UNCOMMON GROUND: CULTURE AND OTHERING IN THE HUMAN RIGHTS PROJECT

Kathleen Cavanaugh*

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INTRODUCTION

In reconstructing the notion of feminism and the centering of whiteness within the feminist movement, Rafia Zakaria's *Against White Feminism: Notes on Disruption* foregrounds several questions that have long plagued the international human rights movement.[1] Are there, as Harris has argued, "universally valid moral beliefs and right and wrong rules and modes of conduct?"[2] or "is universalism barely disguised ethnocentrism, a cultural imperialism?[3]" Zakaria's work wonderfully captures feminism's global, long-standing affinity with colonial, patriarchal, and white-centered/saviour ideals, and finds amity with Matua Mateo's "saviours and savages"[4]

* Kathleen Cavanaugh is Director of the Pozen Center for Human Rights and Faculty in the College at the University of Chicago.

1. RAFIA ZAKARIA, AGAINST WHITE FEMINISM: NOTES ON DISRUPTION (2021).

2. MARVIN HARRIS, THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE 13 (1st ed. 1968).

3. *See* RUTH BENEDICT, PATTERNS OF CULTURE 45-46 (1st ed. 1934).

4. In his 2001 piece, *Savages, Victims and Saviors: The Metaphor of Human Rights*, Makau Matua argues that "[t]he human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other." *See* Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights,* 42 HARV. INT'L L. J. 201 (2001).

critique of human rights. *Saving* the non-Western, non-White, subaltern Other from "oppressive"[5] cultures and "traditional harmful practices"[6] is part of both projects—universalizing and civilizing missions that provide "a single formulation" of how to understand the world, thus reinforcing the power of elites "to produce and reproduce worlds familiar to white privilege.[7]" As this article will detail, in pursuit of eradicating difference, the law—both domestic and international—has become an important ally.

There has been substantive and conflicting scholarly debate that is preoccupied with the question of women's rights as human rights, specifically asking: to what extent "should and can law, with its attribution of right and wrong, exoneration and punishment, be used to eradicate a cultural practice?"[8] There are distinct approaches that endeavor to answer this question. On one end of the continuum, human rights law is read as "impeccable with everything else being adjusted to maintain that assumption."[9] Yet, as Isabelle Gunning reminds us, international law itself has long been "criticized as the embodiment and imposition of Western values on the other peoples of the world."[10] This has been particularly acute, "against … women whatever their cultural background."[11] There are a variety of other accounts that occupy the space within these two rather polar positions, gravitating to one side or the other on the universalist–cultural relativistic understanding of rights. Although the universalist/relativist debate continues to play out in scholarly and activist debates, both Zakaria and Gunning provoke us to rethink (and, indeed, emancipate) "the language, discourse and difference"[12] embedded in this "right versus wrong" discourse.

Before entering into this contentious space, a few points are worth noting. First, there is a significant crossover in the approaches by anti-imperialist feminists and critical legal theorists to the international human

5. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1202 (2001).

6. *See* Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 213 (1992).

7. Sonia Tascón & Jim Ife, *Human Rights and Critical Whiteness: Whose Humanity*, 12 INT'L J. OF HUM. RTS. 307, 323 (2008).

8. Gunning, *supra* note 6, at 189.

9. MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS & ISLAMIC LAW 4-5 (1st ed. 2003).

10. Gunning, *supra* note 6, at 192.

11. *Id.* at 193.

12. Joan Scott's earlier work looks at how these terms have been appropriated within feminist scholarship. *See* Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 34 (1988).

rights regime—both camps read it from its colonial roots to its current day manifestation as both an instrument of oppression and emancipation.[13] To read law, particularly international human rights law, from this point of departure is not to scarecrow the debates, ignore the historical context within which the international human rights machinery sprung, or disregard the slow (but steady) evolution of the human rights corpus from its paradigmatic Western orientation. Rather it is to argue that foregrounding the colonial/imperial roots of the law has pried open a space allowing for a radical reconceptualization of the universalizing imaginary of human rights within feminist theory and human rights discourse, as well as in the rhetoric within UN documents. Whilst progress in language and discourse has happened, Zakaria's argument, which this article supports, is that in practice, these changes are not fully realized for the majority of women.

