

PART I

Introduction

Introduction

The forms of violence to which women are subjected and the ways in which they experience this violence are often shaped by the intersection of gender with other factors such as race, ethnicity, class, age, sexual orientation, disability, nationality, legal status, religion and culture. Therefore diverse strategies that take these intersecting factors into account are required in order to eradicate violence against all women.

United Nations Secretary General, 2006

1.1 Violence against Women and Human Rights: Driving Notions

Violence against Women (VAW) affects approximately one-third of women globally.¹ This pervasive violence has been widely examined, discussed and theorised in different disciplines and from different perspectives over the past 30 years, largely the result of the efforts of the women's movement. VAW is considered in human rights as a form of discrimination, contrary to the right of men and women to the equal enjoyment of civil, political, economic and social rights.² In the process of recognition of VAW as a violation of human rights of women, one

¹ World Health Organisation, Report on Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-partner Sexual Violence, 2013.

² UN Committee on the Elimination of Discrimination Against Women (CEDAW Cee), CEDAW General Recommendation No. 19, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), available at: www.refworld.org/docid/453882a422.html [accessed 12 January 2016]; United Nations General Assembly (UNGA), Declaration on the Elimination of Violence against Women (DEVAW), 20 December 1993, A/RES/48/104, available at: www.refworld.org/docid/3b00f25d2c.html [accessed 12 January 2016]; Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para Convention), 9 June 1994, available at: www.refworld.org/docid/3ae6b38b1c.html [accessed 12 January 2016]; Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), 11 May 2011, available at: www.refworld.org/docid/4ddb74f72.html, [accessed 12 January 2016].

feminist construction served as inspiration for the documents adopted and helped capturing the structural nature of violence affecting women: the concept of *gender*.

‘Gender’, however, is, still today, a debated notion.³ The view of gender that has been incorporated into human rights documents on VAW derives from specific theories and implies specific understandings. This has resulted in a framework with certain characteristics. The brief discussion below will introduce the main aspects of the legal translation of gender and the potential shortcomings that intersectionality intends to tackle.

1.1.1 *The Incorporation of Gender in Human Rights Norms*

Gender has been incorporated into human rights in connection to three aspects, the social construction of gender roles, the man/woman binary and the patriarchal construction of society. The UN Committee on the Elimination of Discrimination Against Women (CEDAW Cee) has clarified that:

The term ‘sex’ here refers to biological differences between men and women. The term ‘gender’ refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.⁴

This understanding of gender, more fully worked out than earlier definitions and resembling feminist notions,⁵ determines who falls under the protection of the framework and against what type of discrimination and violence, according to three main notions.

³ On the debates and confusion that the term ‘gender’ still triggers today, see Scott [2013], 63–77.

⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, available at: www.refworld.org/docid/4d467ea72.html.

⁵ See, for instance, the ‘Statement on the Commonly Understood Meaning of the Term ‘Gender’ resulting from heated debates during the Beijing Conference, which suggests that there is a ‘common understanding’ of the term but refrains from providing any definition. Available at: www.un.org/esa/gopher-data/conf/fwcw/off/a-20a1.en [accessed 13 January 2016].

Firstly, this definition of gender distinguishes the social construction of gender identities from the ‘biological’ nature of sex. Thirty years ago, Scott highlighted the ways ‘gender’ was being used by different disciplines to highlight the relational aspect of sexual differences (women and men were defined in terms of one another) and to take distance from biological explanations.⁶ As such, gender denoted the social creation of the attributed roles for women and men. Similarly, Merry pointed out that ‘gender’ asserts the social nature of the relations between the sexes.⁷

The second proposition derived from this definition of gender is that ‘sex’ is a natural construction. This notion, however, has been challenged by different authors in recent (and not so recent) years, arguing that sex is *also* socially constructed.⁸ Considering sex as a natural construction supports the idea of a male/female divide, ignoring individuals who do not or will not fall under those categories. Furthermore, it promotes a naturalised view of women and men, even though the idea of the social construction of sex difference, said Scott, challenged not only biological explanations, but also the view of ‘men’ and ‘women’ as stable categories (‘enduring bodies’) with a fixed and ‘natural’ content.⁹ Loosening this naturalised views would contribute to a more inclusive view of women and enhanced protection against violence.

