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Minority women's hard choices when seeking redress for multiple discrimination

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Minority women face several dilemmas when they seek redress for multiple discrimination through international human rights instruments. Although human rights instruments are universal in nature, they address either specific issues or they target specific categories of beneficiaries. A minority woman suffering multiple discrimination cannot, therefore, claim her rights in one place but must direct her petition to several instruments. Since this is rarely feasible, minority women may have to make the very hard choice between seeking redress as women, or as members of a minority, or as individuals experiencing specific discrimination. This is no small matter as minority women often suffer discrimination on multiple accounts as members of both social and cultural groups. This Issue Brief explores the legal obstacles that minority women encounter because of their complex human condition.

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1. INTRODUCTION

Minority women may experience discrimination on several fronts due to their membership of a minority. First, they may feel discriminated as members of racial, ethnic, cultural, national, linguistic or religious minority groups, and here the 'or' is perhaps misunderstood; the protection of minority identity often involves more than one of the attributes mentioned. Thus, a member of a minority may experience discrimination on ethnic as well as religious grounds. Moreover, this type of discrimination usually stems from sources outside the minority group, from mainstream society. It is clearly related to the individual's membership of a group, and, although the individual feels the suffering directly, the group is the main target of the violation.

Secondly, a woman who is a member of a minority group may be discriminated against

because she is female. This type of discrimination may stem from outside the minority group as well as from the inside. The outside, or external, discrimination may be based on a woman's gender, but it may also be due to her membership of a specific minority group, i.e. her identity relation with that group. The inside, or internal, discrimination is also because of her gender, if the group discriminates against women for various reasons.¹ Either way, minority women in such situations suffer double discrimination, as women and as members of an identity group.

In addition to suffering as women and as members of a cultural identity group, minority women may experience triple discrimination² based on their social and structural situations.³ If girls do not receive proper education, they risk unemployment for most of their adult life, and unemployment may lead to several conditions. And if they do find employment, it may be in the



informal sector under dangerous conditions involving sexual violence and/or domestic abuse. Lack of education can also lead to illiteracy with the consequence of being excluded from general information and political participation. While lack of education may be caused by poverty, it may also be a deliberate choice made by parents based on cultural traditions. In those cases, girls are often confined to early marriage and early motherhood.

Motherhood is thus a category that may have several consequences, including lack of education and employment but in many cases also poverty if women are abandoned and must survive as single mothers. Single motherhood may also be a result of unwanted pregnancy due to sexual violations.

Poverty thus has many faces; living in rural, remote areas or in ghettos, which minority groups often do, can also lead to poverty. And poverty can be seen by authorities as the right to violate the privacy of minority women, including such serious encroachments as sterilization.

Finally, minority women are increasingly becoming high-risk groups with regard to human trafficking and domestic violence, not to mention conflict related violations, such as rape and physical abuse.

It is almost impossible to count the number of accounts on the basis of which minority women may experience discrimination, but it is clear that these multiple dimensions are not only socially and structurally constructed but also culturally. Moreover, the acts of discrimination are external as well as internal making it difficult to prosecute the sources. Due to the complexity of a woman's situation, it is almost impossible to separate the dimensions of discrimination because they are compounded and aggregate. Minority women as sufferers of multiple discrimination constitute, therefore, a very special category when it comes to human rights protection.

2. THE DILEMMAS

The complexity of compounded and aggregate discrimination poses several dilemmas with regard to ensuring adequate protection and redress for minority women.⁴ First, there is the impact of the internal-external aspect on minority women's options. Whereas external discrimination may be addressed through the broad spectrum of human rights instruments protecting individual human rights, internal discrimination may fall outside the remit of this body of law if minority groups have been granted group rights on the basis of ethnic or other attributes warranting collective rights.

Usually, group rights do not trump individual rights but in some cases it may be the case effectively creating a hierarchy of rights. For example, if a minority group has been granted self-government and/or self-administration in the area of education, the group may be able to restrict access for girls.⁵ Ideally, this area should also be governed by universal individual human rights, but it may not. Minority girls/women/mothers who seek redress against their own group's rights to collective governing are, therefore, put in a very difficult dilemma of whether to go against their own community or continue suffering discrimination.

Secondly, there is the problem of which avenue to select when seeking redress through international human rights instruments. There is no one international human rights instrument that protects the rights of women as well as the rights of minorities, let alone the multiple dimensions that minority women may experience.

