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Inclusion versus Exclusion

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The human rights idea is premised on universal inclusion. This is evident in the notion of universality and inalienability that underpins the post-Second World War human rights movement and the International Bill of Rights – the Universal Declaration of Human Rights (UDHR), the United Nations International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (CESR) all affirm the inherent dignity of *all* persons. The ICCPR specifically asserts that the equal and inalienable rights of 'all members of the human family' are the foundation of freedom, justice and peace in the world (United Nations, 1966). Similarly, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 affirms human rights as a universal and relevant standard for *all* humanity. Its preamble states that the UDHR constitutes a common standard of achievement for all peoples and all nations. It also affirms the commitment of all states to fulfil their obligations to promote universal respect for, and protection of, all human rights and fundamental freedoms. The universal nature of these rights and freedoms, the Declaration proclaims, is 'beyond question' (United Nations, 1993a).

Notwithstanding the claims of global inclusivity, the universality of human rights continues to be challenged on multiple fronts by proponents of varying degrees of cultural relativism and by the fact that the legal universality of human rights is hinged more on possession than enforcement (Duquette, 2005: 59). Although international human rights laws proclaim the universality of human

rights and affirm the fundamental rights of all persons, the reality is that these rights are not fully enjoyed by everyone. Universal human rights remain largely rhetorical and aspirational. Nevertheless, many human rights advocates, international organizations and states assume and assert the universality of international human rights.

In spite of the affirmations of universality and inclusiveness of international human rights law, the human rights idea has not historically been an inclusive one. The history of human rights can be read as a history of tensions between movements for inclusion and the expansion of human rights protection to more people, on the one hand, and countermovements for exclusion and the restriction of human rights protection, on the other. However, international human rights have, for the most part, involved the progressive inclusion in the rights protection system through a series of successful struggles (Brems, 2001: 21). Movements for more inclusiveness in rights entitlements have been confronted with countermovements that seek to restrict the scope of human rights and their universal applicability. Nevertheless, the historical trajectory of the human rights movement has been toward more inclusion than exclusion.

This chapter examines the intersections of exclusion and inclusion in human rights theory and practice. It explores the extent to which international human rights standards help to overcome discrimination and exclusion. It proceeds from the premise that the universality of human rights in terms of their inclusivity is an ongoing project. There are still many members of the human community who are not being granted full and equal protection of their human rights. There are also influential forces opposed to an all-inclusive human rights agenda making certain people around the world remain more vulnerable to human rights abuses than others. The most vulnerable include ethnic and religious minority groups, women in some societies, refugees or so-called illegal immigrants, and homosexuals. These groups provide the framework for the discussion of the tensions between human rights inclusion and exclusion in this chapter.

HISTORICAL DISCOURSE OF RIGHTS INCLUSION AND EXCLUSION

The great strides that have historically been made in human rights protection have been in response to human suffering and social injustices arising from the discriminatory perception and treatment of other people and societies. Such discriminatory attitudes and treatment are often premised on racial, gender, ethnic, religious or class differences. Key movements toward rights protection have sought to challenge the discriminatory status quo and demanded more inclusiveness in the enjoyments of social and political entitlements. Early documents, such as the English Magna Carta and Bill of Rights, the American Declaration of Independence and the French Declaration of the Rights of Man represent antecedents to the idea of human rights in terms of normative ideas of justice and rights inclusiveness.

The Magna Carta reaffirmed long-standing rights of the English nobility by limiting the powers of the king and recognizing that all people, including the monarch, are subject to the law. Similarly, Enlightenment liberal thought expanded the scope of rights and ushered in a revolutionary change in human thought. A secular and relatively more egalitarian morality emerged in Europe and spread throughout the world under the revolutionary banner of the Enlightenment (Ishay, 2008: 64). Enlightenment doctrine of positive individualism, which stressed the primacy of the rational individual as distinct from the power of monarch, religious authority or social control, underpins the inclusionary impulse of the contemporary human rights idea.