The idea of women as a constant category is visible in human rights. Scott explained that the very early and simplest usage of gender was as a synonym of ‘women’, intending to direct attention towards women as a group. Gender thus, meant women.¹⁰ This descriptive usage of gender seems to prevail in human rights law, since, as Scott recalled, within the United Nations, ‘gender awareness means paying attention to what women do, what resources they command, what roles they play in families, localities, and states’.¹¹ Similarly, even today, violence against women and gender-based violence are often used interchangeably, as illustrated by CEDAW General Recommendation 19:

⁶ See Scott [1986], 1053-1075, 1057-106. Two decades later, the American Historical Review published a special issue in honour of Scott’s essay, with a number of articles showing the current state of affairs regarding gender, including a reflection by Scott on the trajectory of the notion and the legacy of her original essay. See Scott [2008], 1422–1430. For more on this updated view of Scott’s essay and her work, see Butler and Weed [2011]. Project MUSE, available at: <https://muse.jhu.edu/> [accessed 6 January 2016].

⁷ Merry [2009], 25.

⁸ See for instance, Butler (1993); Fausto-Sterling [1989, 1992, 2000].

⁹ Scott [2008], footnote 6, 1426

¹⁰ Scott explains that replacing the word ‘women’ by ‘gender’ aimed at achieving academic legitimacy, since it sounded more ‘neutral’.

¹¹ Scott [2013], footnote 3, 67.

Gender based violence is violence that is directed against a woman because she is a woman, or violence that affects women disproportionately.¹²

The third relevant aspect of gender captured in human rights norms relates to the asymmetrical positioning of women and men. Although analysing gender dynamics contributes in understanding how inequality works, the notion of gender did not (at least initially) explain *why* social relations based on sex difference are constructed as they are. One of the explanations offered relied on the patriarchal construction of society, in which males exercise predominant power and women are in a subordinated position.¹³ Based on this proposition, the early stages of the battered-women movement argued that violence against women takes place because women live in a male-dominated society. Merry pointed out that ‘women’s movements have redefined gender violence as a serious problem affecting *all* women and that is at the core of patriarchy’.¹⁴ As a consequence, references to the ‘historically unequal power relations between women and men’ are included in most human rights instruments on VAW.¹⁵ Such an assumption holds, even if recognising that ‘the social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors’.¹⁶

There seem to be two main limitations derived from focusing only on patriarchy as explanation of gender inequality. Firstly, although patriarchy addresses the inequality between men and women, such an approach does not show how gender inequality creates or interacts with other forms of inequality, and takes gender inequality as the primary form of inequality affecting women.¹⁷ Secondly, the focus on patriarchy offers little explanation for cross-cultural variations in gender inequality.¹⁸ Merry also explained that the emphasis on the patriarchal view of gender-based violence tends to blur the cross-cultural differences in the manifestation of violence.

Similarly, Otto has argued that both the binary view of gender (men/women) and the asymmetrical assumption (dominant men,

¹² GR 19, footnote 2.

¹³ Scott [1986], footnote 6.

¹⁴ Merry [2009].

¹⁵ See DEVAW, preamble; GR 19, para. 11; Belem do Para, preamble and Istanbul Convention, preamble.

¹⁶ CEDAW General Recommendation No. 28, footnote 4.

¹⁷ Scott [1986], footnote 6, 1058-159

¹⁸ For early critiques, see [1980]; Beechey [1979], 66-82; Carby [1982].

subordinated women) are counterproductive because it (once again) reinforces naturalised views of men and women, leading to paternalistic responses to women's human rights violations. Moreover, they have exclusionary effects and enforces traditional views on women's sexuality, homophobia and trans-phobia.¹⁹ Merry's view seems in line with Otto's, suggesting that the emphasis on patriarchy takes a heteronormative view of gender-based violence, excluding from this framework any act of violence which is not committed by men against women.

The normative translation of gender thus emphasises women's subordination to men and, to a large extent, women as a naturalised category. These notions have become cornerstones of the current human rights framework on VAW. Yet there is another theoretical concept that could improve this normative translation of gender, which is steadily capturing attention and starting to become visible in the field of human rights and violence against women: intersectionality.

1.1.2 *An 'Emerging' Notion: Intersectionality*

The idea that there is a common, inherent attribute or experience shared by all women regardless of differences based on race, class or sexual orientation has been instrumental to bringing violence against women within the scope of international human rights. Yet, this generalising view of women was incapable of fully reflecting the experience of women belonging to a racial minority or to ethnic communities, projecting the position of 'privileged women', namely white, middle- or upper-class, heterosexual women. For this reason, feminist authors warned that 'a more complex understanding of oppression' was required to truly encompass the different realities of women, which 'would not be compatible with a purely gender-centred analysis'.²⁰

Since the 1980s, theories challenging the notion of women as belonging to a homogeneous category were securing a space in scholarly research and some women's movements. Among those, Crenshaw coined the term 'intersectionality', highlighting the intersection of race and gender, yielding a new and qualitatively different form of discrimination.²¹ It was then recognised that women's race had a complex influence on the forms

¹⁹ Otto [2013].

