

# **Demanding to be human:**

## **The moral authority of human rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

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## **Abstract**

Women's rights occupy a contested moral and political position internationally. They are neither accepted as core values everywhere, nor always struggling for acceptance. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UN General Assembly in 1979, was designed to be an 'international bill of rights for women' (Office of the High Commissioner for Human Rights 2009). It codified non-discrimination within an international treaty to add legitimacy and strength to the implementation of women's rights. The treaty's reception reflects the contested nature of women's rights. While the vast majority of UN member states are signatories, of all comparable treaties CEDAW has the largest number of reservations, many counter to fundamental provisions. CEDAW has supported women's rights for more than three decades. Several barriers to implementation have been highlighted; a lack of resources for the CEDAW Committee and associated bodies and the quarantine of women's rights from the human rights work of the UN (Chinkin 2010, p. 5; Lawson 1996, p. xxix). Delegates at the 1993 World Conference on Human Rights raised the slogan 'women's rights are human rights' to force acknowledgement that human rights were not equally applied to women.

While these difficulties have begun to be addressed within UN processes, CEDAW's efficacy has not been explored. The treaty's content has received little critical attention, and my research helps fill this gap. Using philosophical inquiry, I have compared CEDAW to the International Bill of Human Rights (the Universal Declaration of Human Rights and associated Covenants). Also I have assessed CEDAW against criteria drawn from Amartya Sen's perspective on human rights as an ethical system and considered a range of feminist viewpoints critical of international law. I have found that, as well as strengths, CEDAW has limitations, omissions and flaws. Importantly, CEDAW does not provide a list of women's rights (Burrows 1986, p. 80). Its focus on ending discrimination means that women's relation to rights is mediated through actions by the state. This failure to recast the claimant of human rights as female undermines CEDAW's legitimacy.

## Student Declaration

I, Natalie Zirngast, declare that the Master by Research thesis entitled *Demanding to be human: The moral authority of human rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* is no more than 60,000 words in length, including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature

Date

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## **Glossary of Terms and Abbreviations**

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CSW	Commission on the Status of Women
DEDAW	Declaration on the Elimination of Discrimination against Women
DEVAW	Declaration on the Elimination of Violence against Women
ECOSOC	Economic and Social Council
GAD	Gender and development
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-government organisations
OHCHR	Office of the High Commissioner for Human Rights
OP-CEDAW	Optional Protocol to CEDAW
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UN Women	United Nations women's agency

# Chapter 1 – CEDAW: Unequal among treaties

## 1.1 Introduction

Among the stated goals of the United Nations is the promotion of human rights and freedoms without discrimination on grounds of sex, race, language, or religion. Other goals include encouraging cooperation in solving social and economic problems (Charter of the United Nations 1945). The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)<sup>1</sup> was drafted as a binding instrument of international law in order to codify issues of women's rights internationally. The treaty was adopted by the UN General Assembly in 1979 and entered into force in 1981. In describing CEDAW, the Office of the United Nations High Commissioner for Human Rights (OHCHR) states:

The present document spells out the meaning of equality and how it can be achieved. In so doing, the Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights (Office of the High Commissioner for Human Rights 2009).

However, CEDAW's status among UN human rights treaties is contradictory. It has the second highest number of ratifications, but also the highest number of reservations made by state parties (Acar 2005, p. 3). It has come under considerable scrutiny for the comparative weakness of its obligations, the under-resourcing of its supporting structures for implementation and monitoring and the failures of many states either to provide timely reports to the UN CEDAW Committee or to comply with its provisions (Bunch 1990; Charlesworth 1994b; Chinkin 2010; Elson 2006; Riddle 2002; Zwingel 2005b).

CEDAW was created based on the belief that 'an international treaty is an adequate tool to protect women's rights' (Zwingel 2005b, p. 24). However, competing moral, cultural and economic pressures have made global progress towards the achievement of these rights uneven, difficult and sometimes ambiguous (Benería 2003,

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<sup>1</sup> See Appendix A for full text of the Convention on the Elimination of All Forms of Discrimination against Women (United Nations General Assembly 1979).



p. xii). As UN Secretary-General Ban Ki-moon (2010) attests, glaring inequalities between women and men still exist internationally (though they vary from country to country), and women experience injustice and discrimination. Also, the executive summary of the 2011 report ‘Progress of the World’s Women’ notes the following paradox:

the past century has seen a transformation in women’s legal rights, with countries in every region expanding the scope of women’s legal entitlements. Nevertheless, for most of the world’s women the laws that exist on paper do not translate to equality and justice (UN Women 2011-2012b, p. 1).

Arguably, CEDAW is one of those instruments of law that fails to be translated appropriately into equality and justice.

State parties ratify international agreements to signal their willingness, in principle, to co-operate with others in accordance with the terms of the treaty. Often, they sign because it is in their direct interests to do so. However, while trade and security regimes are signed in order for states either to benefit or to avoid disadvantage, human rights regimes confer neither of these. Rather, as Zwingel states, ‘(m)ore than instruments of direct intragovernmental utility–maximisation, human rights regimes are mechanisms to build common normative ground’ (Zwingel 2005b, p. 26). To this end, as with other international human rights treaties, CEDAW is a universalising project.

The Universal Declaration of Human Rights (UDHR)<sup>2</sup> is a benchmark against which the normative success of all UN human rights regimes can be measured, and the moral authority of the human rights concept is undeniable (Normand & Zaidi 2008, pp. 7-9). Critical discussions of the separation between women’s rights and human rights note the reduced importance of CEDAW and its provisions in contrast to the UDHR (Bunch 1990, p. 492; Peterson & Parisi 1998, pp. 142-54). The level of international moral consensus and cooperation around the UDHR is much greater than that of CEDAW despite the fact that CEDAW contains binding provisions that the Universal Declaration itself does not.

Given the difficulties faced in achieving rights for woman across the globe and the problems with making CEDAW an effective moral, legal and political tool, the

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<sup>2</sup> See Appendix B for full text of the Universal Declaration of Human Rights (United Nations General Assembly 1948).

question of how to increase CEDAW's authority is an important one. The OHCHR's description of CEDAW as an 'international bill of rights for women' suggests an important comparison that will be explored in this thesis; that between CEDAW and the International Bill of Human Rights (within which the UDHR is the core treaty). This comparison will shed some light on the differences in moral authority and consensus between the treaties and help uncover the nature of the gulf between women's rights and human rights.

## **1.2 The nature of this study**

While there is a great deal of literature that mentions CEDAW, it has received little critical attention from a philosophical perspective. This thesis uses a philosophical enquiry into concepts of human rights and women's rights to compare and contrast the International Bill of Human Rights and CEDAW. In setting out the basis of my comparison, I first highlight some key characteristics of human rights. To be effective, they must be universal, moral, claimable and normative; criteria relevant to the success of all human rights treaties including CEDAW. I draw on various theorists to support Amartya Sen's view of human rights as an ethical system. After assessing debates about universalism and criticisms of international human rights law from both feminist and other perspectives, I suggest that, as with human rights in general, feminist approaches that promote a 'thin' universalism seem most likely to provide opportunities for the advancement of women's rights internationally. I also provide some background and context for the International Bill of Human Rights and CEDAW, before presenting an extended analysis of CEDAW's limitations and strengths as a human rights instrument. I develop my assessment of CEDAW using concepts drawn from both human rights theory and feminism. A substantive question will provide the focus:

In what respects do the rights of women articulated in CEDAW contain fundamental differences with the International Bill of Human Rights, in addition to the obvious similarities?

This leads to two supplementary questions:

Does CEDAW recast the human claimant of human rights as female?

Why does CEDAW have reduced moral standing compared to that of the International Bill of Human Rights?

The answers to these questions suggest that in order to fulfil CEDAW's mandate as an international bill of rights for women, a more robust philosophical and practical approach is required towards matters of women's human rights internationally. As an avenue for future research beyond the scope of this thesis I suggest that Martha Nussbaum's capabilities approach holds promise, with the caveat that capabilities are dependent on rights if they are to be fully realised.

### **1.3 Framing the problem**

CEDAW plays an international role as a legal, moral and political tool. These three roles are interlinked, but individually important as distinct functions of the treaty. An instrument of international law, CEDAW codifies principles of equality and non-discrimination for women globally and requires governments to commit to effective measures, legislative and otherwise, to allow these to be fully realised.

As a binding international instrument it imposes legal obligations on signatories to the Convention. It is the most comprehensive treaty upholding women's rights and contains in Article 1 a definition of discrimination against women that is widely recognised within international law. This encompasses both direct and indirect discrimination and supports equality across all spheres of human activity (Chinkin 2010; United Nations General Assembly 1979). Primarily, this is to enable women to live on an equal footing with men. When laws alone are not sufficient, governments are also required to implement other measures to ensure that women are able to exercise these rights and freedoms. This influence flows through to a national and local level in various ways, from creating government obligations to alter national laws to providing a legal underpinning for programs for women that aim to promote development and empowerment. As an international treaty, CEDAW's ongoing interpretations as well as its form and content shape how it is used as a 'living instrument' (Chinkin 2010, p. 6). However as previously noted, to date, CEDAW has been weakly enforced at an international level.). A unique aspect of CEDAW is that it requires that women have access to rights within the private sphere of the family, marriage and home life. Previously, the significant discrimination and abuses of women's rights within the private sphere had been rendered invisible, as it was outside the scope of regular human rights considerations (United Nations Department of Public Information 1996, pp. 41-

2). Once a state party is a signatory to CEDAW, it is under a moral and legal obligation to follow through with its obligations under the Convention.

However, as with other international human rights regimes, CEDAW is considered promotional in that compliance by states is not enforced (Zwingel 2005b, p. 27). It is left to the political will of individual states to implement the Convention. In the international arena, the CEDAW Committee of the United Nations monitors compliance by states through regular country reports and responds to them with concluding comments. The Committee also makes General Recommendations that further develop and refine the interpretation of the Convention (Chinkin, p. 6). Since 2000, CEDAW has also had an Optional Protocol (OP-CEDAW). OP-CEDAW contains two new implementation processes: a complaints procedure for individuals or groups (provided that domestic remedies have been exhausted), and an inquiry procedure to request the investigation of serious violations. State parties must be a signatory to both CEDAW and the Optional Protocol for the latter to take effect. The adoption of the procedures in the Optional Protocol brings CEDAW into line with several other human rights treaties (Division for the Advancement of Women 2009b).

The moral standing of CEDAW is based on its status as an international treaty and also upon its connection to the human rights instruments of the United Nations. According to the CEDAW preamble, it builds upon the rights and principles of equality and non-discrimination contained in the Charter of the United Nations, The International Bill of Human Rights<sup>3</sup> and the Declaration on the Elimination of Discrimination against Women (United Nations General Assembly 1979). In characterising CEDAW as an ‘international bill of rights for women’, a significant parallel has been made between CEDAW and the International Bill of Human Rights. This comparison is useful as it creates an easy method of comparison between the different roles of CEDAW and the different types of rights contained within it. As this difference in moral authority is the primary focus of this thesis, a summary follows of relevant comparisons between the moral authority of the International Bill of Rights and CEDAW.

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<sup>3</sup> The International Bill of Human Rights contains the Universal Declaration of Human Rights (UDHR) and its associated binding instruments, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) (with their Optional Protocols).

Within the International Bill of Human Rights, the UDHR is the primary instrument. It provides the moral foundation of human rights based on the assertion in Article 1 that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (United Nations General Assembly 1948).

As a declaration, the UDHR is a human rights manifesto: it is non-binding and abstract but has moral weight. Binding provisions within international law give effect to and elaborate upon the rights contained in the Declaration. Most directly, this is the case within the International Bill of Human Rights through the two Covenants that were designed specifically to codify the rights in the UDHR. However, the Covenants enshrine a division that the UDHR does not, that between civil and political (first generation) rights and social, economic and cultural (second generation) rights. To fulfil its assigned role as a 'bill of rights for women', CEDAW must provide both a moral foundation and a full spectrum of comprehensive rights in a binding form.

The UDHR was signed in 1948 at the United Nations with 48 countries voting in favour and none against (although there were eight abstentions). More than 60 years later all countries still accept the UDHR, although they may not support each of the human rights treaties associated with it (United Nations Department of Public Information 2008). It is the most translated document in the world (Office of the High Commissioner for Human Rights 2012) and is considered 'the founding document of the human rights movement' (Morsink 2009, p. 4). The UDHR has played a pivotal role in popularising the concept of human rights internationally (Morsink 2009). Almost all modern discussions and debates about the nature and application of human rights make some reference to it (Clapham 2007; Nickel 2010). The clauses contained within it have provided an anchor for many further developments in philosophy, political agitation and international law.

Like the UDHR, CEDAW aims to provide a comprehensive moral foundation for women's rights. In particular, the definition and scope for eliminating discrimination is thorough and encompasses 'the political, economic, social, cultural, civil or any other field' (Article 1, CEDAW). As a legally binding instrument it has much in common

with the two Covenants, but the division between first and second generation rights in the Covenants is not present in CEDAW, making it ‘one of the most integrated Conventions’ (Bunch, in *International Women’s Rights Action Watch Asia Pacific & Center for Women’s Global Leadership* 2009, p. 2). However, the conceptual and practical gulf between the concepts of women’s rights and human rights (and by implication, CEDAW and the UDHR) has been acknowledged for several decades. The assertion that ‘women’s rights are human rights’ has been prominent since the 1993 World Conference on Human Rights (the Vienna Conference). This reflected the criticism raised by the global feminist movement that the human rights contained in the UDHR were not being applied equally to women (Bunch & Frost 2000, p. 5; Elson 2006; Gallagher 1997, p. 284). Donnelly comments:

Women’s rights were until recently something of a stepchild in the field of human rights ... In the past two decades, though, there have been substantial normative and procedural changes in the women’s rights regime and the language of ‘women’s human rights’ – as opposed to the classic ‘women’s rights’ – has entered the mainstream of discussions (2003, p. 149).

Prior to this, the level of structural support and importance within the United Nations attached to the CEDAW treaty was in clear contrast to that of other human rights treaties. Considerably fewer resources were tied to monitoring it, and CEDAW had a lower status by being associated with the Commission for the Status of Women rather than the Commission on Human Rights (Chinkin 2010, p. 5; Lawson 1996, p. xxix). According to Chinkin (2010, p. 6), the efforts of some dedicated members of the CEDAW committee to make CEDAW a ‘living instrument’ and the adoption of both the Optional Protocol to CEDAW (OP-CEDAW) and the UN’s commitment to gender mainstreaming are a mark of progress in the authority and seriousness of the CEDAW treaty. Zwingel (2005a, pp. 405-6) has also noted the shift in the status of the CEDAW Committee from that of a poor cousin to having increased authority to strengthen the profile of the treaty and to promote adherence to it.

However, it would be premature to conclude that women’s rights are now viewed as having the same moral and normative force as human rights in general. The problem of CEDAW’s unequal status is not only a legal and political one, but also exists in the way that women’s rights are seen as philosophically separate to human rights claims.

When measured against the universal acceptance of the UDHR, CEDAW is ‘close to having universal membership’ (Chinkin 2010, p. 6) and as of March 2012 there were 187 parties to the Convention out of a total of 193 United Nations member states (United Nations Treaty Collection 2012a). Nevertheless, as of April 2011 a significant number, 45 countries, still have reservations to CEDAW (UN Women 2011-2012a, pp. 138-41). Defined in Article 2(d) of the Vienna Convention on the Law of Treaties, 1969, a reservation is:

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (United Nations 1969, p. 3).

Reservations are widely considered to undermine the efficacy of treaties, sometimes rendering them toothless or contradictory (Chinkin 2010, p. 7; Riddle 2002, p. 7). The most common reservation to CEDAW is in regard to rights within marriage or the family. Other common reservations refer to clashes with religious or traditional laws or codes, equality of nationality and the ending of discrimination (UN Women 2011-2012b, p. 3). Reservations to CEDAW are a serious concern as many of them contradict core provisions within the treaty (Mayer 1995, p. 179; Riddle 2002, p. 606). To date, few countries with reservations have opted to have them removed.<sup>4</sup> The Optional Protocol (OP-CEDAW) allows no reservations but has an ‘opt-out clause’ (Division for the Advancement of Women 2009b). As of March 2012, 104 state parties had ratified the Optional Protocol (United Nations Treaty Collection 2012d).

While the difficulties with achieving equality and justice for women worldwide are clearly acknowledged, it is arguable as to the degree that CEDAW’s reservations, in particular, undermine the day-to-day practical implementation of the treaty (Acar 2009; Neuwirth 2005). However, the existence of such broad reservations provides a significant challenge to CEDAW in two ways. First, it challenges the ability of CEDAW to become more normative over time, as there is no adequate collective process for reservations to be reconsidered or reviewed formally (Riddle 2002). Second, many of these reservations are based on cultural, religious or traditional grounds which,

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<sup>4</sup> Arat (2008) has noted that while 14 countries have removed or modified reservations, those with cultural or religious reservations are unlikely to withdraw them.

in effect, places women's rights lower in a hierarchy of rights (Charlesworth 1995, p. 108). While there are still some challenges to the human rights concept, the ability to use grounds such as these as the acceptable basis for objecting to the validity of more well-established human rights is minimal (Hafner-Burton, Tsutsui & Meyer 2008, p. 116; Normand & Zaidi 2008, p. 9). In this regard, women's rights are clearly still seen as separate to human rights. Chapter 5 will discuss problems arising from the form of CEDAW's reservations, while Chapter 6 will consider their content, specifically the implications of basing reservations on cultural or religious grounds.

Also, there are concerns with CEDAW's comprehensiveness. Chapter 6 will consider whether CEDAW is complete enough to constitute an 'international bill of rights for women'. As will be discussed in Chapter 5, some limitations have already been acknowledged by the admission that the drafting of CEDAW was constrained by opposition and a tight timeline (Burrows 1986; Cartwright 2007). The adoption of a number of significant General Recommendations (including two concerning a major omission from CEDAW, the issue of violence against women) have been pointed to as evidence of the further development and ongoing interpretation of the Convention (Cartwright 2007; Chinkin 2010, p. 6). To an extent, this is accurate. However, there has been little consideration of whether the Convention itself would stand the test of time, or increasingly become incoherent because of a host of General Recommendations only faintly associated with the treaty (through a vague reference to the broad provisions of Article 1 aimed at ending discrimination).