Building on Enlightenment ideas, sixteenth century Euro-American revolutions expounded broader and more inclusive notions of citizen's rights. The United States Declaration of Independence, for example, marked a radical ideological change toward egalitarianism arising from the American Revolution. The assertion of liberty, individual rights and equality challenged the old order and promised a society of more inclusive citizen participation in governance and the expression of political rights. Similarly, the French Declaration of the Rights of Man and Citizen ushered in a republican era premised on the notion of liberty, equality and fraternity. These forerunners of the contemporary human rights idea advocated, to varying extents, limits to the absolute power of the sovereign or tyranny of the state and set the foundations for broader civil rights that appeared later.

There were, of course, significant limits to the inclusiveness of these historical rights movements. Their promise of rights inclusivity remained tempered by exclusion based on race, gender, class, religious and cultural difference. The Magna Carta, far from being a charter for all humanity or even all English citizens, was restricted to a privileged class in the nobility and feudal aristocracy. It protected the rights of the English barons against the arbitrary powers of King John, but had little to say about the rights of ordinary men and women in England or abroad.

Enlightenment liberal rights tradition centred not so much on universalist inclusion but on particularistic entitlements for the privileged classes, often propertied white men, to the exclusion of the rest of the population. For all their innovative thinking, Enlightenment liberal philosophers such as Thomas Hobbes, John Locke, Thomas Paine and Jean Jacques Rousseau still bought into some conservative and exclusionary ideas. Those who confidently declared rights to be universal in the eighteenth century turned out to have something much less all-inclusive in mind. They considered children, the insane, the imprisoned and foreigners to be unworthy of full participation in the political process. They also excluded those without property, slaves, free blacks, women and, in some cases, religious minorities (Hunt, 2007: 20).

The American Revolution, which was premised on the 'self-evident' equality of all men and the French revolutionary ideas of liberty, fraternity and egalitarianism, did not seriously shake the foundations of slavery and other forms of

social exclusion in these societies. The American Declaration of Independence made the powerful claim that 'all men are created equal, that they are endowed by the Creator with certain unalienable rights', while failing to end racial discrimination in the United States. Slaves continued to be sold and bought as chattel partly because they were not constructed as part of a universal humanity. The French Declaration of the Rights of Man and of the Citizen asserted that 'men are born free and equal in rights', yet this universal claim to freedom and equality excluded many of the common people. French republicans held on the institution of slavery at home and in the colonies; women and members of subordinated minority groups were treated less than full citizens. Such was the persistent exclusionary impulse that there were calls in France for Olympe de Gouges, an advocate of women's rights, to be executed at the guillotine after she issued her 'Declaration of the Rights of Woman and Citizen'.

Despite these limitations, the promise of inclusivity in Enlightenment idealism laid important groundwork for modern human rights. As a moral doctrine, human rights owes much to the spirit of the European Enlightenment and its focus upon the ideals of individual liberty, equality, and an attempt to subordinate political power to the will and interests of those subject to its jurisdiction (Fagan, 2011: 20). The declarations of the American and French revolutions did not resolve all the human rights issues of their time, but they 'opened up a previously unimagined space for political debate' (Hunt, 2007: 133).

In the same way, abolitionists who opposed the slave trade, spurred by both Enlightenment conceptions of natural rights and by religious beliefs, pushed governments to make the suppression of the slave trade a focus of diplomacy and treaty-making. The result, over the first few decades of the nineteenth century, was a novel network of international treaties prohibiting the slave trade. The conceptualization of the slave trade as a crime against humanity, and of slave traders as *hostis humani generis* (enemies of mankind), helped lay the foundation for twentieth century international human rights law (Martinez, 2012: 149). These developments challenged the political and social exclusions of the enslaved and served to affirm their legal inclusiveness with the human community.

