

Gendering the Declaration

FIONNUALA NÍ AOLÁIN*

The Universal Declaration of Human Rights undergoes timely review with each decade milestone. At its fortieth, fiftieth, and now sixtieth passing,¹ we continue to inquire about its influence, its heightened or diminished significance, and the manner in which its vision might be better implemented. With each decade we gain a greater appreciation of the breadth of vision imagined in its language, the continuing validity of its ambition, and the multiple ways in which meaningful enforcement of those ideals falls short. Over the years, greater attention has been focused on the ways in which the Universal Declaration has advanced claims for gender equality. As the document's influence and status has magnified, its gendered boundaries are in plainer sight. Moreover, as feminists have systematically exposed the entrenched biases of international law, the Universal Declaration does not emerge from scrutiny unscathed.

This article focuses primarily on the enduring impact of gender inclusions and exclusions in the drafting of the Universal Declaration of Human Rights. Examining the Declaration's drafting history reveals the character and form of gender as it is included in the document and the long-term effects on the normative character of human rights law. Following in the footsteps of other feminist international scholars,² the article suggests that foundational documents

* Dorsey & Whitney Chair in Law, University of Minnesota Law School, and Professor of Law and Director, Transitional Justice Institute, University of Ulster, Northern Ireland. My thanks to Amanda Lyons for research assistance. All errors remain with the author.

1. See, e.g., Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781 (1998); Tracy E. Higgins, *Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 225 (1998).

2. Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to*

matter to the construction of gender relations in ways that are difficult to dislodge, and create conceptual pathways that can substantially limit theoretically open-ended visions of international human rights law. Thus, advancements typified as achievements in their time may carry greater long-term baggage with them than we perceive. I suggest that a more quizzical view of the gains made for women in the Universal Declaration might contribute to the broader project of defining gender dignity, violation, and accountability in ways that consistently reflect and respond to the experiences and needs of women. This approach would replace the currently dominant accommodationalist model which tries to “fit” the experiences of women into an existing and constrained framework.

It is conventional wisdom that the Universal Declaration, or large portions of it, constitutes customary international law. There is widespread agreement that the Declaration is a foundational document, that its influence has been and remains extraordinary, both domestically and internationally, and that it captures the best of state sentiments with regard to human rights. There is little disagreement that the Universal Declaration is a good thing. Generally, arguing against the Universal Declaration is not a winner. Nonetheless, skepticism has merit, and the start of the skeptical road takes us back to the committee rooms in which the dealing was done.

I. THE LANGUAGE OF SEX

In the opening paragraph of the United Nations Charter, states say they are determined to “reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.” This is further supported by a specific reference to the prohibition of discrimination on the basis of sex.³ In institutional terms, structural commitments to addressing gender discrimination followed when the Economic and Social Council established a Sub-Commission on the Status of Women to “submit proposals, recommendations, and reports to the Commission on

International Law, 85 AM. J. INT’L L. 613 (1991) [hereinafter Charlesworth et al., *Feminist Approaches*]; Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993); Judith Gardam, *A Feminist Analysis of Certain Aspects of International Humanitarian Law*, 12 AUSTL. Y.B. INT’L L. 265 (1992).

3. See Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 2, U.N. Doc. A/810 (Dec. 10, 1948).

Human Rights”⁴ Both Commissions, as we know, played a pivotal role in the adoption of the Universal Declaration in the post-war period.⁵

Some assessments of the Universal Declaration laud its lack of sexism, manifested in the repetition of specific phrases such as “all,” “everyone,” and “no-one.”⁶ Others are more circumspect. Adamantia Pollis has argued that the Declaration is informed by “[t]he notion of man as an autonomous, rational, calculated being . . . a notion of man but not of woman, and not even of all men but only of some.”⁷ If we take seriously the claim that “[t]he structure of the international legal order reflects a male perspective and ensures its continued dominance,”⁸ then paying close attention to the words that implicate social structures is particularly important. In this view, a nod to non-discrimination may not be sufficient to name and fully reveal the multiple ways in which women experience discrimination and exclusion. What the drafters may have understood to constitute impermissible discrimination arguably left intact (and endorsed) a social and political ordering that de facto functions to entrench the discriminations experienced by women. Three particular sections of the Universal Declaration are given detailed consideration to under-

4. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on the Status of Women [CSW], *Report of the Sub-commission on the Status of Women to the Commission on Human Rights*, at 14, U.N. Doc. E/38/Rev.1/App.1 (May 21, 1946). Notably under the leadership of Bodil Begtrup of Denmark, a swift de-coupling from the Commission followed, and the CSW was permitted to report directly to the ECOSOC. Humphrey significantly described the CSW as having as its appointed “representatives women who were militants in their own countries.” Johannes Morsink, *Women’s Rights in the Universal Declaration*, 13 HUM. RTS. Q. 229, 232 (1991) (quoting John P. Humphrey, *Memoirs of John P. Humphrey: The First Director of the United Nations Division of Human Rights*, 5 HUM. RTS. Q. 387, 405 (1983)).

5. The Commission on the Status of Women had to work hard to maintain its standing and to ensure its relevance to the ongoing work of the Commission on Human Rights. A Special Resolution was required which invited “the officers of the Commission on the Status of Women to be present and participate without voting . . . when the rights of women were being considered.” Morsink, *supra* note 4, at 231 (quoting U.N. Doc. E/CN.4/SR.23, at 8 (1947)).

6. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 118 (1999). Morsink notes that the drafters made prohibition of discrimination one of their few substantive drafting principles, as reflected by the repeated use of the words “all,” “everyone,” and “no one”: “all people and all nations” (Preamble), “All human beings” (Article 1), “All men and women” (Article 16), “Everyone” (Articles 2, 3, 6, 8, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29) and “no one” (Articles 4, 5, 9, 11, 12, and 18). *Id.* at 129.

7. Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, in *TOWARD A HUMAN RIGHTS FRAMEWORK* 7 (Peter Schwab & Adamantia Pollis eds., 1982).

8. Charlesworth et al., *Feminist Approaches*, *supra* note 2, at 621.

score this analysis: first, the Preamble and Article 1; second, Article 16; and finally, Articles 23 and 25.

II. EQUALITY, FAMILY, AND WORK

Early drafts of Article 1 started out with the phrase “all men,” and there were considerable negotiations between state representatives on the term and what might replace it.⁹ The Chair of the Commission on the Status of Women (CSW), Bodil Begtrup, working primarily though not exclusively with the Russian delegation, wanted to have the term “human beings” substituted for that of “men.”¹⁰ Moreover, Begtrup sought an addition to the Declaration’s Preamble stating that “when a word indicating the masculine sex is used in the following Bill of Rights, the provision is to be considered as applying without discrimination to women.”¹¹ The proposal was not taken up, and it meant the CSW had no choice but to seek to protect the status of women article by article in the Declaration. These debates continued through the First and Second Drafting Sessions, but by the time of the Third Session the phrase “all human beings” appeared in the draft document and remains. This textual definition represents a positive departure and an affirmative step in confronting gender-based discrimination in the document. But, its success was only partial.

The drafting history of Article 16 (concerning marriage and the family) was torturous.¹² The debates here concerned the status of the family. The final version of Article 16(3) proclaims the family as “the natural and fundamental unit of society.” Moreover, a crucial issue throughout the debates was whether the provision should contain reference to the equality of rights and status in the dissolution of marriage. The matter of marriage status and the disadvantage experienced by women in multiple jurisdictions was a particular preoccupation of the CSW, but its ability to radically influence the final configuration was limited. The article ultimately provides that:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to

9. MORSINK, *supra* note 6, at 118.

10. The debates about terminology revolved (at least formally) around the issues of linguistic translation. The historical documents reveal an interesting relationship between terminology, cultural practices, and political preferences.

