

Review essay

Feminist reconstructions of universalism and the discourse of human rights

Gender, Culture and Human Rights: Reclaiming Universalism

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Reviewed by Jill Marshall

Lecturer in Law, Queen Mary, University of London

Introduction

In recent years, universal principles and, in turn, the universalistic discourse of human rights, have fallen under critical review by feminist scholars. This is part of a more general suspicion of a search for universalism and abstraction in law: feminist legal scholars have highlighted and critiqued the gendered dimension of such an approach.¹ Particular concepts fundamental to political, legal and social theory such as justice,² equality,³ freedom⁴ and rights⁵ have been under the spotlight to see if their structure leads to detrimental consequences for women. Criticisms of rights have taken a variety of forms with rights being seen as too individualistic, reinforcing existing power imbalances, failing to account for women's experiences and focusing too much on the public sphere.

Rights are too individualistic

A major aspect of the feminist critique of rights is the individual nature or individualism of rights. 'Rights' is a concept emanating from the Enlightenment, something which is accorded to the human being or subject who is a free agent, essentially rational.⁶ The holders of rights are traditionally said to be abstract individuals. Because individuals are rights holders or entitled to rights, the assumption is that these abstract, separate individuals are autonomous, self-determining, unencumbered, connected to others through choice; they are persons whose rights are asserted in competition with other rights and other rights holders.⁷ Such versions of rights have been said to encourage egoistic and competitive social motivations, based on implausible ideas of human beings

1 There are many such works, and from a great variety of perspectives; see for example Smart, 1989; Lacey, 1998; 2004; MacKinnon, 1989; 2005; Naffine, 1998; West, 1988.

2 See Okin, 1989; Young, 1990; Knop, 2004.

3 See Young, 1990; MacKinnon, 1989; 2005; Cooper, 2000.

4 See Hirschmann, 2003; Cornell, 1998; Marshall, 2005.

5 See Charlesworth, 1994; Charlesworth and Chinkin, 2000; Engle, 1992; Bunch, 1990; Lacey, 2004; Nussbaum, 1999.

6 See Lloyd, 1984; Naffine, 1998; Lacey, 2004; Marshall, 2005.

7 See in particular West, 1997.

as atomistic – Charles Taylor’s term to criticise the views of those who present humans as being separate from each other – alienated, isolated, ‘atoms’(Taylor, 1992). As such, it will be inevitable that one person’s rights will potentially clash with another’s. Many feminists have argued that balancing competing rights or working out which rights should prevail will inevitably lead to a marginalisation of women’s rights due to a devaluation of the feminine. They adopt cultural feminist arguments,⁸ or radical feminist arguments of structural patriarchy. So when the rights compete, women lose out. Indeed, it has been argued that particular rights, such as freedom of religion or the protection of the family, can justify the continued oppression of women.⁹

This abstract, competitive and egoistic view of what it means to be a person translates into the rights people are said to have but this version is said to ignore the social ‘nature’ of human beings. Arguments are made that the reality of social life is important in making a person who he or she is. It is important, in other words, in forging an individual person’s identity and in recognising or treating others as equals simply by virtue of the fact that he or she is him or herself (Marshall, 2009). The abstract view has been described as reflecting a negative conception of rights based on the right to be left alone; it prevents interference. This view is often compared to a positive conception of rights based on rights to be given certain things. Further, some feminists have argued that the focus on abstract, rational, isolated individuals as the basis of rights for human beings devalues the body. This devaluation is said to turn attention away from bodily-related differences among individuals like sex and gender. Instead people are regarded as indistinguishable and interchangeable in some way. By contrast, some feminists argue that what needs to be examined is the particularity, interdependence and co-operation amongst people rather than their so-called independence and self-sufficiency. Finally, an individualistic conception of rights has also been criticised by socialist or Marxist critics as perpetuating a particular bourgeois liberal worldview while presenting this conception as neutral and universal. In many ways, this criticism is similar to a criticism that ‘rights talk’ (Glendon, 1999) reinforces the status quo.

Rights reinforce existing power imbalances

Some feminists, particularly radical feminists, argue that the social structures in which rights operate are made to seem permanent and often ‘natural’. According to these arguments, such structural constraints are in fact contingent and changeable. Making people think they have rights therefore undermines the possibility of radical transformation of the structural constraints. According to this view, rights oversimplify and reinforce structural inequalities of power by protecting the most privileged. They are a creature of states and a function of existing configurations of power. As such, they are of limited use to the politically marginalised or for the construction of claims which oppose prevailing power relations. Thus, although rights seem to present humans as equal rights holders, because of inequalities of power already existing in societies, including gender-based ones, this presents an unrealistic, and indeed non-existent, equality.