INCLUSIVITY IN INTERNATIONAL HUMAN RIGHTS

The adoption of the UDHR following the end of the Second World War marked the international recognition of certain fundamental rights and freedoms as inalienable universal values to which all individuals are entitled simply by virtue of their humanity. The rise and fall of Nazi Germany had a most profound impact on the idea of universal human rights in the twentieth century as the world united in horror and condemnation of the Holocaust. Nazi atrocities, more than any previous event, brought home the realization that law and morality cannot be grounded in any purely utilitarian, idealist or positivist doctrines (Patterson,

1995 176). Certain actions are wrong, no matter the social or political context, and certain rights are inalienable, no matter the social or political exigencies. This led to a growing acknowledgement that all human beings are entitled to a basic level of rights and that it is the duty of both nation states and the international community to protect and promote these rights. Post-war international consciousness of the need to protect the basic rights of all peoples by means of some universally acceptable parameters is evident in the UDHR, which is the cornerstone of the contemporary human rights movement. At its adoption in 1948, the UDHR was heralded as 'a world milestone in the long struggle for human rights' and 'a magna carta for all humanity' (United Nations, 1997). It promised to be more inclusive than the original English *Magna Carta*.

Although the post-Second World War human rights movement may have been groundbreaking in its universalist aspirations, it has not been spared the historic tensions of inclusion and exclusion in rights discourses. Struggles for political inclusion such as anti-colonialism in the 'Third World', the fight for social inclusion and equal rights for women, indigenous people and other minorities, and the children's rights movement were essentially about inclusion and expanding the international human rights system to include peoples previously denied these rights. Struggles for inclusion have also demanded and obtained additions to the human rights protection system. For example, the inclusion of the ex-colonies in the United Nations system led to the expansion of the right to self-determination and the enunciation of third-generation rights such as the right to development.

Twentieth century anti-colonial struggles for self-determination had a significant impact on the development of the idea of inclusive universal human rights. Colonized people drew on the language of rights emerging in the West in their ideological struggles against imperial powers and their demands for national self-government. Anti-colonial movements in Asia, Africa and elsewhere in the colonized world were among the first mass movements to draw on the universal language of human rights of the post-Second World War era. The adoption of the UDHR in 1948 and the signing of the European Convention on Human Rights (ECHR) two years later lent the moral legitimacy of human rights to long-standing struggles for political self-determination (Burke, 2010: 37). Anti-colonial nationalists demanded that the ideals of freedom and self-determination advanced as the basis of Allied military campaigns against Nazism in Europe and Japanese imperialism in Asia be also extended to them. In India, nationalists led by Gandhi took advantage of the new international emphasis on the right to self-determination espoused in the UN Charter to demand independence from British colonial rule.

However, the notion of including self-determination within the emergent human rights framework was strongly contested. Certain nations wanted it excluded from the emerging framework of universal human rights. At the United Nations, European colonial powers saw the inclusion of self-determination in the human rights framework as a challenge to their national sovereignty. They resisted the prospects of dismantling their colonial empires or extending the

rights of self-determination to colonized peoples on the basis of the new universal human rights order. The principle of sovereignty and the concept of human rights were viewed as fundamentally opposed to each other, one having to do with the rights of states and the other, individual rights. The work of the Human Rights Commission in those early days consisted of underlying struggles over which rights to include and which ones to leave out (Morsink, 1999: 171). It was partly for this reason that human rights were enunciated at the UN on the basis of high principles, leaving the matter of enforcement unresolved (Zeleza and McConnaughay, 2004: 9).

Questions over the inclusivity of the UDHR and its impact on the status of colonized people arose even while the Declaration was still being drafted. It was an inescapable irony that a declaration purporting to be a 'Magna Carta for humanity' was being drawn up at a time when half of the world's population was still under some form of colonial domination. Perhaps to address this paradox and remove any ambiguity over whether the provisions of the Declaration applied to colonized people, the drafters of the Declaration included a clause that stated quite categorically: 'The rights set forth in this Declaration apply equally to all inhabitants and non-self-governing territories.' Some European colonial powers were not comfortable with such a categorical statement affirming the applicability of the Declaration to colonized peoples. There was concern that this would provide new grounds for nationalists and anti-colonial activists to assail the legitimacy of colonial rule and other forms of political domination (Simpson, 2001: 455).

