

Can Gender Equality be Considered as a New Global Legal Order?

Reshma Shireen Jaffrey¹

ABSTRACT

There are certain experiences of people in different nations that can be linked to each other in the global context. Gender discrimination is one such experience, which can be linked to the women of different nations. It is a common social behavior in most of the jurisdictions of the world. But the question is, according to Carrier Menkal-Medow's definition of global law, can gender equality be considered as a legal phenomenon that affect or have the power to affect the behavior beyond a single state border? Can it be said, according to Twining's concept, that gender equality can be a global law, because it is concerned not just with individual's concepts but with a group of related concepts? In this paper, I will try to relate the conditions required to establish a global legal order with the issue of gender equality. Whether gender equality as a global law, fits into various assumptions of a global legal order and argue the role of state and its contribution for the establishment of a global legal order

INTRODUCTION

In this global era, the need for a global legal order is emerging. One of the factors which increases the possibility of a global order is globalization. According to Carrie Menkel- Medow, "transnational law or global law is the study of legal phenomenon, including lawmaking

¹ Author is a recent graduate from National University of Singapore, specializing in International and Comparative Law (L.L.M). The author can be contacted via email at reshma_jaf@yahoo.com.

processes, rules and legal institution , that affect or have the power to affect behavior beyond a single state border."² According to Twining, it is i) " based on a wider conception of law that goes beyond municipal or state law and covers all levels of legal ordering including global , transnational, international, regional, municipal and local non-state" ii) It is concerned not just with individual concepts , but with groups of related concepts both in jurisprudence and in specialized discourse".³

ARGUMENT

Before addressing the issue of gender equality as a new global legal order, there is a need to address the question that why we need gender equality as a global law and what does the respective term gender and equality mean?

GENDER : The term "Gender" refers to the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for men and women".⁴ In other words, the roles of man and women are defined by the society they live in and their role may differ from each society. These roles may be called " man-made" because humans are responsible for designating different roles to men and women in the society.

EQUALITY : The term equality highlights human essential sociability, where every person should be equal before the law because they are equal among themselves in virtue of their natural dignity.⁵ As said by Dworkin " equality is a sovereign virtue".⁶ Persons are distinguished by their genuine dignity, their natural freedom and their radical equality.⁷ Dignity and freedom do not require otherness, but equality does because it includes an element of comparison.⁸ Any discrimination on the ground of sex, age, religion , race or social condition should be eschewed

² Carrie Menkel-Meadow, " *Why and How to Study 'Transnational' Law*" (2011) 1 UC Irvine Law Review 104 -also available at: <http://www.law.uci.edu/lawreview/Vol1No1Articles/menkelmeadow.pdf>

³ William Twining, " *General Jurisprudence: Understanding Law from a Global Perspective*" (Cambridge University Press, 2009) at 39

⁴ Who.int, (2015). WHO , " *What do we mean by "sex" and "gender"?*. [online] Available at: <http://www.who.int/gender/whatisgender/en/> [Accessed 10 Apr. 2015].

⁵ Rafael Domingo, (2010) " *The new global law*" Cambridge [England]: Cambridge University Press, at 131.

⁶ *Id*, at 139

⁷ *Id* at 131

⁸ *Id* at 131

as contrary to law.⁹ We do not have the same intellectual , moral or physical capacities, but we have equality before the law.¹⁰

Combining the above two terms, " Gender" and " Equality, two assumptions can be made. First, in most of the societies and jurisdictions in the world, men are considered to be socially superior than women. Men are the bread-earner of the family and have an above hand in the decision making . On the other hand, women are considered as a caretaker of the family and children, with minimal or almost no say in the decision making. Secondly, due to the above societal differences, women become unequal to men, and due to this inequality the women's contribution in the development of a nation, becomes minimal. Gender Discrimination acts against the ideology of equality, where the dignity of women affected and is contrary to the basic law of "equality". Fundamental differences between men and women warrant different roles in public and private life and explain or justify economic , social and political inequality.¹¹

