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The use of international women's human rights law in addressing gender-based violence in Kosovo

Abstract

This article looks at how feminist legal scholars have approached the subject of law and the role of law in advancing the equality of women with men. By analysing the example of Kosovo, the article discusses the adoption and use of formal legal regulations for international instruments on women's human rights and the institutional response to cases of gender-based violence in Kosovo. I argue that the adoption of formal legal regulations at the global level has had a considerable impact on country-level responses and a direct impact on the ground. The article adopts the approach from *Butterfly Politics* by Catherine MacKinnon, i.e. that the 'Opening of the wings of a butterfly in Brazil may cause a tornado in Texas' (2017: 1). This metaphor embodies the view that small interventions cause global changes, recognising the potential for change resulting from both local and global interventions. The article argues that, while change on the ground might be slow, international human rights for women are a useful tool in furthering the equality agenda and, therefore, should not be easily dismissed.

Keywords: international human rights law, feminism, equality, gender-based violence, levels of reporting crime, trafficking

Context is all
- Margaret Atwood¹

Introduction

This article will look at how feminist legal scholars approach the subject of law and the role of law in advancing the equality of women and men. With reference to Kosovo, it discusses the choice of formal legal regulations to frame international instruments for women's human rights. It also focuses on the institutional response to cases of gender-based violence in Kosovo.

I argue that the adoption of formal legal regulations at global level has had a considerable impact on country-level responses, as well as a direct impact on the ground. However, the article also acknowledges the combinatorial limits of universal rights and adopts the view that we must regularly analyse the actual implementation of these rights within different countries. This analysis focuses on the particular context of Kosovo and the applicability of international women's human rights there.

1 Atwood, Margaret (1987) *The Handmaid's Tale*, Ballantine Books, p. 187.

In order to do so, the article recognises ‘feminisms’ as disputable categories. However, ‘feminist’ perspectives, although an uneasy category to define, call for different approaches by acknowledging women’s different locations, ages, races, statuses and other factors.² The article further adopts the approach from Catherine Mackinnon’s *Butterfly Politics* that ‘The opening of the wings of a butterfly in Brazil may cause a tornado in Texas.³ This metaphor adopts the view that small interventions can lead to global changes, recognising the potential for change resulting from both local and global interventions. The article also argues that international women’s human rights are a useful tool in furthering the equality agenda and that these, therefore, should not be easily dismissed.

The theoretical approach

My argument is divided into two parts. Firstly, I will discuss feminist scholarly debates around the importance of law as a tool to advance equality among women and men, as well as the need for international women’s human rights instruments as a global tool for the equality agenda. Secondly, I will discuss examples of the adoption of international women’s human rights law in Kosovo and, in particular, the adoption of laws to address gender-based violence. The article concludes with highlighting a way forward in effectively addressing gender-based violence cases in Kosovo.

In the past, international women’s human rights law was often interpreted as a new potential source of women’s oppression.⁴ Generally, laws are critiqued for their androcentric perspective that often denies the experiences of women.⁵ Charlesworth further observes that laws have also reinstated dominance for privileged groups in a given society.⁶

Understanding international women’s human rights can be approached from many perspectives. This article adopts the approach that international women’s rights can be defined as the use of international instruments to deal with women’s needs and experiences specifically.⁷ The adoption of international women’s human rights conventions, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has opened new venues in rethinking international law. In particular, the opening of international law to women’s experiences has led to human rights law create a legal jurisprudence which is more responsive to the equality paradigm.

- 2 See, for example, on feminist theory and critique of rights in Radhika Coomaraswamy (1994) ‘To Bellow Like A Cow: Women, Ethnicity and the Discourse of Rights’ in Rebecca J. Cook (Ed.) *Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press).
- 3 Mackinnon, Catherine (2017) *Butterfly Politics* Harvard University Press, p.1-11.
- 4 Charlesworth, Hillary (1994) ‘What are women’s international human rights?’ in Rebecca J. Cook (Ed.) *Human Rights of Women: National and International Perspectives* University of Pennsylvania Press, p. 61.
- 5 *ibid*, p.59.
- 6 *ibid*, p. 59.
- 7 *Supra*, at note 4, p. 59.