11. Morsink, *supra* note 4, at 232 (quoting U.N. Doc. E/CN.4/AC.2/SR.2, at 2–3 (1947)).

12. Initially Article 16 was combined with Article 6 concerning equality before the law.

- marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The emphasis on the elemental role of the family in society underscores the point that deep-seated biases not only lacked recognition in the document, but that the Declaration operated to encapsulate them into itself and, as a result, functioned to preserve the basic social structures that underpin women's lived inequality. By gaining international protection for the family unit, states affirmed their prerogative to seal it off from legal and social inquiry, thereby solidifying the distinction between private and public spheres that have long served to disadvantage women.

An evident and discordant discrepancy arises in respect of Articles 23 and 25. Article 23 is concerned with work, freedom of employment, and pay. In Article 23(1) the Declaration states:

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Article 25 reads as follows:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and his family
2. Motherhood and childhood are entitled to special care and assistance.

Both articles contain references to "himself and his family." The implication of these provisions is that women only gain their status as mothers and homemakers and not as persons in their own right. The provisions also suggest that if there is a family wage, it is earned by a man.¹³ Historically, this notion of the "family" wage reflects thinking

13. See, e.g., ALLAN C. CARLSON & PAUL T. MERO, *THE NATURAL FAMILY: BULWARK OF LIBERTY* (2008). In this book, the authors purport to analyze what the UDHR means today. In so doing, they reveal that the contemporary understanding of "family wage" at the time of UDHR's drafting was a job for dad that's good enough to keep mom at home "in decency." In studying the history of this term, they describe it as the ideal "through which the industrial sector could claim only one adult per family, the father, who in turn had the natural right to a living wage that would also sustain a mother and child at home in decency." *Id.* at 9. They add that the failure of such "family wage systems" resulted from the "imposition of full

that converged the politics of socialists, feminists, and trade unionists on the demand for a “living” or “family” wage in the nineteenth century, for which strategic interests may have encouraged no challenge in the 1940s. Moreover, it clearly ignored the radical shift in work patterns produced by war economics in many negotiating states as women adopted work functions hitherto the exclusive terrain of men. It is an early example of how moments of societal transformation and upheaval in which women play key roles produce outcomes in which women’s separate interests are subsumed by national imperatives and underlying patriarchal interest.¹⁴ The language of Article 23(2), “Everyone, without any discrimination, has the right to equal pay for equal work,” was a compromise for the women’s lobby, which had initially sought the inclusion of specific terminology addressing the particular experiences of women in the workplace.¹⁵

One view on the use of gender specific terminology is that the very active women’s lobby simply missed these inclusions.¹⁶ Equally, this phrase may have gone unchallenged because it reflects and extends an essential and maintained division between the public and the private spheres. The maintenance of this division is a crucial part of understanding where patriarchy remained in play throughout the negotiations of the Universal Declaration.

I maintain that the Universal Declaration sustains a fundamental stake in preserving the public and private spheres, and that this foundation has had long-term influence on the construction of international law norms generally and on norms that speak to gender in particular. This clear-cut distinction between public and private spheres, which is at the heart of the traditional notion of the state, has had a defining influence on international law and an identifiable tenacity in international legal doctrine. International law scholars of the feminist hue have long articulated a notion of the way in which the “public-private” divide manifests itself. As Charlesworth has

‘gender equality.’” *Id.* at 11.

14. See also Christine Chinkin, *Feminist Interventions into International Law*, 19 ADELAIDE L. REV. 13, 14 (1997).

15. Interestingly, one of the reasons this terminology gets dropped is that the link between gender discrimination and discrimination on the basis of race is made by some delegates, creating a profound unwillingness by the colonial powers to engage with the broader issues of race, colonization, and discrimination that are implicated.