With this, another question needs to be addressed , why we need gender equality? Inequality among men and women, disrupts the development of a society. Today, in most of the underdeveloped or developing country women are discriminated and their empowerment is really low. Gender equality is productive because it is essential for any country to develop economically, politically and socially. It is one of the major indicators of the development of any country. Most of the democratic countries have enshrined the principle of gender equality in their Constitution and the situation of women over the years have improved drastically but inequality still persists . Gender equality enhances economic efficiency and improve development outcomes of a country in three ways.¹² First , removing a barrier that prevents women from having the same access as men to education, economic opportunities and the productive input can generate broad ,productive gains which are important in a globalized and a competitive world.¹³ Second, improving women's absolute and relative status contributes to many other development outcomes.¹⁴Third, it helps in leveling the playing field where women

⁹ *Id* at 139

¹⁰ *Id* at 131

¹¹ McClain, Linda C (2009). "*Gender equality*", Cambridge [England]: Cambridge University Press. ", at 4

¹² World Bank, World Development Report 2012: *Gender Equality and Development*. (2012). Population and Development Review, 38(1), at 3

¹³ *Id* at 3

¹⁴ *Id* at 3

and men have equal chances to become socially and politically active , make decisions and shape policies and this will likely lead over time to a better development path.¹⁵

Why should we consider Gender Equality as the new global legal order?

There are two reasons why, gender equality can be considered as a new global legal order . ***Firstly*** , the gender inequality problem is faced by the women all over the world. The Millennium Development Goals by United Nations in 2007, issued a report identifying gender inequality in the domains of the household, the workplace and the political sphere as a persisting problem. ¹⁶ The Global Gender Gap Report issued by the World Economic Forum, which found the persistent gap between men and women in " economic participation", as well as in " political empowerment". ¹⁷ Even though, most of the countries have developed legislation to promote women franchise, the problem of political representation , and few women's participation in political power still exist. There is still a " political empowerment gap" between men and women , measured in terms of " political decision-making at the highest level. ¹⁸ Violation of reproductive rights is one of the greatest examples of gender inequality, persisting in the world today. Despite national and international declarations, the reproductive rights of a women remain controversial and fragile¹⁹. It is controversial because in most of the society, abortion is considered as a crime and those states who have legalized abortion makes it difficult for women to exercise that right by making the law ambiguous. The women's right to self determination over her body is always a subject of the state. Her autonomy is to decide, whether she wants to bear an unborn or not, is always incumbent upon the interest of the state and the social norm of a patriarchal society. In 2007, in the case of *Gonzales v. Carhart* , the court upheld the Federal Partial Birth Abortion Ban Act, even without an exception for the women's health.²⁰ It adopted a paternalistic view of women's decision-making capacity. ²¹ Beyond abortion rights, other aspects of reproduction such as unequal access to contraception and fertility treatments, pregnancy discrimination, and workplace discrimination against mothers, also pose challenges to women's

¹⁵ world development report, *Id* at 3

¹⁶ McClain , *Supra Note* 10 at 7

¹⁷ *Id*

¹⁸ *Id* at 4

¹⁹ *Id*

²⁰ *Id* at 7

²¹ *Id*

equality. Therefore, these problems are commonly faced by women, all over the world. There is a common element - women, a common concern-discrimination at social, economic and political arena and a common solution - a global institutional or legal setup addressing the problem of gender equality.

Secondly, the concerns for gender equality is a global. Every nation along with United Nations are focusing on enhancing the women's equality. It is a major tool for economic development. The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), focus on gender equality and elimination of gender discrimination, highlighting it as a global concern.

Establishing a global legal order from the perspective of Gender Equality

In this section, I will explore the possibilities of establishing a global law by taking into consideration the issue of gender equality.