This article will take forward some of the critiques raised in *Against White Feminism* by exploring the ways in which "gender justice" has manifested within human rights discourse and practice. Section 1 will examine the well-worn but still unresolved universality versus cultural relativity debate. Section 2 will focus on feminism, gender, and women's rights and specifically look at the ways in which the "equality versus difference" debate in feminism is reproduced within the human rights discourse. Section 3 will look at the ways in which anti-imperialist critiques of rights play out within the international (and regional) human rights law arenas. The final section will propose ways that both feminists and human rights activists can move the conversations (and challenges), captured by Zakaria's work, forward.

THE UNIVERSALITY OF OTHERING

The question of universality versus cultural relativity is a well contested but yet unresolved debate within human rights. On the one side, relativists contend that culture and context must be necessary to understand, as well as apply, international legal norms and principles.[14] They argue that

13. This is particularly true of scholars aligned with the Third World Approach to International Law (TWAIL). For more on TWAIL and international human rights, see Makau W. Mutua, *What is TWAIL?*, 94 AM. SOC'Y OF INT'L L. PROC. 31 (2000); Opeoluwa Adetoro Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10 INT'L COMM. L. REV. 379 (2008); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMM. L. REV. 3, 26 (2006).

14. Cultural relativism is not a legal concept and was not developed for legal application; its roots are found in anthropology and philosophy. Importantly, cultural relativism is not disassociated completely from the norms of universality. Rather those who adopt this approach argue that we reason through a process of enculturation; the way we see and understand the world and shape our values and norms is mediated through our experiences and a priori concepts. *See*

in exerting hegemonic control over the historical social formation of the international legal system, the key instruments of international human rights law "reflect a liberal individualism prevalent in the West, and ignore the importance of group membership, of duties, and of respect for nature prevalent in many non-western cultures."[15] In contrast, universalists reject this particular reading of the development of the human rights machinery, arguing that it is both selective and incomplete and believe that there are basic and shared normative rights and values, "for all without distinction."[16]

More recent scholarship situates this debate in a postcolonial framework, mapping out the continuity between the colonial past and the colonial present and examining the relationship between culture and power. Derek Gregory's work, for example, posits that colonization is a cultural process as it "involves the production, circulations, and legitimation of means through repetitions, practices, and performance that enter fully into the constitution of the world."[17] Through this analytical lens, the colonial present is articulated through legal constructs. Whilst Gregory's discussion takes place primarily outside of the field of law, scholars from the Third World Approach to International Law (TWAIL) have situated the application of law in the "colonial present."[18] This approach argues that modern international law (the colonial present) cannot be separated from the historical, cultural, economic, and political backdrop of the European colonial project. Whilst its shape and form differ,

> the conquest and domination between the "Occident and the Orient" find[s] its contemporary articulation in alternative spheres; that is within a public international law framework—from international economic and trade law to human rights and the laws governing the use of force (jus ad

BENEDICT, *supra* note 3, at 278; Ruth Benedict, *Ideologies in the Light of Comparative Data*, *in* AN ANTHROPOLOGIST AT WORK 383 (Margaret Mead, ed., 1959); and MELVILLE J. HERSKOVITS, CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM 14-15, 32, 93, 101 (Frances Herskovits ed., 1973). For a good overview of of more general approaches to cultural relativism within and beyond anthropology, see Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 *AM. ANTHROPOLOGIST* 56 (1988).

15. Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 213 (1999).

16. Yet as understandings of cultural relativism tend to be posited in contrast to the principle of universality within human rights, some of the narrative framework is lost, which, in turn, simplifies a more complicated relationship between the two approaches.

17. DEREK GREGORY, THE COLONIAL PRESENT 8 (1st ed. 2004).

18. *See* Mutua, *supra* note 13. Additionally, see the work of Antony Anghie, John Reynolds, Rémi Bachand, Pooja Parmar, and Upendra Baxi.