Whether CEDAW is sufficient to connect women's rights to human rights in a form that carries sufficient moral authority has not yet been explored. In particular, the question arises whether CEDAW is sufficient to recast the human being at the centre of human rights as female. This question is fundamental as the human rights concept itself has often been accused of being inadequate for women in various ways (Charlesworth 1994b, 1994c; MacKinnon 2006; Nussbaum 2008; Okin 1998). Even the characterisation of CEDAW as an 'international bill of rights for women' can be read as making this acknowledgement.

There is very little critical discussion of the treaty itself, a significant gap that this thesis helps to fill. Much of the academic literature on women's rights internationally mentions CEDAW within the context of compliance or in passing (see for example Jain



2005; Molyneux & Razavi 2002). United Nations publications and recent specific volumes on the treaty focus on its importance and progress towards its implementation (see for example Pietilä 2007; Schöpp-Schilling, H. B. & Flinterman 2007; Shivdas & Coleman 2010). Otherwise CEDAW is usually raised briefly during feminist discussions of international law or international relations (see for example Brooks 2002; Charlesworth 1994b; Edwards 2011; Mayer 1995; Peach 2005; Steans 2006). Even within postgraduate work that focuses on CEDAW, the treaty's content receives no philosophical scrutiny and the focus is purely on implementation processes and their effectiveness (Vohra-Gupta 2010; Zwingel 2005).

There exists a need to consider the philosophical assumptions behind the CEDAW treaty and its processes; an examination that will allow a more thoroughgoing critique of CEDAW's usefulness to women. To do so, I will draw on concepts from human rights theory and feminism. I will also consider the application of both human rights and women's rights, specifically within the UN context, to the implementation and standing of the International Bill of Human Rights and CEDAW. On the spectrum of human rights, women's rights can most accurately be seen as human-rights-in-transition. They have become increasingly more accepted in many places but are far from guaranteed, or even acknowledged adequately, in others. As a human rights treaty CEDAW reflects certain limitations of the era and circumstances of its drafting (Cartwright 2007, p. 30). More than 30 years later, CEDAW must be assessed to see whether it will continue to serve the needs of women as an 'international bill of rights' into the future. This thesis makes a contribution to this agenda.

#### **1.4 Overview**

In this introductory chapter I have outlined the nature of this study and identified the problem of CEDAW's unequal status as not only being legal and political but also as concerning the moral normativity of human rights claims.

Chapter 2 puts forward an analysis of the characteristics of human rights and argues that, for human rights to be effective, they must be universal, moral, claimable and normative. Chapter 3 examines the International Bill of Human Rights and the types of rights contained within its instruments – the non-binding UDHR and the two binding Covenants. It also considers critics of universal human rights and how a variety of views might be reconciled in a world of differences. Chapter 4 focuses on two

themes; whether the needs of women can be addressed adequately through international human rights law and how the varied needs of women worldwide might be reflected in approaches to women's rights that are universal, yet flexible.

In Chapter 5, the focus shifts to CEDAW itself. CEDAW is placed in context, and the treaty's development within the United Nations is outlined. Reservations to CEDAW are examined and in the UN context, further developments on women's rights after CEDAW are sketched. Chapter 6 considers the limitations and strengths of CEDAW, in particular the approach of the Convention to social recognition and economic redistribution, discrimination, matters of biology, sex and gender, culture and religion, and the individual and state sovereignty.

Chapter 7 concludes the thesis by drawing together an assessment of CEDAW's fulfilment of the dual roles of a 'bill of rights' as both a moral declaration and a comprehensive binding instrument. It evaluates the importance of CEDAW's weaknesses, particularly the missing female claimant as the claimant of human rights. Also, it emphasises CEDAW's place in ongoing human rights process and indicates some further avenues for developing women's rights as human rights claims.

## **1.5 Conclusion**

In this chapter I have introduced this thesis as a philosophical assessment of CEDAW by way of contrast with the moral authority of the International Bill of Human Rights. I have argued that the problem of CEDAW's unequal status is not just a legal and political one, but also a philosophical one of moral normativity. I have suggested that in this respect, CEDAW might have significant flaws that inhibit its longevity. Finally, I have provided an overview of the rest of the thesis chapters. In the next chapter I consider the question: What are human rights? The answer to this question will set out philosophical grounds for the human rights concept as a whole as well as for the consideration of the treaties of the International Bill of Human Rights and CEDAW.

## Chapter 2 - What are human rights?

### 2.1 Introduction

The concept of human rights seems simple. It refers to a set of essential, basic claims to which each person is entitled on the basis of their humanity alone (Clapham 2007, pp. 4-5; Donnelly & Howard-Hassmann 1987, p. 1). However, human rights are subject to much discussion and debate concerning both their interpretation and implementation. Varied and contrasting opinions are reflected in the vast literature, which encompasses such diverse academic fields as philosophy, law, international relations, feminism, economics and development, as well as many non-academic sources. Also, the difficulties in achieving human rights globally are well documented (Office of the High Commissioner for Human Rights 2010) and this difficulty is often compounded when it comes to women's rights (UN Women 2011-2012a, p. 8; United Nations Development Programme 2011, pp. 89-94).

This chapter will use a philosophical approach to examine human rights and explore some of the significant challenges to their theoretical strength. I will set out a view of human rights as a dialectical historical process (Donnelly 2003, p. 15) that contains moral, political and legal elements. I will provide a list of the characteristics of human rights, arguing that the conditions essential for their effectiveness are that they be universal, moral, claimable and normative. I will then assess the feasibility of these four characteristics by discussing two of Amartya Sen's (2001, pp. 228-31) categories of human rights critique, those of *legitimacy* and *coherence*. I conclude that human rights are most viable as a tool for justice if they are viewed from a *practical* or *weak* ontological perspective and as having a social and dialectical nature that imposes both *perfect* and *imperfect* obligations on both institutions and individuals. These considerations provide a philosophical foundation for the discussion of CEDAW as a human rights instrument.

### 2.2 Characteristics of human rights

In arguing for human rights as a historical concept, Normand and Zaidi (2008, p. xxvii) assert that human rights have a far-reaching resonance among ordinary people who share a common hope: access to justice via a broad spectrum of rights. They consider that the notion of human rights has the capacity to 'mean different things to different

people while still retaining overall ideological coherence' (Normand & Zaidi 2008, p. 6), and emphasise that the importance of human rights reaches beyond the debates surrounding its definition and implementation (Normand & Zaidi 2008, p. 7). Drawing on their work as human rights activists, they make the following observations:

People we met were rarely, if ever, concerned with metaphysical debates about the origins of human rights or historical controversies over Eurocentrism. Their calculations were based on the more immediate and practical desire to improve their welfare and uplift their communities; they understood human rights as a vocabulary of justice ostensibly endorsed by the key power brokers and decision makers on the international level. Especially in regions scarred by war and conflict, they saw human rights as a peaceful means to pursue their goals (Normand & Zaidi 2008, p. xxvii).

In light of this, an extended discussion of the philosophical nature of human rights and associated criticisms may appear somewhat removed from the practical application of these rights. However, outlining some of the associated debates will shed light on the purpose of human rights claims and assist in clarifying what might be required to keep them from being empty rhetoric.

First, in order to examine the basis of human rights claims, this chapter will consider the characteristics of human rights and comment on the different ways that the term is used in the literature. It will be argued that the characteristics of human rights and the ways that the concept is used suggest that Amartya Sen is correct in his assertion that human rights should be viewed as an ethical system. Sen asserts that '(w) have to judge the plausibility of human rights as a system of ethical reasoning and as the basis of political demands' (Sen 2001, pp. 229-30). Second, in assessing the validity of Sen's claim and evaluating the capacity of human rights claims to be implemented, two types of human rights critique will be explored. These have been dubbed the '*legitimacy critique*' and the '*coherence critique*' by Sen (2001, pp. 227-8). His response to these critiques will also be considered. A third critique identified by Sen (2001, p. 228), the '*cultural critique*', will be addressed in Chapter 3. Finally, in summarising the requirements of human rights as an ethical system, a case will be made for the requirements of such an approach to be universal, moral, claimable, and normative, while being subject to change over time.

Modern views of human rights have a specific history that is tied to the development of the Universal Declaration of Human Rights and associated treaties. The view of rights as an ethical system expressed here is informed by an analysis of the interpretation and implementation of the UDHR and its integration into global ethical life. Normand and Zaidi have commented that ‘(although) highly contested, human rights are still considered to be the best, if not the only possible, universal global ethic’ (2008, p. 7). They argue that the concept of human rights stems from a shared moral concern with justice, and that ‘no other system of universal values has spread so far so fast’ (Normand & Zaidi 2008, p. 8). Also, they contend that the concept has developed such a degree of moral authority that denigrating human rights is not considered merely offensive, but immoral<sup>5</sup> (Normand & Zaidi 2008, p. 9). Human rights have a global reach and authority far beyond the set of statements included within the non-binding UDHR. This would not be possible without the significant moral resonance that they have come to hold, which is in spite of the many criticisms and shortcomings that could be pointed out in their practical application. Chapter 3 will include a more specific discussion of the relevance of these views to the International Bill of Human Rights.

As well as being a set of essential, basic claims, human rights have a number of additional characteristics. Many of these are contested.

They are *universal* rights, as they are applicable to all human beings (Cranston 1973, p. 7; Lawson 1996, p. xix).

They are *moral rights* that are connected to (and reflective of) other moral ideals such as justice, freedom and human dignity (Cranston 1973, p. 14; Duquette 2005, p. 67; Nickel 2010; Normand & Zaidi 2008; Sen 2001).

They are *claimable rights*, in that human rights can be demanded and should be enforced and protected (Donnelly & Howard-Hassmann 1987, p. 1).

They are ‘*high – priority norms*’ (Nickel 2010), much stronger than ordinary norms in their seriousness and enforceability.

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<sup>5</sup> Although free speech is supported as a human right, in general, disparaging human rights tends to reflect negatively on the moral values of the questioner (Normand & Zaidi 2008, p. 9).

They are *paramount* in that apart from exceptional circumstances, they should have precedence over other pressing concerns<sup>6</sup> (Cranston 1973, p. 67; Donnelly & Howard-Hassmann 1987, p. 1).

They are *individual* rather than collective rights, in that they can be claimed by individuals rather than groups (Cranston 1973, pp. 1,7).<sup>7</sup>

They are *inalienable* rights, in that ‘one cannot stop being human’ (Donnelly 2003, p. 10).

They are *inherent* rights in that they are vested in the individual. In particular, this means that ‘(t)hey are not given to people by the state and the state cannot deprive people of their rights’ (Lawson 1996, p. xix).

They set a *minimum standard* for the circumstances under which a person should be able to live (Nickel 2010).

They are *indivisible* due to the interdependence of rights which has been characterised in various ways (Donnelly 2003, p. 27; Kunnemann 1995, pp. 326-7).

While most of these characteristics will be mentioned further in this thesis, the main emphasis will be on the first four characteristics; that they are universal, moral, claimable, and normative. This is where the strength of the human rights concept lies. That is to say, these characteristics are the ones that function to make human rights operate effectively within the social and political system globally. Rights are strongest when they embody these four characteristics. This is not meant to imply that the other characteristics are not necessary to the operation of human rights. They are also important, but they are characteristics that are internal to human rights and not those that give human rights their external force. A case for the importance of these four characteristics will be made throughout as these four requirements are also be

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<sup>6</sup> Views differ as to the absoluteness of human rights. While Dworkin and Scanlon argue that a human right must trump all other moral concerns, Sen argues that this view invites assertions of impracticality. Instead, he allows that they should be considered as serious and powerful arguments that might, on occasion, be overwhelmed by other pressing moral concerns (Sen 2009, p. 360, p. 361 footnote).

<sup>7</sup> A brief discussion of whether rights of national self-determination are an exception to this is contained in Chapter 3. Also, it is worth noting that while rights are claimed individually, they must be achieved collectively. This point will be further elaborated later in this chapter.

conditions for CEDAW's successful implementation. The capacity of CEDAW to meet these requirements will be assessed in Chapters 5 and 6.

The discussion of human rights in the literature also lends credibility to the idea that human rights can best be viewed as an ethical system. Though authors often do not acknowledge this explicitly in the literature, 'human rights' commonly describe one or more of the following aspects of the term (see for example Goodale 2007; Nickel 2010; Normand & Zaidi 2008; Sen 2001, 2004):

a philosophical set of universal (or overarching) moral claims,

a set of legal rights,<sup>8</sup>

a basis for political agitation for moral and legal rights.

The term can be used in several of these ways within the one piece of writing. The common element to the three types of references to human rights is that they all have a moral position at their core, whether it is explicitly acknowledged or not.

The conflation of the three aspects mentioned above can lead to a lack of clarity. For the purposes of this discussion, the following clarifications are suggested. A *universal moral claim* holds an assertion of normative moral legitimacy, but an enforcement mechanism may or may not be specified. A *legal right* enshrines a historically particular, fixed expression of a moral claim through legal enforcement processes. A claim that is the *basis of political agitation* may be either an argument either for recognition or enforcement of an established moral claim or legal right or, alternatively, for legitimising a claim to a human right that may not yet have moral consensus or a legal enforcement mechanism (for example, gay marriage) (Clapham 2007, p. 145; Sen 2001, p. 230). Each of these three circumstances emphasises a different part of the human rights process. To confine a conversation about human rights to any one of these different perspectives would be to make the same mistake as the blind men in the parable of the blind men and the elephant.<sup>9</sup> As will become clear from the discussion that follows, not all authors support the interrelationship between

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<sup>8</sup> This is based on Hart's perspective that human rights are the "parents of law" (Sen 2009, p. 363) in that they motivate and enable legislation, rather than following Bentham's perspective that they are a "child of law" (Sen 2009, p. 363). More clarification on Bentham's views follows in the discussion of the legitimacy critique.

<sup>9</sup> This common parable exists in many versions and with various attributions. In it, three (or more) blind men feel different parts of an elephant and argue about who is able to describe it accurately. Obviously, the most complete description is one that combines all observations. The possibility is also left open for new discoveries if it is presumed that no one person has the complete picture.

these three elements. However, a full description of the concept of human rights must contain all three elements.

The main dissimilarity between these three ways of looking at human rights is the implied difference in the process of determining the legitimacy of claims and their ability to be enforced. However, if they are seen as different phases and not as counter-posed, each describes a valid part of the modern human rights process. These three aspects can be used to delineate the concept of human rights as an ethical system. The moral ideals of existing universal human rights are given a means of implementation through legal rights, while the ability to appeal to an overarching vision of rights and debate the applicability of new interpretations provides a means of struggling for further rights. In explaining the essence of human rights, Donnelly comments:

The forward-looking moral vision of human nature provides the basis for the social changes implicit in claims of human rights ... Human rights seek to fuse moral vision and political practice. The relationship between human nature, human rights, and political society is 'dialectical'. Human rights shape political society, so as to shape human beings, so as to realise the possibilities of human nature, which provide the basis for these rights in the first place (2003, p. 15).

Much more can be said about the dialectical processes of human rights than can be covered in this thesis. Here, it is sufficient to note that taking the view that human rights are dialectical emphasises their historical nature, capacity for change over time and social interrelatedness.

Arguments that contest the nature of human rights as legitimately universal and claimable will be dealt with in relation to the critiques identified by Sen (2001). Consideration of the *legitimacy critique* and selected alternative perspectives will help to specify the nature of human rights as a moral one and help to indicate whether proof is essential for considering human rights to be universal. The moral legitimacy of human rights has been strongly linked to the claim of universality, so the link between the moral and the universal must be clarified insofar as this is possible. Discussion of the *coherence critique* helps to delineate the content of human rights claims, the types of rights that can be reasonably achieved, and the processes involved.



### 2.3 The *legitimacy critique*

Amartya Sen (2001) outlines the argument behind a '*legitimacy critique*' of human rights. In this view, rights are conferred through legislation alone, so that any reference to a primary moral or ethical consideration is unfounded. This is a rejection of the idea of natural rights, often termed the 'rights of man', that are meant to be an intrinsic part of human nature rather than granted by external forces such as God or the state (Donnelly & Howard-Hassmann 1987, p. 3). Natural rights were famously described by Jeremy Bentham in 1843 as 'nonsense upon stilts' (1843, Vol. 2). Bentham maintains that '*Right*, the substantive *right*, is the child of law: from real laws come real rights; but from *imaginary* laws, from laws of nature ... come *imaginary* rights' (1843, Vol. 2). In his attempted refutation of natural rights, among other considerations Bentham was concerned that the need for reforms could be ignored if rights were focused on empty moral statements rather than actual, enforceable legal rights (Cranston 1973, p. 14). This concern has echoes in the writings of modern theorists such as O'Neill (1996, 2000) and James (2003, 2005), though their critiques of human rights address coherence more than legitimacy. As Sen explains:

common to these ... lines of (legitimacy) critique is an insistence that rights must be seen in post-institutional terms as instruments, rather than as a prior ethical entitlement. This militates, in a rather fundamental way, against the basic idea of universal human rights (2001, p. 229).

As a result, a legal right has no moral authority as a 'human rights' claim but only insofar as it is part of an established legal system. In this account any moral claims are just assertions waiting to gain 'rights status' through legislation. The legitimacy critique can be tackled in several ways, and the different approaches of Sen and Cranston will be outlined. While Cranston and Sen both reject Bentham's arguments, they do so from quite different perspectives.

Cranston (1973, p. 17) argues that all regulatory laws have a normative conception of justice at their core that is justified morally, not empirically. In arguing against Bentham, Cranston supports the concepts of both natural laws and natural rights. The concept of natural law as an 'objective moral law (given by God and/or grasped by human reason)' (Donnelly & Howard-Hassmann 1987, p. 1) predates the concept of natural rights as a method of moral evaluation (Donnelly & Howard-Hassmann 1987, p.

3). While the idea of natural law has a long history and many interpretations, the common thread is that of human behaviour directed by reason and conscience as a natural capacity of human beings (Cranston 1973, pp. 11-2; Vizard 2000). While natural laws have moral force, it is only through becoming rights that these laws become enforceable in the sense that rights holders can claim redress (Donnelly & Howard-Hassmann 1987, p. 3). In Cranston's view, '(p)ositive law secures the enforcement of positive rights: natural law gives the justice to natural rights' (1973, p. 14). In this way, he attaches the validity of natural rights to natural laws.