The moral theories ascertain that, certain values are flexible to allow some leeway for differing particularities in respect of laws, custom, moral and institutions, but are rooted in fundamental values that are shared by all human beings by virtue of being human.²² It is difficult to establish that equality of men and women are a part of the moral beliefs. There are certain cultural norms in the society which favors men, especially in patriarchal societies. From a global perspective, these factors might create a hindrance to establish a global law on gender equality. But legal experience such as litigation can stimulate and enlarge the moral imagination. In countries where the judiciary is powerful, it can theorize the issue of gender equality as a moral theory.²³ In other words, the normative behavior of a society towards women can be changed through judicial activism. For example, in India, judicial activism has played an important role in bringing a change the mindset of the people towards equality.

As mentioned in the introduction, global law or global legal order indicates a process of lawmaking or legal phenomenon which has the power to affect behavior beyond a single state border. This possibility of moving beyond a single state border, does not claim that the role of the state is diminished. There is a clear policy on the legal structure of a state, that if gender

²²Twining, *Supra Note 2* at 174

²³ *Id* at 181

equality is to be achieved, there should be a realization of basic minimum rights such as education, health care, social assistance, maternity leave and disability services. This helps in realizing collective economic rights of people. Most of the democratic countries, under its constitution have recognized the rights of equality of men and women. At the same time these rights may not be a part of law in middle eastern Islamic countries where rights are interpreted in the light of religious laws that treat women and men differently in the key sphere of life such as family. These state laws which are in existence, in most of the cases are not realized or effective enough to tackle the root cause of the discrimination problem. Since, in spite of having well established laws, the problem of women facing discrimination is on an increase, a global law can help in resolving this issue. When discrimination faced by women is on a similar platform, the possibility of having a global law increases because global law seeks commonality and uniformity of laws. The legal legislation regarding women's equality might differ in various countries but the ideology behind this equality is the same all over. For example, the percentage political representation of women in parliament may differ, but the ideology that women should be a part of a country's political process is same. This can lead to a process of global law.

But the problem arises, when the global law requires state to not play any role in the process, as mentioned by Twining, it is a "law that goes beyond municipal or state law and covers all levels of legal ordering". It is true, that with the increase of globalization the role of the states is minimized, but surpassing state or municipal law for a global law, is a practical difficulty.

Looking at Patrick Glenn writing on cosmopolitan legal order, it can be said that gender equality fits into the idea of cosmopolitanism. According to Glen, due to the globalization the state legal orders have become more open.²⁴ He emphasized on the notion of radical separation or exclusivity of state law and that proliferation of cosmopolitan legal order has often taken place with state approval or at least with the state acquiesces.²⁵ Relating this to gender equality issue, when a country ratifies international convention such CEDAW, it becomes incumbent upon the state to implement laws of gender equality. According to Glenn, this process is cosmopolitan because they are themselves composed of people of 'nationalities diverse', it draws wide

²⁴ Andrew H and Volker R, (2009). "*Theorising the global legal order*". Oxford: Hart Pub at 28

²⁵ *Id* at 28

varieties of state and non-state law, for its implementation.²⁶ Almost, all the nation states are parties to the CEDAW convention, they are people of "nationalities diverse", and the state government and civil society along with other actors becomes responsible for its implementation. This whole process, helps to shape a particular behavior in a society. As Glen says, "international law is extending to individuals and to 'peoples'".²⁷ The values of protecting women from discrimination in CEDAW change the traditional notion of inequality by putting across the idea that discrimination is wrong. This fits Glenn point, when he says "this process of humanization becomes less international in the traditional sense but necessarily more cosmopolitan."²⁸ In other words, cosmopolitan legal order, which may be classified as an important characteristic of global law, functions with state acquiescence. The state shapes the normative behavior towards women. Therefore, when state does so by implementing treaties in the domestic laws it relates to the same values of women discrimination across other jurisdiction. This opening up and relating of values, fulfils the criteria of cosmopolitan legal order. Glenn's idea of cosmopolitan legal order does fit the criteria of global law but ,he does give us a possibility where, aspirations of global law can be achieved by transnational and non-state actors.