Feminist legal scholars from the US and other regional systems of law, including in Europe, have long discussed different approaches related to the use and role of law for women in advancing the gender equality agenda. Globally, courts and the justice system have often considered acts of violence against women as private and part of intimate family relations.⁸ The so-called 'private/public' debate on rights critiqued the law for treating men and women alike, based on the false presumption that women and men are the same.⁹ This principle of sameness was defined frequently by legal principles which were considered to be gender-neutral and leading to the same treatment of women and men.¹⁰ Other feminist scholars celebrated differences, requiring that the law adopted an ethics of care approach that accepted women's perspectives. Lucy Irigaray stated in her *Ethique de la Difference Sexuelle*:

I will never be in a man's place; a man will never be in mine.¹¹

In her view, men and women would never fully reside in the place of the other as they are irreducibly different.¹² Consequently, the rights discourse was seen as difficult in accommodating the needs and interests of women.

In some regions of the world, Radhika Coomaraswamy argues for the need to get out of the 'Orient trap' in dividing the world into bipolar categories in which the west is considered to be progressive and advanced in terms of women's human rights while the east is seen as backwards.¹³ Rights are a discourse that can appeal to all sides and, depending on the different contexts, should be seen as a valuable tool to address different complexities on the ground, she argues.¹⁴

Laws may construct particular differences between women and men, but the law can have tremendous potential in reconstructing these differences. In her 'Postmodern Feminist Legal Manifesto (An Unfinished Draft)', Mary Joe Frug states:

What law (at least in part) constructs, law reform projects can re-construct or alter... I too believe in using law to oppose the oppression of women.¹⁵

The potential of feminists' legal initiatives to reconstruct the understanding of difference among women and men also has the potential to have an impact on the patriarchal nature of the law.¹⁶ Therefore, the legal struggle also can be understood as a form of political struggle in overcoming the differences that exist.

8 Charlesworth, Hillary (1993) 'Feminist Methods in International Law' *American Journal of International Law* 93(2): 379-394.

9 Levit et al (2016) *Feminist Legal Theory (Second Edition): A Primer (Critical America)* New York University Press, p. 16.

10 *ibid*, p. 16.

11 Irigaray, Lucy (1984) *Ethique de la Difference Sexuelle* p. 19-20.

12 *ibid*, p. 19-20.

13 Coomaraswamy, *op. cit.* Note 16 at p. 55.

14 *ibid*, Note 16 at p. 55.

15 Frug, Mary Joe (1992) 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' *Harvard Law Review* 105(5), pp. 1045, 1046.

16 *ibid*, p.1048; p. 1067.

Outside these approaches, a number of international instruments dealing with women's experiences have adopted the principles of differential treatment based on gender. On this basis was drafted, and adopted, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence.¹⁷ This recent convention acknowledges the gendered nature of violence and requires states to recognise the structural nature of violence against women as a social mechanism that puts women into subordinate positions compared to men.¹⁸ The approach of international law has, slowly but steadily, recognised the structural and social inequality of women and men.

I will turn next to an examination of the extent to which international women's rights have made an impact on the ground. I acknowledge that, despite criticisms, as Martha Minow states, the denial of the discourse of rights to groups by groups that have traditionally dominated is worrisome.¹⁹

The importance of the law is indisputable, but its tendency rarely to support local knowledge, and for it to deliver a framework for knowledge which seeks to be global, may call for caution. Mary Joe Frug proposes that feminist legal scholars should go beyond work that produces totalising theories and should see the differences and hierarchies between the sexes as forms of local disruptions leading to the local production of knowledge. Therefore, she articulates the use of 'local disruptions'²⁰ as a form of feminist analysis that refuses to support singularity within the law, especially as women should not be seen as singular identities. Moreover, one should avoid seeing the law as a category to 'save' women: an essentialist approach often used by white women. Therefore, laws should be changed, reflecting these differences towards furthering the notion of equality and reflecting on the different realities faced by women on a daily basis.²¹

Addressing gender-based violence in Kosovo

While academic feminists busily deconstructed laws and rights,²² civil society activists in Kosovo mobilised around the idea of international women's human rights and the use of international conventions as tools to implement these rights. In Kosovo, one of the newest states in the Balkans region, several legal and policy changes were undertaken using international women's human rights instruments.

Kosovo, an area administered internationally from 1999 until 2008 by the United Nations Mission in Kosovo (UNMIK), has adopted many laws in line with international law and human rights standards. A number of international human rights con-

17 The so-called Istanbul Convention, Preamble, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e> [last accessed 11 May 2017].

18 *ibid*, Preamble.

