

Research Article

On the Margins: The Disenfranchisement of Communities in Contemporary International Human Rights Law as Portrayed by Rosa Ehrenreich Brooks and

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Abstract

This article aims to shed light on the disenfranchisement of marginalised peoples within the contemporary international human rights law regime. Through comparing two works by Rosa Ehrenreich Brooks and Ratna Kapur, it explores the different ways that women and the queer community, in particular, can become invisible within the existing system. On the one hand, it speaks to the authors' consensus on the exclusionary and Western-centric nature of human rights and its theoretical foundations, while also pinpointing the divergences in their arguments on the role of dialogue and their analytical approaches, on the other. Nonetheless, it ultimately concludes that the authors have identified an ideal starting point for further discussion and research into how the existing system can be reformed to ensure that the rights of all individuals, including women and sexual minorities, are respected, protected, and fulfilled.

Introduction

Amidst proliferating discussions on the nature, history, and effectiveness of human rights by legal practitioners and mainstream, feminist, and queer scholars alike, Rosa Ehrenreich Brooks wrote in 2002 that more rigorous feminist engagement with the existing international human rights legal framework was crucial in order to revolutionise both international policy and domestic politico-legal discourse.⁸³⁷ Brooks' account of the lack of female visibility in international law shed light on the shortcomings of the international legal system, revealing numerous ways in which it systematically disadvantages women and neglects their human rights. Almost two decades later, Ratna Kapur lamented in a similar vein that international human rights law remains hostile to queer individuals and their human rights, arguing that the status quo has done more to strip the queer rights movement of its radicality than foster inclusion of the queer community within the current regime.⁸³⁸ Such critiques point to an overarching issue endemic to the architecture of international human rights law — the disenfranchisement of marginalised peoples within the system.

This paper reviews each writer's perspective on the status quo of international human rights law *vis-à-vis* their focuses on women and the queer community, respectively. It identifies the similarities in their understandings of the nature of the contemporary human rights system, on the one hand, and juxtaposes their views on the effectiveness of dialogue, their verdicts on the role of the West, and the theoretical lenses they adopt, on the other. Ultimately, it concludes that despite their differences in argumentation, the insights of both authors reveal that the human rights framework leaves much to be desired for women and queer individuals. That the insights of Brooks, especially, still remain relevant long after the initial publication of her work

⁸³⁷ Rosa Ehrenreich Brooks, "Feminism and International Law: An Opportunity for Transformation." *Yale Journal of Law and Feminism* 14 (2002): 345–61. Note that Brooks has not written on this subject in recent years.

⁸³⁸ Ratna Kapur, "The (Im)Possibility of Queering International Human Rights Law" in *Queering International Law*, ed. Dianne Otto (Routledge, 2017) 131–47, <https://www.taylorfrancis.com/chapters/edit/10.4324/9781315266787-11/im-possibility-queering-international-human-rights-law-ratna-kapur?context=ubx&refId=eef2c5d6-ca4a-4df5-9686-34147e839bd8>.

reiterates that the system must be reformed if it is to fulfil its claim to universality and serve the needs and interests of all sectors of society.

The Exclusionary Nature of Human Rights

Despite their differing analytical focuses on women and the queer community, respectively, both Brooks and Kapur agree that international human rights law has an exclusionary nature. Other scholars have previously argued that the concept of 'human rights' is relatively Western-centric and may thus be difficult to reconcile with the values, traditions, and rules unique to non-Western cultures. The tension between individualistic and collectivistic societies exemplifies this point.⁸³⁹ While both authors concur, they go further in specifically pinpointing women and queer individuals, amongst the vast expanse of such voices, as being neglected by the contemporary human rights regime. They argue that inclusion within the international human rights legal system is largely predicated on conformity with the overarching racial, cultural, sexual and gender paradigms that shape and sustain this system, and women and sexual minorities are among those who 'stray' from such expectations.⁸⁴⁰ Furthermore, they contend that the universalising proclivity of human rights and its tendency to obscure the exclusions on which the regime is founded is paradoxical, considering that the operation was born out of processes of othering and portraying such 'other' peoples as lacking the agency to be liberated from their oppressive traditions, histories and civilisational underdevelopment.⁸⁴¹ *Prima facie*, the erasure of the boundaries between different peoples, which underlie the very concept of human rights, may seem to be a promising step towards equality and human rights for all. However, the very designation of groups such as women and sexual minorities as 'others' in the first place entrenches this exclusionary rhetoric.

⁸³⁹ Hakimeh Saghaie-Biria, "Decolonizing the 'Universal' Human Rights Regime: Questioning American Exceptionalism and Orientalism." *ReOrient* 4, no. 1 (2018): 59–77, <https://doi.org/10.13169/reorient.4.1.0059>. See also Seth Kaplan, "The Limits of Western Human Rights Discourse." in *Human Rights in Thick and Thin Societies* (Cambridge University Press, 2018) 103–33, <https://doi.org/10.1017/9781108557887.007>.