Rights fail to take account of women’s experiences

It is argued that women’s experiences and concerns are not easily translatable into the discourse or language of rights which lends itself to male lives and is based on men’s experiences. The fact that there has been, and continues to be, a lack of women in international legal institutions has been highlighted as another reason why women’s experiences are obscured (Charlesworth and Chinkin,

8 See Gilligan, 1982; West, 1988; 1997.

9 See, for example, Okin, 1999.

2000). More foundationally problematic is the argument that as rights discourse emanated from men, it is arguably based on a male human being. It is therefore inevitable that many will see rights as male-biased. Recently, Catharine MacKinnon has succinctly summarised this whole position as follows:

'The contractarian liberals, building on Greek and Roman antecedents, opposed medieval status notions that assigned human value within a rigid hierarchy based on birth. Seeking to secure human freedom against state tyranny, they posited the radical notion that each person, qua human, had, meaning had by nature, irrevocable and equal entitlements to life, liberty, security, dignity, property, and so on. Through the American and French revolutions, this idea of inalienable human worth called individual rights was entrenched, checking organised power in the form of government. Subsequently, some transnational agreements further elevated and enshrined the same recognitions as binding among state parties . . .

Largely beneath notice in this tradition has been the status of women as such, socially subordinated to men and excluded or ignored, marginalized or subjected by state policy. Women's enforced inequality has been a reality on which all these systems are materially predicated so seamlessly it has been invisible.' (MacKinnon, 2006, p. 149)

Rights focus on the public sphere and not the private

The division between the public world, described as being traditionally male, rational, unemotional, objective, and the private world, correspondingly traditionally female, domestic, emotional, subjective, has meant that international law and human rights law are very much seen to be operating in the public (male) arena, not the private (female) one.¹⁰ So in the international arena, the traditional domain of 'rights talk' has focused on what states are doing in terms of violating their citizens' human rights in the public sphere. In this domain women are disadvantaged because many violations of their rights, particularly those that only, or usually only, happen to women, are invisible because they happen outside the public sphere where there are fewer men to compare them with. As this arena is not traditionally one in which human rights law operates, it usually prevents the abuses that occur there from even being described as human rights issues.

Yet, despite all these criticisms of the discourse of rights, of the efficacy for women of international human rights law and universal principles, most feminists continue to hold onto some conception of law being used as a tool to improve women's daily lives. In *Gender, Culture and Human Rights: Reclaiming Universalism*, part of Hart Publishing's Human Rights in Perspective series, Siobhan Mullally investigates whether, and if so how, a reconciliation of feminism and the universalistic discourse of human rights can be achieved. In this book, she 'begins to explore the implications that discourse ethics might have for our understanding of human rights. It attempts to explore how and whether discourse ethics can inform our thinking about human rights, and, in doing so, reconcile feminism and the global feminist project with the universalistic discourse of human rights' (p. 220).

The virtues and power of rights for women

Mullally's book is part of a growing feminist literature which is sympathetic to the discourse of human rights if it can be used to women's advantage. In terms of this band of literature generally, arguments are presented that, in spite of its faults, there is virtue and power in using 'rights talk'.

¹⁰ See Romany, 1994; Charlesworth and Chinkin, 2000.

Accordingly, the concept of rights is seen by many feminists to have value and could be described as feminists seeking a fuller realisation of what it means to be human and to ensure that women are accorded full humanity including through the use of human rights law (MacKinnon, 2006; Marshall, 2005).

In ten substantive chapters, Mullally convincingly argues that there is much of value in a universalistic human rights approach for feminism. Her approach builds on Seyla Benhabib's Habermasian discourse ethics theory, claiming that its intersubjective approach and critical insights offer feminism a way of redefining universalism and with it the discourse of human rights (p. xxxiii).

Why discourse ethics? Mullally claims that it assists in the process of reconstruction, appealing to universal norms while also supporting immanent critiques within religious communities (p. xli). The book focuses in particular on religious and cultural difference claims and on the challenges posed to feminism in responding to such claims (pp. xxxiii–xxxiv). Mullally's position is that the institutions and procedures necessary to ensure a flourishing of difference require a universalistic framework if their claims are to be sustained (p. xxxv). Human rights is internally linked to democracy: fully realising this could address the criticisms raised by difference feminisms and assist in negotiating the many conflicting cultural claims that limit the pursuit of a global feminist agenda (p. xlv).