> bellum) and international humanitarian law (*jus in bello*) in the context of the state of exception of the "global war on terror."[19]

Tellingly, in debates pitting cultural relativists against human rights universalists, the areas and issues that interest women seem to be, in general, negatively affected.[20] On the one hand, states do devise culturally specific arguments as a means of subjugating the rights of women, of minorities, and so on.[21] Yet, on the other, within feminist approaches,

> culture and cultural diversity have entered into the women's human rights discourse primarily as a negative and subordinating aspect of women's lives and invariably displaced onto a first world/third world divide. In the process colonial assumptions about cultural differences between the West and "the Rest" and the women who inhabit these spaces are replicated. Some cultural practices have come to occupy our imaginations in ways that are totalizing of a culture and its treatment of women, and that are nearly always overly simplistic or a misrepresentation of the practice.[22]

Severed from this particular reading of relativism and re-inserting the difference, post-structuralist, post-orientalist, and feminist scholarship from the global south (among others) is increasingly disrupting the ethnocentric universality[23] that is deeply embedded in the gender justice discourse. As Deniz Kandiyoti has observed, there is "[a]n affinity (…) developed between post-colonial scholarship and feminist criticism in so far as they focus on process of exclusion and domination implicit in the construction of the 'universal' subject."[24]

When unpacking the conceptualization of a universal truth, this scholarship identifies two problematic assumptions. First, the liberal conception of formal "equality" that "invites us to assume that everyone wishes to be treated like we would like"[25] fully captures the diversity of

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19. Kathleen Cavanaugh, *Narrating Law*, *in* ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 25 (Anver Emon, Mark Ellis and Benjamin Glahn eds., 2012).

20. Jill Steans, *Debating Women's Human Rights as a Universal Feminist Project: Defending Women's Human Rights as a Political Tool*, 33 REV. OF INT'L STUD. 11, 11 (2007).

21. This is less, I would argue, about creating a space for the voices of otherness, but as one hegemonic technique.

22. Ratna Kapur, *Un-Veiling Equality: Disciplining the "Other" Woman Through Human Rights Discourse*, *in* ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 265, 278 (Anver Emon, Mark Ellis and Benjamin Glahn eds., 2012).

23. *See* Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 12/13 BOUNDARY 2 333, 335 (1984).

24. Deniz Kandiyoti, *Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing*, *in* FAITH AND FREEDOM WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 19, 19-20 (Mahnaz Afkhami ed., 1st ed. 1995).

25. Martti Koskenniemi, *The Politics in the Temple, Order, Justice and the UN: I Dialectical Review*, 6 EUR. J. INT'L L. 325, 343 (1995).

women's experiences. Joan Scott has noted, "[t]he only alternative, it seems to me, is to refuse to oppose equality to difference and insist continually on differences—differences as the condition of individual and collective identities, differences as the constant challenge to the fixing of those identities, history as the repeated illustration of the play of differences, differences as the very meaning of equality itself."[26] The second assumption is that there are "genuinely 'non-violative' relations between the Self (the 'West') and its Other."[27] If what is required for entry into the respective epistemologies of feminism and human rights is a language and knowledge production based on a set of assumptions and behaviours, how do we rethink (and, indeed, emancipate) their respective vocabularies?

"DISRUPTING" THE DISCOURSE

The work of Judith Butler is a useful starting point in rethinking (and disrupting) the language associated with feminism and human rights and the binary thinking captured in the "equality-versus-difference" debate. In problematizing gender, she notes that when addressing "the question of what constitutes gender (in)equality, and indeed in the first instance, 'human rights,'" it is necessary to keep both of these concepts "disconcertingly open to interrogation."[28] As a category, gender is "confused with sex," creating oppositional binaries[29] and normatively essentializes womanhood.[30] Butler rightly observes that "… gender is not always constituted coherently or consistently in different historical contexts, and intersects with racial, class, ethnic, sexual, and regional modalities of discursively constituted identities."[31]

Constructing a generalized and foundational understanding of women as a homogenous group, essentialized to the condition of white women, results in a type of "epistemological imperialism."[32] "Western" feminism is predicated on a specific understanding of womanhood as "educated, modern, as having control over their own bodies and sexualities, and the

26. Scott, *supra* note 12, at 46.

27. Dipesh Chakrabarty, *Marx after Marxism: A Subaltern Historian's Perspective*, 28 ECON. AND POL. WKLY. 1094, 1094 (1993).

28. Steans, *supra* note 20, at 19.

29. JUDITH P. BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 30 (1st ed. 2006).

30. *Id.* at 11.

31. *Id.* at 4.

