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Kathmandu School of Law (KSL)

Dadhikot-9, Bhaktapur, Nepal, Ph: 6634455, 6634663,

Email: info@ksL.edu.np, www.ksL.edu.np

Gender, Culture and Human Rights: The Tensions and Possibilities of Resolving Them

Tracie Lea Scott¹

This paper will argue that while the basic principles enshrined in international human rights conventions appear fairly straightforward, implementing human rights for women within different cultures requires a deeper analysis of cultural norms in order to address violations. Indeed, a more thoughtful and culturally sensitive analysis is required to ensure that one is identifying human rights violations in a way that recognizes the right of women to live their lives across a range of cultural choices. It will be argued that an analysis of agency is an important tool for understanding how to recognize and implement human rights regimes across the globe. Further, it will be argued that to develop a culture of human rights a positive step in the recognition of women's right to decide, to be protected against persecution for making decisions that lie within a reasonable range of human cultural activity, and to have appropriate government programs to redress violations in a manner that rebuilds human dignity.

Introduction

Human rights declarations attest to the highest aspirations for human social, cultural and economic realisation. They are evidence of the highest ideals, and most admirable goals for the prosperity and dignity of all human beings. The actualization of these rights, however, is woven into the complex tapestry of cultural differences across the planet. It has been repeatedly argued that human rights are tainted by western ideology such that they are even accused of being a weapon for western imperialism.² It has been pointed out that the liberal framework of human rights documents is unfit to be applied to non-western

¹ Dr. Tracie Lea Scott, Prepared for the International Seminar on Redressal to Female Victims – Human Rights and Constitutional Perspectives, Kannur University, School of Legal Studies, Thalassery Campus March 8, 9, 10th 2013

² See, for example P.R. Stearns, *Human Rights in World History* (Routledge 2012).

cultures and is not appropriate for other cultural value systems. In this paper, it is argued that by using the concept of agency, we may find a mechanism to examine some of the cultural tensions that pervade human rights debates in relation in particular to the rights of women. Indeed, it will be argued that through the analysis of agency we can posit some basic propositions that may guide the implementation of human rights for women in different cultural and social systems.

Before discussing the heady terms above that are all laden with multiple meanings and overborne by contested debates, it is important to provide an example that will illustrate the importance of this discussion. The debates in several countries around women wearing garments that cover their hair and face are very interesting. There are a variety of names for these garments – *Shayla*, *Hijab*, *Niqab*, *Burka* amongst others. Particularly in the western world there is a discomfort associated with the notion that women are required to wear such garments. Yasmin Alibhai-Brown, for example, a Shia Muslim herself has spoken against this tradition as a denial of women’s humanity.³ France has banned the *burqa*. A political scandal erupted in the UK when Jack Straw publicly noted his preference for women to remove their face covering while in a meeting with him.⁴ This was followed by calls from conservative newspapers to ban the veil in the UK. In Canada the province of Quebec has banned the *niqab* for women seeking some government services, requiring women to uncover their faces.⁵ From these debates some very different views on women’s garments emerge. On one side of the spectrum people argue that the requirement that women wear a veil or headscarf is a violation of a woman’s human rights. As Brown argues, ‘we communicate with each other with our faces. To deny that interaction is to deny our shared humanity.’⁶ The *burqa* and *niqab* are therefore manifest illustrations of women’s subjugation and enslavement. On the other hand it is argued that to deny a woman the right to wear garments that reflect her beliefs is a human rights violation. The Universal Declaration of Human Rights guarantees freedom of religion.⁷ Indeed, if a woman views her garments as a requirement of her truly held religious belief, banning her from seeking government services, for example,

³ Y. Alibhai-Brown, ‘Wearing the burqa is neither Islamic nor socially acceptable’ <<http://www.independent.co.uk/voices/commentators/yasmin-alibhai-brown/yasmin-alibhaibrown-wearing-the-burqa-is-neither-islamic-nor-socially-acceptable-1743375.html>> accessed December 2012.

⁴ ‘Remove full veils urges Straw’ *BBC* (6 October 2006) <http://news.bbc.co.uk/2/hi/uk_news/5411954.stm> accessed December 2012.

⁵ ‘Quebec bans niqab from government services’ *TheStar* (Canada 24 March 2010) <http://www.thestar.com/news/canada/2010/03/24/quebec_bans_niqab_from_government_services.html> accessed December 2012.

⁶ Brown (n 3).

⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 18.

is a grave violation. Author propose that through using an agency analysis there is a way out of this intractable problem that leads to some basic principles that may be helpful for actualizing women's human rights in a complicated cultural world.