In his often cited book *What is a human right?* Cranston (1973) bases his argument on the work of classic liberal theorists Locke, Hobbes and Mill. He defends a version of human rights derived from Locke's conception of natural rights; these being the individual rights to life, freedom and property (Cranston 1973, p. 1). Cranston defines human rights as a 'form of moral right ... differ(ing) from other moral rights in being the rights of all people at all times in all situations' (1973, p. 21) and emphasises Mill's view that the state, while necessary for social order, must not be allowed to be a 'tyrant' by imposing excessive rules that restrict individual freedom (Mill, in Cranston 1973, pp. 39-40). In justifying the limitation of human rights to these 'natural rights', Cranston introduces three conditions that he believes that other rights (such as social, economic and cultural rights) do not meet, namely those of universality, paramountcy and practicality. As Cranston specifically criticises the UDHR for their inclusion, an assessment of these conditions will be dealt with in Chapter 3.

Sen's conception of human rights extends beyond those recognised by the particular 'natural rights' perspective advanced by Cranston. In his argument against Bentham's perception of rights as purely legal entitlements, Sen (2001, p. 229; 2009, pp. 362-3) asserts that this is not the main way in which the concept of human rights is used and that to judge them on legal terms is a misunderstanding. Human rights are not 'aspiring legal entities' but 'ethical claims' (Sen 2001, p. 229). This is not to say that the practical achievement of human rights is unimportant, just that human rights are a powerful expression of a particular set of ethical demands and aspirations considered universally appropriate for all human beings, rather than only those that are necessarily enforceable in the legal sense. Sen asserts that:

human rights may stand for claims, powers and immunities (and other forms of warranty associated with the concept of rights) supported by ethical judgements, which attach intrinsic importance to those warranties (2001, p. 229).

Consequently, rights may be *potential* or *moral* rights rather than those that are, or could be, the subject of legislation. Also, they may exceed the ability, or desirability of legislation, so that that a right might be a purely normative claim (Sen 2001, pp. 229-30). Sen (2001, p. 229) cites a 'right to respect' as an example of this.

In disputing the validity of the *legitimacy critique*, both Cranston and Sen argue for the existence of a moral perspective that extends beyond its legal expressions. They both make valid points on this question. While many laws are used for the regulation or practical, day to day matters, not all laws are justified (or justifiable) on this practical basis. Many laws only make sense if justified morally. Also, if justice is the foundation for the legal system, all laws have a moral basis at some level. Ethical claims such as human rights are often used to generate new laws but may have normative force without them. However, providing a solid philosophical foundation to establish the plausibility of human rights is not a simple proposition. In order to assess the validity of the moral aspect of human rights, two concepts must be considered, universality and cultural relativism.

Human rights derive their moral authority from their appeal to universality. However, there is the intrinsic problem that all versions of moral rights that claim universality are based on a metaphysical argument. As noted by Morsink (2009, p. 5), the UDHR is based on such a metaphysical conception of universal values. The shaky philosophical grounding of universality combined with the existence of diverse cultural norms might, at first glance, appear to undermine this moral authority (see for example Goodale 2005). However, on closer consideration it is possible to consider these two elements separately without inferring a necessary link between them (Duquette 2005). As a result, it is possible to suggest an alternative approach to creating a moral foundation of rights, that of practical morality (Duquette 2005). These opposing arguments will be considered in more detail.

Goodale (2005) clearly presents an argument for the shaky foundation of the universal in human rights. In the first instance, he argues that the universal nature of

human rights is ontological. After Morsink, he describes the concept of human rights contained in the UDHR as being ‘universal and objective ... (but) necessarily *immanently universal*’ (Goodale 2005, p. 4), in that they are considered to be fundamentally situated within human beings and ‘are entailed by – or perhaps define – the very essence of humanness’ (Goodale 2005, p. 4).<sup>10</sup>

Humanness is not understood to encompass biology alone, but also the ‘cultural, psychological and cognitive human dimensions’ (Goodale 2005, p. 6) that are additional to, but not separate from human biology and make up the human condition. As a result, universal human rights are applicable irrespective of all the contingent factors that might surround individual humans at any point or, as he points out, ‘they are quite literally pre-social or pre-cultural’ (Goodale 2005, p. 4). So, the problem that Goodale points to is that the first principle, from which human rights flow, is the metaphysical argument that human rights are universal. In order to attach human rights to this universality, the proposition that there are such rights must first be able to be established as true. As a metaphysical proposition, Goodale (2005, p. 5) argues, this cannot be done without a ‘logical leap’; the link between universal humanness and universal human rights is unproven.

Goodale’s final conclusion is that a justification for the universal truth of ontological human rights must continue to be pursued if human rights are to be truly meaningful rather than a ‘figment of the conceptual or moral imagination which cannot be taken seriously as the normative foundation for society’ (Goodale 2005, p. 6). He argues that without this, the only alternative is to continue to try to justify human rights through ‘validity’ claims which would anchor human rights in concepts other than universality (social justice, for example) and may be subject to being undermined by assertions of cultural relativism. Also, even if it were possible to establish a moral claim as being politically universal in the sense that it was supported across all cultures, this would still not establish the claim as ontologically universal (Goodale 2005, p. 7).

While agreeing that the universal nature of human rights claims are yet to be established, Duquette has a useful perspective on the perceived clash between the universal and cultural relativism when it comes to human rights. He argues that no

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<sup>10</sup> This description of immanent universality has parallels with (and goes beyond) the interpretation of inalienability previously noted as a characteristic of human rights (Donnelly 2003, p. 10).

grounds have yet been established that conclusively prove that an 'objectively justified ethics' (Duquette 2005, p. 65) is not possible. On the question of cultural relativism he argues that both universalists and relativists have made arguments that contain elements of the other side's perspective and posits a continuum between the two positions. He argues that, while cultural relativism is often couched as a plea for tolerance and a rejection of western cultural imperialism, there are a range of logical fallacies that must be considered when it comes to rights. Duquette argues that cultural relativism is not normative in that while cultural relativism may explain value judgements in relative terms, in itself it creates no common ground or values. As a result, cultural relativism in itself cannot be an argument for tolerance or 'moral objectivity' (2005, p. 64). Arguably, the creation of a value of tolerance from the fact of diversity is an attempt at the creation of a universal. However, the fact of diverse/divergent cultures does not establish tolerance (Duquette 2005, p. 64). Even the identification of a cross-cutting cultural value of tolerance would be subject to the same scepticism in regard to its universal application as other overlapping norms. Also, the fact of diversity in itself does not of necessity disprove universalism, and to think that it does so is a deductive leap.

Duquette asserts:

Cultural relativism does not discredit the universalist project and force one to dispense with objectivity in ethics, with all the psychological and moral consequences that would entail (2005, p. 65).

In addition, he suggests that, while overlapping norms are not enough to establish universal human rights, identifying these norms could serve to strengthen human rights claims, though their existence would not remove the need for a rational, normative justification of their moral basis (Duquette 2005, p. 65). As an alternative, Duquette proposes a non-ontological solution to the idea of a shared moral code and his conception also solves a further problem with the 'universal': that of being a-historical. He puts forward that it is possible to draw inferences from practical experience.

Duquette states:

While neither moral ontology nor philosophical anthropology are sufficient to ground moral universals, experience shows that the sense of the moral is itself universal and that the relativity of human experience and of interpretations of the

human good(s) does not eliminate or make arbitrary reasonable conjectures about commonalities in human moral life (2005, p. 67).

This position is 'pragmatic and historicist', taking into account the evolving nature of human rights, while grounding them in a shared moral sensibility and concern with protecting human dignity (Duquette 2005, p. 67). Duquette (2005, p. 69) characterises Bentham's position, which views rights as 'legal artifacts of positive law', as being analogous to an individual holding a possession. However, he considers this misleading because the existence of moral rights is unlike holding physical possessions. Moral rights necessitate a complex system of recognition involving the interpretation and expression of moral concepts in a social and political context. He emphasises the importance of the relationship between social consensus on the one hand, and the changing critical processes of social morality on the other. In particular, Duquette highlights that consensus around a moral question may not provide it with legitimacy and moral weight, He highlights the prevalence of racism and sexism as examples of this (Duquette 2005, pp. 67-70).

Both Goodale and Duquette clarify that the ontological universality of human rights is yet to be established. For Goodale, the glass is half empty: the ontological basis for human rights must be found if they are to have an irrefutable philosophical foundation, For Duquette, the glass is half full: while no ontological basis for human rights has been found, neither can it be discounted (Duquette 2005, p. 65).

Instead of hanging the future of the human rights concept on this proof (as Goodale advocates) we should use practical morality to assess the relevance of human rights. Duquette's 'pragmatic and historicist' approach has much more to offer the concept of human rights as it lends legitimacy to human rights processes while allowing them to evolve. This approach is also much more in keeping with the real-life practices that surround human rights, processes that are full of debate but that ultimately reflect an ongoing shift towards the development of rights that are universal, moral, claimable and normative. A similar approach to Duquette has been taken by a number of authors to retain both universality and flexibility and is characterised by White (2000) as 'weak ontology'. The concept of the universal can be applied where rights are morally justified due to rights violations, but not where rights are found to be lacking due to limitations in their scope and should therefore be subject to revision (Ackerly 2001, pp. 312-3).

Again, this allows for rights to retain their moral force, their practical relevance and their ability for change.

#### **2.4 The coherence critique**

According to Sen (2001), upholding human rights concerns is the basis of much scepticism about their coherence. This is the problem highlighted by the '*coherence critique*' (Sen 2001, p. 231). In order for claims to be rights, rather than just assertions, they must be able to be demonstrably fulfilled. Again, there are many versions of this critique. Given the vast literature, the versions of this critique addressed here have been selected to provide a sample of the types of arguments and credible criticisms that must be addressed. O'Neill (1996, 2000) and James (2003, 2005) both express a concern with the claimability of rights. In contrast, Sen (2001, 2009) and Buchanan (1987) both highlight the indivisibility of rights. The implications for human or universal rights will be discussed in light of their arguments.

The foundation of O'Neill's argument is that the focus should be on obligations, rather than rights, if the full range of concerns covered by human rights is to be addressed. She points out her concern with the effectiveness of current human rights formulations in her discussion of universal rights, making a distinction between those that impose a universal obligation (liberty rights) and rights that may have universal claimants but that she believes do not impose universal obligations (welfare rights) but rather a series of specialist, individual obligations on agents charged with the task of making these claims a reality (O'Neill 1996, p. 131). The difference between liberty rights and welfare rights is that 'liberty rights do not need institutional structures to be claimable and waivable' (O'Neill 1996, p. 131), whereas welfare rights must be structurally supported if they are to be genuinely claimable (O'Neill 1996, pp. 132-4). Put another way, even in the absence of institutional support the relationship between universal obligations and liberty rights is fairly well established, whereas without that support, the obligations to deliver welfare rights are 'amorphous' (O'Neill 2000, p. 105). Searle (2010) has a similar viewpoint.

The danger that O'Neill identifies in proclaiming welfare concerns as universal human rights is that rhetoric could mask their lack of concrete support at the same time as creating artificially high expectations. While she admits that it is also possible that this could lead to legal and political actions in support of making these rights a reality,

O'Neill is concerned that this approach might backfire. She characterises the use of the term 'rights' in the context of welfare as premature at best, and at worst, a 'bitter mockery to the poor and needy, for whom these rights matter most' (O'Neill 1996, p. 133). Like Duquette, O'Neill rejects the concept of having rights as a possession and views them as a social, requiring others either to act or to avoid obstructing their realisation. In this way, claiming rights imposes obligations on others (O'Neill 2000, p. 98). To avoid the uncertainties of having rights without specified obligations, O'Neill suggests that the discussion should start with obligations, despite their weaker appeal as a concept when compared to rights. She argues that this would entail being 'more realistic, clear and honest about burdens, their justification and their allocation' (O'Neill 1996, p. 135). A focus on obligations makes the responsibility for their fulfilment an essential task and gives more clarity to the process of claiming rights by indicating the responsible party to rights holders (O'Neill 2000, p. 105).

O'Neill and Sen are in agreement about the desirable end result: the ability of all to access the types of welfare listed under the concept of welfare rights. However, they disagree about how the concept of rights may or may not assist this. Both make use of the concept of *perfect* and *imperfect* obligations so the differences between their arguments will be discussed here. According to Buchanan, '(e)thical theorists as diverse as Kant and Mill have shared the view that duties<sup>11</sup> of justice are perfect while duties of charity<sup>12</sup> are imperfect' (1987, p. 569). Perfect and imperfect obligations have been characterised in various ways (Rainbolt 2000, p. 233) and two types of distinctions will be emphasised here, responsibility and latitude. Sen (2001, pp. 230-1) notes that Kant distinguishes between a *perfect obligation* in which responsible agents are defined and an *imperfect obligation* which confers a general responsibility. Also, Rainbolt (2000, p. 233) refers to the perspectives of Kant and Mill, who recognise that perfect obligations have no latitude in their fulfilment whereas imperfect obligations allow some scope for their realisation.

For O'Neill, liberty rights are a matter of justice, whereas other ethically important matters (such as welfare concerns) are a matter of virtue. Through her focus on obligations, O'Neill (1996, pp. 140-1) aims to close the gap between justice and

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<sup>11</sup> For the purposes of this discussion, duty and obligation will be considered equivalent terms.

<sup>12</sup> Also for the purposes of this discussion, charity and virtue will be understood to be interchangeable, as the arguments referring to their relevance to welfare concerns are comparable in this instance. While they are not completely equivalent terms, charity can be characterised as a subset of virtue.



virtue arguing that the complementary aspects of justice and virtue have been obscured by the modern focus on rights and the recipient, rather than on the agent (or actor).

Buchanan (1987) suggests the following traditional distinctions between justice and charity (also applicable to virtue):

*Justice* - negative duties, correlative (and therefore antecedent) rights, enforceable, perfect duties/obligations

*Charity/Virtue* - positive duties, no correlative rights, enforceable, imperfect duties/obligations

In closing the gap between justice and virtue, O'Neill (1996, p. 139) argues for the importance of both the 'right' and the 'good' (justice and virtue) beyond the 'counterpart rights' that are attached to justice. She comments:

Early modern writers who speak of *virtues* as *duties*, or *duties of virtue* did not mistakenly assimilate virtue to right or to justice; they also did not lose sight of the possibility that there may be significant universal obligations that lack counterpart rights (O'Neill 1996, p. 139).

O'Neill identifies four types of obligation or duty that differ in whom they are held by, owed to and whether they have rights attached to the obligations. These are *universal perfect*, *universal imperfect*, *special perfect* and *special imperfect*. The two most relevant types of obligations for the discussion of human rights are what she terms *universal perfect* and *special perfect* obligations. Universal perfect obligations are held by all and are owed to all. These have corresponding liberty rights. Special perfect obligations are held by a specified few and are governed by structured relationships with specified agents and recipients (O'Neill 1996, p. 152). It is through this second type of obligation that O'Neill believes that welfare concerns could be resolved. She states that these could be 'distributively universal given appropriate institutions' (O'Neill 1996, p. 152). Instead of being *imperfect* obligations, O'Neill assigns them the status of *special perfect* obligations, as she believes that this will make them more claimable and less amorphous. O'Neill does not discount the importance of imperfect obligations in general, but in the specific case of welfare concerns she believes that they

have to be the responsibility of particular specified agents and accordingly, has reflected this in assigning them special perfect obligation status.

In contrast to O'Neill, Sen focuses on normativity rather than specifically on claimability. He argues that the full spectrum of human rights is ethically normative and therefore contains prescriptions for rights that should be available to all. This places a moral imperative on all who can assist in the achievement of those rights to do so. In support of this argument, Sen (2001, pp. 230-1) also asserts that, while rights as *imperfect* obligations may end up unrealised, this does not invalidate them. He argues that a 'universal ethical demand' can exist in situations where several appropriate actions can be identified (indicating latitude), and that possible variety in these actions is no reason for dismissing the obligations as unreal or unrealisable (Sen 2009, p. 373). He writes:

Ambiguity in the application of an otherwise significant concept is a reason for incorporating appropriate incompletenesses and allowable variations in the understanding of that concept itself (Sen 2009, p. 374).

Also, Sen (2009, p. 382) argues that even in the achievement of liberty rights there can be both *perfect* and *imperfect* obligations. He cites a case where a woman's liberty rights were violated when she was assaulted and killed. Her attacker violated a *perfect* obligation not to harm her, but the spectators who watched from the apartment block and did nothing also violated their *imperfect* obligation to give assistance (Sen 2009, p. 374).

Buchanan provides a useful perspective which can be used to clarify this example further. In considering matters of justice, the main concern 'at the heart of morality' (Buchanan 1987, p. 561) is the issue of avoiding individual harm. This could also be considered a minimalist position. The harm itself is the primary moral concern, regardless of how the harm came about. If agents have a duty to prevent harm, then they have both a duty not to harm and to aid others to avoid harm, as the harm to the recipient would be the same in each case (Buchanan 1987, p. 561). In this case, the traditional distinction is broken down between negative duties requiring the omission of harmful actions and positive duties which require action. As a result, justice cannot only

be associated with negative rights and duties.<sup>13</sup> Chapter 3 will contain a further discussion on negative and positive rights with particular regard to the rights contained in the UDHR.

The need to make rights truly claimable is part of the political role of rights and the rights process: the social process of dialectical change that creates enforceable rights. While Sen agrees with O'Neill that institutions are important for achieving welfare rights, he feels that the ethical strength of these claims lies in the assessment that they are human rights. Without this assessment, some of the motivations for public activity in support of creating institutional structures to make them a reality would be lost (Sen 2009, p. 383). On one level it seems odd that O'Neill is emphasising the conventional difference between liberty rights and welfare rights at the same time as she aims to erode another classic distinction, that between justice and virtue. These concepts have traditionally been used to uphold the difference between negative (liberty) rights and positive (welfare) rights. Also, if it is to have any validity, O'Neill's argument must be able to be extended to all forms of positive rights that need institutional support. The implications of this require further exploration, which is beyond the scope of this thesis. While the logical structure of her argument cannot be faulted, it is more difficult to support her conclusions. It may be that, by focusing too much on the agents responsible for extending welfare access, she removes much of the moral, social responsibility that an imperfect obligation would confer on all citizens. This reduces the motivation of those who see imperfect obligations as a reason to agitate for better institutions and processes for achieving rights. In this case, O'Neill's aspiration to make welfare concerns claimable might well be undermined.

In focussing her critique on the importance of human rights as enforceable claims, James highlights the terms and structures of their institutional support. She argues that:

Understood as effectively enforceable claims, rights are not vested in individuals but in complex sets of institutions and agents so that no single factor determines what right an agent possesses, and the very existence of a right can be a matter of degree (James 2005, p. 152).

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<sup>13</sup> This discussion raises the deeper question of whether an ultimate distinction can be drawn legitimately between positive and negative rights (discussed further in Chapter 3) and also between other related pairs of concepts (fact/value, is/ought, descriptive/evaluative). I will not deal with it here, but see Doughney (2005, 2006) and Foot (2001) for views that the distinctions ultimately break down in the face of, as Foot puts it, an argument for 'natural goodness' as a rational moral position.