32. *See* Judith Butler, *Merely Cultural*, 227 NEW LEFT REV. 33, 37-38 (1998).

freedom to make their own decisions," [33] whereas the "Other" (read as non-Western women often formerly referred to as "third world" women) are victim-subject, lack agency and are often idealized and gendered images of, "the veiled woman, the powerful mother, the chaste virgin, the obedient wife."[34] From this positionality, "modernization" or "Westernization" increases gender justice.

Such an essentialist reading has three effects. It creates, as Joan Scott has argued, a binary opposition that offers a choice to feminists of either endorsing "equality" or its presumed antithesis, "difference."[35] Secondly, this particular understanding of gender justice "others" women's feminist organizing when it is not structured around familiar values, such as anti-traditionalism, independence from men, and the elimination of gender roles. Lastly, as Gunning has argued, crossing these epistemological borders and entering into spaces and unfamiliar practices creates "…a distance between 'me' and 'the other.' The 'other' is unlike me. The other has no independent perceptions and interest save for that which I impose. If there is voice given to the 'other' that suggests she is organized around her own interests, it is seen as evidence of defectiveness in the 'other.'"[36]

Deeply embedded in these readings are theoretical and conceptual underpinnings that require essentializing the subject as "the immigrant woman victim of minority culture;"[37] a "death by culture."[38] Saving the "Other" requires a distinction to be drawn between, "[a] female subject… and a victim subject of her uncivilized culture and male compatriots."[39] As Lila Abu Lughod has argued, the framing of a powerless "Other" essentializes (and in some cases, re-orientalizes) the "native subject."[40] Feminist analyses of "other" women's situations underplay "[p]ositionality" that is, "the social location from which one analyzes the world,"[41] and often

33. Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1984) 12/13 boundary 2 333, 337

34. *Id.* at 335, 352.

35. Joan Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 32, 34 (1988) (equality-versus-difference can also be underestood as feminism-versus-muticulturalism). *See also* Susan M. Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661, 664 (1998).

36. Gunning, *supra* note 6, at 199.

37. Volpp, *supra* note 5, at 1183.

38. *Id.* at 1185.

39. Dianna Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, *in* INTERNATIONAL LAW AND ITS OTHERS 318, 328 (Anne Orford ed., 2009).

40. Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 AM. ANTHROPOLOGIST 783, 788 (2002).

41. Lila Abu-Lughod, *Orientalism and Middle East Feminist Studies*, 27 FEMINIST STUD. 101, 107 (2001). *See also* Gunning, *supra* note 6, at 202.

(mistakenly) attributes gender injustice to culture or tradition (the culturalist explanation) without understanding the empirical context. In such an ethnocentric approach,

> Essentialized interpretations of culture are used either to justify violation of women's rights in the name of culture or to categorically condemn cultures "out there" as being inherently primitive and violent towards women. Both variants of cultural essentialism ignore the universal dimensions of patriarchal culture that subordinates, albeit differently, women in all societies and fails to recognize women's active agency in resisting and negotiating culture to improve their terms of existence.[42]

As Abu Lughod has argued, where human rights are used to enforce this negative conception of freedom, *saving* women (from family, community, religion, and culture…), they have become a vehicle for Western feminist imperialism.[43]

GENDER JUSTICE

While there is significant writing that unpacks the notion of the "universality" of human rights from a variety of different perspectives, there are four main anti-imperialist feminist critiques: that "individualism, autonomy (and its associations with the secular worldview) and gender-role eliminativism" are important for achieving gender justice;[44] that the process of generating rights for women is fraught with inequalities and power differences; decontextualizing rights negates (and indeed whitewashes) the complexity of actual lives and situations; and that in pursuit of gender justice, feminists and human rights advocates have "run the risk of turning patriarchal."[45] This section will focus on how each of these critiques plays out within the international (and regional) human rights law arenas.

One point of intersection between broader critiques of human rights and the specific challenges by feminist writers is the notion that universal ideals, such as rights, equality, and freedom, are drawn from Western

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42. Alexandra Xanthaki, *Against Integration, for Human Rights*, 20 INT'L J. OF HUM. RTS. 815, 830 (2016) (quoting Rep. of Yakin Ertuk, at 25, U.N. Doc. A/HRC/4/34 (2007)).

43. *See* Abu-Lughod, *supra* note 40.