Human Rights v. Civil Liberties

Human rights, as we now know it, is a doctrine affirmed by the United Nations in 1945 in the Universal Declaration of Human Rights. It is this document that is the cornerstone of modern human rights practice. Many concepts in this document, however, are not new inventions. The right to life, liberty and security of the person appears in many national constitutional documents that predate the human rights paradigm. The right for equal protection of the law is an idea that has echoed throughout history. Protection from arbitrary arrest and detention has been a formative right in the foundation of modern western democracy. These rights are generally considered to be 'civil liberties'. Civil liberties are rights and protections that ensure the state does not unlawfully interfere with people. It is a freedom from the tyranny of the government. It does not impose positive obligations on the government to ensure any minimum level of human dignity or achievement, just the promise that they will not interfere with whatever level of existence their citizens are enjoying. As Anatole France so famously observed, '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'⁸

Justice Rosalie Abella, now of the Supreme Court in Canada, has argued that an understanding of human rights and the realisation of its full potential is dependent upon untangling human rights from the more familiar and institutionally recognized mechanism of civil liberties. She argues that human rights are not limited to protection of the state, but should be understood as also providing positive obligations to help marginalized groups to fully achieve their potential. Talking from the Canadian experience, she reflects on how the positive promise of human rights has been experienced in North America:

The underlying concept of human rights—that no arbitrary barrier should be allowed to stand between a person and his or her aspiration—is not, it seems to me, a refutable proposition. One would not have expected that the pursuit of the elimination of discrimination, the heart of social justice, could ever trigger serious rebuttal. What, after all, is the argument against equality? Inequality? Yet controversy

⁸ See A. France, *Le Lys Rouge* (trs: The Red Lily) (Maison Maraxin 1894).

swirls intensely all around the diversity stage, and in creating so much protection for social pluralism, we have also created a backlash.⁹

Having witnessed the dazzling success of so many individuals in so many of the groups we had previously excluded, we seem to have concluded that the battle with discrimination has been won and that we can, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted, and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades to demonstrate gay and lesbian pride; having constructed hundreds of ramps for persons with disabilities; and having invited Aboriginal people to participate in constitutional discussions that we had started to protect other distinct cultures, many were no longer persuaded that the diversity theory of rights was still relevant, and sought to return to the simpler rights theory in which everyone was treated the same. We became nostalgic for the conformity of the civil liberties approach, and frightened by the way human rights had dramatically altered every institution in society, from the family to the legislature.¹⁰

And this is at the heart of why we are marginalizing human rights, because unlike civil liberties, which rearrange no social relationships and only protect our political ones, human rights are a direct assault on the *status quo*. They are inherently about change—in how we treat each other, not just in how government treats each of us.¹¹

Abella therefore highlights that the true power of human rights is its promise to change the social order to provide opportunities for marginalized groups who were previously excluded. This is a promise for women, as she notes, to join fully into political, social and economic life. She believes that human rights opened the door for women to succeed in North American society in careers and education.

Going back to the example discussed earlier, however, is this, the promise that is going to lead the way to all women regardless of their cultural backgrounds to achieve their full potential. Indeed, how can we even say in the diversity of woman-kind what that full potential should be. Is competing in the professional and business world with men the goal that all women should aspire to? Are we assuming that it is impossible that there is a happily married

⁹ Rosalie Silverman Abella, 'A Generation of Human Rights: Looking Back to the Future' (1998) 36(3) Osgoode Hall Law Journal 597, 606.

¹⁰ Ibid.

¹¹ Ibid 597.

woman in Saudi Arabia with several children who wants to wear her religious garments and to leave the financial affairs – and the driving – to her husband and staff? It is here where we see the real issues that emerge when talking about human rights. There are conflicting visions of what a world where human rights have been fully actualized would look like. In one vision the world would be populated with women whose faces are all fully visible, in another more diverse version individuals are wearing the garments they believe are a part of their cultural heritage and religious observance. The question of supporting human rights for women is therefore a difficult one – should governments be protecting women’s humanity by banning the veil, or should they be protecting a women’s right to wear one?

Culture, Gender, Agency and Human Rights

The issue of the veil discussed above is a representative of the greater challenge we face when discussing the implementation of human rights. This is the question of culture. While the veil is certainly an issue related to religious belief, it is also intimately tied with the larger construct of culture that encompasses all aspects of a society – family structure, economic models, and ceremonial life. Drawing from the work of Will Kymlicka on multiculturalism, he defines culture as societal culture stating ‘a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.’¹² Religious practice can therefore be seen one element of a societal culture.