In supporting O'Neill's assertion that rights must be claimable to avoid their becoming empty rhetoric, James makes a claim that O'Neill does not, namely that 'rights should be viewed not as moral claims, but as effectively enforceable claims that make a practical difference to peoples' lives' (2005, p. 149). In this, James' critique of rights is more about legitimacy than coherence, as she implies, to rephrase Bentham's famous quote, that 'the substantive right, is the child of *enforcement (my insertion)* ... but from imaginary *enforcement (my insertion)* ... come imaginary rights'. However she also believes that while moral positions should be viewed as separate beliefs, the two concepts have a degree of interdependence as they may not only provide support to existing rights but also reasons for reform (James 2003, p. 138). According to James, 'a right is claimable when there is someone to complain to' (2003, p. 135), so it must be possible to identify who, or what is responsible for upholding these rights. In drawing these distinctions about degrees of claimability, James expresses arguments that focus more on a coherence critique because she presumes that rights are in the processes of 'becoming' as their enforceability increases.

While O'Neill addresses the problem of making rights enforceable by focussing on obligations, James takes aim at the enforcement mechanism itself. To James, the conceptual problem occurs if the enforcement is ineffective such that a claimable right is neutered. She argues that:

Where the state is bankrupt, the police force corrupt, the judiciary too cowed to act or the pharmacy empty, claimability is not a route to enforceability and is for practical purposes useless (James 2003, p. 136).

She highlights the complex conditions under which rights are claimed by identifying three elements that must work together, 'institutions, agents who fulfil obligations and agents who claim rights' (James 2003, p. 141) and argues that the 'obligations from which rights flow only emerge within elaborate and interlocking institutions' (James 2003, p. 139). At an informal level rights must be 'taught ... reinforced ... and sanctioned' (James 2003, p. 139) through a variety of social processes. Formally regulated rights need specific institutional support. James (2003, p. 139) asserts that, while each society will vary, a network of such institutions is essential to the provision of enforceable rights. Also, individuals capable of enabling and of

exercising their rights are created through a complex combination of cultural and institutional processes (James 2003, p. 139).

In highlighting the importance of the role of individual agents in claiming their rights, James is concerned that uneven distributions of power may make it difficult for particular individuals to do so (James 2003, p. 143). In particular, '(m)any universal claims are only effectively enforceable where power is distributed fairly evenly' (James 2003, p. 143). James makes a strong point that often claimants can be relatively powerless, but that an increasing normative consensus can over time help to counteract this. She also argues that our assessment of whether rights are effectively enforceable may be partially dependent on our moral view of its urgency (James 2005, p. 138). In making this assertion, James illustrates the importance of moral judgements in both forming obligations and providing the normative force that makes rights enforceable.

However, any reinforcement of the gap between the moral aspect of human rights and their practical enforcement does not help to expand access to justice. The authority of human rights is removed when divorced from the moral. Moreover, without addressing an overarching, moral, normative benchmark, the assertions of claims are likely to become more specific, random, and localised. While it may not be desirable to over-emphasise the rigid enforceability of human rights claims, as James and O'Neill have done, the discussion of their perspectives serves to highlight some important issues about what it might take for a human rights claim to be realised through social processes.

Moreover, rights in the actionable, enforceable sense championed by O'Neill and James might possibly flow from enforcement and need not come from antecedent moral rights. According to Buchanan (1987), the imperfect duties of charity could become perfect duties once codified by institutions, a view consistent with O'Neill's characterisation of special perfect obligations. However, unlike O'Neill, he argues that in this case they are 'also no longer duties of charity, but duties of justice' (Buchanan 1987, p. 570). He also writes that, in this respect:

once such institutional arrangements are in place a revision should take place in our conception of what others have a moral right to aid ... [therefore] the distinction between perfect and imperfect duties is in no way a fundamental

distinction in ethical theory, but, rather a shifting one which changes as our institutions change or as we move from one type of society to another (Buchanan 1987, pp. 570-1).

He adds that if this view is correct:

which moral rights individuals have are not determined exclusively by the ethically relevant features of those individuals. On the contrary, for at least some important moral rights, whether or not an individual has the right depends not only upon whether the individual possesses certain characteristics (such as certain important interests or the capacities associated with personhood) but also upon the availability of institutional arrangements which may or may not exist in a particular society at a given time (Buchanan 1987, p. 571).

Again, this emphasises the social and dialectical nature of human rights. The realisation of a human right should be viewed as a process that begins as an (often contested) assertion in the moral and political spheres, then becomes institutionally supported and more broadly accepted as a normative expectation, often entailing a mixture of perfect and imperfect obligations. However, there are many holes and delays in this process. Reality is never simple and linear. There is often an undeniable gulf between rights and their implementation. This gulf has been approached differently through the arguments considered in this section. One side emphasised the role of moral change and the other emphasised the need for more tangible results from these changes. Ultimately, I support Amartya Sen's assertion that human rights are ethically normative and that the imperfect duties to uphold them add an impetus for further social change, regardless of whether perfect duties exist or not.

If human rights are to be viewed as an ethical system, all aspects of the process should be acknowledged. Sen and O'Neill establish that human rights also create obligations. Many of these have an individual dimension. For example, human rights that prohibit discrimination also place obligations on individuals in regard to their behaviour (Okin, in Nickel 2010). However, human rights are not used to regulate all types of individual behaviour considered 'bad' in a moral sense, lying, for instance

(Nickel 2010).<sup>14</sup> An important focus that can be drawn from James' work is that while rights claimants may be individual human beings, human rights themselves must be collectively realised through a network of claimants, responsible agents and institutions. However, James only highlights one side of the collective realisation of human rights, that of their institutional support, and does not acknowledge that they may have an individual (or behavioural) dimension in the form of imperfect obligations. While Kunnemann (1995) disagrees that human rights specify any such individual duties (and therefore do not, in his view, create a system of ethics), he argues that the main value of human rights is 'their ability to restrict and channel political power' (1995, p. 339). They create a means of empowerment for individuals or groups who are vulnerable (particularly in placing obligations on states to protect them), and guard against misuse of state powers (Kunnemann 1995). Also, given the collective realisation of rights, perfect and imperfect obligations may be individual or collective. To give an example, a state may have a perfect obligation to provide a fair trial, but an imperfect obligation to end discrimination.

The acceptance and enforcement of international human rights also entails a range of political processes that cannot be fully explored in this thesis. However, it is worth noting that these processes may operate from above and from below simultaneously, and not always in concert. Zwingel (2005b, p. 11) highlights the processes of global norm diffusion as a means by which values such as human rights are meaningfully translated into international norms. In contrast to the top-down focus of global norm diffusion, activists such as transnational feminists reveal the processes on the ground (Ackerly 2001). These include a range of grassroots activities such as calling for legal change, supporting education, networking and training, and providing services, while interpreting rights in ways that are relevant to local conditions and continuing to call for changes to internationally recognised norms if they feel that rights could be better served by these changes. International human rights are in a constant state of development and renewal. They reflect the flows back and forth between political action from above and below, shifts in moral opinions and the legal expressions of these changes. Whether the human rights concept was intended to develop such a dynamic is debatable. Its potential for creating lasting change can be met equally with hope or

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<sup>14</sup> Delineating the extent and limits of the effects of individual behaviour governed by human rights, and the inclusion of some behaviour over others, involves elements of moral judgement. Buchanan's (1987, p. 561) minimum position of avoiding harm and the requirement that human rights be paramount (Cranston 1973, p. 67; Donnelly & Howard-Hassmann 1987, p. 1; Sen 2009, pp. 360-1) suggest some obvious starting points for making such judgements.

cynicism as its ultimate success will depend on the changing balance of these forces (Normand & Zaidi 2008). This will be taken up to an extent in Chapter 3 in regard to the International Bill of Human Rights and UN processes.

## **2.5 Conclusion**

In considering the question ‘what is a human right?’ this chapter has set out the characteristics of human rights. However, it also argued that human rights are subject to a dialectical historical process. I have put forward the view that the essential conditions for human rights to be effective are the four requirements that they be universal, moral, claimable and normative. I have defended this position through a discussion of some arguments from two types of human rights critique, coherence and legitimacy. I have concluded that a flexible approach that emphasises the application of a practical morality or weak ontology, perfect and imperfect obligations, and the actions of both individuals and institutions provides the best answer to the question ‘what is a human right?’ This discussion provides a philosophical context for the following chapters and for the discussion of the CEDAW treaty. Chapter 3 will outline the approach taken to human rights within the United Nations and, specifically, the International Bill of Human Rights. This chapter will pay particular attention to the question of universality in weighing up the feasibility and efficacy of human rights instruments in international law against the abstract ideal.



## **Chapter 3 – The International Bill of Human Rights**

### **3.1 Introduction**

The contemporary rise to prominence of human rights as a philosophical concept is unarguably connected to a specific historical development – the adoption of the Universal Declaration of Human Rights (UDHR) at the United Nations. Discussions of the UDHR as both a philosophical treatise and as a practical document are many and there are intense debates about implementation and whether the rights contained within it are truly universal in nature. In order to contain the conversation to issues that will assist in considering the moral authority of the human rights concept, I will touch on the following areas.

First, I will set out the categories of rights contained in International Bill of Human Rights and (following on from Chapter 2) discuss a further argument on their coherence, namely the debate around positive and negative rights. Second, I will consider whether the rights contained in the UDHR (and, by extension, the binding Covenants) truly express a global sentiment in support of universal human rights. Third, I will assess whether the disjuncture between the international nature of the International Bill of Human Rights and its state-based implementation processes creates a barrier to its moral authority. In concluding, I find that, despite limitations and barriers to implementation, the International Bill of Human Rights provides an internationally credible embodiment of the human rights concept and consequently has global moral authority. This is important for the relevance of the comparison between the International Bill of Human Rights and CEDAW, and for CEDAW itself as a treaty within the ‘Universal Declaration model’ of human rights.

### **3.2 The ‘Universal Declaration model’ of human rights**

Donnelly proposes that the pivotal role of the UDHR has shaped the modern interpretations of human rights and that ‘for the purposes of international action, human right means roughly ‘what is in the Universal Declaration of Human Rights’ (2003, p. 22). In his view, the characteristics that define the Universal Declaration model are a strong emphasis on the rights highlighted in the liberal philosophical tradition, namely individual rights, private property and state sovereignty, but also on universalism and the indivisibility of rights (Donnelly 2003, p. 35). The approach of the United Nations

to human rights has been described by many authors as outlining three generations of rights, each generation reflecting a different level of ‘conception, institutionalisation and achievement’ (Kirby 1997, p. 3). The generational metaphor has been used to reflect the development and codification of rights over time within international agreements and law: from the 18th century conception of civil and political rights to the early 20th century considerations of economic, social and cultural rights and then to the assertions of group or collective rights in the late 20th century and beyond (Wellman 2000, p. 640). While many other categorisations and divisions of rights are possible (see for example Donnelly 2003, p. 24), the categorisations used in the generational approach (civil, political, economic, social, cultural, and group or collective rights) are the ones that are most commonly used. These traditional categories provide a well-recognised method of classification and also provide a clear link to historical discussions of rights. For this reason, despite their possible shortcomings, they will be generally be used throughout in preference to other categories. Likewise, the division of rights into generations will be used as it reflects historical perceptions that were woven into the development of the UDHR and its subsequent codification and application, though the approach itself will come under scrutiny.

The generational metaphor is an imperfect one in a number of respects. Generations of rights do not replace one another or necessarily flow from each other, and it may be argued that some rights form preconditions for the full realisation of earlier generations of rights. The latter argument has been advanced by some advocates of both second and third generation rights (Wellman 2000, p. 641). The metaphor also suggests a hierarchy of rights, with the primary importance given to civil and political rights considered to reflect a dominant western viewpoint. On this view, third-world countries are more likely to highlight second and third generation rights<sup>15</sup> (Charlesworth 1994b, p. 58; 1995, p. 106). An important consideration is the feminist criticism of characterising rights as generations. Charlesworth states that:

From a woman’s perspective, however, the definition and development of the three generations of rights have much in common: they are built on typically male

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<sup>15</sup> Also, Charlesworth, Chinkin and Wright suggests that ‘(t)he sustained third-world critique of international law and insistence on diversity may well have prepared the philosophical ground for feminist critiques’ (1991, p. 644).

life experiences and in their current form do not respond to the most pressing risks women face (1994b, p. 59).

Likewise, Peterson and Parisi (1998) highlight the marginalisation of women within the generational model. These concerns will be addressed further in Chapter 4.

Civil and political rights are labelled 'first generation' rights; so called because they have been around the longest and have attracted the most international agreement. These include such rights as freedom of speech, the right to vote, freedom of religion and association, freedom from torture and the right to a fair hearing on legal matters (Langwith 2008, p. 19). These are also considered 'negative' rights in the sense that they are designed to prevent the excesses of the state. The idea is that by guaranteeing these basic freedoms, the action of the state is limited and the individual is protected from excessive state intervention. Civil and political rights are considered an aspect of good government within the western tradition (Langwith 2008, p. 21).

'Second generation' economic, social and cultural rights include access to food, clothing, shelter, education, medical care, and social services (Clapham 2007, p. 120). These are labelled 'positive' rights in that they often require state intervention for their realisation. Two main difficulties with second generation rights have been expressed: what they should include and how they should be enabled or enforced (see for example Clapham 2007, pp. 119-42). While these types of rights have been envisioned for as long as civil and political rights, there has been far less consensus on their achievement (Kirby 1997, p. 3).

'Third generation' rights are the ones that are the most contested: labelled group, collective or solidarity rights. Most often included in this category are rights to self-determination, development and to a sustainable and healthy environment (Kirby 1997, p. 4; Wellman 2000). Arguments in favour of third generation rights view them as a necessary addition or supplement to the Universal Declaration and associated human rights instruments in that they are able to address adequately the concerns of oppressed groups as a collective, rather than as individual rights holders. Freeman (1995) gives the following example:

the interests of individual members of dominant ethnic groups may be adequately protected by their individual human rights. By contrast, the interests of indigenous

peoples or of immigrant minorities and those of their individual members may require the protection of collective rights (1995, p. 38).

Donnelly (2003, pp. 209-11) lists some of the many debates about third generation rights including the question of identifying and delineating which groups should hold rights, how to deal with perceived clashes between collective and individual rights and whether the need for group rights adds anything significant that could not be solved by a more thorough application of individual rights. Some collective rights are more controversial than others. For example, the right to self-determination, which is enshrined in binding UN provisions, is better recognised than the right to development (Kirby 1997, pp. 4,11). It must be noted that self-determination was included in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenants on Civil and Political Rights (ICCPR) as a collective right (Donnelly 2003, p. 23), but that this right is not specified in the UDHR. In practice, many states already recognise a range of collective rights and provide means for addressing disadvantage, such as affirmative action policies. Even if not strictly a matter of human rights in these cases, the approach sits within the bounds of a human rights-based conception of justice (Freeman 1995, p. 33). While outside the scope of this thesis, further research could prove useful on approaches to group or collective rights regarding their relevance to women and whether (or under what circumstances) a group rights approach might be warranted.

As noted in Chapter 1, the UDHR contains both first and second generation rights. The separation between first and second generation rights is highlighted when considering International Bill of Human Rights as a whole, with the separation of the rights in the UDHR into two separate Covenants, the ICCPR and ICESCR. In order to resolve early disagreements about the force of the Declaration, the UDHR was always designed to be a statement of general principles that was to be accompanied by another document in the form of a binding convention explicitly outlining rights and limits (Office of the High Commissioner for Human Rights 1996). After some further disagreements, the original conception of one binding convention to codify the rights in the UDHR was changed to the drafting of two documents containing different sets of rights, one containing civil and political rights, the other, economic, social and cultural rights. The separation of rights into these two covenants reflects disagreements between

some UN member states as to the way the different types of rights should be grouped and handled (Normand & Zaidi 2008, p. 198; Office of the High Commissioner for Human Rights 1996). These disagreements were indicative of Cold War tensions and illustrated the divide between two ideological positions: the clash between western free market principles and communist state centralisation (Normand & Zaidi 2008, pp. 200-1). Drafting had begun after the signing of the UDHR in 1948 but slow progress resulted in the two conventions, the ICCPR and the ICESCR being signed in 1966. They both came into force in 1976 (Normand & Zaidi 2008, p. 198; Office of the High Commissioner for Human Rights 1996).

**Figure 1: Summary of Human Rights in the UDHR<sup>16</sup>**

<p><b>Articles 1–2</b> <b>Fundamental principles</b></p> <ul style="list-style-type: none"> <li>• dignity, liberty, equality and brotherhood.</li> <li>• non-discrimination on race, colour, sex, language, religion, opinion, origin, birth or other status</li> </ul>			
<p><b>Articles 3–11</b> <b>Rights of the individual</b></p> <ul style="list-style-type: none"> <li>• life, liberty, security of person</li> <li>• freedom from slavery and torture</li> <li>• recognition as a person before the law</li> <li>• equality before the law, equal protection under law and fair remedy for violations</li> <li>• no arbitrary detention arrest or exile</li> <li>• right to fair trial, innocent until proven guilty, no laws to be applied retrospectively</li> </ul>	<p><b>Articles 12–17</b> <b>Rights of the individual in civil society</b></p> <ul style="list-style-type: none"> <li>• right to private non-interference, defence of privacy and reputation</li> <li>• freedom of movement in side and between States</li> <li>• right to seek asylum</li> <li>• right to a nationality</li> <li>• right to marriage, equal rights in marriage and divorce with free and full consent of parties, protection of the family</li> <li>• right to own property</li> </ul>	<p><b>Articles 18–21</b> <b>Spiritual, public and political freedoms</b></p> <ul style="list-style-type: none"> <li>• thought, conscience and religion</li> <li>• opinion and expression</li> <li>• peaceful assembly and association</li> <li>• to take part in government, universal suffrage, equal access to public service</li> </ul>	<p><b>Articles 22–27</b> <b>Social, economic and cultural rights</b></p> <ul style="list-style-type: none"> <li>• social security and conditions sufficient for dignity and free development of personality</li> <li>• right to work, fair pay, fair conditions, trade unions, rest and leisure</li> <li>• fair standard of living, health and wellbeing</li> <li>• care during motherhood and childhood</li> <li>• education and cultural freedoms</li> </ul>
<p><b>Articles 28–30</b> <b>Conditions for realizing the rights in the Declaration</b></p> <ul style="list-style-type: none"> <li>• right to a social order that supports human rights, individual duties to the community, all rights to be exercised in line with the Declaration</li> </ul>			

<sup>16</sup> See Appendix B for full text of the Universal Declaration of Human Rights (United Nations General Assembly 1948).

