

Understanding the Issue of Gender Discrimination as a ‘Crime’ of Gender Apartheid and Placing Violence against Women at the Centre of this Matrix

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Abstract

This paper using the model of Racial Apartheid, once prevalent in South Africa, attempts to ask whether some of the severe forms of gender discrimination can be treated and termed as Gender Apartheid. It argues that class domination/segregation regime does not always have to follow the exact South African model in order to qualify for the crime of apartheid, the proof that discriminatory acts are severe, systematic and institutionalized are enough to establish the crime. The article notes that despite many commonalities between the two types of crimes, the degree of condemnation that practices of Racial Apartheid receive is far greater than the comparable acts of gender apartheid. It recommends that Apartheid, whether racial or gender, should be treated equally, and gender apartheid should accordingly be considered ‘crime against humanity’.

Key Words Apartheid, Gender, Racial, Discrimination, Violence.

Introduction

This article recognises that violence against women is a part of a larger system of structural gender inequality; therefore, in order to combat violence against women it is necessary to address the deep-seated patterns of gender inequality and discrimination within the family and society (Goldfrab, 2003). The present article argues that the powerful framework of a human rights system is capable of bringing lasting solutions to the violations of women’s human rights including violence against women. As a necessary first step, a gender sensitive reading of the key human rights law documents is required. This article uses broad strokes to sketch out the main features of the crime of apartheid as described in the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973. Thereafter, it situates gender in the apartheid debate by exploring some of the commonalities between the racial and gender apartheid.

The system of racial discrimination and segregation that prevailed in South Africa from 1948 until its abolition in the early 1990s has been termed as Apartheid (Ratner). It refers to the set of government policies and social practices in South Africa, (Tangelder) which sought to regulate the legal and social relationship between white and black, colonizers and colonized (Beinart, William,

Dubow, & Saul, 1995: 01). Social divisions in the South African society increasingly took on a rigid racial character. As part of its decades-long efforts to eliminate the discriminatory practices, the United Nations adopted a legal framework in the form of International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973. (the Convention hereinafter) In its article II the Convention refers to crime of apartheid as ‘crime against humanity’ and defined it as

[I]nhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. (Article II of the International Convention on the Suppression and the Punishment of Crime of Apartheid , 1973).

Article II of the Convention then goes on to list various types of racial apartheid such as denial of the right to life and liberty of person, murder, infliction of serious bodily or mental harm, violation of dignity, subjection to torture, cruel inhuman and degrading treatment, deliberate imposition of living conditions meant to cause physical destruction entirely or partially, legislative or policy measures aimed to prevent from participation in the political, social, economic and cultural life of the country and deliberate creation of conditions preventing the full development by denying human rights and freedoms of a racial group.¹

The crime of apartheid is also defined by the Rome Statute of the International Criminal Court (ICC) 2002 as inhumane acts of a character similar to other crimes against humanity

[C]ommitted in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime (Article 7 (j) Rome Statute of ICC 2002).

Apartheid differs from other forms of racial discrimination not only because it was aggravated form of racism but also ‘in that it was the official policy of a State member of the United Nations’ (Keane, 2007: 190). Its practical manifestations included ineligibility from voting, demarcation of social spheres, restrictions on the freedom of movement by issuing internal travel passes for blacks, limited rights of citizenship, monopoly on the country’s resources via control over the legal system ((Ratner, <http://www.crimesofwar.org/a-z-guide/apartheid/>). The Convention establishes universal jurisdiction which enables the prosecution of individuals, members of organizations and agents of the state, who can be held criminally liable regardless of their location and their motive, and whether they encourage, cooperate with, or directly commit actions or omissions as part of the crime of apartheid (Article III of the Convention). While the crime of apartheid is most often associated with the racist policies of South Africa, the term more generally refers to racially based policies in any state (Morton, 2000: 27) (Dugard, 2013). The wording of the Convention suggest that the list of ‘inhuman acts’ described in Article II as comprising the ‘crime of apartheid’ are intended ‘as

illustrative and inclusive, not as exhaustive or exclusive' (Plessis, 2011). A broader potential range of policies is implied by the qualifier of 'similar policies and practices [...] as practiced in Southern Africa'. It is, therefore, arguable that the existence of general structure of apartheid is sufficient to constitute the crime, all acts listed in article II or their practice in the same precise manner need not to be established, nor do they need to be committed in South Africa². The notion of racial apartheid and discrimination presupposes the superiority of white European race and ethnicity (Tangelder, 2003: 242). Such assumptions provide a pretext to the 'superior' race or ethnicity to believe that they are entitled to govern and enslave inferior races (Mayer, 2000: 242).