44. SERENE J. KHADER, DECOLONIZING UNIVERSALISM: A TRANSNATIONAL FEMINIST ETHIC 3 (2018).

45. As I will discuss later, this manifests two ways, both in discourse (projecting a type of patriarchial othering separate from the Western "self") and in practice, in how feminist strategy has been adopted by international human rights enforcing mechanisms when "saving" women drawn from minority cultures from their cultural or religious selves. Azizah Y. Al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 41, 44 (Susan M. Okin ed., 1999).

Enlightenment liberalism and, as such, are neither universal nor neutral.[46] As these ideals are foundational to the framing (and reading) of international human rights law, the very vehicles used to promote and protect human rights in the international fora are, as Ratna Kapur has argued, part of the teleological narrative of Western Enlightenment.[47] While there are credible debates that suggest that the historical origins of human rights are far more inclusive (and emphasize the possibilities contained within its evolutiveness), what is clear is that human rights, in practice, reproduce rather than challenge "hegemonic understandings of culture and gender."[48] As I noted earlier, these understandings embed notions of individuality, secularism, and "whiteness" and reduce the complexity of human experience to a singular understanding: a form of "cultural tyranny."[49]

There is no doubt that human rights have, at the international level, advanced women's rights by providing a language and remedy for gender inequality. Yet it was primarily feminists from the Global North that shaped a particular understanding of gender rights[50] that, in turn, informed how the international machinery worked to remedy gender oppression. Through these interventions, international human rights discourses, as articulated

46. For a good overview of this critique *see generally* Joseph Oloka-Onyango & Sylvia Tamale, *"The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. QUARTERLY 691 (1995); *see also* Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse, in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 164 (1995); and Martin Chanock, *'Culture' and Human Rights Orientalising, Occidentalising and Authenticity*, *in* BEYOND RIGHTS TALK AND CULTURE TALK (2000); Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189 (1993); and RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL (2018).

47. *See generally* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

48. *Id.* at 33.

49. ZAKARIA, *supra* note 1, at 7.

50. There are several writers who have critiqued the ways in which gender equality has been framed around a particular reading of patriarchy as monolithically universal and women as—a cross-culturally singular, homogeneous group with the same interests, perspectives, goals and similar experiences. *See generally* Chandra Mohanty, *Feminist Encounters: Locating the Politics of Experience*, 1 COPYRIGHT 30 (1987); and Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, *in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 51 (Chandra Mohanty et al. eds., 1991). For how this played out within international forums, see Celina Romany, *On Surrendering Privilege: Diversity in Feminist Redefinition of Human Rights Law*, *in* FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN'S CLAIMS TO HUMAN RIGHTS 543 (1995). For a good overview of women's rights as human rights development, see Laura Parisi, *Feminist Perspectives on Human Rights*, OXFORD RSCH. ENCYCLOPEDIAS OF INT'L STUD. 547 (2017).

within UN forums and in UN documents, focus on the elimination of male control over a women's body and sexuality through separatism, matriarchy, or lesbian politics; fighting against pornography and prostitution and later, by drawing a link between gender and class oppression.[51] This was, as Third World/ Post-Colonial Feminists[52] would argue, a race and class blind "white feminism" that failed to take account of the complexity of women's lives[53] and that created an unequal partnership that preferenced the needs of "white women" over women of color who continued to be subject to systems of racial and international oppression. These unequal power relationships between (predominately) white and brown feminists are integral to the story of the "white savior industrial complex."[54]And while UN bodies (and other international actors) have responded to theoretical developments in feminist discourse by adopting the feminist concept of "intersectionality," this may be more of a normative than substantive change. Empirical studies of UN treaty bodies and other UN initiatives suggest that the way in which key indicators of gender equality progress (such as patriarchy and empowerment) are measured continue to be informed by liberal "white" feminism.[55]

The final critique asserts that gender justice feminists and human rights advocates have often adopted strategies and approaches that are intolerant of religious and cultural differences. Practices that involve women, their clothing, their bodies and their legal status (such as veiling, genital cutting (FGC/FGM), polygamy, and forced marriages) are, as Seyla Benhabib

51. *See e.g.,* REBECCA J. COOK, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (1994); JULIE PETERS & ANDREA WOLPER, WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (1995); and NIAMH REILLY, WOMEN'S HUMAN RIGHTS: SEEKING GENDER JUSTICE IN A GLOBALIZING AGE (2009).