<b>Figure 2: Binding Categories of Human Rights</b> <b>from the International Covenant on Economic, Social and Cultural Rights (ICESCR) and</b> <b>the International Covenants on Civil and Political Rights (ICCPR)<sup>17</sup></b>	
<p><b>Economic rights</b></p> <p>1. The right to gain and sustain an adequate standard of living</p> <ul style="list-style-type: none"> <li>• the right to be free from hunger (ICESCR 11.2)</li> <li>• the right to an adequate standard of living, including adequate food, clothing and housing (ICESCR 11.1)</li> <li>• the right to work (ICESCR 6)</li> </ul> <p>2. Labor rights</p> <ul style="list-style-type: none"> <li>• the right to just and favorable working conditions (ICESCR 7)</li> <li>• - the right to form and join trade unions, and the right to strike (ICESCR 8)</li> </ul>	<p><b>Civil Rights</b></p> <p>9. The right of recognition and equality before the law (ICCPR 16, ICCPR26)</p> <p>10. The rights of prisoners</p> <ul style="list-style-type: none"> <li>• concerning capital punishment, right to life (ICCPR 6); prohibition of torture (ICCPR 7); prohibition of slavery (ICCPR 8); prohibition of arbitrary arrest (ICCPR 9); and basic principles of the penal system (ICCPR 10)</li> </ul> <p>11. The right to a fair trial</p> <ul style="list-style-type: none"> <li>• equality before a court, assumption of innocence (ICCPR 14); prohibition of ex post facto laws (ICCPR 15); and prohibition of imprisonment for debt (ICCPR 11)</li> </ul> <p>12. The right to liberty of movement (ICCPR 12)</p> <ul style="list-style-type: none"> <li>• protection of foreigners in case of expulsion (ICCPR 13)</li> </ul> <p>13. The right to freedom of opinion</p> <ul style="list-style-type: none"> <li>• protection of the individual's sphere of freedom (ICCPR 17); freedom of thought, conscience, and religion (ICCPR 19); right to free speech (ICCPR 19); and prohibition of war and discrimination propaganda (ICCPR 20)</li> </ul>
<p><b>Social Rights</b></p> <p>3. The right to social security (ICESCR 9)</p> <p>4. The rights of families, mothers, and children (ICESCR 10)</p> <ul style="list-style-type: none"> <li>• protection of the family, freedom of marriage (ICCPR 23), and rights of the child (ICCPR 24)</li> </ul> <p>5. The right to physical and mental health (ICESCR 12)</p>	<p><b>Political rights</b></p> <p>14. Freedom of peaceful assembly (ICCPR 21)</p> <p>15. Freedom of association (ICCPR 22)</p> <p>16. The right to participation in political life (ICCPR 25)</p>
<p><b>Cultural Rights</b></p> <p>6. The right to education (ICESCR 13)</p> <ul style="list-style-type: none"> <li>• The right to compulsory primary education (ICESCR 14)</li> </ul> <p>7. The right to take part in cultural life and the right to free scientific progress (ICESCR 15)</p> <p>8. The rights of minorities (ICCPR 27)</p>	

(Source: Kunnemann 1995, pp. 324-5)

The preceding figures show the breakdown of rights in the three main instruments that make up the International Bill of Human Rights. A summary of the human rights contained in the UDHR is shown in **Figure 1**,<sup>18</sup> while **Figure 2** divides the provisions of the binding covenants into civil, political, economic, social and cultural rights. The rights contained within UDHR are all expressed as individual rights although there are collective elements to the participation of individuals in a significant number of them (Freeman 1995, p. 27). The division of the rights contained in the UDHR into the two

<sup>17</sup> (United Nations General Assembly 1966a, 1966b)

<sup>18</sup> Table based, in part, on Glendon's (2004, p. 3) explanation of drafter René Cassin's structure of the Declaration.

separate binding Covenants has had implications for both the implementation and perception of first and second generation rights. Normand and Zaidi have observed that:

The drafting history and plain language of the two texts reinforced the hierarchy within human rights. Beyond the special case of self-determination, the only common language was in the nonbinding preambles and the procedural and technical provisions. The contrasting phrasing of crucial articles undermined the legal status of economic, social and cultural rights and established a legacy of unequal treatment that continues to affect the human rights system today. Civil and political rights were expressed in classical [individual] rights terminology ... But for economic, social and cultural rights, the primary actor and agent was the state rather than the person ... Compounding this treatment ... [the ICCPR] mandated effective remedies for violations (placed on states on behalf of persons) ... In contrast, the [ICESCR] not only omitted any mention of violations or remedies but also provided a broad escape clause in Article 2 (1) that undermined the prospects for holding states accountable (2008, p. 207).

Some of these differences in wording are relevant to the analysis of CEDAW and will be discussed further in Chapter 6.

Along with significant differences in implementation processes, supporting infrastructure and prestige, the civil and political rights of ICCPR have often been accorded a more primary role in practice (Beetham 1995, p. 42). However, Vizard argues that current perspectives in legal philosophy and case law surrounding human rights support a position that all types of human rights (civil, political, economic, cultural and social) involve both positive and negative guarantees that involve state commitments to 'protection, promotion and assistance' and to 'immunity, non-interference and restraint' (2005, p. 5). Vizard believes that this change in international emphasis since the mid-1990s towards the incorporation of both negative and positive rights is a break from past neglect of the rights contained in the ICESCR. To explore this development, the debates on the characterisation of rights as 'negative' or 'positive' will be discussed further in the next section.

### 3.3 ‘Negative’ and ‘positive’ rights or indivisible human rights?

In characterising the ‘Universal Declaration model’ of rights, Donnelly (2003, p. 27) argues that human rights are indivisible and interdependent and not a menu from which to pick and choose. He takes issue with the view that the rights contained in the UDHR can be separated between ‘negative’ and ‘positive’, and rejects the idea put forward by Cranston that economic, social and cultural rights cannot be seen as equivalent to civil and political rights (Cranston 1973; Donnelly 2003, p. 28). Donnelly maintains that ‘(a)ll human rights require both positive action and restraint on behalf of the state’ (2003, p. 30).

As mentioned in Chapter 2, Cranston rejects on several grounds the idea that the economic, social and cultural rights in the UDHR are real rights. He argues that they are *impractical* because they cannot be ‘readily secured by ... simple legislation’ (1973, p. 66), unlike civil and political rights which, in the main, are supposed to enshrine government non-interference. Second generation rights are *not universal*, in that not everyone has a need for each and every right listed (such as holiday pay), and they are not ‘of *paramount importance* (emphasis in original)’ in that ‘it is a paramount duty to relieve great distress, as it is not a paramount duty to give pleasure’ (Cranston 1973, p. 67).

According to Cranston, economic, social and cultural rights do not impose the universal duties that are attached to universal rights. He comments:

The so-called economic and social rights ... impose no such universal duty. They are rights to be given things ... such as a decent income ... but who is called upon to do the giving? Whose duty is it? When the authors of the [ICESCR] assert that ‘everyone has the right to social security’, are they saying that everyone ought to subscribe to some form of world-wide social security system ...? If something of the kind is meant, why do the United Nations Covenants make no provision for instituting such a system? And if no such system exists, where is the obligation and where is the right? (Cranston 1973, p. 69)

In his rebuttal of Cranston’s position, Donnelly agrees that human rights should be both universal and paramount. However, he believes that economic, social and cultural rights meet these criteria, citing the right to work, the right to an education and



rights to food and health care as examples of rights that can have a fundamental impact on dignity, life and participation as a citizen (Donnelly 2003, p. 28). In response to the assertion that legislation alone can provide civil and political rights and that this is not the case for economic, cultural and social rights, Donnelly comments that all legislation must be backed by enforcement if the right is to be realised effectively (2003, p. 29). He rejects Cranston's assertion that positive rights are more difficult to implement. Donnelly argues that this assertion is mainly based on concerns about the financial cost of implementation and, as such, he considers it to have no claim to a firm moral or theoretical foundation (2003, p. 29).

Furthermore, Wellman observes that 'several UN Documents assert the indivisibility of human rights in the sense that no subset of them can be realised in a world in which others are absent or violated' (2000, p. 641). This is a stronger notion of indivisibility than that provided by Donnelly 'in which the value of each right is significantly augmented by the presence of many others' (2003, p. 27). Also, Kirby argues that 'Knowledge and enjoyment of civil rights depends upon the other basic rights to life: education, health services and an opportunity to flourish in happiness as a human being' (1997, p. 5) and notes that for many women this is particularly important (1997, p. 9). Chapter 6 will put forward a further discussion of the indivisibility of rights as reflected in CEDAW.

### **3.4 The moral universality of human rights**

As well as the general criticisms of human rights contained in Chapter 2, there has been the accusation in particular that the UHDR reflects a western or cultural, moral and political bias; criticisms that can also be levelled at many of the other covenants that rely on it as a basis (Clapham 2007, p. 23; Morsink 1999, p. xi). For this reason, the arguments about moral universality will focus on the UDHR. Here, the '*cultural critique*' will be explored as the third critique of human rights identified by Sen (2001, p. 231). Proponents of a cultural critique imply that the moral position expressed by a human rights approach is not universally shared and that other equally valid ethical frameworks clash with elements of it. This has sometimes been characterised as an 'Asian values' debate (Sen 2001, p. 231), but in recent years the focus has moved towards religion, Islam in particular (see for example Bassin 2007; Ignatieff 2000).

These issues have often been invoked at the intersection of the women's rights and human rights discussion, and will be revisited in Chapters 4 and 6.

Accusations of cultural imperialism in the UDHR often begin with criticisms of the drafting process (Morsink 1999, p. x). Unarguably, a number of documents, mostly western in origin, were used as the basis for drafting the UDHR. Included were the Magna Carta (1215), the American Declaration of Independence (1776) and Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789) (Clapham 2007, p. 23; Vizard 2000). There was also a significant western influence on the drafting committee overall (Clapham 2007, p. 43). The language and sentiment of the Declaration strongly echoes these influences. These evolved from the ideas of the Enlightenment, the philosophical movement of the 17th and 18th century that dominated western political thinking and also provided the ideological basis for the modern, secular state (Vizard 2000). In particular, the UDHR's Enlightenment legacy stems from perspectives of 'natural rights' and 'natural law' (see also Chapter 2) and reflects, among other influences, the Lockean social contract, emphasising individual rights to life, freedom and property (Clapham 2007, p. 7) and Kantian ethics, which universalises moral principles based on a perception of common human rationality and capacity for self-determination (O'Neill 1993; Vizard 2000).

However there is much disagreement on whether the concern for the human condition expressed within the Declaration reflects a primarily western perspective. Vizard (2000) provides an extensive summary of viewpoints in diverse cultural and religious traditions from different regions. She argues that these show evidence of elements that constitute recurring common principles and that human rights may be justified cross-culturally using what Rawls described as an *overlapping consensus*, a process whereby an agreement on norms may be reached even though the justifications for those norms might differ. According to Sen (2001), while components of the ideas making up the modern perspective of rights were present in historical writings in the west, the same is also true of many Asian writings and Islamic traditions. In particular he highlights notions of freedom and tolerance as common elements. Sen (2001, p. 234) argues that the main issue is whether such notions are present in these traditions and not whether there are more authoritarian views present as well, given that the same could be said of the western tradition.

In regard to the Declaration itself, Morsink (1999, 2009) stresses the philosophical agreement between the drafters on the inherent rights of the human person and argues that the ‘charges of ethnocentrism that were levelled at the Declaration were not often well-founded’ (1999, p. xii). He argues that the impact of a range of ideological perspectives and interest groups such as the women’s lobby, communists, socialists and third-world countries had a profound effect on the shape of the final document, which has helped to ensure its longevity (Morsink 1991, 1999). Griffin (2001) suggests that, while influenced by western tradition, the UDHR makes little reference to theory. Griffin comments ‘it is a feature of the international declarations in general that they pay little attention to reasons or justifications’ (2001, p. 6) and believes that international law can often rely on silent agreement on ‘dignity of the person’ (2001, p. 6) without necessitating an investigation into the details of what this means. Similarly, Bassin (2007) suggests that the vague nature of justifications for human rights in the UDHR was deliberate. She argues that this was designed to allow the inclusion of both more established rights (civil and political) and newer ones (social and economic) while avoiding reference to specific cultural, religious or historical traditions, therefore creating an adaptable and pluralist framework for the new rights discourse (Bassin 2007, pp. 139-40). She comments:

[the drafters] seemed eager to avoid entering the quagmire of conflicting religious and other foundational ideologies, and simply focused on trying to design a workable list of human rights norms, as content, upon which UN members could agree to adopt (Bassin 2007, p. 140).

As noted previously, the Declaration still has worldwide acceptance even though it has been over 60 years since it was signed and human rights have a global resonance. Diverse groups are able to unite in their struggles for rights and social justice under the banner of internationally recognised human rights (Normand & Zaidi 2008, p. xxvii). In reflecting on their activist work on human rights issues, Normand and Zaidi note that:

in every country we worked in ... it is a cliché, but people everywhere shared common dreams for a better life free from various oppressions and indignities and could find their hopes reflected in the civil, political, social, economic, or cultural rights recognised in the human rights regime. Who does not want food on the table, a place of one’s own, a good education, work at a living wage, an

opportunity to express one's views and conscience, a chance to develop and thrive? (2008, p. xxvii)

Freeman (2002) argues that 'the concept of human rights is both theoretically universal and practically globalised' (2002, p. 173). Even such strong critics of the human rights concept as Pollis and Schwab, who first wrote in 1979 that '(e)fforts to impose the Declaration as it currently stands not only reflect a moral chauvinism and ethnocentric bias, but are also bound to fail' (2006, p. 68) seem to suggest that the concept of human rights has been more flexible in practice than they anticipated. They state:

The controversy between civil and political rights versus economic, social and cultural rights has dissipated as an increasing awareness of their interdependence has developed. Concurrently, there is a growing awareness of cultural diversity and hence of varying conceptions of rights, while societal demands have expanded the substance of human rights (Pollis & Schwab 2000, pp. 1-2).

While not defending universalism per se, they allow that 'the dichotomy between universalism and cultural relativism has been overdrawn' (Pollis & Schwab 2000, p. 3). They acknowledge the importance of historical processes of change and suggest there may be grounds for synthesis eventually leading to a new 'evolution of a universal conception of human rights' (Pollis & Schwab 2000, p. 3). This position recalls the 'pragmatic and historicist' position of Duquette discussed in Chapter 2 (Duquette 2005, p. 67). Bassin (2007) goes even further, arguing that the strength of the human rights concept lies in its ability to evolve through 'agonism', a process of continual political struggle. She suggests that, while the moral concept of human rights relies necessarily on view of a universal humanity worthy of certain basic freedoms, and entitlements, there will never be full, universal consensus on human rights (Bassin 2007, p. 13). Bassin writes:

Although it is possible to imagine 'consensus' as a sectional support base for human rights, the universalism of human rights as a discourse compels its adherents to increase the levels of its own recognition so that practices which violate human rights are minimised. Therefore, what is, in actuality, a sectional base of support for human rights strives to become a universal support base.

However, it never actually reaches this endpoint. It is eternally chasing and striving towards an illusion, a mirage, a vision that vividly appears before it yet seems to forever slip away into the distance. Yet, it is in the striving from whence positive change is effected and numerous small victories are won and greater recognition gained, the cumulation of which is a valuable result in itself, from the point of view of human rights supporters (2007, p. 245).

In part, this process of continual striving towards a moral ideal gives human rights its power, despite many problems with implementation and disagreements on the exact details. Bassin's view is particularly useful for considering the rights that are most morally contested: rights-in-progress such as women's rights that still have a smaller sectional support base than do more established human rights.

Given the vast literature on human rights, much more could be said about their moral universality. For the purpose of this thesis, two final points will be emphasised. The first is purely historical: in 1948 in the aftermath of WWII and the holocaust, the United Nations drafted the UDHR as part of a common agreement to prevent such events in the future (Ignatieff 2000; Morsink 1999; Nickel 2010). These events had a profound effect on the drafters of the Declaration, and the combination of this and debates in the UN between delegates from a range of ideological traditions (albeit with the western tradition most prominent) led to a broad treaty based on the inherent dignity of the human person (UDHR preamble) and containing both first and second generation rights (Dean, H 2007; Morsink 1999). Far from becoming a 'dead letter', as many might have expected from a non-binding Declaration, the UDHR has caught the international moral imagination. As Normand and Zaidi express it:

People have always yearned for freedom, security and social justice; the modern human rights system was the first to assert these values as the birthright of people everywhere (2008, p. 340).

The second point is to emphasise that far from being an 'end point', a destination at the conclusion of a historical road, the universality of human rights is in a constant state of formation. Donnelly (2003, p. 15) emphasises their dialectical nature; a circular reflexive process whereby rights shape society, affecting human beings and changing the ways rights are perceived (see also Chapter 2). Bassin (2007) emphasises the

process of striving towards a moral vision of a universal humanity with rights and freedoms, with positive changes occurring through the process of reaching for a worthy, yet illusive ideal. Hartley Dean observes that:

Human rights are a historical fiction. This is not to diminish the concept, rather to recognise that the notion of a universally definable set of rights that are inherent to human beings by virtue of their humanity is a socially constructed ideal. Human rights are an expression neither of eternal verities on the one hand, nor mere moral norms on the other, but of systematically derived ethical principles or social values (2004a, p. 7).

While acknowledging the historical and dialectical nature of the universality of rights in the UDHR (and by extension, the Covenants), their moral authority in the modern world is clear. However, it is more than possible that better formulations of ethical norms and principles that fulfil the universal human need for freedom, security and justice will be found in the future. Also, it is not enough merely for human rights to be asserted. They must be realised.

The question of implementation is important for the International Bill of Human Rights, especially as the two Covenants are binding instruments of international law. As of March 2012, 160 states were party to the ICESCR (United Nations Treaty Collection 2012c) and 167 were party to the ICCPR (United Nations Treaty Collection 2012b). Again, there is an enormous amount of literature that considers the vexed problem of achieving the full spectrum of human rights at the international, national and local levels. It is not possible to do the question of implementation proper justice within the scope of this thesis. However, I will briefly consider some matters that are most relevant in regard to the discussion of CEDAW: the promotional nature of human rights regimes and the contradictory role of the state, the particular difficulties in achieving social, cultural and economic rights and both optimistic and pessimistic views on human rights implementation in the modern context of globalisation.