⁸⁴⁰ Kapur, "(Im)Possibility of Queering International Human Rights Law", 142.

⁸⁴¹ Makau wa Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" *Harvard International Law Journal* 42, no. 1 (2001): 201–45.

Moreover, Brooks and Kapur both challenge the extent to which the current international human rights legal framework and the pithy pursuit of 'equality' and 'equal rights' can effectively serve the needs and interests of marginalised communities, particularly due to the prominence of 'assumed norms' within international law.⁸⁴² They discuss the assumed norms of 'maleness' and heteronormativity to which international human rights law continues to adhere, unconsciously or otherwise, bemoaning the unfortunate reality that they are used as an aspirational benchmark. Brooks points out that advancements in the human rights of women have historically been measured relative to the entitlements of men, where the ultimate goal is for women to be treated "the same" as and have equal access to education, jobs, and public authority on the same basis as their male counterparts.⁸⁴³ In the same vein, Kapur argues that much of queer human rights advocacy has focused on legal recognition for sexual minorities, such as through campaigns for marriage equality.⁸⁴⁴ However, both authors pose the question of why the rights of women and queer individuals should be assessed against such masculine and heteronormative metrics. Given the vastly different societal, cultural and biological circumstances of such marginalised groups, why should the protections under international human rights law afforded to their male and heterosexual counterparts be an object of desire? It is these parameters within which the international human rights regime is currently situated that stifles the effectiveness of human rights and the potential of the regime to protect marginalised populations. Brooks and Kapur thus encourage skepticism of the effectiveness of an international human rights legal system that inadvertently encourages marginalised people, such as women and sexual minorities, to strive for entitlements conferred according to existing male and heteronormative standards.

Brooks and Kapur's observations on the exclusionary nature and the stunted effectiveness of human rights, attributable to Eurocentrism and the reinforcement of

⁸⁴² Brooks, "Feminism and International Law", 350. See also Kapur, *"(Im)Possibility of Queering International Human Rights Law"*, 134.

⁸⁴³ Brooks, "Feminism and International Law", 350-51.

⁸⁴⁴ Kapur, *"(Im)Possibility of Queering International Human Rights Law"*, 134.

norms of maleness and heteronormativity, while not necessarily revolutionary *per se*, are certainly thought-provoking and encourage the questioning of the extent to which the human rights project actually upholds the interests of all human beings. Their insights serve as a reminder that human rights' claim to universality and its seemingly altruistic nature should not go unchallenged, suggesting that it is, indeed, pertinent to interrogate the liberal imagination upon which human rights were conceived.

At a Crossroads: The Effectiveness of Dialogue and the Role of the West

Despite their consensus on the exclusionary essence and role of entrenched norms in impeding the effectiveness of the contemporary human rights framework, however, the accounts of Brooks and Kapur begin to diverge when one considers the intricacies of their critiques. For example, Brooks adopts a relatively sanguine stance on the role of dialogue in bolstering the effectiveness of the international human rights legal system. She proposes that "rights-talk", though indeed performative in many contexts and not necessarily constructive under certain sociocultural circumstances, can be a gateway to understanding the world and act as a platform for both the introduction and advocacy of meaningful change.⁸⁴⁵ Conversely, Kapur is largely pessimistic about the role that mere talk of rights can play in enhancing the efficacy of international human rights law. She maintains a comparatively cynical view that dialogue is a political tool seeking to govern the lives of 'other' peoples while masquerading as a force for good.⁸⁴⁶ Because the contemporary human rights regime is built on Western-centric, normative understandings of queer, the insights that can emerge from human rights discourse are inherently restricted by the boundaries imposed by such ideas, stifling the revolutionary capacity of the subversive queer activist.⁸⁴⁷ Kapur thus argues that discourse alone is meaningless if it takes place within the confines of the Euro-American imaginary, and therefore calls for a radical decoupling of queer from the way it is portrayed in the West. In this light, Brooks' optimism in this respect appears somewhat misplaced as she fails to consider the Western scaffolding which

⁸⁴⁵ Brooks, "Feminism and International Law", 345.

⁸⁴⁶ Kapur, "(Im)Possibility of Queering International Human Rights Law", 144.

⁸⁴⁷ Kapur, "(Im)Possibility of Queering International Human Rights Law", 145.

shrouds the human rights regime and the implications that such undertones have for the effectiveness of human rights.