White minority-ruled South Africa, one of the countries that opposed the UDHR, was concerned about the implications for its policy of racial segregation. Its delegate stated that the text of the Declaration went beyond generally accepted rights. He argued that the right to participate in government was not universal; it was conditioned not only by nationality but also by qualifications of franchise (United Nations, 1948a). In the end, the General Assembly deleted the clause specifically affirming the applicability of the UDHR to colonized peoples and replaced it with a less specific one: 'No distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any limitation of sovereignty' (United Nations, 1948b). It was also emphasized that the Declaration was not legally binding on United Nations member states that had adopted it.

European imperial powers at the forefront of establishing the UN and drafting the UDHR had an entrenched interest in defending their sovereignty and evading glaring contradiction between colonialism and the human rights idea. For these powers, delinking self-determination struggles in their Asian and African colonies from human rights idealism at the UN was a matter of political and ideological expedience. They viewed the principle of sovereignty and the concept of human rights as being fundamentally opposed to each other – one having to do with the rights of states and the other with the rights of individuals.

The exclusion of the voices and perspectives of colonized peoples in the process of drawing up the UDHR remains one of the strongest limitations of its claim to universality. However, the UDHR was significant in the decolonization process because it reinforced the right of self-determination. In spite of the compromises made to achieve consensus on the Declaration, it proved effective in grounding anti-colonial demands for independence in an emergent universal human rights agenda. In direct repudiation of colonialism, Article 21 of the UDHR states that the will of the people shall be the basis of the authority of government and affirms the right of everyone to take part in the government of his or her country.

In 1960, the UN General Assembly took a further step in the inclusion of the political rights of colonized people within the framework for international human rights protection with the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Declaration reaffirmed the fundamental human rights, dignity and worth of all humans, and the equal right of peoples of all nations to self-determination. It asserted that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory. It also acknowledged that the process of liberation of colonized people was 'irresistible and irreversible' (Sohn, 1986: 319). These principles were subsequently included in the ICCPR in 1966.

The inclusion of self-determination within the United Nation human rights framework in the 1950s and 1960s set the tone for the progressive expansion of boundaries of the international human rights system in the succeeding years. The more inclusive the international human rights system became, the more it became a patchwork of standards and concepts relating to an increasingly varied range of human situations (Brems, 2001: 21). A key dimension of progressive realization of an all-inclusive human rights system has been the emergence of specialized conventions on the human rights of particular categories of people such as refugees and irregular migrants, women, children and people with disabilities.

Tensions continue, however, over the scope of human rights and what to include and exclude within the international human rights system. In many communities around the world, certain groups continue to be systematically disadvantaged because they are discriminated against. Such groups are often differentiated by race, ethnicity, age, sexual orientation, religion, caste, or gender. Formal and informal processes in domestic justice systems and the international human rights framework discriminate against excluded groups. At times, this is because of the lack of technical and resource capacity to protect the rights of politically and socially marginalized groups. At other times, however, exclusion is due to the absence of political will to challenge entrenched inequities and fully extend human rights protection to marginalized groups. Perhaps the clearest examples of such politically motivated exclusion are the limitations imposed on refugee rights protection.

