Feminist and Third World Approaches to International Law

Cecilia Bailliet
Feminist Approaches to International Law - Karen Knopp

- An ethic of care should apply to relations between State
- The international legal principle of non-intervention in the internal affairs of States leaves women vulnerable to discrimination and abuse
- Structural Bias of PIL
- Seeks personalize and personify PIL normative constructs
- PIL should address oppression and inequality of women
Time Line - Engle

- 1985-90 Add women to human rights protection in international law
- 1987-95 Critique of human rights as structurally biased
- 1992- present Third World Feminism - seek culturally sensitive universalism
A State’s international status (e.g. membership in UN) should be conditional on gender-conscious ideas of representation and democracy

Look at representation of women in foreign service and international organisations/institutions
Each delegate may be accompanied by advisers, who shall not exceed two in number for each item on the agenda of the meeting. When questions specially affecting women are to be considered by the Conference, one at least of the advisers should be a woman.
Gunning

- Examine cooperation in international relations, instead of conflict.
- Accept NGOs (including Women’s NGOs) as creators of international law, given consent of states to their participation.
Public/Private Divide- Responsibility to Protect

- International law regulates relations between States, which take place in the public sphere, whereas a State's treatment of its nationals occurs in the State's private sphere. Violation of territorial integrity depicted as “rape” of a country.

- Emergence of Humanitarian Intervention - protection of the vulnerable, identification of mass rapes as war crimes, CAH, and possible genocide
Feminist International Law Knopp-Different Perspectives

- Women participate in international law in ways that reflect their identity as part of an ethnic, linguistic, or religious group, rather than the united front of gender.

- Women's voices should be equally represented because all voices should be represented and women are half of humankind.

- Women's experience is ethically superior and can therefore provide a standard for judging the world.
Conferences

- 1994 Cairo Conference on Population and Development (Autonomy & Health)
- 1995 Beijing Conference on Women (Sexual and Reproductive Rights)
- Drafting of Declaration of Elimination of Violence Against Women
- ICTY & ICTR Rape as War Crime
- UNSC Resolution 1820 on sexual violence in conflict
Feminist Legal Theory

- The Use of Force - Orford
- State Sovereignty and Non-Interference - Knop
- Self-Determination - Chinkin & Wright
- Humanitarian Law - Gardam
- Nationality - Knop & Chinkin
- Human Rights - Romany, Engle, MacKinnon
- International Criminal Law - Askin
- International Economic Law - Pahuja
Feminist Legal Theory

- **Structural bias critics** - Charlesworth, Chinkin, & Wright - analyse international law for deployment of literal and metaphorical distinctions between male and female

- Knopp - Use progressive critique of international law to assist women - e.g. decentralization of the state - look at indigenous self-determination

- Romany - Economic and Social Rights, Development
Feminist Legal Theory

- Use Feminist Theory to assist other disadvantaged groups

- Orford - Globalisation and Economic Exploitation - Use Techniques and Organisation of Feminist Activists to Resist

- Engle - Take advantage of structural bias - use private space to liberate women
Engle

Need to separate culture from economics

Look at gendered and cultural dimensions of the global distribution of wealth and to the economic dimensions of politics and policies about gender and culture
The international law concept of global or environmental stewardship is most likely to embody the feminist morality, as it "embraces a notion of caretaking and accountability to ourselves and future generations."

Examine diminishing global natural resources and power imbalances among states- sustainable development
Culture: The Exotic Other Female

- Women who participate in oppression of other women
- Pro-clitoridectomy
- Pro-Breast Augmentation
- Pro-"Family Values" anti-state intervention
Third World Feminism

- Liberal inclusion - PIL has ignored third world women and should assimilate them
- Structural Bias - PIL is so structurally biased against third world women that it has to be significantly restructured to accommodate them.
  - Gana: Right to Development based on group focus, will not help women
- Nyamu - Deference to culture combines with formal (colonial) legal structures to disempower women
- Manjii - structural adjustment policies of IMF exploit women workers
- Western feminism seen as collaborating with imperialist hegemonies of the North - seek to enlighten non-Western women
Third World Perspectives on PIL

- Colonial History has a formative doctrinal and institutional impact on PIL
- Legalisation of diplomatic and economic relations. Euro-centric PIL
- Westphalian PIL is ideological and hegemonic- Sovereignty and the War on Terror (as dominance of North over South)
- Power relations are solidified in structural frameworks that result in exploitation and oppression of the most disadvantaged peoples and countries in the world
- Emergence of Non-Aligned Movement, G-77, G-21
- View that the Third World needs development is ideological-examine climate change and human rights
- Interventionist diplomacy is guised as humanitarianism
Third World Perspectives on PIL