19 Minow, Martha (1987) 'Interpreting Rights: An Essay for Robert Cover' *Yale Law Journal* 96(8): 1860-1915.

20 Frug, Mary Joe, *op. cit.* pp. 1045-46.

21 Mackinnon, Catherine (2005) *Women's Lives, Men's Laws* Harvard University Press.

22 Kelly, Liz (2006) *Inside Outsiders, Mainstreaming Violence Against Women into Human Rights Discourse* Taylor and Francis Online.

ventions, such as the United Nations Convention on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Convention for the Protection of Human Rights and Fundamental Freedoms, were named as directly applicable legislation in Kosovo. In cases of conflict with Kosovo law, the international conventions had priority over the provisions of the Kosovo law and the decisions of the public institutions.²³

After its declaration of independence in 2008, Kosovo continued to enact several more laws based on the definitions of these conventions.²⁴ In the case of conflict, any decision made by the courts or by public administration institutions continues to be potentially superseded by the principles covered under the international conventions.²⁵ CEDAW was enlisted as a directly applicable law in Kosovo, so it was utilised by activists and civil society to push the government of Kosovo to adopt and amend laws in line with international human rights standards.²⁶ In particular, CEDAW is a useful tool as it specifically covers discrimination against women and provides for a wide coverage of rights including the social and economic rights of women, non-discrimination and protection from violence against women. This Convention also defines equality in family and in marital relations, including the equality of women and men in inheritance and property rights.²⁷

Following its independence, the government of Kosovo adopted a set of laws addressing violence against women following advocacy by civil society and in particular by women's rights activists.²⁸ Specifically, a number of laws and institutional mechanisms were set up in order to address the needs of women, including legislation to address gender-based violence.

- 23 Article 22 of the Constitution of the Republic of Kosovo, available at: http://www.kuvendikosoves.org/common/docs/Constitution_of_the_Republic_of_Kosovo_with_amend.I-XXV_2017.pdf [last accessed 10 October 2017].
- 24 By November 2005, former Finnish President Marti Ahtisaari was appointed as the UN Special Envoy on discussing and proposing a settlement agreement for Kosovo's status. The so-called *Comprehensive Proposal for the Kosovo Status Settlement (CSP)* was not accepted by the UN Security Council as a result of opposition by Russia. Accordingly, the Kosovo government accepted the CSP proposal and unilaterally declared independence in 2008. As of 2018, Kosovo is recognised as a state by 115 states, including most EU member states. However, it is still not a member state of the United Nations. See, for example, KIPRED for FRIDE *Strengthening Women's Citizenship in the Context of State-Building: Kosovo Security Sector and Decentralisation* available at: http://fride.org/descarga/IP_Women_Citizenship_Kosovo_ENG_ag10.pdf, pp. 4-5.
- 25 Article 22 of the Constitution of the Republic of Kosovo, available at: http://www.kuvendikosoves.org/common/docs/Constitution_of_the_Republic_of_Kosovo_with_amend.I-XXV_2017.pdf [last accessed 11 November 2017].
- 26 See, for example, Kosovo Women's Network *1325 Facts and Fables: A collection of stories on the Implementation of UN Security Council Resolution 1325 on Women, Peace and Security in Kosovo*, available at: <https://www.womensnetwork.org/documents/2013012016559661.pdf>.
- 27 Available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [last accessed 10 November 2017].
- 28 Kosovo Women's Network *op. cit.*

For example, in 2010 the Kosovo Assembly adopted the Law on Protection Against Domestic Violence.²⁹ The adoption of this law followed an initiative undertaken under the UN Mission in Kosovo to draft the first UN Regulation on Protection Against Domestic Violence. The preamble of UNMIK Regulation 2003/12 on Protection Against Domestic Violence quoted also CEDAW principles as the basis for enacting the law, acknowledging that domestic violence acts should not be tolerated as:

There should be effective legal protection and an assistance mechanism for victims of domestic violence.

Prior to UNMIK legal initiatives, nothing existed in Kosovo's legislation in terms of protecting individuals from acts of domestic violence or other forms of gender-based violence. Under CEDAW's General Recommendation 19 on Violence against Women, gender-based violence is considered a form of discrimination against women that seriously slows women's ability to enjoy their rights on the basis of equality with men.³⁰ It is a form of violence directed against women on grounds based purely on gender, and it commonly affects women disproportionately, including acts that are physical, mental or sexual, as well as other acts of deprivation and coercion against women.³¹

By 2012, Kosovo had also enacted another set of laws to address the needs of the victims of gender-based violence, including violations of rights arising from trafficking in human beings and rape, in which areas a number of provisions were enacted specifically under the Kosovo Criminal Code.³² In 2013, the Kosovo Assembly also adopted the Law on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Trafficking.³³ A set of mechanisms was also set up to respond to the needs of the survivors of various forms of gender-based violence, including the Kosovo Police Unit on Domestic Violence and Anti-Trafficking as well as the appointment of police officers to deal with cases of gender-based violence.³⁴

Prior to the adoption of the new law, a majority of cases were considered part of the Kosovo criminal procedure that did not specifically define domestic violence or

29 Law No. 03/L-182 on Protection against Domestic Violence, available at <http://www.assembly-kosova.org/common/docs/ligjet/2010-182-eng.pdf>.

