

FEMINIST PERSPECTIVE OF INTERNATIONAL LAW AND ITS EFFECT ON INTERNATIONAL COURTS AND TRIBUNALS

Misbah Sabohi, Prince Sultan University
Saghir Maher, Prince Sultan University
Shafiqul Hassan Prince Sultan University

ABSTRACT

The male-dominated international community has heavily influenced the system of international lawmaking. In response to less participation of women in the international law making the law has become one-sided and the provisions of human rights tend to tilt in favor of male gender. The influence has been enormous and quite noticeable in international law. The gender approach of international law has also seen a drastic change in its approach towards addressing problems relating to situations of the female gender. While theoretically, the international tribunals tend to stay neutral in their approaches towards a solution for problems the reality is otherwise. They get influenced by the hermeneutics of male-dominated language and approaches. This article applies exploratory methods to understand how much impact does feminism has on international courts and tribunals. It will explore the idea of existence and changing of norms and the representation of women in international courts and tribunals.

Keywords: International Law, Feminist Approach, Feminism, International Tribunals, Language of Law.

INTRODUCTION

Not more and not less it is the equation that we are fighting for is the “*slogan*” which one might hear the feminist speaking of. The voice has gained momentum in the last century and has reached out to millions. Forcing the male dominance to realize the meaning of equal human opportunities. Resultantly, the formation of Platforms and declarations of UN that led nations to rethink over their laws and policies. The influence has been enormous and quite noticeable in international law as well in many ways. The gender approach of international law has also seen a drastic change in its approach towards addressing problems relating to situations of the female gender. The international courts and tribunals though acknowledge the feministic needs and accept the equality of genders, but the influence is not that strong as many may say. This article would explore how much impact does feminism has on international courts and tribunals. This article would also try briefly to explore some issues of the feminist perspective of international law and what exactly they are.

The human rights laws are mostly considered as the birth of post-World War II era. Though one might consider it otherwise these rules or laws came successively in sequence and in generations. The first-generation rights are the civil and political rights (Cook, 2012). The

second-generation rights are the economic, social and cultural rights, and the third would be considered as group rights of people. These generation-based rights have become the developing stages of human rights laws. The interesting factor here is that these stages have seen their rise within the United Nations system and hence is the outcome of the understanding of some nations, which can be considered as more influential in the international community. Where does the gender of “*woman*” stand amidst all this is yet a question which has seen much controversy amongst jurists. The male-dominated international community has heavily influenced the system of international lawmaking (Charlesworth & Chinkin, 2000). In response to less participation of women in the international law making the law has become one-sided and the provisions of human rights that are in the law are from the male prism.

RESEARCH METHODOLOGY

The legislation, the law-making process and the language of law has been hugely influenced by male domination (Charlesworth & Chinkin, 2000). This article is using qualitative research methods to explore whether there is exists bias in the international organizations with respect to a woman’s place. In order to explore an answer this research conducts a case study where different legislative instruments and document are reviewed in context of female involvement in international organizations. Authors like Saksena (2007) and Charlesworth & Chinkin (2000) are of the view that gender based bias has affected the norm development in international law institutions too like United Nations Organization or International court and tribunals (Herman, 1993). The case study of Professor Christine Cleiren and Judge Hanne Sophie Greve will explore the bare rules available, it understands in law and how does it have any impact on female participants in international organisations. Through the review of some international documents like UNO resolutions or treaty court drafts that makeup the international organizations, the study goes into the reasons behind the current state of affairs whether that be less participations of women in law making process or any other influences.

RESULTS

International Law and Feminist Perspective

As Janice Richardson quotes from *Sexing the subject of law* (Richardson, 2017).

“This Book reflects a central concern of modern social theory, which is the nature of identity. What does it mean to be a human subject or self? What is the nature of (Legal) personhood? The Legal person, or legal subject, plays an absolutely critical role in law. The attributes accorded by law to its subject serve to justify and rationalise Law’s very form and priorities. If Feminist are to change law, then, it is vital that they deal with the implicit as well as explicit sexing of the legal person”.

The international law is mostly closed in its boundaries as many jurists suggest. Boundaries like Jurisdiction, legal and territory have hugely occupied the books of international law, and in putting itself in these boundaries, it has also put feminist approach and theories of international law at a far corner (Charlesworth & Chinkin, 2000). The perspective of female international law is quite wide as to its definition and also comprises of many schools of thoughts

as well. It can be said that two things are of importance with respect of International courts and tribunals.

1. The norm development of international law concerning the feminist perspective.
2. The development of the representation system in international courts for the females.