International human rights instruments are usually universal in nature in that they seek to protect all humankind. There are target beneficiaries mentioned in specific instruments, of course. For instance, there are human rights instruments targeting children; others target persons with disabilities, members of indigenous groups or persons belonging to minorities. However, even if they are designed to protect target beneficiaries, they seldom include provisions for gender discrimination.



Thus, the gender neutrality of both human and minority rights instruments is an obstacle with which minority women must deal. This can easily pose yet another dilemma for minority women who may not see their own experiences with multiple discrimination in a simple perspective. The implications are, therefore, that the international human rights framework may prevent minority women from accessing their compounded rights.

3. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

International human rights instruments of relevance for minority women's protection fall into three main categories in terms of **non-discrimination**: those that are gender neutral, those that are minority neutral and those that are both gender and minority neutral. Relevant instruments are those that have monitoring mechanisms.

In addition, human rights instruments may be gender and/or minority sensitive or insensitive in **specific thematic provisions**. Specific thematic provisions, that are gender sensitive, may for example refer to 'his or her' language or 'his or her' name. This approach does not necessarily ensure non-discrimination in the specific area but it allows for establishing an inclusive approach to the enjoyment of the provision.

The problem is that unless the provision specifically targets women and/or girls, it is still gender neutral. And likewise, a provision that does not specifically refer to membership of a minority group, will not guarantee positive protection on minority related issues. In the next three sections, eight targeted and three universal human rights instruments are reviewed.⁶

3.1 Targeted human rights instruments

The most important targeted human rights instrument devoted entirely to non-discrimination on the basis of identity group or **minority** membership, the United Nations (UN)

Convention on the Elimination of Racial Discrimination (CERD), is unfortunately gender neutral.⁷ Article 2 of the CERD sets out the main goals of the instrument to condemn racial discrimination and to pursue eliminating it in all its forms, including eliminating all practice of racial discrimination against persons, groups of persons or institutions. However, it does not refer specifically to discrimination against women.

Article 5, which is the main thematic article of the Convention, stipulates that governments must undertake to prohibit and to eliminate racial discrimination in all its forms and guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, and to ensure equality before the law. The forms of enjoyment mentioned are numerous and include cultural rights, but there are no references to discrimination due to gender.

The most important human rights instrument devoted entirely to non-discrimination on the basis of **gender**, the UN Convention on the Elimination of Discrimination (CEDAW), is unfortunately minority neutral.⁸ While it takes into account the need to eliminate prejudice and sex role stereotyping, which affect women in minorities, it does not refer to these in terms of minority membership. However, it calls for protecting women in a number of the situations that may create multiple and compounded discrimination of minority women, including human trafficking, prostitution and rural life. And it includes the cultural domain in the areas considered relevant for protecting the rights of women.

One of the most **gender** sensitive targeted international human rights instruments is the Convention on the Rights of Persons with Disability (CRPD).⁹ The instrument devotes an entire article to women with disability in Article 6. Unfortunately, it is minority neutral.

The targeted UN Convention on the Rights of the Child (CRC) is both **gender and minority** sensitive.¹⁰ In Article 2, there is provision for equality between both sexes and equal enjoyment of the rights in the instrument.



And Article 30 provides for minority membership and the right to culture, religion and the use of minority languages. Moreover, the Convention's Article 8 provides for protecting the child's right to preserve his or her identity. This is, therefore, a human rights instrument that could well give redress to young girls from minority groups.

Finally, one instrument, which could have had high potential for protecting minority women, is the (revised) European Social Charter.¹¹ It is gender sensitive in its Article 20, which provides for equality and non-discrimination between women and men. However, there are minority-women relevant articles of the Charter, which are not gender sensitive. Moreover, the Charter is entirely minority neutral, which is a shame because it contains numerous minority relevant provisions, such as for instance protection against poverty and social exclusion (Article 30).

3.2 Minority rights instruments

Turning to international minority rights instruments, three are relevant and all are *gender neutral*. First, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹² provides for non-discrimination in several fields in Article 4; none of these include, however, references to gender. Moreover, none of the thematic provisions are gender sensitive in indicating his or her as applicable perspectives for protection.

The second is the UN Declaration on the Rights of Indigenous Peoples, which is also gender neutral on non-discrimination.¹³ In its very last provision, Article 46 it provides for equality and non-discrimination but not gender equality. However, in Article 21 on social rights it puts obligations on states to take special measures with regard to the social rights of women.