52. Third World (anti imperial) feminists' agendas were framed around gender, class, racial &international oppression; western feminists' indifference to colonial legacy; international power differentials, dependency, poverty, SAPs, militarism, violence against women, and ecological deterioration; fighting against neocolonialism, capitalism, and cultural hegemonies.

53. This critique of human rights features prominently in the work of Lila Abu-Lughod, who concluded: "I have called into question the capacity of any rights frameworks to capture the complexity of actual people's lives." *See* LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 221 (1st ed. 2013).

54. ZAKARIA, *supra* note 1, at 56. The examples Zakaria gives in Chapter 3 are illustrative but, unfortunately, are not uncommon both in terms of how "aid" for empowerment is conceived and distributed but, as well, how equality is enforced through international human rights law.

55. *See* Zehra F. Kabasakal Arat, *Globalization, Feminisms, and Women's Empowerment: Comments on Rhoda E. Howard Hassmann's Article,"Universal Women's Rights Since 1970,"* 10 J. OF HUM. RTS. 458, 463 (2011). *See also* Cassandra Mudgway, *Can International Human Rights Law Smash the Patriarchy? A Review of 'Patriarchy' According to United Nations Treaty Bodies and Special Procedures*, 29 FEMINIST LEGAL STUD. 67 (2021).

rightly notes, sites of cultural and moral conflict.[56] Gender justice advocates argue that these are patriarchial practices that cannot be reconciled with gender equality, with women's equal value, with their autonomy, dignity, and freedom. Yet this "universalized" understanding limits patriarchy to mean culture and "harmful traditional practices" and represents an essentialized "understanding of women's experiences: that of white, western and middle-class women."[57] This, in turn, creates a type of patriarchial Othering, "an artificial binary between 'first world' and 'third world' women [where] [f]irst world women are characterized as political agents, whereas third world women are the homogenous victimized 'other.'"[58]

Whilst this approach has been subject to significant critique from within both feminism and human rights, its stickiness is found in UN official documents and international human rights law court decisions. This is true when examining the Committee proceedings of the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[59] one of the most important international vehicles for advocating women's rights. CEDAW has a large number of state parties (182 at the time of this writing) who have committed to protecting and ensuring women's human rights.[60] Gender equality, under CEDAW, includes dismantling social, religious, and cultural structures which foster the subordination of women by men. Article 5(a)[61] of the treaty directs states to take measures to eliminate gender stereotypes by modifying "social and cultural patterns of conduct" that reinforce negative gender stereotypes "and the idea of inferiority." The Committee tasked to ensure compliance with CEDAW has read "social and cultural patterns of conduct" to include religious, traditional. and customary beliefs, ideas, rules, and

56. SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 84 (2002).

57. Mudgway, *supra* note 55, at 70.

58. *Id.*

59. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

60. *Status of Ratification: Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS HUM. RTS., https://indicators.ohchr.org/ (last updated Jan. 27, 2023).

61. This language has been replicated under Article 12(1) of the Istanbul Convention that states: "Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions, and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men." *See* Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 12, May 11, 2011, C.E.T.S. 210.

practices. Critics have argued that Article 5's underlying message is that "traditional" practices or beliefs (read as harmful or barbaric) be replaced with "modern" (read Western) practices and beliefs.[62] One study has detailed how this approach, in practice, has affected the work of CEDAW as well as other UN treaty bodies. Cassandra Mudgway has empirically unpacked how UN treaty bodies (with a specific focus on CEDAW's concluding observations) have used the notion of "patriarchy" when evaluating some states parties but not others:

> To summarise, the CEDAW Committee is presenting "patriarchy" in a limiting way by connecting "patriarchal attitudes" to certain harmful practices. Such practices are overwhelmingly associated with the "Global South" and a narrowly constructed concept of "culture" under article 5. This risks "othering" or "exotifying" patriarchy itself. Moreover, this approach represents a traditional concept of patriarchy as being the overt subordination of women by men. This is concerning because this narrow conceptualisation is followed by other treaty bodes [sic].[63]

