacity of the divide, i.e. whether selective policy of non-interference can be politically neutral has not been questioned.¹²

Similarly, the freedom of religion has been interpreted as imposing a duty of non-interference, even where the application of this principle has meant permitting restrictions of women's sexual and reproductive freedoms, as well as freedom of expression and movement.

Just like religion, culture has been seen as a private sphere, even if cultural rights were often used to justify the subordination of women. Indeed, as Rao argues, no other group has suffered greater violations of its human rights in the name of culture.¹³ While recognition of cultural rights acknowledges the influence of cultural norms on the development of personality and challenges the divide between positive and negative freedom, cultural rights still express the gendered public/private divide by regulating culture to the private sphere. This goes for the economic and social rights as well; the International Covenant on Economic, Social and Cultural Rights is largely focused on the public sphere.¹⁴ For example, the right to just and favourable conditions of work is confined to work in the public sphere (work for remuneration), while most work by women is performed in informal economy. In addition, the right to health, as defined in the Covenant, fails to mention reproductive and sexual health.¹⁵

10 S. Wright, 'Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions,' (1992) 12 *Australian Yearbook of International Law* 241.

11 R. Eisler, 'Human Rights: Towards an Integrated Theory for Action' (1987) 9 *Human Rights Quarterly* 287, 292.

12 S.M. Okin, *Justice, Gender and the Family* (Basic Books, New York 1989); F.E. Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835; F.E. Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497.

13 A Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in J. Peters and A. Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, New York 1995).

14 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

15 CESCR has, however, interpreted the right to health to include reproductive and sexual health.

Thus, the gender perspective is lacking in the traditional interpretation of rights. While the human rights bodies are starting to recognise that violations of rights can take different form for women and men, they are still shy in imposing obligations on the state in the private sphere. Under international human rights law states have a responsibility not only for its own acts through direct action, complicity or acquiescence, but also for failure to exercise due diligence in preventing and punishing the acts of individuals.¹⁶ Nevertheless, not all human rights bodies acknowledge the principle in question. For instance, the Committee against Torture has still not fully accepted this principle mostly because of the Convention's definition of torture, which requires that the act be committed by or at the instigation of, or with consent or acquiescence of a public official or other person acting in an official capacity.¹⁷ Furthermore, complicity and acquiescence are often narrowly interpreted. The pervasive nature of gender discrimination has usually not been taken into account when determining the responsibility of the state.

Moreover, the scope of positive obligations¹⁸ tends to be limited: despite the availability of the wide-ranging measures as indicated in the general comments of the human rights bodies, the focus is usually placed on the legislative measures, whereas the states are given leeway in the sphere of cultural and social norms, especially when 'public morality' is at issue. This seems to be the case with sexual and reproductive rights. Finally, while it is recognised that the obligations can be different in respect of protecting the rights of women and men, positive obligations required to secure the rights of women are often confused with affirmative action.

Affirmative action¹⁹, on the other hand, is still seen as an exceptional measure

CESCR, 'General Comment 14 (2000)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) HRI/GEN/Rev.7, 86.

- 16 For differences between complicity, ratification/adoption and lack of due diligence as bases for state responsibility, see 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June 2001 and 2 July- 0 August 2001) UN Doc A/56/10, ch. IV: State Responsibility (Draft Articles and Commentary). The doctrine of 'due diligence' was first expounded in international human rights jurisprudence by the Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988).
- 17 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1(1).
- 18 Positive obligations refer to the state's duties to take positive steps to ensure that rights are protected, even in the sphere of relations between individuals. Positive obligations include the duty to prevent violations, investigate and where appropriate punish the perpetrator, and remedy the victim. The duty to prevent refer not only to the duty to set up an effective legal framework but all those measures of 'all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts'. *Velasquez Rodriguez*, para. 175.
- 19 Affirmative action, also known as positive or reverse discrimination and temporary special measures refer to measures of preferential treatment of the members of the disadvantaged group undertaken with the aim of achieving *de facto* equality and remedying historical or existing discrimination against the group. For the measures to be legitimate there are generally two requirements: that they are undertaken with a

in international human rights law.²⁰ The dominant theory of equality in international law is the liberal theory; accordingly, the dominant test is that of equal treatment. While international human rights law recognises that different treatment is required when individuals are in significantly different situation, this prong of the test is in practice, however, rarely applied.²¹

The main presupposition underlying international human rights law constitutes the irrelevance of difference. The fact that women face mostly sex-specific threats in enjoying their human rights, requires different type of action on behalf of the states which should include the private sphere. Thus, international human rights law must acknowledge the relevance of the sex/gender difference and address inequalities attached to it.