All international human rights agreements are characterised by Donnelly as ‘strongly promotional’ (2003, p. 130). International human rights norms are reliant on sovereign states for their implementation and this often raises contradictions and barriers to implementation. Donnelly writes that at the level of the United Nations:

The global human rights regime involves widely accepted substantive norms, authoritative multilateral standard setting procedures, considerable promotional activity, but very limited international implementation that rarely goes beyond mandatory reporting procedures. There is no international enforcement. Such normative strength and procedural weakness is not accidental but the result of conscious political decisions (2003, p. 135).

Donnelly and others believe that relative agreement on the authority of international human rights is shown by the high numbers of signatories to the key treaties (2003, p. 127). He characterises this agreement as an acknowledgement of 'moral interdependence' (Donnelly 2003, p. 137) but notes that this is politically weak and that '(s)tates typically participate in an international regime only to achieve national objectives in an environment of perceived international interdependence' (Donnelly 2003, p. 136). Others, such as Hafner-Burton, Tsutsui and Meyer (2008, p. 116), argue that precisely because the normative standard of human rights is so strong and its enforcement so weak, states can gain international legitimacy by ratifying international agreement with few consequences for their lack of commitment or even non-compliance. They highlight the lack of improvements in human rights overall and point to the high levels of treaty ratification among countries identified as the most extreme human rights abusers. However, they also note that perceptions of human rights have changed the way people view a wide range of practices, leading to greater visibility of violations, and remark that 'what was once [attributed to] culture is seen as rampant injustice' (Hafner-Burton, Tsutsui & Meyer 2008, p. 116).

Contradictions of implementation are centred on the role of the state, which is both responsible for upholding and extending human rights, and a primary threat to their achievement. States are responsible for upholding both 'negative' and 'positive' rights in both their exercise of restraint and in providing the means for the full spectrum of human rights to be achieved (Donnelly 2003, pp. 35-6). Also, the importance of political economy to the achievement of human rights has been insufficiently explored (Freeman 2002, pp. 173-4). As a result, the primacy of state sovereignty does not necessarily facilitate rights and justice. This is particularly the case as states often appear to interact in ways comparable to profit-maximising firms in an anarchic free market (Rochester 1993, p. 13). The high degree of interdependence between states,

spearheaded by multi-national corporations, is often asymmetrical. As Rochester says, '(i)t is commonly noted that international governance occurs without international government' (1993, p. 30). With the rise of globalisation, other powerful forces such as multi-national corporations and international financial institutions may also violate human rights internationally and erode any gains made at a state level (Freeman 2002, pp. 173-4; Thomas 1998, p. 182).

In particular, the disparity between the rights contained in the two Covenants continues to persist. Those in the ICESCR are still treated as goals rather than as real rights. Beetham (1995, p. 43) notes that, after the Cold War, it might have been possible to move on from the conflict between approaches to first and second generation rights, but the result was a deepening of resistance to economic, social and cultural rights and an increase in the gap between rich and poor due to the growing pressures of capitalism. Hartley Dean highlights the collapse of the welfare state at the same time as economic globalisation and the rise of a new human rights discourse, dubbed a 'third wave' of human rights, that links human development specifically to globalisation (2004a, p. 7). While, for example, the commitment to economic, social and cultural rights of the United Nations Development Programme (UNDP) is enhanced in Human Development Reports by reference to human capabilities<sup>19</sup> and to the seriousness of economic, social and cultural rights claims, a commitment to the status quo is also emphasised by the emphasis on economic growth and liberal democracy (Dean, H 2004a, p. 11). However, it seems doubtful that the status quo will provide an answer to the problem of the implementation of economic, social and cultural rights. Beetham (1995) demonstrates this through a discussion of two viewpoints that he calls the 'technical-economic' and the 'politico-economic'. Drawing on various UNDP and World Bank reports, he suggests that the technical knowledge and resources exist so that the needs of the world's population could be met within 10 or so years with various methods of finance that would not overburden first-world taxpayers. However, while this may be technically feasible, it seems impossible that the established international political forces would align to make this happen. He writes:

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<sup>19</sup> Dean (2004a) notes that the Human Development Report 2000 report includes an introduction by Amartya Sen outlining perfect and imperfect duties. Also see Chapter 2.



The structures of power and interest and the forces at work in the international economy and within developing countries themselves pull remorselessly in the opposite direction to a basic rights agenda (Beetham 1995, pp. 56-7).

On an international level, the terms of trade, finance and the actions of international regulatory institutions favour the developed world. At a domestic level various problems such as inequalities of wealth and lack of access to decision-making processes often support a tendency for public expenditure to be siphoned away from basic services (Beetham 1995, p. 57).

On one level, Beetham paints a bleak picture. However, there are both optimistic and pessimistic views about the future of human rights implementation. The more pessimistic highlight the disjuncture between the key international principles of national sovereignty and universal human rights and 'the irrelevance of human rights concerns in the face of great-power politics and the UN's structural weakness' (Normand & Zaidi 2008, p. xxv). The more optimistic emphasise developments such as transnational solidarity between human rights organisations, activists and other social movement forces (Dean, H 2004a, pp. 10-1; Normand & Zaidi 2008, p. 341). Gready (2004) draws attention to the distinctions made by Richard Faulk between 'globalisation from above and globalisation from below' (2004, p. 346), which highlights tensions between the economic and political agendas imposed by states and transnational interests and various forms of critique and resistance from communities that potentially generate both localised support and transnational solidarity. It remains to be seen whether activists and communities on the ground can draw on the mobilising potential of the contradictions between human rights norms and their real-life implementation. As Beetham suggests:

The promotional aspect of the human rights agenda is not only addressed to those whose responsibility it is to secure the rights in question. It also serves as a legitimation for the deprived in their struggles to realise their rights on their own behalf, by providing a set of internationally validated standards to which they can appeal (1995, p. 44).

There seems to be general agreement that the potential for the moral authority of human rights to be translated into genuine, tangible human rights has not been tested (Freeman 2002; Gready 2004; Normand & Zaidi 2008). While some advances have

been made in access to rights and justice since the UDHR was signed, many injustices still remain. However, given the moral strength of the concept of human rights, at this point they seem to present the most potential as a unifying ideological position from which struggles against injustice can be generated.

### **3.5 Conclusion**

I have set out generations and types of rights within the Universal Declaration model of rights. Also I have examined the International Bill of Human Rights and the types of rights contained within its instruments – the non-binding UDHR and the two binding Covenants. After considering the debate about positive and negative rights and whether human rights are indivisible, I have concluded that the indivisibility of human rights is a viable position. I have discussed cultural critiques of human rights and assert that a variety of views might be reconciled within the human rights concept despite cultural differences. While acknowledging the many problems with the implementation of universal human rights, I have highlighted their potential as a unifying moral foundation on which future struggles for implementation can be built. Chapter 4 sets out feminist critiques of international law and assesses the degree to which women's needs may be met by international human rights instruments. This chapter will also consider the question of universality in regard to women's rights.

## **Chapter 4 – Universal women’s rights**

### **4.1 Introduction**

A vexed question in recent feminist history is whether there is a universality of women’s interests and experiences that can be adequately addressed by overarching rights. However, if CEDAW, or any other international human rights instrument, is to be truly relevant to women some form of universality must be able to be established. As noted in Chapter 1, the concepts of human rights and women’s rights have only truly begun to align in the United Nations since the Vienna Conference in 1993. The integration of ‘women into the human rights framework ... [has] required a significant reinterpretation of traditional human rights, or a ‘re-gendering’ of sorts’ (Friedman 2006, p. 481). In the process of bringing together the concepts of human rights and women’s rights, both have undergone re-examination and scrutiny. In order to help situate CEDAW as an international treaty within both feminist and human rights discourses, this chapter will outline the history of feminist engagement with international human rights law using the stages of feminist critique suggested by Edwards (2011).

The approach of feminists towards international human rights law has varied over time and there is a wide spectrum of approaches: from those who argue that the human rights concept will never be fully capable of assisting women in their quest to gain true rights and equality to others who believe a human rights approach can be beneficial for women. These debates are summarised here in order to situate CEDAW within the changing landscape of women’s international human rights and provide background for the discussion of their effectiveness. I argue that despite its limitations, the human rights concept has value for assisting women in their pursuit of rights. I also argue that there is an important trend in feminist theory which emphasises a level of universality while also acknowledging the importance of differences.

### **4.2 Women’s rights and international human rights law**

The famous quote that ‘feminism is the radical notion that women are people’ (Kramarae & Treichler 1985) may seem like a mere aphorism. Nevertheless, this tenet is at the heart of feminist critiques of international human rights. As explained in Chapter 2, by virtue of being human, each individual is able to claim human rights,

whether they are established moral or legal claims or those in progress. However, feminists have established that the 'human' in traditional human rights based on liberal philosophy was a male subject. Human rights prioritised rights in the public sphere (a traditionally male arena) and ignored the private sphere (a traditionally female one) (see for example Bunch 1990; Charlesworth 1995; Charlesworth, Chinkin & Wright 1991; Edwards 2011). This was equally the case when the concept of human rights was translated from a state level to an international level (Charlesworth 1994b; Friedman 2006, pp. 480-1). For example, human rights interpretations based on the UDHR were not applied to many issues significant to women (Pietilä 2007, p. 27). Historically women's rights were viewed as a separate category. They were treated as less important and marginalised within UN processes (Chinkin 2010, p. 5; Donnelly 2003, p. 149; Lawson 1996, p. xxix). These issues will be discussed in the following chapters.

International law was designed to regulate the interaction of states. The usual matters of international law, security, conflict, order and sovereignty do not at first glance seem to lend themselves easily to gender analysis (Saloom 2006, p. 168). However, when the impact of these laws on individuals is examined, international law and the ways that it engages with the state are revealed as heavily gendered practices (Charlesworth, Chinkin & Wright 1991, p. 614; Enloe 2004). With the development of the UDHR and subsequent UN agreements, international human rights law reflected a significant departure from previous forms of international law and relations. Under other circumstances, the state as the subject of international law was opaque: a party to agreements but not subject to evaluation of its internal affairs. International human rights law was radical in that it placed restrictions on sovereignty, subjecting the effects of internal actions of states on individuals to international scrutiny (Brooks 2002, p. 348). For the first time, individuals and groups could make claims through international legal processes (Charlesworth 1994b, p. 58). Although state actions were rendered more transparent in their own practices by human rights law, states maintained another opaque barrier to legal scrutiny, that between the public and the private.

As the wording of most international agreements illustrates, earlier human rights thinking concentrated on violations of governments occurring in the public sphere and did not address the actions of citizens in the private sphere, where many women experience the most harm (Edwards 2011, p. 65; Okin 1998, p. 35; Peters & Wolper

1995, p. 2). State actions in the civil and political arenas were regulated, but individual actions within the home or family, even if they appeared the same as prohibited state actions, were outside the scope of international human rights (Brooks 2002, p. 348). As Peters and Wolper observe:

This focus has created an artificial legal and perceptual divide between crimes by state actors and those by non-state actors, whether individuals, organisations or even unofficial governments (1995, p. 2).

This distinction rendered anything that happened in the private, domestic realm as not suitable subjects for international law under the rationale that the role of states is 'political, not personal' (Saloom 2006, p. 165). As a result, a wide range of serious abuses including domestic violence, rape and sexual trafficking were considered outside the scope of international law and subject to domestic law, if regulated at all (Brooks 2002, p. 349). Brooks makes a further observation that 'this distinction between national and international law maps almost precisely onto equally problematic domestic law distinctions between private and public realms of behaviour' (2002, p. 349).

The arbitrary requirements of statehood can also have unintended consequences for women. This can range from the difficulties faced by refugees (who are more likely to be women and particularly vulnerable) to the absence in the definition of statehood of any requirements in regard to gender discrimination, giving persistently discriminatory states such as the Vatican more power internationally. Despite international norms that prohibit discrimination against women, there are no provisions for censuring states on grounds of discrimination. This can have a significant effect at the international level. Given that UN and other international forums often make decisions by consensus, one or more states can block or delay the implementation of programs with impunity (Brooks 2002, p. 350). Charlesworth has commented that 'the comparatively radical and vulnerable nature of human rights law within the international legal order has protected it from internal critique' (1994b, p. 63). She also notes that this unwillingness to scrutinise the tenets of human rights law has been challenged due to developments in women's international human rights (Charlesworth 1994b, p. 59). In Saloom's (2006) view, feminist analysis brings something unique to international law and relations, prioritising rights and equality for women. However she also notes that current institutional structures, particularly the state, are often not capable of delivering this

outcome. Feminist theories ‘challenge existing distributions of power’ (Saloom 2006, p. 160). Saloom (2006, p. 159) emphasises that, while feminists often have differing views on international issues, there is the potential for feminist theory to transform the international system. However, alongside this potential a note of caution must be added. A reliance on law can be problematic for a host of reasons. Poor women are often understandably hostile to interventions into their lives by the state or the law, as previous encounters with both may have involved discrimination, oppression and sometimes brutalisation (Bahar 1996; Heise 1995). It might be difficult to convince some women that regulation of private actions by a state, however sanctioned by international law, will be better for their well-being. Also, ‘given the vexed place of women in both law creation and law justification’ (Peach 2005, p. 82), some women may be better served by support coming from non-legal means. Broader reforms and social movements have sometimes been sparked by legal and rights based strategies, but if these active social forces do not become engaged then these strategies may fail (Peach 2005, p. 100). Peach (2005) also notes that, when international law is viewed by states as ‘an external, foreign, and sometimes hostile force’ (2005, p. 86), an international human rights focussed approach may create a backlash both socially and culturally, whereas a more localised approach that reflects accepted cultural and legal norms may be more effective (2005, p. 100). Any version of universal rights for women needs to be flexible enough to accommodate a variety of methods for creating change.

Edwards (2011) suggests that feminist engagement with international law can be characterised as four stages, with some overlap occurring between them. These stages are outlined in **Figure 3** on the following page. The discussion in this chapter will be focussed on the analyses and time period covered primarily by the last three of Edwards’ stages of analysis. In outlining developments at the UN leading up to the drafting of CEDAW, Chapter 5 sufficiently considers the period characterised as focussed on formal equality, so this stage will be mentioned here only in passing. Where appropriate, an effort will be made to situate these analyses within the different strands of feminist theory.

Feminists differ widely in their approach to how best to manage the interactions and relationships that create change, in how to analyse or characterise them and in the directions they believe would be most fruitful for achieving women’s emancipation.

<b>Figure 3: Feminist Analyses of International Law</b>		
<b>1948 to 1970s</b>	<b>Formal equality</b>	Focussed on equality with men and obtaining formal recognition including codification in UDHR and CEDAW
<b>1980s – present</b>	<b>Deconstruction of law</b>	Four critiques of international law: <ul style="list-style-type: none"> <li>• Women absent from international law and decision making</li> <li>• Human rights as ‘men’s rights’</li> <li>• Public/private dichotomy</li> <li>• ‘Essentialises’ women</li> </ul>
<b>1990s – present</b>	<b>Reconstruction, Reconceptualisation, Reinterpretation</b>	Less criticism, more emphasis on ways to engage with human rights system  Beginning of advocacy for women’s rights as human rights, especially focussed on violence against women
<b>2000 – present</b>	<b>Reflection, Re-evaluation, Reassessment</b>	Assesses previous deconstruction and reconstruction approaches, emphasis on empirical analysis

(Source: Edwards 2011, pp. 39-43)

The diversity of feminist opinion is such that Fellmeth (2000, p. 664) considers it a theoretical ‘genre’, rather than a particular school of thought. Historically, feminism has also been said to come in ‘waves’: a ‘first wave’ concerned primarily with women’s civil and political rights; a ‘second wave’ containing several main categories, liberal, radical and Marxist/socialist; and a ‘third wave’ containing a plethora of different perspectives (Bryson 1999; Wearing 1996). Among third wave perspectives have been included post-modern (or post-structuralist) feminists, cultural feminists, third-world feminists, cyberfeminists, ecofeminists and others (Gillis, Howie & Munford 2004). This list is by no means exhaustive. Some have also posited that there is a ‘fourth wave’ (Baumgardner 2011). It is not possible to reflect every relevant feminist perspective within this thesis, and I will be focussing less on ‘waves’ of feminist thought than specific perspectives on the issues concerned. However, I will argue that, just as the feminist analysis of international law has shown a particular trajectory, an important trend has emerged in feminism within and beyond the feminist engagement with international human rights law. This trend shows a shift towards a ‘thin’ universalism

that acknowledges and values difference while allowing for a level of universal, shared experience and grounds for solidarity.

From the 1980s to the present, Edwards highlights the feminist analyses focussed on the deconstruction of law. The first of the four critiques in this stage highlight the absence of women from international law and decision-making on the question of rights (Brooks 2002; Edwards 2011). There are three aspects to this initial argument. First, there are only small numbers of women who are direct participants in an official capacity in international relations, politics, institutions, and in international law (Charlesworth 1995, p. 105; Edwards 2011; Saloom 2006, p. 165). Charlesworth comments that:

Unless the experiences of women contribute directly to the mainstream international legal order, beginning with women's equal representation in law making forums, international human rights law loses its claim to universal applicability: it should be more accurately characterised as international men's rights law (1995, p. 105).

While this concern emphasises formal rather than substantive equality, it is part of women's entitlement to full social participation. It has also been shown that women's participation improves the decisions bearing on women's needs (Edwards 2011, p. 44). There are some caveats to this. Women representatives themselves may be working within various ideological constraints and the idea that men are always unable to act in women's interests is not sound. Nevertheless, while women's equal involvement in decision-making forums is not a sufficient condition to improve the relevance of their decisions to women, it is a necessary one (Edwards 2011, pp. 46-7).<sup>20</sup> A second aspect of this critique is that there is often insufficient expertise on women's concerns and that this should be part of the duty, and the training, of all decision makers, not just women. If there are women representatives, they are often called on to represent their gender regardless of knowledge or experience. Edwards writes:

while female decision makers may be able to use their own experiences to identify with and empathise with the situation of other women, this assumes that they

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<sup>20</sup> While he agrees that equal representation is desirable and that women's rights should be promoted, Fellmeth (2000) puts forward the dissenting view that international law itself does not show the same conceptual or procedural gender biases that occur at the state level. However, the majority of other feminist authors hold the position that gender bias is present in international law.



share the same or similar experiences, or that women by virtue of their sex 'naturally' have an interest in women's human rights. Neither of these assumptions bears out in reality (2011, p. 47).