These two issues would be the subject of this article considering that these two are important factors for looking into impacts on international courts while considering the feminist perspective.

Norms Development and International Courts

Some jurists believe that the condition of female society can be improved by the change in norms of international law and the language in which it has been produced so far. (Amongst number of jurists Hillary Charlesworth and Christine Chinkin are the more famous who believe that norms can make the difference in international law and then the organs of international law). The change in norms means to change the existing laws which had been developed throughout the time being influenced by the male-dominated society. This domination has created an international law which looks at feminist society from their angle and believes the human rights are the once that male society determines. Hillary Charlsworth also believes that this situation has led to the law that is still at the Grotian stage (the seventeenth-century renowned jurist). This male-dominated development also gave rise to a male-dominated law of treaties. It is important to mention treaties here as the international relations and law both depend a lot if not all on treaties for its creation. The creation of the United Nations Organization itself can also be seen as the result of treaties or understanding amongst nations (Charter of The United Nations, 1945). Also the organs of the UNO such as to be mentioning like International Court of Justice (ICJ) are the creation of some understanding amongst nations. Therefore, the ultimate effect of the male-dominated norms goes down into the organs and specifically speaking goes down to the international judicial system of the UN. Same is the case of International Criminal Court (Rome Statute of the International Criminal Court, 1998), European Court of Human Rights (ECHR) and numerous other tribunals that can be known as international. The feminist jurists have done their best to contribute to the norm- development of international law and worked hard to change the male-dominated system to equal. Some of the contributions made my feminist jurists in their perspective are in CEDAW (The term stands for the international Convention on Elimination of All Forms of Discrimination against Women.)

CEDAW is primarily responsible for monitoring the states over their compliance of the convention that is now famous as "*Women's Convention*". The convention has also seen problems for states not signing or ratifying the convention due to the religious or cultural situation. States also tend to opt out of some clauses due to their reasons of sovereignty (Libya expressed reservation to CEDAW in 2010). USA, Iran, Sudan, Somalia, Tonga are not even signatories to CEDAW (While a lot is being done in USA it is not a signatory to the Convention puts the efforts of numerous Women rights advocates at risk.) The convention is also under-budgeted as compared to the other treaty based human right bodies. Despite a well-known phenomenon the discrimination is an endemic against women (Saksena, 2007). USA has a fear

that it might undermine its national sovereignty (Saksena, 2007). This matter was taken up at a subcommittee hearing of the United States, Senate, Committee on the Judiciary, Subcommittee on Human Rights and the Law (Steven, 2012). These facts in support were given by Congressional Research service at the very beginning as well (Service, 1999). It was argued that the CEDAW was consistent with US laws and did not pose any sovereignty issue. Another small nation that has yet to ratify the CEDAW is Tonga. Helen refers to it as gender politics in Tonga (Lee, 2017). There was a move to ratify CEDAW in Tonga in 2006 which got quashed in 2009 when the parliament decided not to ratify it. The reason being the right to throne of Tonga for male (Lee, 2017).

CEDAW is one of the most significant documents produced for the Protection of Human rights (Ulrich, 2000). Evatt believes that several conventions such as International Convention of Civil and Political Rights, International Convention on Economic Social and Cultural Rights and many others, failed to fully protect the rights of women (Evatt, 2002). This ultimately produced CEDAW, yet there are many points that still have implication problems for this conventions (Mullins, 2018). One being its weak enforcement mechanism of applying its clauses on its members. There are times when rights of individuals are affected or violated under the convention but they by rules cannot make inter-state complaints or petition. There is a requirement for the victims to first ensure that they have approached, exhausted all local state remedies for the problem before UN forum can be contacted. This is self defeating because it delays remedy.

The system of United Nations Organization as well as the International Court of Justice and other tribunals absolutely acknowledge the principle of equal opportunities and no distinction of gender. The norm is well founded in the instruments of international law. E.g. The Vienna World Conference on Human rights held in 1993 strongly urged the mainstream issues of women to be addressed and included with in the UNO system (UN Doc. A/CONF.49/668 of 25 June 1993)¹. These instruments along with number of other instruments have influenced international courts and tribunals. The effect however calls for a more efforts into legislation and the acceptance or ratification of the legislation by majority of nations.