- Falk- Strengthen civil society in development of PIL
- Stevens- Dismantle Nation- State, keep State
- Shalakany- Examine interplay of law and religion-
- An-Na’im grounds Sharia in international human rights law, but see critiques
- Examine historical and cultural context of law
- Law often juxtaposed to religion as ”modern”
- UN supported anti-colonial and anti-apartheid movements, and supported Third World claims to natural resources
- Global Civil Society uses PIL to seek equity, democratisation and accountability
Challenges

- Deterritorialized nature of North/South in international economic relations
- WTO, International Financial Markets
- Third World states cannot rule effectively over economy, people or territory
- Globalization biased towards market forces and neoliberal ideology - supports link between the rich and disenfranchises the poor in the third world
- ICC did not address the crime of aggression
- Need counter-hegemonic interpretation of human rights, ecological sustainability, and the global rule of law (prohibition on the use of force)
- Regionalism, Global Civic Activism
Baxi

- Governance - Problems with Postcolonial corrupt regimes
- Rights - Self-Determination, Social and Economic Rights, But consider Regime repression
- Development - Permanent Sovereignty over natural resources
- Justice
- Outlaw Divine Right of Empire
Falk- Trends

- Global human rights movement
- Empowerment of Global Civil Society
- ICC
- Accountability of leaders for CAH
- Support for humanitarian intervention in the event of genocide
- Collective response to climate change
- Recognition of dysfunction of war as basis of global security
- Regional and global law replaces international law
Hegemony- world internalises the necessity and legitimacy of domination through law- Prevent institutionalisation and consolidation of hegemony via reform of multilateral institutions

- Economic power
- Cultural power
- Military power

Future depends on politics of the multitude (Hardt & Negri)- coalitions of social movements and small states
Boaventura de Sousa Santos

- Hegemonic Neoliberal Globalization- property rights, contract
- Economic, social, political, cultural apartheid-
- **Savage zones** have no social contract, no rule of law, (Uncivil society, excluded from rights)
- **Civilized zones** have social contract, state provides protection (intimate society- state guarantees rights)
- **Post-Contractualism-exclusion** of citizens in ghettos, sweatshops, prisons, trafficking, prostitution, child labour, under-employment, unemployment- work ceases to sustain citizenship or autonomy of person (Strange civil society enjoys C& P rights but not socio-economic rights)
- **Pre-Contractualism**- block access to citizenship of refugees and migrants
- **Abyssal Legal Thinking**- divide human from sub-human- Guantanamo, Palestine, Darfur
- Counter-hegemonic emancipatory movements from below- indigenous, migrants, environmentalists
Mutua Metaphor: “Savages-Victims-Saviours”

Mainstream human rights lawyers tend to characterize their mission in the following sort of way:

There are savages from the South violating the fundamental human rights of victims from the South; it is the moral and legal duty of the North to use the international human rights structure, which is the saviour, to save these victims and bring the savages to justice.

Mutua argues that the human rights structure, far from being a saviour, is “ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy.”

Thus, the human rights corpus, regardless of whether it saves the victim from the savage, seeks to impose European notions of morality, civility, and progress.

The human rights movement “falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions.”
Makau Mutua: International law is a “regime and discourse of domination and subordination, not resistance and liberation.”

TWAIL:

1) engaging in an interdisciplinary examination of the extralegal effects of international law on the South;

2) using historical evidence from the colonial and post-colonial periods to demonstrate the contingent nature of international law doctrines; and

3) using localized cultural evidence to challenge the universality of the theoretical underpinnings of international law.

At a broader normative level, the Twailian project is to foster reforms to the international law regime that will promote equity and justice for the South.
David Kennedy

Why do property rights travel so securely when the extraterritorial reach of labor law or employment discrimination or environmental protection law continues to seem unreasonable?

How do we decide whether a low wage development strategy is an unfair subsidy or the extraterritorial application of labor law a non-tariff barrier to trade?

We will need to ask for whom we govern, for what form of political, social and economic life do we propose a constitution.
Fourth World

Global justice demands of indigenous people, migrants, displaced persons, environmentalists

Lack of central authority for implementation and enforcement

Legal Pluralism - indigenous customary norms, national law, international law

New subjects of PIL

Law of peoples

Technical dimension of law v. Politics - dispute resolution, arbitration, IP, trade, commerce, cyber,

Singer - Seek Global Justice and Global Democracy as alternative to Empire - Need to abide by Global Ethics in order to achieve Security – One World