From the above discussion two core elements of racial apartheid can be discerned, institutionalized domination of one racial group over another, which is central to the definition of apartheid, and the support of such practices by law and policy of a state.

Similarities between racial apartheid and certain forms of gender discrimination have been pointed out by some feminists (Mayer, 2000: 2000). Arguably, many states maintain gender discriminatory policies that might well meet the definition of apartheid, even if those practices lack some of the legal specificities of the South African model. Gender apartheid takes many forms including gender based violence (GBV), which is widespread in many parts of the world including Pakistan (Copelon, 1994: 117) (Jensen, 2001) (Afkhami, 2001) (Copelon, *International Human Rights Dimensions of Intimate Violence: Another Stand in the Dialectic of Feminist Lawmaking*, 2003: 871) (Charlesworth, Hilary, Chinkin, & Christine, 1993: 71) . It encompasses a wide range of women's human rights violations, such as threat to life, security and dignity of the victim. Some of its overt manifestations include rape, honour related crimes, forced prostitution, intimate partner violence, female genital mutilation and so on. According to the World Bank's estimates, rape and domestic violence against women accounts for 5 percent of the healthy years of the life lost to women aged 15-44 years in the developing countries ((Khan, n.d.). Moreover, women are maimed or killed through many other practices that are not very noticeable to the state, yet equally pervasive and harmful. For instance a woman's right to life is threatened even before her birth (Coomaraswamy, 1999: 39-42) (Coomaraswamy, 2002: 22) (Mathur, 2007: 07). The age old practice of female foeticide and infanticide in India and China accounts for millions of gender-selective killings³. Pre-natal diagnostic techniques are frequently utilized in these countries for sex-selective abortions (Zeng, 1993: 297). The 'missing girls' phenomenon is quite common in developed East Asian societies, such as South Korea and Taiwan (Guntupalli, *Gender and Development*). Dowry related deaths and acid attacks on girls persist in India and Bangladesh despite advocacy campaigns (Coomaraswamy, *Cultural Practices in the Family that are Violent Towards Women E/CN.4/2002/83*, 2002: 12). All the aforementioned types of violence are specifically directed against

women. These violations of women's human rights are systematic and discriminatory enough to form a case for gender apartheid. State's inaction in most of these cases is tantamount to *de facto* approval of these practices. In many states women enjoy only limited legal personhood due to unequal legal entitlements (Fukudda-Parr, 2002: 22). For instance in some countries women do not have a right to pass on their nationality to their children or spouse, this hampers the full enjoyment of their citizenship rights (Coomaraswamy, Examples Pakistan, Kenya, Venezuela, Monaco,, 2002: 21) (Hijab, 2002: 12-17). A clear example of this state sanctioned discrimination against women can be seen in the form of Pakistani Citizenship Act 1951. A non-citizen woman, who marries a Pakistani man, can acquire Pakistani citizenship under the Act but no such parallel right exist for a foreign spouse of a Pakistani woman. Many legal systems, including Pakistan, provide unequal/discriminatory laws relating to marriage, such as polygamous forms of marriages, and divorce (Erturk, 2008: 17) (Coomaraswamy, Examples Pakistan, Kenya, Venezuela, Monaco,, 2002: 12-20-21). Likewise, unequal economic opportunities, employment status/wages, minimum participation in political arena are some common patterns in the policies of many countries (UN Human Development Report, 2002: 22) (Romany, 1993: 123-24).

Nelson Mandela described apartheid as;

the color line that all too often determines who is rich and who is poor... who lives in luxury and who lives in squalor... who shall get food, clothing, and health care... and who will live and who will die (Mendala, n.d).

If the word 'color' is replaced by 'gender' in the above statement, it will truly mirror the deplorable status of women in most societies. The economically driven global male domination system explains the inequitable distribution of resources along gender line (Brun, O, & Romancy, 1993: 15). For instance in many developing countries women have poor command over financial resources and they rarely possess landed property, female resource possession is particularly low in South-east Asia (Gutupalli, n.d.). It is contended that men may have vested economic interests in retaining a status quo that favours them, just as the white minority had in retaining racial apartheid in South Africa.⁴ (William, 1986)

A system of dichotomous social values, where men have rights over women but not vice versa and existing structural gender inequalities are arguably responsible for the prevailing discriminatory patterns of social, economic and political disadvantage. The Norwegian peace scholar Galtung describes Structural Violence as 'the endemic violence which exists in the disparity of a community's structure' (Galtung, 2012: 17). The notion of male superiority, entrenched in many cultures of the world, (Copelon, 2003: 872) validates the systematic subjugation of women (one social group) by men (another social group). Additionally, it continues to provide the backbone to a system of domination. Ironically, philosophies of racial superiority are largely deemed irrational, abhorrent and indefensible, and therefore rejected by many in the present day world (Mayer,