The third aspect to considerations of women's absence in law is whether women's interests are better served by specialised or by mainstream processes (Edwards 2011, p. 49). Often, this issue has led to a paradox. Women's concerns are either sidelined in specialised areas or subsumed by other agendas within mainstream ones. Attempts to deal with this through UN processes include *gender mainstreaming*, which integrates a gender perspective across UN activities, and *gender architecture, reform* which consolidates the UN's women-focussed areas into one agency. These issues are touched on in Chapter 5.

The second critique, which comprises the deconstruction of international law, is that human rights are 'men's rights' (Bunch 1990; Charlesworth 1995; Charlesworth, Chinkin & Wright 1991; Edwards 2011). There are many aspects to this critique. Human rights, in the liberal tradition of natural rights, are defined according to male fears (Charlesworth, Chinkin & Wright 1991; Edwards 2011). In particular, this involves negative rights, civil and political rights designed to prevent interference by the state in the lives of individuals in their engagement with the public sphere (Cranston 1973; Edwards 2011). As noted in Chapter 3, while the human rights contained in the International Bill of Human Rights (and also in CEDAW, see Chapter 6) cover the full spectrum, there is a clear hierarchy that prioritises the civil and political. In addition, women have different experiences to those of men in regard to their access to rights across the spectrum. Edwards (2011) refers to this difference as 'structural inequality': a variety of causes that maintain the denial of women's rights and their overall marginalisation through poverty, oppressive cultural or religious practices, lack of access to education, and political marginalisation. By setting a male standard within international law, women are always positioned outside that standard. Among other results, this has led to a lack of clarity as to exactly what women's rights should be (as opposed to formulations of non-discrimination such as CEDAW, which sets out what should not happen and not what should happen) (Burrows 1986; Edwards 2011; Gould 2008). International law contains double standards on sexual discrimination that would not be acceptable in regard to racial discrimination, such as the acceptance of cultural

and religious reservations to CEDAW that argue these considerations should take priority over women's equality (Charlesworth 1994b; Edwards 2011; Mayer 1995). Both of these last points will be revisited in Chapter 6 in regard to CEDAW.

The effect on women of the different priority given to first-generation rights and the lack of inclusion of their experiences across all three generations is worth further consideration. As noted in Chapter 3, feminist critics have rejected the 'generational' approach as being unrepresentative of women's circumstances and therefore marginalising and unresponsive to their needs (Charlesworth 1994b, p. 59; Peterson & Parisi 1998). For example, Bunch argues that:

Much of the abuse of women is part of a larger socio-economic and cultural web that entraps women, making them vulnerable to abuses that cannot be delineated as exclusively political or solely caused by states. The indivisibility of rights and the inclusion of the so-called second generation (or socio-economic) human rights to food, shelter and work (clearly delineated as part of the UN Universal Declaration of Human Rights) is therefore vital to addressing women's concern's fully (1995, p. 14).

Charlesworth (1995) outlines the ways in which the needs of women are excluded from the three generations of rights. While civil and political rights were designed to protect individuals from interference or oppression by the state, they only provide protection in the public sphere not the private sphere in which women are most vulnerable to violence and other threats to their lives and well-being. At first glance, second-generation rights seem more likely to provide support to women as they move beyond the public/private distinction. However, the way in which these rights are defined maintains this distinction in ways that exclude women. For example, Charlesworth points out that the primary economic, social and cultural relationship of many women is with men, whose authority is maintained by state institutions, structures and processes. She cites the invisibility of women's unpaid domestic work as an example of the way in which the ICESCR ignores the applicability of the right to equal pay and conditions. Also, while cultural and religious practices have regularly been used to violate women's rights, these have often been judged as being private matters outside the scope of human rights law. Overwhelmingly, cultural and religious freedom has had priority over women's rights in both international and domestic arenas in

practice (Charlesworth 1995, p. 106-8). Despite their potential for addressing women's concerns, the development of third generation rights has also had an androcentric bias. For example, Charlesworth (1995, p. 109) argues that the right to development has provided little support to women because it has been applied in support of male-dominated economic forums, and self-determination has been supported in circumstances that would disadvantage women.

Nancy Fraser (1999) has argued that women require both *recognition* and *redistribution* in order to reflect the full range of women's needs and fulfil the requirements of social justice. Recognition acknowledges the cultural basis of women's oppression, which devalues women and leads to various forms of subordination, abuse and denial of rights. Redistribution acknowledges its economic basis. Women's labour is exploited through unpaid domestic and reproductive work in the private sphere and lower paid, lower status jobs in the public sphere. She suggests that these different categories require different types of remedy and argues that feminist activists have tended to prioritise one or the other, with the differences sometimes becoming outright polarisation (Fraser, N 1999, p. 31). This polarisation can be linked to one of the key debates within second wave feminism between 'radical' and 'Marxist' feminists, namely whether the primary cause of women's oppression was patriarchy or class. Nancy Fraser identifies a number of false antitheses stemming from it: 'redistribution or recognition? class politics or identity politics? multiculturalism or social democracy?' (1999, p. 26). By arguing for the 'bivalent' nature of gender as an unequal form of social differentiation requiring both redistribution and recognition, she provides a useful means of integrating the full spectrum of women's concerns (Fraser, N 1999, p. 31). Her categories can also be considered both to mirror the divisions of rights into civil, political, social cultural and economic rights and to acknowledge the interdependence for women of all these rights. Consequently Fraser's categorisations will be used in Chapter 6 to assess the extent to which CEDAW supports both recognition and redistribution.

The third area of criticism identified by Edwards is that of the public/private dichotomy, which has been a key target of feminist theorists aiming to change international human rights law. As noted earlier, the wording of most international agreements shows that the original focus of human rights was on abuses in the public

sphere at the hands of the state and not on those in the private sphere (Edwards 2011, p. 65; Okin 1998, p. 35; Peters & Wolper 1995, p. 2). Charlesworth, Chinkin and Wright (1991, p. 626) note the normative aspects of the division between public and private spheres. Unequal gender roles and divisions of labour were framed as 'natural' by placing greater value and significance on activities in the public, male domain as opposed to the private, female domain. Traditionally, women and men were psychologically characterised according to fundamental binary distinctions: passive/aggressive, reactive/active, emotional/logical. All of these helped maintain and reinforce the argument for 'natural' gender roles. They also note that, while public and private are not defined in the same way in all societies, there is a 'universal pattern of identifying women's activities as private, and thus of lesser value' (Charlesworth, Chinkin & Wright 1991, p. 626). Overwhelmingly women's experiences of discrimination and human rights abuses are highly gender-specific, with most occurring in the private sphere. If abuses occur for some other reason (e.g. political persecution), there may be additional forms of abuse, such as sexual assault (Bunch 1995, p. 12). In addition, a women's ability to participate in the public sphere is affected by her experiences in the private sphere. A woman cannot have access to the full range of rights as a citizen if she is denied access to them because of restrictions at home (Bunch 1995, p. 14; Peach 2005, p. 93). For this reason, Bunch states:

The women's human rights movement has focussed primarily on abuses where gender is a primary or related factor because these have been the most invisible and offer the greatest challenge to the human rights movement (1995, pp. 12-3).

However, other feminists contend that this dichotomy in international human rights law is false. Private family matters such as marriage, consent to marriage and child-rearing are addressed in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) (Edwards 2011, p. 68). Edwards argues that this this divide is often used as a screen to avoid women's concerns and that:

The public/private distinction is in any event a false dichotomy, as the state is involved in all areas of life, whether by direct intervention, legal regulation, or policy choices not to intervene (2011, p. 317).

Nevertheless, she does not argue for a complete collapse of the dichotomy, noting that in some contexts the idea of the private may be helpful for women, for example in issues of abortion, sexual freedom and reproductive health (Edwards 2011, p. 71). Charlesworth (1994b, p. 60) points to the main problem: women often have little power in either public or private spheres, a situation that is sometimes reinforced through the operation of international human rights law.

### **4.3 Essentialism and Universalism**

The last of the four critiques of international law is that it 'essentialises' women by implying that women share common, universal interests and therefore have a need for common rights (Brooks 2002; Edwards 2011). Such essentialism, it is argued, makes false generalisations and ignores important differences between women: race, class, culture, sexual orientation, religion. According to this view, by making these false generalisations, international human rights law is rendered unable and unwilling to respond in a meaningful way to the various needs for justice required by the wide spectrum of women. Brooks describes this as 'a feminist critique of the feminist critique of international law' (2002, p. 353). The first critique acknowledged the absence of women and law's inability to respond to women. This was followed by a second argument that feminist attempts to engage with international law on behalf of women as a group are shown to be flawed enterprises once the diversity of women's experiences and challenges to the idea of a 'female perspective' are taken into account (Brooks 2002, pp. 353-4).

Okin (1998) situates the peak of these discussions in the 1980s and early 1990s and remarks that this period shows a divergence between the concerns of (mainly) western feminist theorists and (mainly) third-world feminist activists. At the same time as debates about essentialism delivered both some important lessons and some exaggeration and absurdity in western theory, there was a push from third-world feminist activists (and a handful of western activist-theorists) to have women's rights recognised as human rights (Ackerly & Okin 1999, p. 44; Okin 1998). Okin writes:

Holding hearings in their own countries, meeting and networking in regional and subregional groups, and then combining their knowledge at international meetings, groups from Africa, the Asia-Pacific region, and Latin America, as well as well as those from more economically developed parts of the world, were

finding that women had a lot in common. They found that discrimination against women; patterns of gender-based violence, including domestic battery; and the sexual and economic exploitation of women and girls were virtually universal phenomena (1998, p. 44).

The call for women's rights as human rights was a strategic move in which the male-biased nature of human rights was acknowledged but at the same time reclaimed or 're-visioned' for women as the rights of half of humanity (Bunch 1990; Elson 2006). Hundreds of thousands of women worldwide participated in an international movement that co-operated to push for this view, culminating in the important acknowledgements at the 1993 Vienna Conference that human rights had been inadequately applied to women and that this must change, particularly in regard to violence against women (Elson 2006).

Concretely, this development suggests that any wholesale rejection of commonalities between women is inconsistent with some fundamental aspects of women's experiences. However, feminist criticisms of essentialism and the ways that international human law may be unable or unwilling to address the needs and aspirations of women for rights and justice must all be assessed on their merits. A comprehensive assessment of all such criticisms is beyond the scope of this thesis due to the breadth of feminist debate on the question of essentialism, so this assessment will be limited to a general discussion of some key tendencies and ideas. The use of labels such as 'cultural' and 'post-modern' reflect terms referred to in the relevant literature.

Influenced by Gilligan's (1982) work on female moral choices (which posits an 'ethics of care'), 'cultural' feminists<sup>21</sup> contend that the law only reflects a narrow, male oriented view of human experience (Charlesworth 1994b; Peach 2005; Saloom 2006) and prioritises a 'white, western/Northern European Judeo-Christian, heterosexual, propertied, educated, male ideology' (Hernandez-Truyol, in Peach 2005, p. 90). They reject the law's focus on qualities characterised as male – objectivity, rationality and abstraction – and argue that a more comprehensive approach would include qualities characterised as female – connectedness, care and contextualisation (Charlesworth 1994b, p. 65; Charlesworth, Chinkin & Wright 1991, p. 615). Cultural feminists view

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<sup>21</sup> See for example, the work of Patricia Cain (1990), Radhika Coomaraswamy (2002), Bertha Hernandez-Truyol (2004) and Leslye Obiora (1996).

the cultural context of an individual as intrinsic to their identity and sense of self (Obiora, in Peach 2005, p. 90). Acknowledging cultural variation must therefore be an essential part of any concept of rights. As a result, they are doubtful that a universal approach to international human rights, and the inclusion of women under this banner, will provide anything of value to women. Cultural feminists also express several other grounds for their scepticism. They are concerned that international law has little influence over many of ways in which male domination is maintained, both psychologically and socially, and that legal solutions create few prospects for female empowerment. Also, they are wary of the ability of a heavily western-influenced normative legal model to support and promote the needs of non-western women (Peach 2005, pp. 90-2). Peach writes:

According to cultural feminists, then, women's empowerment must come primarily from alternative, perhaps subaltern, social and psychological strategies that recognise and respect sexual difference, cultural diversity and the radically different social locations that women in various parts of the world occupy. Rather than propose a universalist and legalistic strategy that ignores the differences between women or among women, cultural feminists advocate a diverse range of locally tailored and wide-ranging strategies that take account of such differences as they affect the full scope of women's lives (2005, p. 92-93).

While there is some value in a cultural feminist analysis, namely that it challenges law's claims to be neutral and objective, while also highlighting the absence of women's perspectives and experiences in law's development, it also has drawbacks. In a legal setting, an emphasis on differences between male and female styles of moral reasoning may lend itself to biological stereotyping that bolsters discrimination (Charlesworth 1994b, p. 65; Charlesworth, Chinkin & Wright 1991, p. 615). Over-emphasising an 'ethics of care' can be problematic because women are those with the primary social duties for care and supposed 'natural' talents for caring. As a result, women can be defined in a dichotomy opposite men (Elson 2006; Leahy 2011). In order to avoid perpetuating inequality or subordination (and to avoid women's complicity in it), Elson and Leahy suggests that an ethics of human rights should include both an emphasis on women's rights and on men's care obligations (Elson 2006; Leahy 2011).

A discussion of the place of culture in considerations of international women's rights is complex. Culture, as a concept, is notoriously slippery. Levels of participation, acceptance, loyalty, dissent and criticism may differ as widely as the practices and beliefs that make up any one culture in any given historical context. Culture is only one part of the power relations that make up the social context in which the oppression of women exists. Social forces, pressures and institutions, such as economics, politics, or national and international law, also have specific social effects beyond those that might be attributed to culture alone. Culture, in a broad sense, permeates activities in both private and public spheres, but the extent to which it is the main factor in determining their specific content is variable, and subject to change. There are a number of ways in which questions of culture (and religion, which is a subset of culture) (Raday 2003, p. 666) create complications for women's human rights. Women are often seen as the 'guardians' of culture, viewed historically as most responsible for its maintenance and continuation (Rao 1995, p. 169). As a result, cultural identities as a whole are often bound up with the status and roles of women (Edwards 2011, p. 58). Negative practices that oppress and harm women are often carried out in the name of culture, indeed, as commented by Rao, '(n)o social group has suffered greater violation of its human rights in the name of culture than women' (Rao 1995, p. 169). Sometimes, if members of a minority cultural group feel that they are under pressure from outside, a way of reasserting control is to reinforce, or even revive, cultural practices in the sphere most unregulated by external forces, the private sphere. Often, this takes the form of oppression against women (Phillips 2005).

While it has been accused of valuing a 'secular transnational modernity' (Merry, in Edwards 2011, p. 76) that problematises culture, international human rights law only regulates cultural issues that defy its provisions (Edwards 2011, p. 76; Raday 2003, p. 666). Rao (1995, p. 168) suggests that a wide range of political claims have been made in the name of culture. Many have a direct impact on women. She calls for a careful assessment of such claims and for questioning the politics behind culture based arguments such as the status of speaker, in whose name they speak and the degree of participation of members affected by proposition. She notes that 'women are neither purely victims nor purely beneficiaries of cultural politics ... [and] women have less access to international discussions on culture' (Rao 1995, p. 172). Rao has also criticised the tendency of mainstream human rights to concentrate on discussions with



state and government representatives which, for women, 'often amounts to hearing the oppressors' voice in lieu of the victims' (1995, p. 170). Also, culture often intersects with a range of aspects of identity (gender, sexuality, race, and class) in complicated ways. For example, women engaged in nationalist struggles might, on the one hand, find themselves both arguing for cultural self-determination, while on the other, find that repressive cultural practices mean that gender justice is then subsumed in the name of culture. This adds layers of complexity to women's concerns that are not easily resolved but are of concern for the achievement for women's human rights (Rao 1995, p. 172). A specific discussion of cultural and religious clashes with CEDAWs provisions is contained in Chapter 6.

Rao (1995) and Narayan (1998) urge caution when characterising cultural differences within international law and feminism respectively. In her rejection of cultural exceptions to women's rights provisions, Rao argues for a more thorough analysis of the notion of difference:

We seem content to acknowledge that difference exists where it is asserted, and we concentrate our energies on maintaining peace among supposedly different social groups. Indeed, an overly simple notion of the relationship between culture and human rights in our world of differences has emerged in a dichotomous form, with the universalists falling on one side and the relativists on the other (1995, p. 168).

In cautioning feminists against essentialising western and third-world differences in the name of culture, Narayan (1998) says that arguments of both similarity and difference have been used as colonial and imperialist tools and also that feminist ideas cease to be purely western when they are taken up in non-western contexts by women who see themselves reflected in their goals. Cultural feminist's acknowledgement of the centrality of culture to women's identities suggests that some flexibility should be employed in notions of human rights. However, culture cannot always be used to signify difference as opposed to similarity. A similar point can be made about the approach of 'post-modern' feminists towards cultural difference.

The post-modern feminist position, that it is not possible to view women as an essential, unified category, has some clear ramifications for international law (Saloom

2006, p. 162). At its simplest, the general premise that women experience discrimination as a gender is the basis of feminist theory and action (Butler 1999, p. 3; Gamble 2001b, p. vii). However, many post-modern feminists believe the notion of women's commonality is problematic. They argue that essentialising women according to gender marginalises the impact on women as political subjects both of historical and cultural contexts, and of other aspects of identities, such as race, class, and ethnicity (Brown 1995, p. 166; Butler 1999, p. 6). Among other concerns, post-modern feminists contend that failing to take a full account of difference creates a power imbalance, as it is mainly white middle-class women who focus primarily on gender oppression and are the most vocal in advocating women's rights (Barrett 1988, p. vi; Gamble 2001a, p. 54; Nussbaum 2001, p. 137). In addition, feminists has been accused of colonising and appropriating non-western cultures both in order to universalise a western picture of oppression and to subtly paint occurrences of gender oppression in non-western countries as evidence of their backwardness (Brown 1995, p. 166; Steans 2006, p. 17).

According to such post-modernists, any attempt to find a universal 'truth' only serves to displace and marginalise other points of view (Steans 2006, p. 17). For example, Judith Butler contends that the concept of gender as a cross-cultural, universal foundation for feminism is often a foil for another universal concept, a hegemonic view of patriarchal oppression. She suggests that this fails to take into account the multiple, culturally specific contexts in which oppression takes place (Butler 1999, p. 6). Butler writes:

The urgency of feminism to establish a universal status for patriarchy in order to strengthen the appearance of feminism's own claims to be representative has occasionally motivated the shortcut to a categorical, or fictive universality of the structure of domination, held to produce women's common, subjugated experience (1999, pp. 6-7).