²⁰ Scott [1986], footnote 2; Flax [1990]; Spelman [1988]; Charlesworth [1999], 379–394, 384. See, for example, claims from black and 'non-white' feminist scholars. Hull, Scott and Smith [1982]; Anthias and Yuval-Davis [1983], 62–75; Dill [1983], 131–150; Hill Collins [1990].

²¹ Crenshaw [1989], 139–67; Crenshaw [1990], 1241.

of violence that women suffer and the way they experience such violence. Together with race, the importance of ‘seeing’ other characteristics, such as social class, sexual orientation, migrant status, age, religion and disability, became more commonly acknowledged.

The human rights documents on VAW have, to a certain extent, paid attention to multiple inequalities besides gender inequality, although in different ways. The CEDAW Committee highlighted the special vulnerability of some women, such as those living in rural areas and domestic workers.²² Later on, it would issue general recommendations addressing specific groups of women.²³ By the mid-1990s, the Beijing Declaration and Platform for Action²⁴ called on governments to ‘intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people’. In the year 2000, the UN Expert Group Meeting on Gender and Racial Discrimination examined the ‘intersecting subordination’ that women suffer based on their race and gender, and emphasised the urgent need to develop an *intersectional approach* to identify multiple forms of discrimination and its effect on women and girls.²⁵ This report was followed by CERD’s General Recommendation XXV on Gender related dimensions of racial discrimination.²⁶

²² For instance, UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 19, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), available at: www.refworld.org/docid/453882a422.html, [accessed 7 December 2014].

²³ For instance, see UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 18 on Disabled Women, adopted at the Tenth Session, 1991 (contained in Document A/46/38), 1991, A/46/38, available at: www.refworld.org/docid/453882a322.html [accessed 7 November 2016]; and later on, General recommendation No. 26 on women migrant workers, 5 December 2008, CEDAW/C/2009/WP.1/R, available at: www.refworld.org/docid/4a54bc33d.html [accessed 7 November 2016] and General recommendation No. 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27, available at: www.refworld.org/docid/4ed3528b2.html [accessed 7 November 2016].

²⁴ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, available at: www.refworld.org/docid/3dde04324.html [accessed 12 January 2016].

²⁵ Gender and Racial Discrimination Report of the Expert Group Meeting. Available at: www.un.org/womenwatch/daw/csw/genrac/report.htm [accessed 12 January 2016].

²⁶ UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXV Concerning Gender related dimensions of racial discrimination, 20 March 2000, A/55/18, available at: www.un.org/documents/ga/docs/55/a5518.pdf [accessed 12 January 2016].

Over the past decade, the United Nations Special Rapporteur on Violence Against Women (UN SRVAW) added to the momentum through country reports and case studies.²⁷ The 2009 report explicitly referred to ‘intersectionality’ as an important tool in the elimination of VAW.²⁸ The intersection of inequalities affecting women and the importance of adopting an intersectional approach in relation to violence against women has been repeatedly recognised by other UN bodies as well, such as the United Nations Secretary General (UN SG) in his ‘In-depth study on violence against women.’²⁹ The United Nations General Assembly (UNGA) has also urged States to ‘ensure that diverse strategies that take into account the intersection of gender with other factors are developed in order to eradicate all forms of violence against women.’³⁰

These developments suggest that intersectionality is slowly becoming part of the human rights framework on VAW, reaching out and including all women under the protection of human rights. However, after four decades of theoretical elaborations, what intersectionality exactly entails, particularly in relation to law and how to apply it to concrete human rights violations remains unclear. This uncertainty has produced some skepticism and led some scholars to wonder if this is not a new buzzword of uncertain meaning.³¹

1.2 Aim of the Book

The adoption of intersectionality within international human rights, particularly in relation to VAW has several positive consequences. It certainly carries a strong symbolic meaning, that is, the recognition of the diversity of women and their different experiences, making them

²⁷ The role of Special Rapporteur on VAW has been performed by Ms. Radhika Coomaraswamy (Sri Lanka), 1994 – July 2003; Dr. Yakin Ertürk (Turkey), August 2003–July 2009; Ms. Rashida Manjoo (South Africa), August 2009–July 2015, and since August 2015, Dr. Dubravka (Croatia).