EXCLUSIONS IN REFUGEE RIGHTS PROTECTION

The establishment of a treaty-based system for the protection of human rights is one of the most important of international law's achievements in requiring accountability for states in the treatment of all individuals within their territories (Beyani, 2006: 270). The 1951 Convention Relating to the Status of Refugees (hereinafter Refugee Convention) exercises a supervisory mandate premised on the diplomatic protection of refugees within the community of nations. Under the Refugee Convention, a 'refugee' is defined as an individual who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owning to such fear, is unwilling to avail himself of the protection of that country" (United Nations, 1951: 3). This typically includes individuals whose race, gender, ethnicity or religion makes them targets for prosecution. Nearly 15 million people are currently defined as refugees by the Office of the UN High Commissioner for Refugees (UNHCR). An additional 20 million are identified as 'internally displaced persons' (IDPs) while 5 million people are 'of concern' to the international refugee agency. Together, these 40 million people constitute about 1 of every 150 persons on the earth (Steiner, 2003: 3).

Refugees and irregular migrants find themselves in particularly vulnerable situations. They often come from countries where governments are either unwilling or unable to protect their human rights. In some cases, governments themselves commit the human rights abuses against their own people that trigger refugee flows. The only option available for many in this circumstance is to seek asylum in other countries. On reaching destination counties, however, asylum seekers and irregular migrants often find themselves trapped in a whirlpool of inclusion/exclusion dialectic (Overbeek, 1995: 16).

A key exclusionary element of the international human rights systems for the protection of refugees is the lack of a treaty body mechanism and competence to decide on the legality of measures pursued by states under the Refugee Convention (Beyani, 2006: 281). International human rights treaties leave it to each state to implement their provisions without dictating how this is to be done. There is nothing in the Refugee Convention that specifies the manner in which states' obligations are to be enacted or how the principles of the treaty are implemented. The result is that many countries have opted for a progressively narrow interpretation of the Convention. Under such narrow interpretations, fewer and fewer irregular migrants are deemed qualified for refugee status and protection in receiving countries. Countries that once had generous refugee policies now see the cost of asylum as outweighing the benefits and are increasingly restricting the protection offered to refugees. A growing number of states have adopted measures that either deny asylum hearings altogether or provide for accelerated procedures in 'safe third countries', effectively limiting the number of refugees claimants that reach their borders.

Another exclusionary limitation of the international human rights system is the restricted framework for refugee protection. Going by the restricted definition of

'refugee' in the Refugee Convention, refugees constitute only a small subclass of migrants subjected to human rights abuse. IDPs are, for the most part, excluded from the refugee human rights protection framework even though they are essentially refugees who have not left their country of origin, either by choice or because of the lack of opportunity to do so. In order to qualify for refugee status under the Convention, a refugee claimant (or asylum seeker) must be outside his country of origin and possess a 'well-founded fear of persecution' (United Nations, 1951: 3). However, as several studies have pointed out, proving persecution is often a difficult if not impossible task for many asylum claimants who flee their home countries without any possessions or documentation, and arrive in the receiving countries without the relevant language skills or cultural orientation (Kenstroom, 2011: 404).

Some scholars have argued that the absoluteness of the individual's right to be treated in a humane manner has to be counterbalanced by the 'justifiability' of the treatment in the particular situation. They warn against an uncontrolled enlargement of human rights procedures particularly where they relate to declaring refugee status and determining grounds for asylum. It has been argued that although the enlargement of the application of the phrase 'inhuman and degrading treatment' may be justified from a humanitarian point of view, it is questionable in so far as it raises the unprecedented result of progressively nullifying the very legal nature of asylum (Fabbricotti, 1998: 660).

While constricted interpretations of what constitutes cruel, inhuman and degrading treatment may bring conceptual specificity to international refugee protection law, it risks excluding many victims of human rights violations. The exclusion of many claimants from international human rights protection has arisen from the reluctance of receiving states to grant refugee status to individuals whose fear of persecution, while well founded, is shared by large numbers of countrymen. Many states demand that the refugee claimants must prove that they have been singled out and thereby face a greater risk of persecution than others in that society (Gibney, 2009: 316). This is often a high hurdle to jump. The result is that many legitimate asylum claimants have nowhere to turn. They are effectively excluded from human rights protection in their home countries, excluded from protection in the receiving countries and excluded from protection within international human rights law.