Reading patriarchy as "the exclusive domain of the other"[64] is also visible in the jurisprudence of the European Court of Human Rights, especially where the Court has dealt with the issue of veiling. For example, in the case of *Dahlab v. Switzerland,* a case declared inadmissible by the European Court of Human Rights (ECtHR), the applicant was a Swiss teacher in a public primary school who had converted from Catholicism to Islam. [65] In applying cantonal law aimed at preserving the secular character of public schools, the school authorities prohibited the applicant from wearing the hijab when teaching (although the State acknowledged that the applicant never attempted to disseminate her religious teachings to her students).[66] The Swiss government's argument, one supported by the Federal Court of Switzerland and, subsequently, the ECtHR, was underpinned by the principle of *laïcité* (neutrality).[67] The Swiss government argued that to preserve the "religious peace" in the community, some restrictions on the civil servants' right to manifest their religion or belief

62. *See* Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55 (2003).

63. Included in her study are Concluding Observations and/or General Comments of the Human Rights Committee, the Committee on Economic Social and Cultural Rights, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities. *See* Mudgway, *supra* note 55, at 67, 84 (2021).

64. Susanna Mancini, *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection, and Cultural Racism*, 10 I• CON 411 (2012).

65. Dahlab v. Switzerland 2001-V Eur. Ct. H.R. 447, 451.

66. *Id.* at 451-52, 456.

67. *Id.* at 455.

were necessary. [68] This was even more compelling in an educational setting, where students may be more easily influenced and "religious peace" must be protected with extreme care (the Court paid specific attention to the young age of the applicant's students).[69] The Court characterized the headscarf as a "powerful external symbol" that was "imposed on women by a [religious] precept… *hard to square with the principle of gender equality*,"[70] thereby weighing in on the debate as to whether this particular religious manifestation was one of free choice or coercion.

The ECtHR was to adopt a similar approach in *Sahin v. Turkey*,[71] which involved the expulsion of a twenty-four-year-old medical student at the University of Istanbul for defying a 1998 decision by the Vice Chancellor of the University of Istanbul prohibiting wearing a hijab in lectures, courses, or tutorials. The 2004 decision by a seven-judge chamber of the ECtHR found that there had been no violation of the applicant's Article 9 (freedom of religion) rights.[72] In its ruling, the Court argued that "the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as necessary in a democratic society."[73] The case was later referred to the Grand Chamber where the decision was upheld.[74] Using the same reasoning as in Dahlab case, the Court held that limitations on the headscarf may be justified in order to promote gender equality because the headscarf was a "'powerful external symbol' . . . imposed on women by a religious precept" and, as such, was "hard to reconcile with the principle of gender equality.[75]

Importantly, in these cases, the Court drew on a number of European states' court decisions and legal debates concerning the Islamic headscarf and state education in Belgium, France,[76] Germany,[77] the Netherlands,

68. *Id.* at 454-55.

69. *Id.* at 456, 463.

70. *Id.* at 463.

71. Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 181-183, https://www.echr.coe.int/Documents/Reports_Recueil_2005-XI.pdf.

72. *Id.* at 208.

73. *Id.* at 195-96.

74. *Id.*

75. *Id.* at 205.

76. In *Sahin*, ECtHR explicitly quoted the French National Assembly's bill of February 2004, which banned "visible" religious symbols in state primary and secondary schools. *Id.* at 192.

77. *Id.* at 193 (quoting BVerfG, 2 BvR 1436/02, Sept. 24, 2003, ¶ 10-11 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html.

Switzerland, and the United Kingdom. When measured against restrictions on religious dress for men, the *Sahin* case also reveals a marked difference in the Court's approach. In *Arslan v. Turkey*, a case involving the wearing of religious dress at a religious procession in Ankara by members of the Muslim sect Tarikat Aczmendi, the Court found that the state's conviction of the men violated Article 9.[78] Despite both cases involving the wearing of religious dress in public, the Court drew a "fallacious"[79] distinction between public educational institutions in *Sahin* and the public square in *Arslan*.[80] As Bronwyn Roantree has compellingly argued, if the purpose of this differentiated treatment is the promotion of gender equality, then,

> […] as Arslan demonstrates, far from promoting gender equality, by upholding the prohibition on the headscarf the Court is re-entrenching gender discrimination with its willingness to accept men's self-ascriptions of their intentions, even when there is significant evidence contradicting their claims, yet rejecting the same self-ascriptions from women. By rejecting women's own statements of their intentions, the Court is effectively erasing women's agency, an erasure made even more problematic because it is done in the name of gender equality.[81]

As Susanna Mancini has rightly argued, "… the ban on the veil suggests that women have only one way to exercise their rights correctly, and it regulates them accordingly. That is, it makes a political use of women's bodies."[82]

WHAT NEXT?