30 See UN CEDAW General Recommendation 19 on Violence against Women, available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [last accessed 20 November 2017].

31 *ibid*, Paragraph 6.

32 See Article 171 on Trafficking in Persons and Article 230 on Rape of the Kosovo Criminal Code. Available at <http://www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf>. Last accessed 20/11/2017.

33 See Law No. 04/L-218 on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Trafficking, available at: https://www.mpb-ks.org/repository/docs/Ligji_kunder_traifikimit_-Anglisht.pdf [last accessed 20 November 2017].

34 See p. 9 of the *Evaluation Report of the Kosovo Program against Domestic Violence and Action Plan 2011-2014* (2015), available at: http://abgj.rks-gov.net/Portals/0/Ambasada_Raporti%20anglisht.pdf [last accessed 20 November 2017].

trafficking in human beings. This legal gap often led to a weak implementation of the law and insufficient attention paid by the courts.³⁵ For example, from 2010 and onwards the number of cases of reports of domestic violence has shown a steady increase, with more than one thousand domestic violence cases reported on an annual basis.³⁶ For the years prior to the setting-up of the UN Mission in Kosovo,³⁷ the number of domestic violence cases in Kosovo remains unknown since the majority of official reports were taken by the Serbian administration following their withdrawal from Kosovo in 1999.³⁸ Another important factor specific to Kosovo in the low levels of citizens reporting issues to the police is the history of distrust towards state institutions prior to 1999.³⁹

In particular, the increase in the levels of reporting by women on cases of domestic violence does not necessarily show the scale of effectiveness of the laws on handling cases of domestic violence. However, this does offer a comparison from which to understand the opening up of spaces and opportunities for women to report specifically on cases of domestic violence. In the past, such reports were almost non-existent, also as a result of the lack of a definition of acts of domestic violence under the applicable law.

The Kosovo Police also report forty victims of trafficking identified in Kosovo annually, on average, based on the definitions of trafficking in human beings offered under Kosovo's legislation.⁴⁰

Conclusion

Domestic violence continues to be increasingly reported, with approximately 1 000 cases now being reported on an annual basis. Other forms of gender-based violence cases have also been reported, including trafficking in human beings. Predominantly in Kosovo, women report violence in bigger numbers than men as women continue to experience violence in bigger numbers than men.⁴¹ Additionally, official

35 The Criminal Code separately defines crimes committed within a domestic relationship; crimes of light or grievous bodily harm; threat; coercion; sexual assault or rape. Also under Summary of Recommendations, paragraph 7, the amendment of the Criminal Code and the inclusion of the definition of domestic violence is recommended to increase the effective implementation of the laws. See *ibid.*

36 *ibid.* p. 10. Data from Kosovo Police. A majority of the cases reported concern violence against women (80%) followed by children and male elderly reports of violence.

37 The UN Mission in Kosovo was set up in 1999, following the Kosovo war. See United Nations Security Council Resolution 1244 on the Situation Relating Kosovo, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> [last accessed 20 October 2017].

38 *ibid.*

39 See for example Kosovo Women's Network *op. cit.* p. 123.

40 p. 2 of the *Country Gender Profile: An Analysis of Gender Differences at all levels in Kosovo* (2014), Orgut Consulting for Kosovo Agency for Gender Equality, funded by Swedish Development Agency in Kosovo, available at: http://www.swedenabroad.com/ImagVaultFiles/id_20757/cf_2/Orgut_Kosovo_Gender_Profile_FINAL_2014-05-08.PDF [last accessed 11 November 2017].

41 *ibid.* see p. 2.

reports show that, throughout the years, there has been an increase also in the number of restraining orders requested and issued in Kosovo to protect the victims of domestic violence since the adoption of the laws.⁴² However, an in-depth evaluation of the effectiveness of these laws was not the aim of this article.

The article shows that international women's human rights may be considered a useful tool in furthering the equality agenda by looking at the particular context of Kosovo and the applicability of international women's human rights there. By opening up opportunities for women to report on cases of gender-based violence, the practical use of international women's human rights law in the case of Kosovo has opened up small avenues for change.

Overall, the use of international women's human rights law may be seen as baby steps but, however, they are also steps in a process of change, albeit slow. The article claims that one should not give up on the potential of using international women's human rights as a context-based and strategic tool in furthering the equality agenda between women and men.

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42 Kosovo Women's Network, *op. cit.* See p. 120.

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