Exclusionary tendencies are also evident in the distinction made between political and economic migrants. Although this distinction exists legally and politically, it makes little sense in social reality. The political and economic impulses for migration are usually connected. Political violence is often triggered by worsening economic conditions, and economic hardship frequently results from the exercise of repressive power (Overbeek, 1995: 16). The same fuzziness applies to the distinction between forced and voluntary migration, which has the effect of excluding many claimants from the protection of international human rights law.

As the number of refugee claimants in the world increases, domestic and international human rights frameworks for their protection seem to be narrowing rather than expanding. National legal and institutional frameworks for protecting the

rights of stateless persons are often unreliable, while international frameworks are largely ineffective. Stateless refugees might appeal for the protection of their human rights, but the reality is that, more often than not, those rights are guaranteed by no institution with the power to enforce them. The plight of refugees around the world therefore gives lie to the principle of equality before the law on which nation states and the universal human rights system are built. Human rights are purported to attach to humans simply in their being human. The reality, however, is that without membership as citizens of a polity, universal human rights have proved to be an illusion (Berkowitz, 2011: 62). The exclusion of many irregular migrants from human rights protection attests to this. The rights of those who have no state polity to enforce their rights, such as refugees, are virtually non-existent and they remain effectively excluded from any real frameworks for human rights protection. The same can be said of women's rights and the exclusionary barriers imposed by culture, sexisms and institutional discrimination.

INCLUDING THE RIGHTS OF WOMEN

In many societies, unequal power relations between men and women have historically put women in subordinate and disadvantaged positions. Such subordination has long been socially constructed and culturally justified as part of the 'natural' order. The post-Second World War universal human rights idea was premised on the notion that women, like men, are entitled to all the protections and assurances set forth in the International Bill of Rights – that is, the UDHR, the ICCPR and the ICESCR (Stark, 2009: 431). However, given the wide-ranging human rights issues that women face, it became obvious that the recognition of women's rights needed to be addressed more specifically. This resulted in specific international laws aimed at protecting and promoting the rights of women.

The adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by the UN General Assembly in 1979 inaugurated the institution of the specific women's rights corpus within the international human rights system. It complemented other landmark documents on women rights such as the Declaration on the Elimination of Discrimination against Women, the Declaration on the Elimination of Violence against Women adopted by the United Nations in 1993, and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) adopted in 2011.

In spite of these international provisions for protecting women's rights, many women remain second-class citizens throughout the world. Women in many societies around the world remain effectively excluded from the political process with limited opportunities to participate in local or national politics. This effectively restricts their civil and political rights as laid out in the international bill of rights. In the twenty-first century, women in some countries are still disenfranchised and denied the right to vote. Even where they vote, they may not

be able to run for office due to illiteracy, economic limitations or cultural restrictions (Nazir et al., 2005: 21). The international legal framework for the protection of women's rights now in place has not yet been applied effectively to redress the disadvantages and injustice experienced by women by reason only of their being women. Women in many societies remain excluded from the full protection of domestic and international human rights laws.

The reasons for this exclusion are complex and vary from country to country; however, certain common factors can be identified. These include a lack of understanding of the systemic nature of the subordination of women as a human rights violation, an unwillingness of human rights groups to focus on women's rights and the persistence of cultural practices and belief systems that perpetuate women's subjugation. In some countries, men have complete authority and control over the lives of women, leaving them without the right to marry a person of their choice, and without legal access to divorce or the ability to enjoy inheritance rights. In a few countries, a woman cannot even obtain a passport, or buy and sell property. Physical abuse within, and outside of, marriage, including rape and so-called 'honour killings', is tolerated in some societies. Human rights advocates sometimes fail to see women's rights as human rights because of a lack of understanding of the depth of the institutional and cultural norms that condemn women to deeply inferior status in many locations around the world (Ross, 2008: xxix).