3.1. Feminist contributions to human rights theories

The relevance of difference between women and men and among women themselves is the main focus of the difference feminism, which includes cultural, radical, diversity and postmodern feminism. Difference feminisms reject the view of an individual as an ‘abstract disembodied person of reason’ as well as the concept of universal human rights built upon this view, claiming that universalism cannot be achieved without paying attention to difference. Different strands of difference feminisms give different critiques and offer different proposals as is summarised below.

Cultural feminism²² criticises human rights discourse for being a male discourse of the ‘ethics of justice’, calling for the incorporation of the ‘ethics of care’, which the supporter of this strand associate with women.²³ As the ‘ethics of care’ has traditionally been associated with the ‘private sphere’, these feminists ask for a deconstruction of the public/private divide. Cultural feminists criticise in particular the atomistic, individualistic view of the right holder, arguing that such a view of the individual does not represent the experiences of women whose

purpose of ameliorating disadvantage and that they are temporary in character.

20 They are mentioned only in the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against women.

21 The European Court of Human Rights, for example, has applied the test only once in the case of *Thlimmenos v. Greece* [GC] (App no 38365/97) ECHR 2000-IV.

22 Cultural feminism developed in the late 1970s as a critique of liberal feminism’s standard of equal treatment. Cultural feminism focuses on sex/gender difference. It sees sex as a relevant social factor and asks for the recognition and revaluation of female difference.

23 The ‘ethic of justice’ is an ethic which involves abstracting moral problems from interpersonal relationships and balancing rights in a hierarchical fashion, while the ‘ethic of care’ represents a relational and contextual approach to moral problems that values care and empathy. These concepts and the idea of ‘different voice’ feminism were first developed by C. Gilligan in her research on the moral development of boys and girls. She found that male subjects typically responded to the moral problems with an ethic of justice, while her female respondents typically responded with an ethic of care. C. Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, Cambridge MA 1982).

lives have qualities of connectedness.²⁴ Moreover, cultural feminists criticise the conceptualisation of freedom as the freedom from ‘interference’ by others. They argue that freedom is only meaningful if it promotes relationships with other human beings, and hence submit that the freedom that human rights should promote is not a freedom to dissociate from others, but the freedom to safely associate with others.²⁵ Finally, these feminists criticise the dominant conceptualisation of equality as equal treatment, asking instead for a different treatment. Some specific proposals include re-conceptualising rights as relational²⁶ and creating separate ‘sexuate rights’ for women and men.²⁷

On the other hand, radical feminism²⁸ criticises human rights for neglecting power relations: ‘male supremacy and female subordination.’²⁹ They also argue that the conceptualisation of the subject as autonomous person of reason is gender-biased, pointing to the fact that women have not yet had full autonomy and freedom due to the historically denied respect for their physical and sexual integrity. Furthermore, they argue against the conceptualisation of equality as either equal or different treatment, instead defining the equality question as the question of the distribution of power, i.e. the subordination of women. They hence propose a dominance approach to equality, according to which the test would be whether the measure in question perpetuates, facilitates or reinforces the subordination of women. This approach focuses on sex-specific abuses, such as violence against women, pornography and prostitution. Radical feminism exposes its political nature and places it into the public sphere, arguing for the re-conceptualisation of the public/private divide.