Mullally's helpful structure begins by setting out, in a pleasing writing style, the feminist critiques of law and human rights. She gives us an interesting analysis of the well-trodden, often repetitive, feminist critiques and intersects them with human rights law. In keeping with a relocation of rights as social, she explains that '[t]hough feminism can and must recognise the location of the human self within networks of relationships, without a commitment to the overriding priority of individual autonomy, feminism loses its critical potential' (p. 9). In this she shares Nussbaum's and other liberal feminists' concerns about post-structuralism – '[t]he de-centred subject, lacking in autonomy or in any kind of identity, is unlikely to be an effective agent of social transformation' (p. 20). She demonstrates this criticism in contrast to what she calls Iris Marion Young's presumption that a free floating pluralism would not permit such behaviour as racism or homophobia. To make this claim clearly, says Mullally, requires a reference to principles that can claim a universal validity (p. 21). The alternatives to individual autonomy, universalism and human rights do not provide the resources necessary to build a truly global feminism to address discrimination and inequality (p. 25). Optimistically, Mullally argues that the human self can be defined differently and that universalist moral theory does not have to rely on essentialist definitions of the human self (p. 24).

There are helpful explanatory chapters on the theories of Alan Gewirth, John Rawls, Martha Nussbaum and Seyla Benhabib. These show that, despite their promise and quality, the first two theories fail to incorporate or allow for the full import of a feminist rethinking of liberal political theory and of human rights principles. This is largely a result of the reasoning methods used: Gewirth fails to be intersubjective, to acknowledge difference and the need for public discussion and participation in decision-making processes (p. 38). Meanwhile, 'Rawls's idea of an overlapping consensus is too parasitic on existing practice to be transformative' (p. 44). This leads Mullally to conclude that '[b]y limiting the scope of political liberalism, Rawls hopes to placate communitarian critics. He ends, however, by pleasing no-one' (p. 48). Mullally, in contrast, argues that:

'Only an inter-subjective concept of reason and a relational understanding of human rights . . . can ensure a just and inclusive distribution of such benefits and burdens. And, only if we ensure such a just and inclusive distribution, can we reconcile feminism and the universalistic discourse of rights.' (p. 39)

Favouring Benhabib's goal of arriving at 'just multicultural arrangements to create a sense of belonging for diverse communities and to demand the inclusion of the "other"', Mullally moves on to explore the implications of discourse ethics for the reservations system in international treaty

law and the impact of this in relation to the integrity of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

In her final three chapters, Mullally applies the discourse ethics framework in an analysis of the human rights of women in Ireland, Pakistan and India. These countries were chosen as they share common constitutional traditions and each resisted the application of human rights norms to the domestic sphere with particular repercussions for reproductive rights and relations within the family (p. 115).

In Ireland, Mullally claims that '[d]rawing on the critiques put forward by the Vatican and its allies, Christian right groups in Ireland have rejected human rights discourse as impoverished, libertarian and peculiarly western. In doing so, they have exposed the dangers to feminism of yielding to communitarian and cultural claims' (p. 155). Through reference to family and reproductive laws, Mullally argues that feminist voices were silenced: negotiating between claims of constitutional principles and the Roman Catholic religious arguments in the Republic of Ireland requires a normative framework which defines the limits of reasonable pluralism using the core principles of universal respect and egalitarian reciprocity as parameters. It is only within such a universalistic framework that there is space, says Mullally, for the 'other' and for differences within the polity (p. 159).

In similarly structured chapters on Pakistan and India, Mullally's analysis provides fascinating insight into the tension between communitarian and democratic equality demands. She explains that using a discourse ethics framework will not put multicultural arrangements in opposition to gender equality and feminism, but that such arrangements nonetheless must be just. If feminism is to realise its transformative potential those tests of justice must extend to domains labelled as public or private (p. 195). So she argues that reconciling feminism and the politics of multiculturalism requires a universalistic framework to secure both gender equality and a flourishing of difference.

Whilst Mullally's conclusions and the links between discourse ethics and the practical examples could have been made stronger, this section of the book provides concrete application of the theory and practice of the human rights of women and links well with the rest of the book. As such, the book succeeds in its goal of being 'a step that resituates feminism within the discourse of human rights, properly understood' (p. 224). It contributes significantly to highlighting with suspicion 'the growing gap between feminist theory and practice' (p. 223).

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