Another problem for the achievement of global, is the interdependence of law , in this case, gender equality with other non-state laws such as religion, legal tradition families and custom. As pointed out by Twining, it is important to distinguish between different levels and spheres of relation and of ordering.²⁹ The notion of gender discrimination is sometimes inherent in the society. Cultural, social and religious perceptions of gender roles are often ingrained in a society acceptable by both men and women. These cultural , social and religious factors may be considered as a non-state laws or the institutionalized social practice that operate independently of the municipal or domestic legal system. In process of diminishing the discrimination against women , the state plays an important role to help in making the process of making gender equality a reality. I agree when Twining said that national boundaries are no longer significant does not mean that we can no longer treat domestic law as if it is self contained.³⁰ Legal pluralism is one of the important aspect of gender discrimination. It is governed by non state

²⁶ *Id* at 29

²⁷ *Id* at 31

²⁸ *Id*

²⁹ *Id* at 41

³⁰ *Id* at 49

laws, such as customs and religious and cultural practices. It is important to take these into consideration. State law inevitably interacts with pre-existing local normative order, including state law, unofficial law and various customary practices. It is important to know how these laws are interacting.³¹ These factors make the possibility of making a global law difficult.

Another aspect of global law is the existing International Law. International Law deals with the states from the stand of sovereign, rulers and legislators without taking into consideration the view of users, consumers, victims and litigants.³² This applies to gender problem as well. Most of the international laws to protect women, do not take into consideration the plurality of women's lives and experience. But this works when we apply this method of international law into the global perspective. Because for international law to work, there should be a consensus of what free and equal citizens would accept after negotiation as a freestanding political view of society as a fair and acceptable system of cooperation between people with very different cosmologies and values.³³ Equal treatment and being free from discrimination is a requirement of an equitable society and cooperation between societies from different nation can form the basis of global law on gender equality.

When Stefan Oeter's lays the importance of international law for attaining a global law, it seems to be a more practicable approach. As due to the globalization, states, economies and societies are more and more independent, which means that there is an ever growing demand of coordination and cooperation between states and societal actors in general.³⁴ This coordination and cooperation plays an important role to achieve state proclaimed objectives.³⁵ The reasons for the coordination and cooperation arises due to the fact that, there lies a collective interest between the states³⁶. Protection of women and promoting gender equality has become a collective interest for every state. In order to participate in the international forums and be a part of the United Nations, gender equality had become an essential criteria. States have recognized that for economic development, women empowerment and equality is an important factor. But this, again, from the global perspective, as pointed out by Oeter this collective interest will be

³¹ Halpin, *Supra Note 23* at 50

³² *Id* at 55

³³ *Id* at 57

³⁴ *Id* at 69

³⁵ *Id*

³⁶ *Id* at 70

affected by positive and negative externalities³⁷. These externalities create divergent incentives to cooperate for states as well as political and societal actors inside states.³⁸ This makes the achievement of collective goods difficult.³⁹

I agree with Stefan Oeter , when he says " theorizing the global legal order is not possible without reflecting on the place of law in the global order and in the community of states".⁴⁰ I will try to relate my argument about the importance of states for issue of gender equality with the position established by him. To put across the idea of gender equality and implementation of its laws, the state as a central actor along with NGO's, individuals and non-state actors becomes important. For example, in India, there is a central law regarding abortion called medical termination of pregnancy act , at the same time there is judicial activism and awareness movement by women's right organization which furthers the purpose of the act . To have a law governing body at the global level, there is a need for a central law which governs the state. With the help the Non-state actors, a consensus can be developed by coordinating central laws of different states. For example, a consensus can be made on reproductive freedom, unequal pay, domestic violence and sex trafficking. But this, might be affected by what Oeter calls " social constructivism". Where the state actors operating from the state level , may be inclined to behave in conformity values and identities found in the legal and social norms.⁴¹