24 R. West, ‘Revitalising Rights’ in *Re-Imagining Justice: Progressive Interpretation of Formal Equality, Rights and the Rule of Law* (Ashgate, Aldershot 2003). J. Nedelsky, ‘Reconceiving Rights as Relationship’ (1993) 1 *Review of Constitutional Studies*

25 R. West, J. Nedelsky, *ibid.*

26 West argues for recognising the role human rights have in expressing and creating relationship and proposes the inclusion of the ‘right to security against private violence’ and ‘right to care’ as a part of such re-conceptualisation. Nedelsky similarly insists on acknowledging our relational nature, and the role of relationships in developing autonomy. *Ibid.*

27 Irigaray criticizes the dominant (male) conceptualisation of rights as ‘rights of having’ and proposes their re-conceptualisation as ‘rights of being’, which would express variety of identities rather than assuming a false equality between the subjects of rights. She proposes sexually specific rights that would recognise male and female cultures. Abstractly defined rights, such as rights to dignity and physical and moral integrity would pertain to both women and men, but would entail different entitlements (for women they would entail rights to virginity, right to choose motherhood, right to preferential guardianship of children, etc). L. Irigaray, *Thinking the Difference: For a Peaceful Revolution* (Routledge, New York 1994).

28 Radical feminism emerged in the 1980s as a response to the sameness/difference dilemma of liberal and cultural feminism. It focuses on the subordination of women, which is in their view structural in the same way that class oppression is structural for Marxists. MacKinnon, its most high-profile proponent, sees the appropriation of women’s sexuality by men as the central instrument of male dominance and the legal system as the central mechanism of its maintenance through the endorsement of male standard, conceived as ‘objectivity’.

29 C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge MA 1987) 39.

Diversity feminists³⁰ criticise human rights law for neglecting the interlocking systems of discrimination. These theorists show that other identity characteristics and social attributes determine the frequency and the form of human rights abuse in addition to sex and gender. They also expose the exclusionary tendencies of universalistic discourses, such as international human rights law and call for legal reforms to give voices to previously excluded women. In that respect they propose the intersectional approaches to addressing discrimination which would recognise the suffering of those multiply disadvantaged.³¹

Postmodern feminist theorists³² engage in the de-construction of the main international human rights law concepts, such as subjects, rights, equality, and freedom. These feminists reject the dominant view of a (legal) subject as an autonomous, rational, self-interested and a free-willed individual, opposing any dichotomies, such as the public/private divide, positive/negative freedom, male/female, as false.³³ They focus on multiplicity, instability and flexibility of the identity(ies) and the international human rights law's role in constructing sexed identities and power relations in society, seeing it 'as a site of political struggle over sex differences.'³⁴

30 Diversity feminism developed in the late 20th century as a response to the essentialism of the previous theories, influenced by the emergence of new jurisprudential perspectives, in particular, by the Critical Legal Studies, critical race theory, lesbian jurisprudence and postcolonial and post-modern theories. It focuses on differences among women and interlocking systems of discrimination and includes feminists of colour, lesbian feminists, and 'the Third World feminists.

31 Crenshaw. K. (1989) 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,' *University of Chicago Legal Forum* 1989: 139-169; 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color, 43 *Stanford Law Review* (1991) 1241. See also Working Group on Women and Human Rights, *Background Briefing on Intersectionality*, available at <http://www.cwgl.rutgers.edu/globalcenter/policy/bkgdbrfintersec.html>

32 Postmodern feminism does not represent a single theory. Moreover, postmodern feminists do not believe in a single theory or a single 'truth,' and are particularly opposed to creation of any 'Grand Theory.' Often following Derrida, many postmodern feminists use techniques of deconstruction to expose internal contradictions of apparently coherent system of thoughts. Other postmodern feminists, following Lacan, are interested in reinterpreting traditional Freudian psychoanalysis, with all its implications for biological determinism and subordination of women. Postmodern feminists often combine both theoretical perspectives. Finally, following Foucault, postmodern feminists analyse the discursive powers of law.

33 D. Cornell (*At the Heart of Freedom: Feminism, Sex and Equality* (Princeton University Press, Princeton 1998) has, for example, critiqued the binary notion of gender, insisting instead that 'there are as many different possible forms to our sexuate being as there are people'. See also J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York 1990); and *Bodies that Matter: On the Discursive Limits of "Sex"* (Routledge, New York 1993).

34 C. Smart, *Feminism and the Power of Law* (Routledge, London 1989); M. Frug, *Postmodern Legal Feminism* (Routledge, New York 1992).