Gender roles are also bound up in societal culture. The possible paths that the life of a woman will take are ultimately circumscribed by gender roles created by a culture. This operates on a very practical level – are girls getting access to education and subsequent professional opportunities? This also operates on a theoretical level. As Butler explains, according to the theory of power and the constitution of the self:

Foucault points out that juridical system of power *produce* the subjects they subsequently come to represent. Juridical notions of power appear to regulate political life in purely negative terms—that is, through the limitation, prohibition, regulation, control, and even “protection” of individuals related to the political structure through the contingent and retractable operation of choice. But the subjects regulated in such structures are, by virtue of being subjected to them, formed, defined,

¹² W. Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995) 76.

and reproduced in accordance with the requirements of those structures. If this analysis is right, then the juridical formation of language and politics that represents women as ‘the subject’ of feminism is itself a discursive formation and effect of a given version of representational politics. And the feminist subject turns out to be discursively constituted by the political system that is supposed to facilitate its emancipation. This becomes politically problematic if that system can be shown to produce gendered subjects along a differential axis of domination or to produce subjects who are presumed to be masculine. In such cases, an uncritical appeal to such a system for the emancipation of “women” will be clearly self-defeating.¹³

The thought is that, since being a woman is constructed and regulated by the social world, the politics from within that system striving to ‘emancipate’ women, to use Butler’s words, can never effect any change. It is, in rather basic terms the old argument about whether one cannot tear down the master’s house with the master’s tools. We are therefore left with an interesting problem – how does one make any choices that are not already presupposed by the culture that they inhabit? If a woman’s identity is constructed and regulated by her culture then are her choices genuine acts of agency or is agency merely a façade.

If we take the notion of the constructed subject to its limits, however, it becomes obvious that even if identity and choices cannot be entirely constrained. If they were to use Bhabha’s phase, how would newness come into the world. Judith Butler argued in *Gender Trouble*, that it is the performative action of being:

As a process, signification harbors within itself what the epistemological discourse refers to as ‘agency.’ The rules that govern intelligible identity, i.e., that enable and restrict the intelligible assertion of an ‘I’, rules that are partially structures along matrices of gender hierarchy and compulsory heterosexuality, operate through *repetition*. Indeed, when the subject is said to be constituted, that means simply that the subject is a consequence of certain rule-governed discourses that govern the intelligible invocation of identity. The subject is not *determined* by the rules through which it is generated because signification is *not a founding act, but rather a regulated process of repetition* that both conceals itself and enforces its rules precisely through the production of substantializing effects. In a sense, all signification takes the place

¹³ J. Butler, *Gender Trouble* (Routledge 2007) 2-3.

within the orbit of the compulsion to repeat; ‘agency’ then, is to be located within the possibility of a variation on that repetition. If the rules governing signification not only restrict, but enable the assertion of alternative domains of cultural intelligibility, i.e. new possibilities for gender that contest the rigid codes of hierarchical binarisms, then it is only within the practices of repetitive signifying that a subversion of identity becomes possible. The injunction *to be* a given gender produces necessarily failures, a variety of incoherent configurations that in their multiplicity exceed and defy the injunction by which they are generated. Further, the very injunction to be a given gender takes place through discursive routes: to be a good mother, to be a heterosexually desirable object, to be a fit worker, in sum, to signify a multiplicity of guarantees in response to a vergence of different demands at once. The coexistence or convergence of such discursive injunctions produces the possibility of a complex reconfiguration and deployment; it is not transcendental subjects who enables action in the midst of such a convergence. There is no self that is prior to its entrance into this conflicted cultural field. There is only a taking up of the tools where they lie, where the very “taking up” is enabled by the tool lying there.¹⁴

Butler here argues that even though we as individuals are formed by our cultural context, within that cultural context there are multiple roles that one plays. In meeting the demands of these roles, and by participating within these cultural formations there is the possibility for something to emerge, a reconfiguration, that is different than the one that came before. I think this is particularly relevant in the modern world where there are few places in the world that have not been touched by globalization. The internet, the mobile phone, and increased mobility across the planet have provided a cacophony of discursive formulations that increase the rapidity of cultural change. It is therefore by being in the world that we change it. Agency is therefore not simply just possible, but inevitable.

The promise of human rights is therefore a commitment to the flourishing of the human as they act upon our world. Human rights stand for the protection of the individual from state interference with the qualities that make us human, our ability to act in the world – our agency. This may sound like the same old liberal motto – the primacy of the individual and her freedoms. It is argued that it is not, however, because the model of agency presupposed here is one that emerges from community, from discourse, and from culture. It is the ability to act in relation to our families, communities, and nations.

¹⁴ Ibid 198-199.