²⁸ See, for example, the characterisation of intersectionality included in the Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk: addendum: 15 years of the United Nations SR on violence against women, its causes and consequences (1994–2009): a critical review, 27 May 2009, A/HRC/11/6/Add.5, available at: www.refworld.org/docid/4a3f5fc62.html [accessed 2 December 2014], 31.

²⁹ UN General Assembly, In-depth study on all forms of violence against women: report of the Secretary-General, 6 July 2006, A/61/122/Add.1 (UNSG report), available at: www.refworld.org/docid/484e58702.html [accessed 2 December 2014], para 361.

³⁰ UN General Assembly, Intensification of efforts to eliminate all forms of violence against women: resolution adopted by the General Assembly, 30 January 2007, A/RES/61/143, available at: www.refworld.org/docid/45fe45762.html [accessed 2 December 2014].

³¹ Davis [2008], 67.

visible and challenging essentialist views. It also disentangles the VAW project from western feminist ideas and recalls other voices and realities. In addition, and perhaps more importantly, including intersectionality in the human rights framework on VAW may extend the protection of the framework to women who are often overlooked, or insufficiently covered by gender-based policies, and thus, ensure their enjoyment of human rights.

This book entails a double analysis. On one hand, it *theoretically* explores the human rights framework on VAW from the perspective of intersectionality. Following a theoretical discussion of intersectionality in relation to VAW, the book reveals to what extent intersectionality is already explicitly and/or implicitly incorporated in the human rights framework on VAW and what the consequences are for States. Further, the book examines *empirically* the extent to which the application of an intersectional approach to VAW can contribute to reveal gaps in legislation and policies. This combined approach provides a grounded overview of the relevance of intersectionality for the field of VAW. Overall, the study intends to contribute to a more comprehensive and inclusive reading of the human rights framework on VAW, and also, to do away with the perception that intersectionality is foreign to the VAW project.

1.3 Structure of the Book

The book is divided into four parts. Part I explores intersectionality in relation to VAW from a theoretical perspective. Chapter 2 provides a detailed analysis of intersectionality from the perspective of social sciences. It describes the guiding notions, principles and propositions commonly connected to the intersectional approach and highlights some of the elements that are relevant for cases of violence against women. It also suggests a technique for identifying intersectionality in the formulation of human rights documents on VAW.

Part II explores the position of intersectionality within the international human rights norms on VAW and derived obligations. Chapter 3 provides an introduction to the normative framework examined in this book, describing guiding principles and general obligations. In doing so, the legal and practical value of soft law for VAW, particularly in the light of the mixed nature of the norms and the relevance of non-State actors, is discussed. Chapters 4 and 5 constitute the core legal dimension of this book. In Chapter 4, the analytical technique suggested in Chapter 2 reveals the extent to which human rights norms and jurisprudence

at the UN adopt an intersectional approach to VAW. Chapter 5 contains a similar analysis, but focuses on the Council of Europe (CoE) and the Organization of American States (OAS). These two chapters provide a general overview of the current normative framework applicable to VAW from an intersectional point of view.

Part III explores intersectionality in practice, by means of two empirical case studies on domestic violence. These case studies, discussed in Chapters 6 and 7, have three main purposes. Firstly, they provide an opportunity to empirically explore if and how the intersectional approach promoted at the UN, CoE and OAS is applied in practice. Secondly, they explore the ability of the intersectional approach to reveal gaps in legislation and policies on VAW *vis-à-vis* marginalised women. Lastly, they help illustrate in practice the differences in the approaches to intersectionality described in Chapter 2. The case studies follow a qualitative approach, using participant observation, semi-structured interviews and focus groups with victims of domestic violence and service providers. The first case study, carried out in Spain, focused on women belonging to the Roma minority, while the second case, carried out in Argentina, focused on the social categories of distinction appearing in a complex geographical setting.

Part IV is the integrative and conclusive stage, providing a critical assessment of the incorporation of intersectionality into the human rights framework on VAW so far, and the potentials and limitations for the future.

1.4 Terms and Terminology

Violence against women is understood in this thesis as any act or conduct, based on gender, which causes death or physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in the public or the private sphere. This definition resembles that of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para Convention),³² with the addition of ‘economical harm’, included in the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention).³³ The term *intimate partner violence* (IPV) describes

³² Belem do Para Convention, footnote 2, Article 1.

³³ Istanbul Convention, footnote 2, Article 3(a).