At this point, let us discuss the actual effects of feminist perspective on international courts and tribunals. Even though the principle of non-discrimination is well enshrined in the principles of these tribunals yet there is a very sensitive line which puts the perspective of feminist principles of international law to the other end of general international law. This line is the state representation, meaning there by that the states are the only actors in most of the international tribunals and courts (The very close example of this would be International Court of Justice). There are regional tribunals and courts which accept petitions of individuals, for example the European Court of Human Rights (ECHR) While there are courts and tribunals that can entertain individuals with specific problem the biggest hindrances in most of these tribunals is the duty to seek local remedy. So, in most of the cases the feminist approach of international law stays in local courts of the states from where it is trying to free itself out. The solution for that is to create actual universal norms that would ensure equal rights for male and female alike. CEDAW does provide at least a starting point. While looking at the state of International Court of Justice (ICJ) it is also important to mention that it also puts itself in restrictions of not entertaining the third-party intervention. This enables the state in a non-action position when it wants to pursue the rights of women against the states, which violate it. The problems in

international law have always created loopholes for the states to carry on with their violations of women rights. The perspective of feminist-based international law is very correct to counter the very norms of international law that asks for the language of the law to be gender free. Looking at the Rome Statute of International Criminal Court (ICC) at a glance gives a good idea of the fact that the feminist perspective of international law in putting efforts in to changing norms is a right step. For example the Article 6 of the statute mentions:

“For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- 1. Killing members of the group.*
- 2. Causing serious bodily or mental harm to members of the group.*
- 3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.*
- 4. Imposing measures intended to prevent births within the group.*
- 5. Forcibly transferring children of the group to another group.”*

Further more the definition of Crimes against Humanity in the Rome Statutes is a good example of the normative development of feminist interaction with international law (e.g. Article 7 Paragraph 1 clause g of the Rome Statute of The International Criminal Court) because it includes crimes like rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. Looking into Article 7 Para 2 Clause c of the Rome Statute of The International Criminal Court shows the actual meaning of statute and it goes.

“Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”

ICC recent stand over the case of Burmas treatment of Rohingya mentions women and children in particular shows how the international norms for the protection of women are developing. Burmas stand over Rohingya has clearly violated human rights violation (Mehtar, 2017). The words in particular ‘women and children’ are the clear example of feminist based norms development in international law. This is of course a quite impressive effect of feminist perspective of international law on international courts and tribunals. however it is not enough and it is important to state that the Rome statute is for an extreme condition of the violation of women rights. There are rights which are for normal life and are probably even more important at times because they tend to affect the conditions of women for which the effect is yet to be seen. These rights might range from equal participation in events, to equal enjoyment of rights given by Governments. They include same salary rights, working hours and may also in some condition be the rights to be considered as them just to be accepted as equal partner of life. The women convention does consider these questions well but what is the position of women convention is yet another controversial question.

Article 29 of CEDAW establishes the jurisdiction of International Court of Justice over the disputes, which pertain to the interpretation of application of the convention. The sad thing is that most of the nations have made reservation to this section (Most reservations are on the first five sections that are crucial for the women convention (list of states can be accessed at https://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf)

These sections outline all the rights to be safeguarded at national level by the state parties). There are cases where international tribunals and courts have given some space for third party arguments. The word “*third party intervention*” may not be used here because arguments are all the good that it gets to International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for former Yugoslavia. It has been established by the Security Council under Chapter VII of the UN Charter. The statutes of the ICTY were adopted on 25 May 1993 by Resolution 827 and International criminal tribunal for Rwanda (ICTR) have given some space for arguments in support of sexual offences etc. The ICTY has received amicus briefs in its proceedings. It accepted two amicus briefs, one from American NGO and the second from Christine Chinkin (Charlesworth & Chinkin, 2000). Some feminist norms have also found their way in the statutes of International criminal tribunal for former Yugoslavia. As the Article 4.2 (d) of the statute provides the definition of genocide as:

“Imposing measures intended to prevent births within the group”.

Also in defining the crimes against humanity in Article 5 the court clearly states as follows:

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts.”

In all the cases mentioned above there is an element of norms that shows a great struggle of the feminist jurisprudence which intends to uphold and develop the feminist perspective of international law (Emphasizing on the word rape has put an effect on international law. At one time in history it was the winning reward of the army to take away the women and girls for to treat them as comfort women. The example of Nanjing is quite famous in this regard where in Nanjing massacre of December 1937 by Japan led the army in taking many girls and women as comfort women. Same was done by Japan with Korea. The offences so far have been not compensated for. This kind of legislation ensures the safety of rights of women in international law, which then protects them against different nations). These enactments also bring forward two things:

1. That a certain offense against female sections of any state has been recognised as a crime.
2. This crime is liable to be punished by international law as well. It also ensures that the process of third-party intervention, which is at the stage of the argument, is also developing.