Third is the European Framework Convention for the Protection of National Minorities (FCNM),¹⁴ which also omits a reference to gender in its non-discrimination provision in Article 4; the Article refers to

equality between members of minorities and the majority. However, a few other thematic provisions are gender sensitive, such as the right to use minority language with authorities (Article 10), with regard to names and signs in minority languages (Article 11) and on learning minority languages (Article 14).

3.3 Universal human rights instruments

The only universal human rights instrument that is both minority and gender sensitive in its non-discrimination clause is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁵ This instrument is not, however, fully universal as it is applied mainly in Europe.

Article 14 of the Convention provides for universal protection against discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Unlike any other general human rights instrument, the ECHR refers directly to minority membership. Article 14 does not, however, stand alone, and persons seeking redress must claim Article 14 in conjunction with one of the thematic provisions of the instrument. These include basic human rights, including for instance the right to family life.

The arguably most important universal human rights instruments with global reach are the two UN instruments, which constitute the so-called International Bill of Rights. First, the International Covenant on Civil and Political Rights (ICCPR)¹⁶ is gender sensitive in its non-discrimination clause and minority sensitive in thematic provisions. Article 3 stipulates the equal rights between men and women, and Article 27 protects the cultural, religious and linguistic rights of members of minorities defined on the basis of these three attributes. Article 27 is not, however, gender sensitive.

Secondly, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷ could be relevant for minority women's litigation in that it provides for gender equality and non-discrimination in Article 3. It is



not, however, minority sensitive with the exception that it refers to the right to participate in cultural life.

4. IN PRACTICE

International experts are acutely aware that minority women face dilemmas when seeking redress for multiple and compounded discrimination. Established monitoring bodies and expert committees have over the years issued opinions, general comments and recommendations on issues of multiple discrimination.¹⁸ Most of these address single issues related directly to the instrument that they support.

The most important commentary was issued in 2000 by the expert committee on the CERD, General Recommendation No. 25 on “Gender related dimensions of racial discrimination.”¹⁹ Noting that “there are circumstances in which racial discrimination only or primarily affects women” and that such discrimination often “escape detection if there is no explicit recognition or acknowledgement”, the Committee recognized that some forms of racial discrimination have a unique and specific impact on women.

Thus, the Committee recommends to integrate gender perspectives and gender analyses, and to use gender-inclusive language in its work and drafting. Specifically, the Committee suggested giving particular consideration to

- the forms and manifestations of discrimination,
- the circumstances in which it occurs,
- the consequences of it, and
- the availability and accessibility of remedies and complaint mechanisms.

The Committee also urged states party to the CERD to address gender issues in their reports.

Another expert committee that has taken up the baton recently is the Advisory Committee on the Framework Convention (ACFC).²⁰ Like

several other Council of Europe monitoring bodies, the ACFC has appointed a Gender Equality Rapporteur to assist it in its effort. With the FCNM being gender neutral, the efforts of the ACFC have little to go by. The ACFC has, nevertheless, begun to address gender issues in connection with Article 3 with regard to data collection, Article 4 on non-discrimination as well as those articles that are gender sensitive.²¹ Being a key minority rights instrument, observers have, however, suggested that the ACFC must tread a fine line to balance the two issues, gender and minority membership in a culturally sensitive manner.²²

5. TWO APPROACHES

Two approaches to addressing multiple discrimination in international human rights law can be discerned. Some observers have argued that international human rights instruments could be seen as complementing each other, thus creating ‘synergy’ between instruments and measures across the divide between universal and targeted instruments.²³ Exactly how synergy is created is not clear with the exception of mainstreaming the gender focus into provisions that are gender neutral. Cross-referencing between instruments and provisions is another option.²⁴ This might, however, allow for interpretation and selective implementation. Thus, there is the risk that governments remain passive following essentially laissez-faire approaches. This type of synergy is, therefore, likely to result in inconsistent protection of minority women’s rights.

Another approach that has received attention recently is the idea of linking the various types of discrimination through a horizontal perspective. This approach sees multiple discrimination not only as compounded but also as an overlap between sectors. Multiple discrimination thus happens where these overlapping sectors meet. Rather than a vertical aggregation of issues, this approach sees a horizontal line-up of sectors the meeting point of which is the area where multiple discrimination happens. Aggregation is thus considered too



simple, whereas the horizontal perspective allows for the inter-linking of issues through the overlap of sectors.