The debate over gender violence underscores the exclusionary impulses that persist in international human rights discourse on women's rights. While some forms of gender violence such as torture and genocide have widely been recognized as human rights violations, interpersonal and domestic violence was, for a long time, excluded from the human rights framework. Yet, it is easy to see how interpersonal violence can be interpreted as a violation of women's human rights, especially where the state has acted in a discriminatory way by failing to adequately prosecute and punish sexual and physical assaults against women.

Although individual perpetrators of domestic violence are not legally liable under international human rights law, states are responsible for their failures to meet international obligations, even for acts by private persons, if they fail to make an effort to eliminate or mitigate the acts. Seen from this perspective, state action or inaction can be restrictive of the full protection of women rights. This is the case in many countries where the inclusion of gender violence into the international and domestic human rights framework faces opposition from those who see defining gender violence as a human right as an assault on culture (Merry, 2006: 292).

The responses of international human rights institutions in the context of violence against women have been described as 'mixed, arbitrary, superficial and inconsistent' (Edwards, 2011: 4). There have been advances in the international human rights framework for protecting women from gender-based violence but the impact has been largely rhetorical rather than structural. The debates over women's rights have long been characterized by the tensions over what to include or exclude. For a long time, core issues relating to women's rights were

excluded from the international human rights framework. Domestic violence, for example, was historically not viewed as a violation of women's human rights because it was not, and is not, directly perpetuated by the state. Rather, it was considered as being within the private or cultural spheres (Stark, 2009: 343). Struggles for inclusion, however, led to the Declaration on the Elimination of Violence against Women, which recognizes that violence against women 'violates and impairs or nullifies the enjoyment by women of human rights' (United Nations, 1993b). More significantly, the Declaration prohibits states from invoking custom, tradition, or religious considerations as excuses to avoid its obligations to prevent and punish acts of violence against women.

Women's rights, however, continue to be undermined by exclusionary impulses arising from competing claims of religious and cultural rights. Even when states have signed on to human rights instruments recognizing gender equality, many of them have taken on broad reservations that effectively limit the scope of women's rights. It is instructive that more states have entered reservations to their ratification of the CEDAW than to any other human rights treaty (Arat, 2003: 233). Most of these reservations contest the guarantees of equality for women in marriage and in the family, and the prohibition of forms of discrimination against women. Resistance to change has come mainly from religious conservatives who believe in subordinate gender-specific roles for women on the basis of patriarchal cultural claims and those who view human rights in this area as an intrusion on the private realm, or even a form of Western imperialism (Stark, 2009: 350). The result is that in many societies around the world women and girls remain excluded from the full protection of national and international human rights laws. Similar trends are evident with respect to lesbian, gay, bisexual and transgender (LGBT) rights.

EMBRACING LGBT RIGHTS

Across the world discriminatory laws and policies affect the rights and well-being of LGBT people. The issues range from legal recognition of same-sex marriage to the prescription of the death penalty as punishment for same-sex sexual activity or identity. Exclusion of LGBT people from human rights protection also arises from state policies on a wide range of issues: recognition of same-sex relationships, LGBT adoption, sexual orientation and military service, immigration equality, anti-discrimination laws, and hate crime laws regarding violence against LGBT people. Of these issues, physical violence against LGBT people is perhaps the most pertinent. In many countries LGBT people are targets of organized abuse from religious extremists, paramilitary groups, neo-Nazis, extreme nationalists and others, as well as of family and community violence.

Although extant human rights laws can be interpreted broadly in ways that address some of the forms of discrimination and oppression they experience, international human rights law has largely been silent on the rights of LGBT people.

Until recently there were few international legal instruments and institutions that explicitly addressed human rights violations as they pertain to homosexuals (Goodhart, 2011: 68). Even human rights organizations traditionally excluded LGBT issues from their advocacy agendas. LGBT rights issues were neglected in much of work of Human Rights Watch during the heyday of the organization's human rights activism in the 1980s and early 1990s (Bob, 2009: 58).