The Right to Decide

In the previous section it was argued that being human means the ability to act within our world. It was argued that human rights, first and foremost, stands for the protection of this one idea. As a result of this analysis it is proposed that the first priority of human rights should be to foster an individual's right to be an agent – the right to decide.

Now this paper will be the first one to recognize that there are a wealth of barriers in the world that forestall a woman's right to decide. Economic circumstances, family ties, personal characteristics, and simply the feasibility of certain paths. The world in its current form is not egalitarian, and while it is not impossible for a rural girl from Congo to become a lawyer or a doctor, it certainly presents great challenges. Indeed, there are many areas of the world where the availability of food poses great challenges, and the paper does not want to minimize the importance of these struggles. What it wants is to argue that if we focus on giving women the right to decide as a goal then it becomes rather clear what the role of human rights is. For the girl in Congo, human rights must foster a safe, healthy and secure society in which she can attend an educational institution. For women who want to wear a veil, it is fostering a society where she is not disadvantaged by her choice of garment. Reciprocally, if a woman is being forced to wear a veil by an abusive partner, it is the role of human rights to ensure she has the ability to make her own choices.

The Right to Protection from Persecution for Choices

The ability to be an agent in the world, and make choices is only the first step. Recent events in Egypt have shown that in order for women to have meaningful agency, there must also be protection from persecution for their choices. Women who chose to participate in the protests were decreed as inciting their own sexual assaults. These women chose to participate in a political movement – they were not only not denied protection from violence as a result -but blamed for it.¹⁵ This is not to say that governments do not have legitimate rights to control protests, legitimizing sexual violence against

¹⁵ For example, one article explains that women in Egypt came out into struggle even before the revolution broke out and were present and active in it at every stage, fighting like men, for a change in their social and economic conditions. Masses of women came out in the revolution and showed heroic courage in the face of militias, thugs, repressive security and other reactionary forces. Revolutionary women in Egypt have been tortured and killed in the fight against repression and for emancipation. Sexual violence and sex attacks on women demonstrators in Egypt have been increasingly reported in the last few weeks and months. During the week of the second anniversary of 25th January, over 20 reports were made about women being sexually harassed and raped in Tahrir Square in the middle of mass protests. 'Egypt: two years on from the revolution, what is the way forward for women's struggle for liberation?' (Socialist South Africa, 15 March 2013) <<http://www.socialistsouthafrica.co.za>> accessed 1 May 2013.

women is not however a legitimate response. Similarly, if a woman is in an abusive relationship and the veil is being used as an instrument of her oppression, then that woman should have reach to the law to protect her choice. It is therefore the role of the state, and the law to ensure that women get equal protection under the law, even if her choices are not ones supported by her family or community.

Rebuilding Dignity, Concluding Thoughts

Justice Rosalie Abella is firm in her belief that human rights are about implementing social change. Human rights are an ideal that should reshape our world, and bring us closer to a community where people are ‘born free and equal in dignity and rights... endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’¹⁶ Across the globe, from Ohio to Shanghai, Yellowknife to Calcutta to Nepal¹⁷, women are victims of violence that offend their basic claim to human dignity. The social changes necessarily also arise from the basic human need to be agents in the world. Violence robs people of this fundamental safety and changes the world into a dark and dangerous place where any simple act of agency can lead to victimization. Therefore the final imperative is for society to recognize the need for positive steps to rebuild the ability for individuals to live in the world with a guarantee of safety. Jason Beckett has recently written an article arguing that the seeming global epidemic of violence against women arises from the systemic dehumanization of women in everything from pop videos to political discourse.¹⁸

It seems then, that the very simple answer that seems so impossible to achieve is the treatment of women, and everyone else for that matter, as humans worthy of dignity and respect. This is not an easy task in a culturally diverse world, but also not as far from being impossibility.

¹⁶ UDHR(n 7) art 1.

¹⁷ Rabina Kumari Nepali, 14, stands apart from her family in front of the *chaupadi goth* a squat hut where she sleeps during her period. Women in this region are considered unclean while they are menstruating and must live apart from their families during those days. They find shelter in similar huts, caves or out in the open. *Chaupadi* the practice of secluding women during menstruation is a form of violence against women simply based on sexuality. See Allyn Gaeste ‘Nepal: Chaupadi Culture and Violence against Women’ (PulitzerCenter, 5 February 2013) <<http://pulitzercenter.org/projects/nepal-cultural-practice-women-rights-sexual-violence-chaupadi-migration-WHO>> accessed 1 May 2013.

¹⁸ J. Beckett, ‘Dehumanisation and the Systemic Perpetuation of Rape’ <<http://criticallegalthinking.com/2013/02/26/dehumanisation-and-the-systemic-perpetuation-of-rape>> accessed on December 2012