The technical term in law is intersectionality,²⁵ or the idea that spheres of justice²⁶ inter-act to cross-redress violations. Cross-redressing is an approach that has emerged from debates on social justice. It means, “using measures aimed at eliminating one dimension of inequality to remedy inequality in another area.”²⁷ The debate aimed to reconcile the aspect of status (recognition of cultural groups)²⁸ with distribution (of social services). It basically argues that boundaries must be broken down between the cultural and social spheres in order to achieve equality.²⁹

6. FROM LAISSEZ-FAIRE TO REFORM

This brief survey of a few relevant international human rights and minority rights instruments serves to highlight that the terrain minority women have to charter is rather rough when seeking redress at the international level for multiple discrimination. It involves first of all choosing between instruments by deciding which instrument will yield the highest satisfaction. Secondly, there is the dilemma of choosing between identities; identity in terms of

being a female and identity in terms of membership of a minority group. This choice is potentially very painful for minority women.

Thus, international human rights law does not have a clear path for minority women to follow. At best it suggests creating synergy between instruments and provisions, including addressing gender issues in monitoring. This approach is, however, not likely to create consistency and does not secure minority women equal protection. I would argue it is too passive, as it does not provide for future standard-setting to improve. In a sense it is a laissez-faire approach.

The alternative of inter-sectional mainstreaming suggested by experts is likely in the long run to create better consistency in redressing violations against minority women. I argue this because it calls for improving not only monitoring but also enhancing new instruments or adopting protocols to existing documents. By mainstreaming inter-sectionality into standard-setting as well as monitoring, there is a greater chance that all dimensions of violations will systematically be detected. And by demanding inter-sectionality in future instruments, international human rights law will eventually be reformed. It is a pro-active approach to overcoming the fragmented and unfair system that minority women must face.



Notes

¹ See Will Kymlicka's discussion of internal restrictions and external protections in W. Kymlicka, *Multicultural Citizenship* (Clarendon Press, Oxford, 1995), 35-44.

² Sia Spiliopoulou Åkermark following Delyth Morris defines triple disadvantage as the disadvantages that women suffer firstly by virtue of their gender, secondly by virtue of their membership in a minority, and thirdly by living in peripheral areas, being handicapped or forced into a refugee or migrant status. S. Spiliopoulou Åkermark, *Human Rights of Minority Women. A Manual of International Law* (The Åland Islands Peace Institute, Mariehamn, 2000), 12.

³ According to Iris Marion Young, structural inequality refers to “relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social position.” I. M. Young, *Inclusion and Democracy* (Oxford University Press, Oxford, 2000), 98. Structure is generally agreed to be one of the most elusive concepts of the social sciences. Most typically it is seen as designating the actual arrangement of individuals and groups into larger entities, i.e. the social facts of society.

⁴ A. Phillips, “Dilemmas of gender and culture: the judge, the democrat and the political activist” in A. Eisenberg and J. Spinner-Halev (eds.), *Minorities within Minorities*, 113-134, at 115.

⁵ S. Moller Okin, “Feminism and Multiculturalism: Some Tensions” in 108 *Ethics* (1998), 661-684 and S. Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton University Press, Princeton, 1999).

⁶ Case law is not reviewed here. Please refer to Tove H. Malloy, “Standards to Eliminate Compounded Discrimination: The Case of the Intersectionality of ‘Minorities within Minorities.’ Or, why Universal Legal Standards Must Engage with the Concept of Culture” in Kristin Henrard, *Double Standards Pertaining to Minority Protection* (Koninklijke Brill NV, 2010), 259-296.

⁷ Convention on the Elimination of Racial Discrimination (CERD), at

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>> (Accessed: October 11, 2015).

⁸ Convention on the Elimination of Discrimination (CEDAW), at

<<http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>> (Accessed: October 11, 2015).

⁹ Convention on the Rights of Persons with Disability (CRPD), at

<<http://www.un.org/disabilities/convention/conventionfull.shtml>> (Accessed: October 11, 2015).

¹⁰ Convention on the Rights of the Child (CRC), at <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> (Accessed: October 11, 2015).

¹¹ European Social Charter, at <<http://www.coe.int/T/DGHL/Monitoring/SocialCharter/>> (Accessed: October, 2015).

¹² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, at <<http://www.un.org/documents/ga/res/47/a47r135.htm>> (Accessed: October 11, 2015).

¹³ UN Declaration on the Rights of Indigenous Peoples, at

<http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> (Accessed: October 11, 2015).

¹⁴ European Framework Convention for the Protection of National Minorities (FCNM), at

<<http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>> (Accessed: October 11, 2015).

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), at

<https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf> (Accessed: October 11, 2015).