2000: 242). In contrast however, the identical notions of male superiority do not prompt the same reaction. Since men predominantly occupy key positions in governments of many states, International Law/human rights law largely incorporates and represents male values and interests (Mayer, 2000: 240) (Charlsworth, 1993: 68-69). Consequently, the same importance has never been accorded to women related issues in the human rights discourses (Charlsworth, 1993: 72). Simma and Alston argue that;

it must be asked whether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not death by starvation, and which finds no place for a right of access to primary health care is not flawed in terms both of the theory of human rights and of United Nations doctrine (Charlsworth, 1993: 68).

Any discussion of the notion of gender apartheid would invariably evoke the images of oppressed women living under repressive Islamic regimes such as Afghanistan, Saudi Arabia and Iran (Handrahan, 2001) (Hunter, 1999) (Mayer, 2000: 254-59). Whilst it is acknowledged that some of the gross violations of women's human rights take place in these societies, it is argued that the phenomenon of systematic denial of women's rights and resulting phenomenon of gender based violence is not confined to any particular region, culture, religion or historical time (Erturk, 2007: 13). Various forms of violence against women have manifested themselves in almost every society and it had been accepted and even condoned throughout recorded history. This is arguably more so in relation to domestic violence against women which is often supported by legal and social tenets, and is seen as the husband's prerogative to chastise his erring wife. This authority had been exercised by many men with impunity for centuries (Hart, 1991). Since violence against women is the outcome of gender inequality and discrimination that is socially developed and women are victimised as a class, VAW clearly has a gender dimension, often combined by class, culture, ethnicity, etc.

The practices of gender apartheid are so deeply interwoven into the social and legal fabric of the majority of cultures that they are generally viewed as a part of normal everyday life (Coomaraswamy, 2002: 21). For instance the practice of female genital mutilation (Mostly Prevalent in Africa) or forced marriages are normalised through deeply entrenched cultural norms. These assumptions as to norms are often supported by a country's legal system, and even where equality clauses exist in various laws and constitutions, unequal treatment sanctioned by customary norms and religious precepts continues to hold sway (Mukhopadhyay, 2007: 272). For instance laws relating to violence against women, particularly domestic violence against women have been changing in the last two decades in various countries, violence against women continues to be a major problem in many societies and one of the most widespread violation of human rights globally

(<https://unwomen.org.au/focus-areas/ending-violence-against-women>). Arguably, law works effectively only if other systems also collaborate in a concerted manner to eradicate violence against women from the society (Hart, 1991: 13). Legal strategies, no matter how carefully crafted, tend to fail if social attitudes are not aligned with law against VAW. 'Legal safeguards work best where the society embraces practices compatible with the remedies articulated in the law' (Hart, 1991: 13). That is why the International Convention on the Elimination of All forms of Discrimination against Women 1979, specifically address this issue and urge the state parties to take necessary measures targeting to eradicate harmful gender discriminatory attitudes from the society.

Moreover, women's freedom of movement has been considerably curtailed in countries having restrictive travel policies, for example where women are not allowed to travel without male escort or/and without the permission of husband/father (Coomaraswamy, 2002: 25). However, restrictions to women's mobility are much more pervasive, effective and wider in scope where they are regulated, and in many instances promoted, by the social norms of the society (Coomaraswamy, 2002: 25). Severe legal and social control over women's sexual and reproductive choices; denial of their rights to hold or inherit property; to receive education and to pursue career are some other common instances of gender based violation of rights (Coomaraswamy, 2002: 21-26). In many countries women continue to be largely unrepresented in politics. The list of women's human rights violations can be lengthy and it would be difficult to offer any detailed catalogue of such violations within the confines of this text. However, the above cited forms of harmful discrimination fulfil most of the criteria of article II of the Convention, and their cumulative effect, arguably, makes a strong case for *gender apartheid*. The existence of separate set of laws dividing citizens of the same state on the basis of their group identity is understandable from the above few examples. Besides, perpetrators of gender crimes enjoy impunity in many jurisdictions, (Coomaraswamy, 2002: 28) which is tantamount to a *de facto* legal regime of discriminatory character (Shah, 2008: 1179) (Coplun, 1993: 343-44) (Meyersfeld, 2003: 423) (Romany, 1993: 115-117). For example in Pakistan the plea of diminished responsibility under the provision of 'grave and sudden provocation', remained on the statute books for about hundred years, until it was abolished in 1990. This provision, though not actually meant to cover Honour Related Crimes, empowered the judges to often liberally apply the law to cases of women's murders in such crimes. This provision was omitted from criminal codes more than two decades ago, yet higher judiciary in several cases continue to re-enact old law by giving decisions in old frame of mind in cases of Honour Related Crimes (Savitri & Ahmad, 2004: 157).