All of these theories bring vital contributions to human rights, but all have their limitations. While the cultural feminists' exposure of the maleness of dominant discourses and the call for the incorporation of the alternative values offers significant insights for re-conceptualising human rights, its strict classification of values into female and male (coupled with the call for different treatment and separate rights for women and men by some cultural feminists) has exclusive tendencies. Overstressing and oversimplifying gender difference, without paying attention to cultural construction of gender, may entrench gender difference without challenging the stereotypes and disadvantages attached to such difference.

Radical feminists' exposure of the 'implicit male gender' of the 'universal subject' of rights demands that women finally become subjects of human rights through inclusion of gender-based violence and re-conceptualisation of equality as dominance. Needless to say, this has significantly furthered the fight for women's rights. Despite this progress, radical feminism has serious essentialist tendencies.³⁵ It gives a one-dimensional account of women's subordination, portraying women as victims of sexual oppression.³⁶ Moreover, this theory assumes homogeneity of women and the centrality of gender impression.³⁷

The intersectional approaches to discrimination is the central contribution of diversity feminists, whereas the postmodern feminists' main impact arises from their demand for the re-conceptualisation of subject, equality, freedom and public/private dichotomy in a manner that acknowledges multiplicity of identity and exposure of the controversies of utilising human rights discourse for the empowerment of women.³⁸ However, some of the proposals to deconstruct the woman as a subject when we can speak of ourselves as subjects, might be practically and politically damaging.³⁹ That said, postmodern critiques do not necessitate rejecting gender as a

35 Essentialism refers to false universalism and gender essentialism. False universalism refers to the use of the unstated norm of the most privileged group of women- namely, white, middle class, heterosexual women- as universal norm explaining experiences of all women. Gender essentialism refers to (which accords too much weight to gender oppression, minimizing the impacts of oppression based on race, class or sexual orientation). See K. Barllet, *Gender Law*, (1994) 1 *Duke Journal of Gender Law & Policy* 1.

36 Lesbian feminists were particularly critical of MacKinnon's portrayal of sexuality, warning her against basing the theory on the experiences of heterosexual women alone. See, e.g. PA Cane, 'Feminist Jurisprudence: Grounding the Theories' (1989-90) 4 *Berkeley Women's Law Journal* 191.

37 For a critique of the exclusion of the concerns of women of colour see A. Harris, 'Race and Essentialism in Feminist Legal Theories' (1990) 42 *Stanford Law Review* 581. For the exclusion of lesbian experiences see Cane, *ibid.*

38 R. Kapur, 'Revisioning the Role of Law in Women's Human Rights Struggles' in Meckled-Garica, S. and Cali, B. (eds.) *The Legalisation of Human Rights: Multidisciplinary Perspectives* (Routledge, London 2006).

39 The distinction has been made between sceptical and affirmative postmodernists. While sceptical focus on the negative, affirmative postmodernists adopt less dogmatic, negative, ideological attitudes to the present and future. Not all socio-political action is decried, not all values rejected. Thus, affirmative postmodernism offers avenues for development. In addition, different legal postmodern theories differ in their views on utility of legal action; while Smart

conceptual tool for the political pursuit of women's equality and women's rights, but rather advocate its decentralisation and placement aside other crucial factors such as race, class, sexual orientation, age, etc. By doing so, they place the goal of achieving the 'freedom of all sexed beings' on the agenda of the feminist movement.⁴⁰

3.2. Incorporating feminist critiques: An inclusive approach to human rights

As the difference feminisms show, the universal human rights framework has to take sex/gender into account and recognise all particular instances of the violations of abstractly defined universal rights, even when they take different forms in respect to men and women. Difference is, after all, what all humans have in common. Moreover, difference, particularly sex/gender difference as a primary axis of social differentiation, significantly influences the position of power in the society and hence the frequency and form of human rights violation. Thus, the 'woman question' calls for re-conceptualising and re-interpreting human rights.⁴¹ Women's rights need to be incorporated into the universal human rights framework.

Universal human rights cannot be secured by merely employing the equal treatment strategy. While it is true that we all share common humanity, common human characteristics are developed differently in different human bodies under different external conditions and are given different meaning by different cultures.⁴² Both our commonality and difference define us equally as human beings wherefore, the theory of equality and human rights have to take these two features into account. Equal treatment strategy fails as it gives primacy to the abstract human commonality, neglecting the differences and power dynamics which are inherent in difference. Hence, the theory of inclusive human rights jurisprudence rejects this conceptualisation of equality. It also rejects the conceptualisation of equality as different treatment. Such a conceptualisation essentialises gender difference while, as a comparative approach, it does not challenge structural disadvantages attached to difference.