16. Morsink, *supra* note 4, at 234–35.

noted:

Historically, the formation of the state depended on a sexual division of labor and the relegation of women to a private, domestic, devalued sphere. Men dominated in the public sphere of citizenship and political and economic life. The state institutionalized the patriarchal family both as the qualification for citizenship and public life and also as the base socio-economic unit. The functions of the state were identified with men.¹⁷

A number of these characteristics are evident in the articles of the Universal Declaration discussed here, but notably pervade Articles 23 and 25. They range from the strong validation of the family as the heart of the societal contract, to the articulation of work and wage as a male domain to which specific kinds of guarantees are offered, and to the special status offered to motherhood.

The public-private distinction sustains women's oppression on a global level. The most pervasive harms experienced by women tend to occur within the inner sanctum of the private realm, within the family. As in domestic law, the non-regulation of the private realm, or the message that emanates from the protection of the private, legitimates self-regulation, which translates ultimately into male dominance for women. The Universal Declaration has many positives, no doubt, but for women we need to ask with careful consideration: what kinds of assumptions were embedded in its passage; how well did it undertake the task (for women) of being a transformational document on their terms; and what long-term influence has the bedding in of these core assumptions and binaries had on the corpus of international legal norms as it applies to women.

What then does this drafting history and its outcomes tell us? In reflecting on the significance of the terms used, we should pay attention to the manner in which the term "woman" or "women" can be mentioned in policy-making contexts but without actually bringing the concept of gender into play. As feminists have long argued, we need to be cautious about whether or not the use of the term actually does real "work" for women in legal contexts.

17. Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in *RECONCEIVING REALITY: WOMEN IN INTERNATIONAL LAW* 1, 9–10 (Dorinda G. Dallmeyer ed., 1993) (footnote omitted).

Kaufman and Lindquist have highlighted a valuable difference between “gender-neutral” language and “corrective language” for the purposes of advancing gender equality through international legal norms. Corrective language, they note, has three important advantages over gender-neutral language: “(1) [I]t addresses situations that do not victimize men as they do women; (2) it allows for woman-centered solution without reference to male action; and (3) it can prescribe active public policy to achieve fairness rather than passive elimination of discriminatory laws and norms.”¹⁸ Under this lens, the small gain in gender-neutral language advanced by the Universal Declaration fails to do the corrective work required to ameliorate the deeply grounded legal and social dispossessions experienced by women. We need to be assiduously wary when rights claims (while certainly assisting in developing political consciousness) can be incorrectly assumed to solve an imbalance of power. In practice, the reality is far different, and “the promise of rights is thwarted by the inequalities of power between men and women.”¹⁹ The articulation of the right can then operate, as Catherine MacKinnon has rightly noted, to conceal “the substantive way in which the man has become the measure of all things.”²⁰

Further, when the term “woman” is entirely absent, we should not assume, as many of the Universal Declaration’s drafters did, that “neutral” phrases delivered gender-friendly outcomes. In fact, the opposite is likely to be true. Gender neutrality sits in a legal universe which is deeply masculine and will be interpreted and actualized in that subjective social realm. So, neutrality is distinctly marginal in the dominant cultural and legal paradigms, and its capacity to bring into focus the experience of women in the terms on which it is experienced is distinctly limited. This skepticism is one to keep to the fore as we reflect on the influence of the Universal Declaration on social and legal realities in which it is believed to have influence.²¹

18. Natalie Hevener Kaufman & Stefanie A. Lindquist, *Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 114, 114–15 (Julie Peters & Andrea Wolper eds., 1995).