Kapur also dives deeper than Brooks in her critique of the effectiveness of international human rights law, adopting a postcolonial lens in her analysis and arguing that the current system perpetuates a form of cultural neo-imperialism.⁸⁴⁸ Further consolidating the aforementioned Eurocentrism of human rights, Western understandings of homosexuality and the prescriptive queer subject are becoming increasingly dominant, and attempts to universalise human rights consequently impose such ideas internationally. What the Western ideology espouses is the idea that the queer individual is dichotomous to the heterosexual, and that public exposure and “inclusion in heteronormative structures and the patriarchal institutions of the family” are sufficient to fulfil same-sex desire and reaffirm the queer identity.⁸⁴⁹ Kapur argues that this is not only a gross misunderstanding of the needs and the very character of the queer community, but it also proscribes a set of rights and a sense of identity to the queer individual in such a way that prevents the emergence of a fully-fledged postcolonial Asian or African narrative of the homosexual.⁸⁵⁰ As such, the superficial inclusion of LGBTQ+ voices based on a Eurocentric conception of queer is insufficient to confront the “newly emerging hegemonic, colonising queer in human rights” and fails to serve any meaningful purpose in buttressing the efficacy of the human rights system.⁸⁵¹

These differences are reflected in the way each author understands the place of the West within the international human rights legal regime we know today. While Kapur is evidently quite critical of the way Western narratives are entrenched, reinforced and reproduced in human rights, Brooks displays a comparatively forgiving stance on the incremental steps that the United States, in particular, has taken in order to be more inclusive and representative of women in the realm of international human rights law.⁸⁵² Moreover, having pointed out the Western-centrism of the field, Brooks

⁸⁴⁸ Kapur, “(Im)Possibility of Queering International Human Rights Law”, 138.

⁸⁴⁹ Kapur, “(Im)Possibility of Queering International Human Rights Law”, 140.

⁸⁵⁰ Kapur, “(Im)Possibility of Queering International Human Rights Law”, 138.

⁸⁵¹ Kapur, “(Im)Possibility of Queering International Human Rights Law”, 140.

⁸⁵² Brooks, “Feminism and International Law”, 357.

ironically proceeds to predominantly consider the implications of progress in human rights for the American feminist and the American legal landscape, especially within American law schools, courts, and legislation such as the Violence Against Women Act (VAWA).⁸⁵³ She does not contemplate how this might manifest in other non-Western jurisdictions, or discuss the influence that such transformations might have on women and the institutions that represent them in other regions of the world. In light of her critique of the exclusionary nature of human rights, this appears to be a crucial oversight and a missed opportunity to consider the broader implications of her analysis beyond the American context.

Contrastingly, echoing her postcolonial focus and in an attempt to subvert the age-old Eurocentrism of human rights, Kapur incorporates, albeit briefly, a potential South Asian-inspired conception of a non-binary subject that defies liberal expectations and is not shackled to the focus of Western human rights advocacy on sexual acts and identities.⁸⁵⁴ As such, Kapur advances a more comprehensive argument and seems to make an effort to shift away from the very Eurocentric character of human rights that her piece criticises, in an earnest attempt to fill the gaps in the representation of marginalised peoples that plague contemporary human rights law.

However, this is not to discredit entirely the narrative put forward by Brooks. Years on from the initial release of her article, gender bias in international law remains an unfortunate reality. This is evidenced in, *inter alia*, the continued underrepresentation of women in the international lawmaking sphere,⁸⁵⁵ and the inadequacy of legal frameworks in addressing issues that disproportionately affect women, such as sexual abuse, domestic violence, and genital mutilation.⁸⁵⁶ This speaks volumes about the

⁸⁵³ Brooks, "Feminism and International Law", 359.

⁸⁵⁴ Kapur, "(Im)Possibility of Queering International Human Rights Law", 144.

⁸⁵⁵ See, for example, the United Nations General Assembly (UNGA) Memorandum of the Secretary-General on the Election of Two Judges to the Roster of the International Residual Mechanism for Criminal Tribunals (November 19 2018) UN Doc A/73/577. All 11 candidates for the election of two judges to the International Residual Mechanism for Criminal Tribunals were male.

⁸⁵⁶ Eve McCabe, "The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afghanistan" *UCLA Journal of International Law and Foreign Affairs* 5, no. 2 (2000): 419–60, <https://doi.org/10.2307/45302148>.

endemic nature of the invisibility of women in the field, as well as the lack of progress being made in shifting the human rights infrastructure away from traditional patriarchal organisational logics. It is apparent that the steps necessary to tackle the exclusive nature of human rights and its masculine focus have not been taken, or action has been insufficient. Thus, despite Brooks' oversight of postcolonial and non-Western perspectives, her work still serves as a reminder that more can be done for marginalised communities within the international human rights legal framework, and that more *must* be done if we are to reform and strengthen the human rights regime.

Conclusion

To conclude, the works of authors Rosa Ehrenreich Brooks and Ratna Kapur serve to elucidate the ways in which the contemporary international human rights system disadvantages marginalised groups, especially women and sexual minorities. Their commentaries on the exclusionary nature and theoretical shortcomings of human rights shed light on the necessity of a legal framework that effectively addresses the entitlements, needs and interests of marginalised peoples. Notably, the authors do diverge on matters such as the role of dialogue, the theoretical angles from which they conduct their analysis, and the emphasis that they place on the West in international human rights today. Nonetheless, both Brooks and Kapur aim to shed light on the marginalised communities disenfranchised by the contemporary international human rights law regime, providing an ideal starting point for future academic debate and research on how the system can be reformed to enhance its effectiveness for all the individuals and groups it claims to serve.

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