The concept of inclusive jurisprudence is based on the idea of equality as a challenge to disadvantage. Built upon the dominance theory of equality this approach is modified by critiques of its essentialism by the theory of intersectionality of discrimination. It examines whether the challenged measure perpetuates disadvantage of traditionally disadvantaged social groups. Likewise, by assessing such measures it investigates multiple and intersectional forms of discrimination taking the perspective of those affected by it into consideration. This

proposes decentralising law, Frug proposes legal strategies through re-construction.

40 D. Cornell (n. 33)

41 Asking the 'woman question' means looking beneath the surface of legal concepts and rules to identify the gender implications of rules and assumptions underlying them. KT Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829.

42 B. Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan, Basingstoke 2000).

conceptualisation of equality responds to the difference in a manner that respects difference (without essentialising it), but challenges (multiple and intersectional forms of) disadvantages attached to the differences.

In addition, the concept of inclusive human rights jurisprudence challenges the dichotomies between positive and negative freedom and positive and negative obligations. As cultural feminists note we cannot develop as human (social) beings by being left alone: 'what makes our autonomy possible is not separation but relationship.'⁴³ These relationships, however, must be free from violence, discrimination and other violations of personal autonomy, as emphasised by radical feminists in particular. Hence, in addition to negative obligations, the state should have positive obligations to render our freedoms more meaningful. This can be achieved by tackling the effects of different kinds of discrimination based on our personal characteristics and by promoting relationships between individuals that foster development of autonomy and freedom.

Human rights must also be protected in the private sphere. Not only is the public/private dichotomy false, it is also gendered as it makes violence against women invisible. Human beings live in both public and private spheres. Women have traditionally been assigned to the 'private sphere' of family which was perceived as being outside the reach of international human rights law, even when their private choices and the right of self-determination have been violated. The dichotomy hence needs to be re-conceptualised in a manner that challenges discrimination and violence in the private sphere, while protecting the right to self-determination and personal development (in both 'public' and 'private' spheres). Violence against women and violation of sexual and reproductive rights has to be incorporated into the human rights agenda.

Conclusion

Although the main premise of international human rights law is universality and the equal respect of rights of all human beings, women's human rights remain marginalised in practice. As analysed in this paper the reasons for under-inclusiveness lie in the gendered conceptualisation of the main theoretical concepts on which international human rights law is based and in the gendered framework of international law, i.e. in the public/private divide.

The international human rights law has traditionally operated on the idea of genderless disembodied persons of reasons operating in the public sphere. The main aim was to protect them against an overly zealous state encroaching upon the private sphere. International human rights law has started to recognise the relevance of (gender) difference and inequalities situated in the private sphere. What more, its boundaries are starting to shift and women's rights are becoming recognised as part of the universal human rights law. However, much remains to be done in order for the international human rights law to become truly inclusive.

43 Nedelsky.

The first step is to re-conceptualise the subject, equality and freedom in a manner that recognises gender difference and the disadvantages attached to it. This would result in shifting of the public/private divide so that violence against women, violations of reproductive rights and women's economic disadvantage would finally be placed on the human rights agenda and could not be justified by the 'private spheres' of culture, tradition or religion.

Summary

ADDRESSING THE SEX/GENDER DIFFERENCE: AN INCLUSIVE APPROACH TO HUMAN RIGHTS

Women's experiences of human rights abuse have long been marginalised in international human rights law. The main human rights concepts such as personhood, equality and freedom have been defined on the basis of the experiences of men. Likewise, the main framework of international law, i.e. the public/private divide has been defined in a gendered (masculine) manner. Thus, the ideal of universality of human rights has not yet been achieved.