It is also pertinent to mention that ICJ and most of the tribunals are reluctant to accept individual claims not supported by the states. The individual petitions are mostly out of the jurisdiction of the international courts and tribunals. States are sensitive to mentioning of

individuals in this regard to avoid highlighting the situation in their society which women face in the local ground. It needs to jump an entire system to enter the international system. The local system, which is heavily, represented by male gender even affects the lawmaking process that keeps them in power. It is the same story in an international platform where the males are a dominating figure, and the same effect is seen in the lawmaking process of international law.

The representation of women in institutions is also not fair in any way, even though it is increasing. The underrepresentation of female in international courts and tribunals is a sad reality. The increase in number of female to at least equal ensures better legislation from the true point of view of the feminist perspective. The international system then creates a principle of universality that is to be followed by its entire community of members. The change in norms of international law and jurisprudence ensures to protect all those rights of female, which have been left not discussed throughout centuries. So the actual truth that this study shows is that though the effect is there to be seen of the feminist perspectives of international law but yet there is a huge gap that needs to be filled. This is the gap of norms that can be considered as the actual language of the international law. Changing the norm sense of the international law can do the change to a larger scale in creating any effect of feminist perspective of international law. It also however requires more legislation. It is also true that the human bodies have their boundaries and can not perform more then their ability but yet they are human being, both male and female.

Development of Representation in International Courts and Tribunals

The issue of the representation is also of great importance in order to show the effect created by feminist perspective of international law. There was a time when institutes were occupied to its entirety, may it be national institute for international. The development of feminist perspective of international law has forced both international and national institutes to rethink and reframe the institutional structure. At the time of the creation of the UNO their was not much consideration given to the female participation in these institution and the courts and tribunals alike. However the beginning of the criminal tribunals and the criminal courts now have seen a tremendous change of the representation of female in decision making. An extreme amount of care has been taken to ensure the participation of women in these tribunals. The number however is still low but the basic international law is now improving in women representation. Initially there was no woman representative in the tribunal but by the coming of two vacancies, two renowned ladies joined the forum of International Criminal Tribunal for former Yugoslavia. One was Professor Christine Cleiren from the Netherlands and the other was the Norwegian representative, the honorable Judge Hanne Sophie Greve. The first one was given the duty to prepare a special report on the legal aspect of sexual assaults and rape. The commission of experts was given the duty to investigate the rape in Croatia. (The Article quite remarkably differentiates the history from today's tribunals and clearly differentiate between the old tribunals which were established under international law and the tribunal constituted by security Council in 1992 under the resolution 771 and numerous other resolutions in this regard). The all-women investigation team gave its report and their findings were included in the final report of the commission before it was dissolved (Final report of the commission of Experts established pursuant to the Security Council resolution no 780). The rules of Procedure and

evidence of the court contain Rule 34 which is of importance which also gave way for the participation of women in the legal proceedings of the tribunals. Rule 34 goes as follows:

“There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:

1. *Recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute.*
2. *Provide counselling and support for them, in particular in cases of rape and sexual assault. (Amended 2 July 1999).*

Due consideration shall be given, in the appointment of staff, to the employment of qualified women.”

DISCUSSION

The rule has created a precedent that is going to pave the way for more legislation and is an effective role to play in improving feminist perspective in international law. This rule also creates an effect on international courts and tribunals by making the involvement of women in such like tribunals inevitable. The Secretary General has been very careful in the appointing female staff for the sensitive work of these tribunals. The second Chief prosecutor for ICTY and ICTR was Louise Arbour, a former judge from Canada and the third and all times famous Carla Del Ponte was from Switzerland (Prosecutor *vs.* Dusko Tadic, 1995). Patricia Viseur Sellers was appointed as a legal advisor for gender-related crimes. The General Assembly has also been very careful in the selection of the judges so as to ensure the representation of the women in the tribunal. The first bench of the ICTY had two female judges out of eleven Judges and the same was the result of the 1997 election (Similar details can be found on the web site of these tribunals which for Yugoslavia and Rawanda). The condition of ICJ is a bit weak in this regard but is liable to change as well for the sake of peace and security. The equal opportunities to institutions is a right of women and more than that it is need of the time and if it is not improved, then the justice situation cannot be improved either. The presence of women in these tribunals insures the proper incoming of evidence from women who would be clearly reluctant to give such evidence to a man. Rape or sexual crimes in this regard can be considered as offences for which a woman is quite reluctant to give any proper evidence to a man and it can be achieved by the presence of women. In some of the cases female testimonies are crucially necessary and to gain a real result from top to bottom it is necessary to get those testimonies and to protect the witnesses from further fears and harassment. Women investigators and prosecutors have shown their presence very much helpful and necessary for the existence of these tribunals.