Centering feminism on gender alone has sidelined the impact of whiteness, class, culture, imperialism, and religion on gender parity. Zakaria's stealth critique, and that of other anti-imperialist feminists, demonstrates that this white-centered feminism has served as the voice of gender equality without reconciling it with its dimensionality. This is not just an academic or conceptual problem. As this article has detailed, it has manifested in the ways in which the human rights discourse and its advocates understand and agitate for gender equality. In moving the feminist discourse on women's rights forward, the challenge is,

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78. *See* Ahmet Arslan & Others v. Turkey, App. No. 41135/98, ¶¶ 6-7, 52 (Apr. 10, 2010), https://hudoc.echr.coe.int/eng?i=001-97380.

79. Bronwyn Roantree, *Gender and Religious Dress at the European Court of Human Rights: A Comparison of Şahin v. Turkey and Arslan v. Turkey*, 87 FORDHAM L. REV. 101, 110 (2018).

80. *Id.* at 110 (referring to Aslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. 49 (2009)).

81. *Id.* at 111-12.

82. Mancini, *supra* note 64, at 422.

> […]to think of ways in which to express their politics without subjugating other subjectivities through claims to the idea of a "true self" or a singular truth about all women. The re-envisioning of the subject of women's rights discourse leads to a reformulation of the notions of agency and choice. It is an agency that is neither situated exclusively in the individual nor denied because of some overarching oppression. It is situated in the structures of social relationships, the location of the subject, and the shape-shifting of culture. It is located in the recognition that the post-colonial subject can and does dance, across the shaky edifice of gender and culture, bringing to this project the possibility of imagining a more transformative and inclusive politics.[83]

There are a number of ways that feminists are re-envisioning this space, in both language and practice. Ayelet Shachar's work, for example, moves beyond a "religious particularist"[84] and "secular absolutist"[85] construct. She proposes an "intersectionist or joint-governance framework"[86] that provides an alternative to "a clear rejection of the simplistic either-your-culture-or-your-rights approach."[87] This "transformative accommodation"[88] of "privatised diversity,"[89] is an intersectional approach that provides "a more context-sensitive analysis that sees women's freedom and equality as partly-promoted (rather than inhibited) by recognition of their "communal" identity."[90] And in her 2019 book, *On Gender, Alterity and Human Rights*, Ratna Kapur provides an overview of useful and sustainable alternatives to the human rights discourse outside of a liberal formulation. In this pathbreaking work, Kapur moves away from human rights as a freedom project,[91] explores what alternative registers might look like, and examines what reimagining human rights within such a vision could be. [92]

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83. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 37 (2002).

84. Ayelet Shachar, *Should Church and State Be Joined at the Altar? Women's Rights and the Multicultural Dilemma*, *in* CITIZENSHIP IN DIVERSE SOCIETIES 199, 213-17 (Will Kymlicka & Wayne Norman eds., 2000).

85. *Id.* at 209-213.

86. Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQ. L. 573, 596-97 (2008).

87. *Id.* at 597.

88. *Id.* at 602.

89. *Id.* at 575.

90. *Id.* at 579.

91. RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 111 (1st ed. 2018).

92. *See id.*

While there is much work being done to reimagine and reconfigure how we advance gender justice, Zakaria's eloquent analysis reminds us just how much work remains. *Against White Feminism* amplifies and centers a critical conversation. It is not a call to abandon the feminist project or the potentiality of human rights but rather to press for "transformative change" by "removing the dichotomy between an essential 'good' of the Truth of universalism and the 'Otherness' of anything that lies outside."[93] It is only in doing so, Zakaria concludes, that "what whiteness has done to feminism, what it has stolen from it…can be cast out—through vocal and visible upheavals of structures of power."[94]

93. Cavanaugh, *supra* note 19, at 17, 26.

94. ZAKARIA, *supra* note 1, at 209.