This paper proposes a new approach to the interpretation of human rights with the view of resolving the problem of under-inclusiveness. Under the inclusive approach based on difference feminism theories, greater attention should be paid to the sex/gender difference, while efforts should be made to remove disadvantages attached to difference. Hence, the 'woman question' should be posed by re-conceptualising and re-interpreting human rights concepts, i.e. the subject, equality and freedom in a manner that recognises gender (and other) difference. Furthermore, the boundaries of the public/private divide would be shifted and gender-based violence, reproductive self-determination and women's economic disadvantage finally placed on the human rights agenda.

Key words: *Women's rights, freedom, equality, the public/private divide, woman's question, gender-based violence, reproductive freedom, women's economic disadvantage*

Zusammenfassung

SEX- UND GESCHLECHTSUNTERSCHIEDE ÜBERPRÜFT: INKLUSIVER ANSATZ ZU MENSCHENRECHTEN

Unterdrückung der Menschenrechte aus der Perspektive von Frauen wurde im Kontext der internationalen Menschenrechte lange marginalisiert. Darüber hinaus wurden die Grundbegriffe des Menschenrechts wie Persönlichkeit, Gleichheit und Freiheit aus der männlichen Perspektive definiert. Die Aufteilung des Völkerrechts auf privates und öffentliches wurde auch geschlechtsbewusst (maskulin) definiert. Deswegen ist das Ideal universaler Menschenrechte noch nicht erreicht worden.

In dieser Arbeit wird ein neuer Zugang zur Auslegung von Menschenrechten vorgeschlagen, mit der Absicht das Problem der Unterinklusivität zu beseitigen. Der auf der feministischen Unterschiedstheorie basierte inklusive Ansatz, fordert größere Achtung für die Geschlechtsunterschiede die eng mit anderen Identitätsmerkmalen verbunden sind, und fordert Bemühungen um die aus den Unterschieden ergebende

Nachteile zu beheben. Ferner, die sog. Frauenfrage setzt voraus, dass einige Grundbegriffe wie Gleichheit und Freiheit rekonzeptualisiert und neuinterpretiert werden, unter Anerkennung der Geschlechts- und anderer Unterschiede. Damit wären die Grenzen der Teilung öffentlich/privat geschoben um endlich geschlechtsbasierte Gewalt, reproduktive Selbstdeterminierung und ökonomische Position von Frauen an die Menschenrechtsagenda zu stellen

***Schlüsselwörter:** Frauenrechte, Freiheit, Gleichheit, Teilung öffentlich/privat, Frauenfrage, geschlechtsbasierte Gewalt, reproduktive Freiheit, ökonomische Position von Frauen*

Riassunto

RISOLUZIONE DELLA QUESTIONE DELLE DIVERSITA' CONNESSE AL SESSO/GENERE: APPROCCIO INCLUSIVO AI DIRITTI UMANI

Le esperienze delle donne sulla violazione dei diritti umani a lungo sono state poste ai margini nell'ambito internazionale di tutela dei diritti umani. Il concetto principale dei diritti umani – la personalità, l'eguaglianza e la libertà erano definiti in base a esperienze maschili, mentre il quadro del diritto internazionale – la suddivisione tra privato e pubblico, era concepito al maschile. I diritti umani, pertanto, non hanno ancora raggiunto un'ideale di universalità.

Questo articolo propone un approccio all'interpretazione dei diritti umani, il quale cerca di risolvere il problema dell'insufficiente partecipazione. L'approccio partecipativo, fondato sulle teorie femministe della diversità, pretende che l'attenzione venga dedicata alla differenza di sesso/genere, nell'intersezione con gli altri fattori di identificazione e che lotta contro le avversità che si legano alle differenze. Tale approccio richiede che nella concettualizzazione ed interpretazione dei diritti umani si ponga "la questione femminile". Il tutto risulterebbe con la riconcettualizzazione del soggetto, dell'eguaglianza e della libertà nel modo che permette di riconoscere anche le diversità di sesso. Ancora, cambierebbero i confini del privato e del pubblico in modo tale da porre nell'agenda dei diritti umani le questioni della violenza dovuta al genere di appartenenza, della libertà di riproduttiva e degli svantaggi economici femminili.

***Parole chiave:** Diritti delle donne, libertà, eguaglianza, suddivisione tra privato e pubblico, questione femminile, violenza dovuta al genere di appartenenza, libertà di riproduttiva, svantaggi economici femminili.*