Charlsworth and Chinkin (2000) points out another fact that there is also a possibility that the international law might link the involvement of women in tribunals to the situations of women. This is however is not a good approach for the reason that most of the jurist in feminist international law have only shown the importance of women towards the situation of women. It is restricting women role and is not the whole picture or the whole truth as one may say. To say that the inclusions of women in the international courts and tribunals are as useful for the men themselves to is gender oriented. This approach of the international community is absolutely misleading and would put the cause of feminist perspective in the wrong side. One reason why it

is easy to think that women representation is being done only to link it with women problems and not as a base of equality is that there is not enough representation in other fields or institutes of UNO. Tribunals such as World Trade Organization and Tribunal on Law of the Sea have little representation by female gender and shows a picture of how the feminist perspective of international law is being misused in its application. As has been mentioned before that most of these tribunals are for testing the extreme of nature amongst human needs and offences, which are grave in nature. The real issue is the actual life. The women representation should be ensured to such places, which govern the general legislation also so that they can make the difference in international law and ensure the effectiveness of the law and its application as well.

CONCLUSION

This discussion shows that the international law and the feminist perspective of women towards it have changed the situation of courts and tribunals radically but at the same time has led it to more confusing ends. The effect is noticeable but is not as much as it should be even if it is radical. This article addresses amongst various things, two aspects namely:

1. Existence and changing of norms.
2. The representation of women in international courts and tribunals.

These two aspects can be a good judge of the effect of the feminist approach to international regimes in international courts and tribunals. The norms, as has been mentioned, did change but were not enough to challenge centuries-old mindset. The creation of feminist-based norms in international law specifically for the courts and tribunals is important to ensure its effect on national systems. Most of the work in norm changing has been done in human rights law of women so that the courts local or international practicing, international law can safeguard those rights.

A lot of conventions such as CEDAW have now paved the way for further legislation to be fair for women. There is, however, a need for more legislation to ensure a proper place of women in tribunals. The way women representation is done has given a wrong picture that the women are needed for women only. Although the feminist perspective of international law has shown its effect on international courts and tribunals yet there is more to be done to show an effect which would give fair place in international courts and tribunals to female members of the international community who are equally competent. In the same way, more legislation would give the courts more power in giving true and effective justice.

ENDNOTE

1. UN Doc. A/CONF.49/668 of 25 June 1993

REFERENCES

- Charlesworth, H., & Chinkin, C. (2000). *The boundaries of international law: A feminist analysis*. Manchester University Press.
- Charter of The United Nations. (1945). *Statute of the international court of justice*.

- Cook, R.J. (2012). *Human rights of women: National and international perspectives*. University of Pennsylvania Press.
- Evatt, E. (2002). Finding a voice for women's rights: The early days of CEDAW. *The George Washington International Law Review*, 34(1), 515-530.
- Herman, D. (1993). *Feminist legal theory: Readings in law and gender*. *Social & Legal Studies*, 2(4), 507–508.
- Lee, H. (2017). CEDAW Smokescreens: Gender politics in contemporary tonga. *Contemporary Pacific*, 29(1), 66-90.
- Mehar, S.S., & Mishah, S. (2017). Human rights violation against rohingya, no place to go authors. *International Journal of Economic Research*, 14(20), 389-396.
- Mullins, L.B. (2018). CEDAW: The challenges of enshrining women's equality in international law. *Public Integrity*, 20(3), 257-272.
- Prosecutor vs. Dusko Tadic. (1995). Retrieved from <http://www.un.org/icty/tadic/trialc2/decision-e/100895.html>
- Richardson, J. (2017). *Selves, persons, individuals: Philosophical perspectives on women and legal obligations*. Routledge.
- Rome Statute of the International Criminal Court (1998). *Rome treaty draft passed by UN general assembly*.
- Saksena, A. (2007). CEDAW: Mandate for substantive equality. *Indian Journal of Gender Studies*, 14(3), 481-498.
- Service, C.R. (1999). *Convention on the elimination of all forms of discrimination against women (CEDAW): A fact sheet (RS20097)*.
- Steven, G. (2012). *Women's rights are human rights U.S. ratification of the convention on the elimination of all forms of discrimination against women (CEDAW)*.
- Ulrich, J.L. (2000). Confronting gender-based violence with international instruments: Is a solution to the pandemic within reach? *Indiana Journal of Global Legal Studies*, 22(1), 629-654.