It might happen that certain gender equality laws ,for example, labour laws or reproductive right laws, the coordination must not necessarily happen in legal forms, but often takes place in informal networks. States do not act with one voice in the international arena.⁴² There is a need for the growing role of transnational corporate and civil society actors , mostly in the forms of transnational enterprise and international NGOs⁴³. I agree with Oeter , when he says the organizational backbone of 'global legal order' is not a unitary structure of global government, but is an anarchical array of trans-governmental and transnational networks linking specialized

³⁷ *Id* at 71

³⁸ *Id*

³⁹ *Id*

⁴⁰ *Id* at 64

⁴¹ Halpin, *Supra* note 23 at 65

⁴² *Id* at 72

⁴³ *Id* at 74

bureaucracies and agencies throughout the world.⁴⁴ Various feminist movements in the past few decades have made the gender equality visible at an international platform, making it an important concern for the policy actors in various jurisdictions. Thus, Possibility of gender equality as a global law can be more, if there is an emphasis on the role of non-state actors. Non-state actors in the form of pressure groups, religious bodies , social critics and more play parts in different aspects of the processes.

The focal point from the above explanation is that ,for establishing a global legal order, it is difficult to diminish the existence of the state. It is true that with globalization is a claim that the state is in decline. This decline of state cannot conclude the fact that, the role of the state is diminished or have no role to play.

With this the question arises, how can gender equality become a global law when the it is difficult to demolish or ignore the role of the state. The harmonization of gender equality laws, can be possible by creating a supranational authority which will recognize higher norms like protecting women from domestic violence, reproductive rights, by harmonizing the laws of different nations or people.⁴⁵

CONCLUSION

From the overall analysis, three issues are highlighted while approaching gender equality as a global law. First, it is difficult to ignore the role of states, while approaching towards a global law. Secondly, the interdependence of state laws on gender equality to the non-state laws such as religion , social norms and custom. Thirdly, international law and international legal order can be an important tool for the achievement of global consensus on the laws of gender equality.

My fundamental point of this research paper is to stress on the fact that it is difficult to establish a global legal order without the taking "states" into consideration. The stand of legal pluralism taken by Glenn and Twining, has a practical approach towards the possibility of a global law. I do not, diminish the theory of global law, but have tried to explore the possibility of attaining a global law through state and non-state actors. The possibility of Gender equality to becoming a global law increases when instead of diminishing the role of state, minimize it and enhance the

⁴⁴ *Id* at 81

⁴⁵ *Id* at 5

role of non state actors. The state plays a central role in putting forward a consensus . The cosmopolitan legal thought, promoted by Glenn, where we can accept the present norms,(in this case the current state law of gender equality) and then open to reconciliation with multiple alternatives (engaging non-state actors).⁴⁶ Women's organizations working at the national level can form a central body which can link the various non-state actors working for women's rights. This can help in changing the normative character of gender discrimination by spreading awareness through a global platform. This can be related to Oeter's approach, where he stresses on the formation of "global legal order" through an anarchical array of trans-governmental and transnational networks linking the specialized agencies throughout the world..⁴⁷

It is necessary to have a new mentality through which inequalities among peoples and nations are mitigated by law, which are strengthened by new tools and actors. ⁴⁸ The main aim of a global legal order is to look at the world and humankind as a whole and setting accounts of a particular phenomenon in the context of broad geographical pictures and long historical time-frames.⁴⁹ The obstacle which prevents successful establishment of a global legal order is that the world does not have an uniform set of societal values and cultures. These dimensions cannot be ignored and it is important to take these social norms into consideration because harmonization of laws is one of the imperative of global legal order.

⁴⁶ Halpin ,*Supra note 23* at 9

⁴⁷ *Supra note 23* at 81

⁴⁸ Domingo, *Supra note 4* at 100

⁴⁹ *Id* at 41

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