¹⁶ International Covenant on Civil and Political Rights (ICCPR), at

<<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> (Accessed: October 11, 2015).

¹⁷ International Covenant on Economic, Social and Cultural Rights (ECECSR), at

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> (Accessed: October 11, 2015)

¹⁸ See for instance, Committee on Economic, Social and Cultural Rights, General Comments Nr. Nr. 5 (Disability); Committee on the Elimination of Racial Discrimination, General Recommendation Nr. 27 (Roma); Committee on the Elimination of Discrimination against Women, General Recommendation nr. 18 (Disabled women); Committee on the Rights of the Child, General Comment Nr. 3 (HIV/AIDS); Committee on the Elimination of Racial Discrimination, General Recommendation Nr. 21 (Self-determination) and Nr. 27 (Roma); Committee on the Elimination of Discrimination against Women, General Recommendation Nr. 14 (Female circumcision), and Committee on the Rights of the Child, General Comment Nr. 3 (HIV/AIDS) and Nr. 4 (Adolescent health).



¹⁹ General Recommendation No. 25 on “Gender related dimensions of racial discrimination”, at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/76a293e49a88bd23802568bd00538d83?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83?OpenDocument)> (Accessed: October 11, 2015).

²⁰ ACFC monitoring Opinions, at <<http://www.coe.int/en/web/minorities/monitoring>> (Accessed: October 11, 2015).

²¹ The argument is based on a survey of 3rd cycle opinions issued by the ACFC.

²² P. Thornberry, “Article 12” and “Article 13” in M. Weller (ed.), *The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, Oxford, 2005), 365-393, at 390-393. See also Thornberry, ‘The UN Declaration: Background, Analysis and Observations’ in A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (Åbo Akademi University Institute for Human Rights and Minority Rights Groups, Turku/ Åbo and London, 1995), 11-71; see also Åkermark, *ibid*.

²³ I borrow this analogy from Kristin Henrard. The synergy argument rests on the assumption that minority-specific and non-minority-specific instruments work combined to protect members of minorities. K. Henrard, “Ever-Increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority-Specific Instruments” in 3 *European Yearbook of Minority Issues*, (2003/4), (Martinus Nijhoff Publishers, Leiden, 2005), 15-41. See also, K. Henrard and R. Dunbar (eds.), *Synergies in Minority Protection* (Cambridge University Press, Cambridge, 2008).

²⁴ Cross-referencing creates legitimacy and exists at several levels. In standard-setting, it is common to reference other international human rights standards in preambles. In monitoring, it is feasible to cross-reference targeted human rights instruments that relate to the issue at stake thereby strengthening the argument. And in case law, cross-referencing is quite common and part of the nature of building consensus around a standard. T. H. Malloy, *ibid*.

²⁵ The concept was first introduced in feminist theory as a response to certain blindness in that theory towards the way in which various categories, such as gender and race interact and create new identity processes rather than co-exist as separate categories. K. Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, 43 *Stanford Law Review* (1991), 1241-1279. See also, S. V. Knudsen, “Intersectionality – A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks.” Paper presented to the Eighth International Conference on Learning and Educational Media, Caen, France, 26-29 October 2005; J. Jedwab and I. Donaldson, “Intersections of Diversity”, 35, No. 3, *Canadian Ethnic Studies*, 1; L. McCall, “The Complexity of Intersectionality”, 3 *Signs*, (2005), 1771-1800; T. H. Malloy, *ibid*; C. I. Ravnbøl, “The Human Rights of Minority Women: Romani Women’s Rights from a Perspective on International Human Rights Law and Politics”, 17 *International Journal on Minority and Group Rights* (2010), 1-45.

²⁶ A sphere is here understood as a sector, such as education or an area, such as political affairs, i.e. any field where domination can happen, or what Walzer terms “different times and places.” M. Walzer, *Spheres of Justice* (Basic Books, 1983), 3-4.

²⁷ T. H. Malloy, *ibid*.

²⁸ Status in democratic justice refers to recognition, i.e. recognition of difference and recognition of group existence in terms of cultural minorities. Some proponents of equality of status have even argued for recognition of cultural survival. C. Taylor, “The Politics of Recognition” in A. Gutmann (ed.), *Multiculturalism* (Princeton University Press, Princeton, 1992/1994), 25-74.

²⁹ See debate between Nancy Fraser and Axel Honneth in N. Fraser and A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange*, tr. J. Golb, J. Ingram, and C. Wilke (Verso, London, 2003), 7-109.



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