As with women's rights, the main obstacles to the inclusion of LGBT rights in the human rights framework have been religious and cultural barriers. These exclusionary barriers can be found in every region of the world. In Latin America, for example, rampant discrimination and violence on the basis of sexual orientation has been attributed partly to a prevalent machismo culture. LGBT people are regularly murdered, imprisoned, tortured, raped and harassed, while local law enforcement and courts reinforce or ignore discriminatory practices. Studies suggest the problem is so severe that hundreds of LGBT people seek asylum outside their home countries to escape brutality and discrimination (Cardenas, 2010: 109). These trends are also evident in Africa and the Middle East. Even in Western democracies, such as the United States and Canada, LGBT people face severe discrimination and violations of their basic human rights (Smith, 2008).

The movement for including gay rights in the human rights framework arises against the background of cumulative historical experience of successful human rights in various domains – religious toleration, racial equality and gender equality (Richards, 1999: 1). There have been modest important shifts in the direction of including LGBT rights more firmly in the international human rights framework. In 2011, the United Nations passed its first resolution recognizing LGBT rights and followed up with a report documenting violations of the rights of LGBT people, including hate crimes, criminalization of homosexuality, and discrimination. The resolution expressed 'grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity' (United Nations, 2011b).

The subsequent report prepared by the UN Office for the High Commissioner for Human Rights (UNHCHR) detailed the exclusion of, and discriminatory treatment against, LGBT people, including killings, hate-motivated violence, torture, detention, criminalization and discrimination in jobs, health care and education, because of their real or perceived sexual orientation or gender identity. The report also outlined a pattern of human rights violations that demands a response and acknowledged that governments have too often overlooked violence and discrimination based on sexual orientation and gender identity (United Nations, 2011b). It called upon countries to bring LGBT people within national human rights protection by repealing laws that criminalize homosexuality, abolishing the death penalty for offences involving consensual sexual relations and enacting comprehensive anti-discrimination laws (United Nations, 2011b).

The United Nations Gay Rights Protection Resolution marked a significant first step in the inclusion of LGBT people within the international human rights framework.

It marked an important milestone in the struggle for inclusion and equality, and the international recognition that LGBT persons are endowed with the same inalienable rights – and entitled to the same protections – as all human beings. However, as with previous historical movements for human rights inclusion, the extension of universal human rights protection to LGBT people has been met with stiff opposition. Strident calls have been made to exclude LGBT rights protection from the universal human rights framework. The resistance that the movement for inclusion faces at both domestic and international levels is demonstrated by the tense and difficult negotiations it took to pass the Gay Rights Protection Resolution at the United Nations Human Rights Council (United Nations, 2011c). The resolution, which was put forward by South Africa, was only narrowly passed with 23 votes in favour and 19 against. One opposing diplomat condemned the resolution as 'an attempt to replace the natural rights of a human being with an unnatural right' (Salisbury, 2011). Opposition to the inclusion of LGBT rights protection in the UN human rights corpus is a reminder of the historic tensions between inclusionary and exclusion impulses in development of international human rights.

CONCLUSION AND FUTURE DIRECTIONS

The history of the universal human rights movement has been a struggle for progressive inclusion. The project for inclusion has involved working to ensure that support systems for the universal respect for, and protection of, human rights and fundamental freedoms are available to all. However, the project for inclusion is continually challenged by exclusionary impulses premised on politics, religion, culture and established institutional practices. Exclusionary impulses have also been premised on concerns about rights inflation and the 'overproduction of human rights' – the notion that if every entitlement becomes a human right, the human rights idea may lose it normative value and power.

Critics of the expansion of the human rights framework caution that not every human or social problem is best defined and solved by human rights enunciations. While there may be some merit to this argument the reality of today's world is that even with the broadest framing of human rights, many people across the world still remain excluded from the most basic protection. This persistence of such exclusions poses a challenge to the normative universality of human rights and reflects the unfulfilled promised of the human rights revolution.

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