19. Charlesworth et al., *Feminist Approaches*, *supra* note 2, at 635.

20. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 81, 82 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

21. See, e.g., Pascha Bueno Hansen, *Itinerary of an Orphan Project: State and Society Ambivalence Toward Sexual Violence During the Internal Armed Conflicts in Peru*

III. FOUNDATIONAL DOCUMENTS

Though passed by General Assembly resolution in 1948 with eight abstentions, there is broad agreement that the Universal Declaration constitutes a foundational document for the modern international human rights regime. Foundational documents are relatively new phenomena for the international human rights movement for the obvious reason that the regime itself is largely a product of the post-World War II renewal; though, many domestic legal systems have similar status documents (usually national constitutions or bills of rights). Foundational documents are an important conceptual category for legal systems. They provide security and a sense of longitude to the norms they validate. They perform important symbolic functions by giving rise to myths (and realities) of universal buy-in, validation by the body politic as a whole, and long-term legitimacy to the values they contain. The legitimacy factor allows for repeat play of the document without the need for repetitious justification; this substantiation further affirms the validity of the starting point.

There are pitfalls of course. Foundational documents, whether domestic bills of rights or international declarations, are indisputably accompanied by gender snares. Some do better than others. The Universal Declaration makes evident attempts to engage with the pernicious effects of gender inequality. Nonetheless, as the foregoing analysis of certain articles in the Declaration illustrates, it validates not only deeply problematic gender distinctions in the arena of the private (family) and the public (work), but its neutrality cloaks a deeply gendered vision of the world. Precisely because the foundational document contains and elevates these damaging gender dimensions, an odd paradox arises. As the political worth of the document has risen, and its symbolic significance has grown, it becomes difficult to “knock down” the Universal Declaration on the grounds of its gendered failings because of the broader political and legal investment held by the document for multiple constituencies. Feminists find themselves reluctant to criticize the Universal Declaration, wary of the costs that such adversarial engagement would result in, but cornered by a chorus of validation. Conceptually, the fact of foundational and touchstone status makes the

argument a difficult one because, in many ways, the Universal Declaration presents a simple way to make a broader human rights argument. It requires much greater dissection of the Declaration to reveal its gender limitations. These “picky” arguments do better retail than wholesale, one consequence being that critics of the Declaration may experience de-legitimization or being marked out as hostile and out of the mainstream view of human rights when they offer a gendered critique. As a result, criticism by feminists of the Universal Declaration has been subdued. The quietness, I suggest, results from the particular confluence of the silencing that a foundational document can produce with the difficulty in articulating that a gender-neutral vision fails to deliver transformational outcomes when it comes to addressing the conceptual, political, and social perniciousness of gender discrimination.

CONCLUSION

This view of the Universal Declaration is a pessimistic one. It acknowledges a general value, but is far more circumspect as to the worth delivered to women as women by the Universal Declaration. Despite its claims of gender advancement, the Declaration left much work undone and may function to undercut the more radical analysis necessary to address the depth of discrimination, inequality, and exclusion experienced by women across jurisdictions and cultures. While much graft has been undertaken since 1948, we are far from advanced in the endeavor of equality, and, as Chinkin pessimistically noted:

The feminist project has not been seen by international lawyers and decision-makers as part of the mutating international legal order but as essentially appertaining to women’s rights (which can be sidelined along with other human rights). Despite important feminist writings there has not been any radical change in international legal structures, sources, methodologies or substance that takes account of them.²²

So to where do we turn as we look forward from the chorus of celebration? A starting point for my evaluation is the guidelines, specified by Kaufman and Lindquist, that probe whether international norms are likely to achieve gender objectives. First they ask whether

22. Chinkin, *supra* note 14, at 21.

the provisions “advance the ability of women to speak and define their own power in their own voices”?; secondly, whether the legal norm implies “that man is the measure and the standard for establishing appropriate, fair and reasonable behavior or treatment”?; and thirdly, whether there are “safeguards built in . . . to ensure that the provisions will not be used against women”?²³ I suggest that the Universal Declaration may fall short on all three measures. Some observers may caution against such cynicism and suggest that we should take what we have and work with it. By contrast, I urge us to start by seeking clarity about the limitations of existing standards. In the sharpness of that lucidity we will be able to identify what the structural barriers to gender equality are and address them in the full honesty revealed by the depths of the task at hand.

23. Kaufman & Lindquist, *supra* note 18, at 122.