The need for separate zones or actual physical segregation, as it was practiced in South Africa, may become irrelevant where same objectives of class oppression can be achieved by creating intangible ghettos through social marginalisation.

Gender apartheid, given its global scope and institutional entrenchment, may have similar deleterious effects as South Africa's racial and ethnic apartheid policy had. Regrettably, these patterns of oppression and discrimination against women have never been satisfactorily addressed in Human Rights Law. The stance of the international community is far stronger on racial apartheid than on the comparable forms of gender apartheid (Mayer, 2000: 239). Mayer notes that in the original scheme of UN, racial and gender discrimination are equally condemned and there is no hierarchy or prioritization of issues on any such ground (Mayer, 2000: 247). Thus there is no legal or moral justification to treat racial discrimination as an abominable crime and to consider another offence of the same specie not even worthy of attention, just because its subject matter is gender⁵. Arguably the prioritization of issues on the basis of gender is a later development in the UN system, primarily because various UN bodies are largely dominated by men (Mayer, 2000: 247). For this very reason issues in Human Rights Law are prioritized and 'defined according to what men fear will happen to them, those harms against which they seek guarantees' and women related matters do not fall into this category (Charlasworth & Chinkin, 1993: 69).

Concluding Remarks

The present article has attempted to highlight similarities between racial apartheid, a well established crime in the eyes of international human rights law, and aggravated forms of gender discrimination which is prevailing in many societies of the world. It finds many significant common features in the two types of crimes. By comparing certain aggravated types of gender discrimination with racial apartheid this article aspires to attract the same international attention towards the issues and argued that some serious gender discriminatory policies of certain countries should be treated as gender apartheid in order to bring the crime of gender apartheid into the folds of well established norms and procedures of human rights law dealing with the prohibition on apartheid. It has argued that substituting the term "gender" instead of "race" in the definition of apartheid can equate legally sanctioned systematic gender oppression, by one large group of humans against another, with racial apartheid; and if racial apartheid is fit to rank as a crime against humanity, then so too is politically enforced gender oppression.

Finally, re-visioning of human rights system from gender perspective and resort to functional approach is strongly recommended, this can provide myriad of opportunities to tap into the emancipatory potential of human rights law. It is arguably a time to move away from the traditional conception of apartheid, and include other categories such as gender in its definition. A mere literal reading of the text may limit the scope of human rights law, its interpretation should rather be done in the light of its true spirit and purpose, which is a well recognised principle of national and international legal system⁶. A myopic, contradictory and

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selective approach to Human Rights Law may also compromise the credibility of the whole system; as a result it would suffer from some of the same ills for which it was supposed to provide the cure, such as discrimination. This discussion concludes with MacKinnon's assertion that 'For the glorious dream of the Universal Declaration to come true, for human rights to be universal, both the reality it challenges and the standard it sets need to change'.

Notes

1. *a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:*
 - (i) By murder of members of a racial group or groups;*
 - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;*
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;*
 - (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;*
 - (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;*
 - d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;*
 - (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;*
 - (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.*
2. United Nations Special Rapporteur for Palestine John Dugard. In its Article 7, the Rome Statute of the International Criminal Court 1998, included the "crime of apartheid" as a form of crime against humanity, Article 85(4) c . Draft Code of Crimes against the Peace and Security of

- Mankind adopted by the International Law Commission in 1996, recognize it as a crime (A/51/10), p. 49).
3. These killing are carried out due to the economic and social preference for sons. Coomaraswamy, R., 2002, p.22 Sen, Amartya, 1990, More Than 100 Million Women Are Missing, *N.Y. Rev. Books*, 30 Dec. p.61 Coale, Ansley and Banister, Judith, 1994, "Five Decades of Missing Females in China," *Demography*, 31: 3 p. 472. Dahlburg, John-Thor, 1994, 'Where killing baby girls 'is no big sin', *The Los Angeles Times* February 28
 4. Many commentators agree that the ideology of apartheid had material underpinnings as well, the maintenance of racist policies in the South Africa was in the same way in the economic interest of the white minority as sexist policies of patriarchal ideology for men, Pomeroy,
 5. Apartheid of any kind is contrary to the general principles of international law. Article 55 of the UN Charter provides the basis when it requires Member States to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.
 6. Vienna Convention on the Law of Treaties 1969

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