As a result, some post-modern feminists conclude, as Wendy Brown does, 'that 'woman' is a dangerous and depoliticising metonymy ... the sanguine 'we' uttered in feminist theory only two decades ago is gone for good' (1995, p. 166). Steans (2006) argues that without a perception of common interests, the idea that feminist theory might assist women's emancipation becomes problematic because the theoretical project becomes 'a form of domination whereby the theorist comprehends and

appropriates the object of knowledge' (2006, p. 16). Instead, post-modern feminists focus on the deconstruction of universal theories by exposing their biases and preconceptions. They emphasise the specific and the empirical in their approaches to gender relations, and support cross-cultural understanding (Steans 2006, pp. 17-8). Post-modern feminists also doubt the ability of legal approaches to provide any support to processes of change for women. Butler (1999, p. 4) uses Foucault's conception that regulatory legal systems define, shape and reproduce the subjects of their regulation. She argues that:

This becomes politically problematic if that system can be shown to produce gendered subjects along a differential axis of domination or to produce subjects who are presumed to be masculine. In such cases, an uncritical appeal to such a system for the emancipation of 'women' will be clearly self-defeating ... It is not enough to inquire into how women might become more fully represented in language and politics. Feminist critique ought to be able to understand how the category of 'women,' the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought (Butler 1999, p. 5).

The post-modern approach has been criticised for its potential to be overly fragmenting and to lead to political and theoretical paralysis (Benhabib 1989, p. 369; Dean, J 1996, p. 7; Rhode 1990, p. 620). Rhode comments that a post-modern position:

limits its own aspirations to authority ... Adherents are left in the awkward position of maintaining that gender oppression exists while challenging our capacity to document it (1990, p. 620).

MacKinnon (2006) thoroughly rejects the post-modern approach. She argues that, in feminism, there has never been an abstract Truth: as a theory it was built through a process of making sense of diverse, individual women's experiences from which a vision of common oppression emerged. As such, feminist theory is grounded in real social conditions. The development of collective consciousness around these conditions led to the emergence of a new theoretical approach to explain them. This was taken up globally as women related it to their own experiences (MacKinnon 2006, p. 45). In regard to women's human rights, MacKinnon states:

Just as women have begun to become human, even as we have begun to transform the human so that it is something more worth having and might apply to us, we are told by high theory that the human is inherently authoritarian, not worth having, untransformable and may not even exist (2006, p. 62.).

She argues that post-modernism prevents women's human rights from being meaningful, not primarily by challenging their universality (though it does that too), but through relativism eroding knowledge of the social reality of oppression and the conditions of the oppressed. This relativism prevents effective criticisms of the social order in which human rights violations takes place and consequently prevents theorising about appropriate action against them (MacKinnon 2006, p. 45). In the post-modern period, much recent feminist scholarship has been accused of abandoning the needs of real women by having a purely academic focus and, due to post-modern scepticism and concerns about identity, being derailed by nervousness around any universalising concept of women's rights (Mohanty 2003, p. 6). In this regard, post-modernism is clearly a dead end for the achievement of women's human rights, whether through international law or other means.

On the other hand, Edwards (2011) expresses concern that, along with many feminist scholars and activists, international human rights law presents an incomplete picture of women that essentialises them through the stereotypes of victims, mothers or as non-western 'others'. While this picture highlights the areas where women are most vulnerable and in need of justice, women are effectively sidelined by such stereotypes, which again prevent them from being seen as full human beings. In particular, she is concerned that:

The focus at the level of international law on gender-related violence against women serves to reinforce stereotypes about the statuses, roles and responsibilities and capabilities of women in law and in society at large ... it posits them as ... in need of protection rather than empowerment ... [and] has the capacity to undermine women's autonomy, self-determination, and dignity as first and foremost, human beings (Edwards 2011, p. 316).

Edwards calls for a rebalancing of human rights law to reflect the multiple facets of diverse women's lives (Edwards 2011, p. 85). This would be a welcome and necessary

development. However, Edwards places the wrong emphasis on the problem by situating it at the level of international law. The problems Edwards points to are not abstractly produced and reproduced at the level of international law, though they may be sometimes be reinforced by it, but occur in social reality within women's lives. Such criticisms must not lose sight of the real women who experience lack of agency or victimhood and rights violations. In particular, it cannot be denied that women are the victims, or targets, of various discriminations, inequalities and gross violations of rights. Victimhood and a lack of agency are more of a problem if rights are seen as something provided for women rather than a process of justice in which they are actively involved, whether in its promotion, enforcement or ongoing development. These processes on the ground must be strengthened.

The acknowledgement of commonalities between women also has another important result from a feminist activist perspective, the capacity to build solidarity between women struggling for change locally, nationally and internationally. If, as argued in Chapter 2, human rights are an evolving ethical system, then women's active involvement in the political evolution of rights is essential, both for the development of rights and for the democratic and transformative potential that such engagement might bring. The key to solving this problem is to increase the capacity for women's agency in regard to their own rights by involvement at all levels: the international, and most particularly (for reasons of accessibility) at the national, local and grassroots levels. Ackerly (2001), for instance, lists a whole range of activities undertaken by activists, from engagement at the level of international law to grass roots legal change, support for education, networking and training, and providing services. Encouraging women to be involved helps to promote agency for both women activists and the communities in which they are engaged. Considering the problem in this light helps to keep it in context, and might help to alleviate some of the frustrations that women, such as Edwards (2011, p. 320), express about the international law arena.

Criticisms of essentialism in international human rights law have highlighted important issues that have formed part of the 're-vision' of human rights, and women's rights as human rights, since the 1990s. This process has seen a revival of broader feminist engagement with the UN on women's rights issues. Notwithstanding women's involvement with women's rights at the UN, there was little engagement by women's

organisations with the human rights system overall. Previously, the trajectories of the human rights and women's rights movements rarely intersected on either a theoretical or organisational level (Elson 2006, p. 99; Lawson 1996, pp. xxix-xxx) The revitalised engagement process is often characterised as a political move, with the 'women's rights as human rights' strategy arising from the contention that it is afforded legitimacy by the strength of the claim to represent half of humanity. The emphasis on rights also emerges from the tensions of globalisation from above and below (Elson 2006) (also mentioned in Chapter 3) and the 'political and intellectual decline of the left, with human rights acting as a global rallying point for intellectuals and radicals stricken by its collapse worldwide' (Stivens in Elson 2006, p.102).

Given the importance of concerns about the impact of universalism, a range of significant approaches has arisen in feminist theory that advocate what can best be describes as a 'thin' universalism, though they characterise it in a variety of ways and with different emphases. These approaches are compatible with the 'pragmatic–historicist' and 'weak ontological' approaches outlined in Chapter 2. A 'thin' universalism acknowledges commonalities while leaving room for difference. For example, Peach (2005, pp. 94-5) argues that a 'pragmatist feminist' position can acknowledge commonalities without being essentialist: bodily integrity, deprivation and protection from harm and abuse, as well as cognitive capacities, and an interest in not being subordinated. She maintains that:

all prescriptions, even those made in light of universal values or norms, must be justified in full awareness of the concrete facts of the particular circumstance with respect to which the prescription is being made (Peach 2005, p. 95).

In addition, Peach (2005, p. 96) notes that cultures are dynamic. Individual identities are developed in social contexts, influenced by both local and, increasingly, international conditions. Acknowledging these interactions need not create tensions in understanding rights or improving women's position. Similarly, Ackerly's 'feminist social criticism' aims to respect diversity while still having theoretical clout (Ackerly & Okin 1999, p. 135). It employs 'deliberative enquiry, sceptical scrutiny, and guiding criteria' (Ackerly & Okin 1999, p. 138), as well as supporting criteria that are responsive to both local and universal circumstances based on 'what people ought to be able to choose to do' (Ackerly & Okin 1999, p. 139).

Martha Nussbaum goes further. In developing an explicitly universalising and normative theory of human capabilities, as a set of common requirements for full human flourishing, Nussbaum (1995, p. 74) rejects theoretical approaches that deny commonalities. She contends that her capabilities approach is flexible enough to accommodate differences while recognising that there are fundamental requirements that all human beings need in order to live fully human lives. She acknowledges that:

many universal conceptions of the human being have been insular in an arrogant way, and neglectful of differences among cultures and ways of life. Some have been neglectful of choice and autonomy. And many have been prejudicially applied (Nussbaum 1995, p. 72).

However she argues that this does not mean that all universalising concepts must therefore be flawed (Nussbaum 1995, p. 72). The potential for a capabilities approach to be combined with CEDAW is addressed briefly in Chapter 6 as an avenue for future research.

#### **4.4 Conclusion**

Edwards (2011) has characterised the period from 2000 to the present as a period of reflection, re-evaluation and reassessment in regard to international human rights law and women's human rights. In this chapter, and in keeping with these considerations, I have considered feminist critiques of international law. I have found that despite the many limitations of international law which must be taken into account, there is still the capacity for the human rights concept to provide a compelling foundation for the struggle for women's human rights. Also, I have argued that within this reassessment, an important trend has emerged: a shift towards a 'thin' universalism that acknowledges and values difference while allowing for a level of universal, shared experience. Chapter 5 moves into a discussion of the CEDAW treaty itself.

## **Chapter 5 – CEDAW and women’s rights at the United Nations**

### **5.1 Introduction**

In part, the existence of CEDAW reflects the ongoing efforts of women since the foundation of the United Nations to make sure that the issues of gender and discrimination would form a fundamental part of its agenda. However, these efforts have had mixed results. This chapter places the development of CEDAW in context at the United Nations in order to provide some background and insight into its strengths and weaknesses as a treaty. I argue that, while CEDAW reflects a history of willingness by the UN to broach issues of women’s rights, this has been within a limited framework. In particular, I consider whether the acceptance of extensive reservations to CEDAW indicates a desire at the UN for an appearance of unity on women’s rights over an agreement on substance. Also, I sketch some of the significant developments on women’s rights in the UN since the adoption of CEDAW and consider whether these are likely to have a substantive bearing on the effectiveness and future relevance of the treaty as an instrument for the advancement of women’s human rights. I conclude that, despite its limitations, CEDAW is important as part of the historical process of women’s human rights development.

### **5.2 Women’s rights at the United Nations**

Of the 160 signatories to the 1945 UN Charter, the founding document of the United Nations, just four were women. However, the participation of a small group of women as delegates, councillors and technical experts and lobbying by women’s organisations were instrumental in ensuring that the Charter contained a reference to the ‘equal rights of men and women’ alongside the commitment to human rights (Division for the Advancement of Women 2006, p. 7; Galey 1995; Tinker & Fraser 2004, p. xvi; Zwingel 2005b, pp. 81-2).

A new visibility of women’s rights issues after the Second World War was attributed in no small part to the many non-traditional roles that women had played during the wartime period (United Nations Department of Public Information 1996, p. 8). In ‘An Open Letter to the Women of the World’, presented by US delegate Eleanor Roosevelt to the UN General Assembly on February 12, 1946 and signed by 16 other



women delegates, it was noted that the ‘new chance for peace was won through the joint efforts of men and women ... at a time when the need for united effort broke down barriers of race, creed and sex’. Women were called on to ‘share in the work of peace and reconstruction as they did in war and resistance’ and governments were urged to ‘encourage women everywhere to take a more active part in national and international affairs’ (Division for the Advancement of Women 2006; Pietilä 2007, p. 131; United Nations Department of Public Information 1996).

Created early in 1946, the Sub-commission on the Status of Women reported to the Commission on Human Rights, but it was argued by a number of women delegates and NGO representatives, including the Chairperson of the Sub-commission Bodil Bergtrup, that it should become a full commission in its own right. Bergtrup had argued for a separate commission in order that women’s concerns should not be ‘dependent on the pace of another commission’, as they would be if considered alongside other human rights issues (Morsink 1991, p. 230; Pietilä 2007, p. 14). In the June 1946 resolution establishing the new Commission on the Status of Women (CSW), the Economic and Social Council (ECOSOC) directed it to ‘prepare recommendations and reports to the Economic and Social Council on promoting women’s rights in political, economic, civil, social and educational fields’ and to make recommendations ‘on urgent problems requiring immediate attention in the field of women’s rights’ (Division for the Advancement of Women 2006). ECOSOC then referred these recommendations to be considered and decided upon by the General Assembly and its Third Committee on Social and Humanitarian Affairs (Galey 1994, p. 132).

According to Galey (1995, p. 14), the CSW had a unique connection to the women’s movement internationally. A former United Nations Director of the Human Rights Division, John Humphrey commented in his memoirs that:

more perhaps than any other United Nations body the delegates to the Commission on the Status of Women were personally committed to its objectives ... [and] acted as a kind of lobby for the women of the world ... There was no more independent body in the UN. Many governments had appointed ... as their representatives women who were militants in their own countries’ (Humphrey, in Morsink 1991, p. 232).

However, despite this relative independence the CSW was not immune to the global political mood. Like the UN itself, in the early period the CSW was dominated by western and pro-western members. A number of small political conflicts within the CSW reflected Cold War tensions, and there were minor clashes on other issues. However, the operations of the CSW were not significantly disrupted due to its overall political homogeneity (Galey 1995). Galey considers that ‘members, observers, and Secretariat staff predominately reflected a traditional western view of women’s place in society and polity’ (1995, pp. 15-6). A former CSW member also recalls that:

A constant topic of debate in the commission ... was the superiority of women’s status in the Soviet bloc as against the advantages of women in market-oriented economies. The challenge of development to bridge the gap between the rich and the poor countries was not yet well articulated by women leaders coming from the South. They were not yet aware of the international dimensions of the women’s movement (Shahani 2004, p. 28).

Another significant aspect of the CSW was its connection to non-government organisations (NGOs). Prior to the 1970s, CSW members often held positions in national women’s organisations and helped the CSW to operate as an expert body, rather than the more political body of later years (reflecting the changing appointments as more women moved into government roles) (Galey 1995, p. 14; Zwingel 2005b, p. 85). From its earliest meetings the CSW allowed the participation in various ways of many women’s international NGOs. Approved NGOs with consultative status to ECOSOC gained the ability to observe CSW meetings and to make contributions (Division for the Advancement of Women 2006, p. 2). According to Piettla, ‘[NGOs] were the channel through which the Commission aspired to establish direct contact with the women of Member states’ (Pietilä 2007, p. 15). As only governments were able to propose items for consideration by CSW, NGOs soon worked out an effective way to get their issues on the agenda by persuading government representatives to adopt and submit their proposals. Over time this led to many NGO suggestions being adopted by the CSW, sometimes flowing through to UN resolutions (Division for the Advancement of Women 2006, p. 2; Pietilä 2007, p. 15).

From its formation until the drafting of CEDAW, the work of the CSW went through some changes in emphasis. In the period 1946–1962, the primary focus for

CSW was on the promotion of equality through raising awareness and supporting legal rights for women (Division for the Advancement of Women 2006, p. 4; Tinker & Fraser 2004, p. xvi; Zwingel 2005b, p. 82). From 1963 until International Women's Year in 1975, CSW began to focus on the role of women in development both as 'beneficiaries and as agents of change' (Division for the Advancement of Women 2006, p. 6).

International Women's Year in 1975 focused on three aspects of women's rights: peace, equality and development. According to Tinker and Fraser (2004, p. xvi), delegates from communist countries had often argued that rather than legal rights, peace was the most significant issue for women in their countries due to the prior existence of legal equalities. Galey comments that:

over its historical development, the CSW has addressed three main categories of women's issues that parallel the UN's major purposes: (1) peace and security, (2) economic and social development, and (3) human rights without distinction as to race, sex, nationality, or religion (1994, p. 133).

The new emphasis on women in development marked an important change in the focus of the work of the CSW. The significance of women's role in development had not initially been recognised by the United Nations until a number of crucial points about the nature of development were exposed. In the discussions and debates within the UN surrounding the First Development Decade 1960–1970 about the best ways to achieve economic development, capitalist approaches such as infrastructure and industrial projects were criticised for increasing the gaps between rich and poor. The importance of including social issues was highlighted as a way to counter this. Once social planning was incorporated into discussions of national economic development, it became clear that issues of women in development had to be included in the work of CSW (Tinker & Fraser 2004, p. xvii).

The involvement of two economists proved crucial to this process. Gloria Scott laid the foundations for the approach now identified as women in development through her work as head of social planning in the Department of Economic and Social Affairs governed by ECOSOC. A key meeting organised by Scott in 1972 was the Interregional Meeting of Experts on the Integration of Women in Development. Ester Boserup was rapporteur to the meeting as well-being on the UN Development Planning Committee. Boserup's book, *Women's Role in Economic Development*, was published in 1970 and

considered ground-breaking. Her work challenged the prevalent notion that women were inactive in agriculture. In fact, in many developing countries they were the main food producers. It also highlighted the ways in which population increases, access to land and technologies affected women's participation in food production. She also highlighted the ways in which the imposition of western conceptions of men's primary role in agriculture often disadvantaged women and their families (Boserup 2007, p. 6; Scott 2004; Tinker & Fraser 2004, p. xviii). Boserup believed that the CSW secretariat viewed her role at the meeting:

as a means to get members of the Commission to change their focus from the generally unpopular subject of abstract women's rights to the popular one of economic development (Boserup, in Tinker & Fraser 2004, p. xvii).

As previously indicated, the creation of the CSW was considered by its founders to be essential in order for women's concerns to be addressed adequately within the UN framework. However, in regard to women's human rights, the success of this approach has been questioned as these concerns have often been sidelined in other UN bodies and viewed as the work of the CSW. In 1973 this was reflected by an administrative move that placed the CSW under the Centre for Development and Social Affairs rather than the Division of Human Rights. As a result, women's concerns were subsequently considered by UN bodies other than the CSW principally as being matters of social and economic development. Initially CEDAW was also affected by this perception, being seen primarily as a development tool rather than one in support of human rights. Nevertheless, with the support and involvement of NGOs and other participants in the international women's movement, the CSW was the focal point for driving a women's rights agenda within the UN (Zwingel 2005b, p. 91). More recently there have been changes to the administration of both the CSW and CEDAW. As of January 2008, the CEDAW Committee has been serviced by the Office of the High Commissioner for Human Rights (Division for the Advancement of Women 2009a; UN Women 2011). Also, with the creation of UN Women in 2011, the CSW is now being administered by the new agency.

A summary of the events leading up to the development of CEDAW is contained in **Figure 4** on the following page.

## Figure 4: Progress towards CEDAW

- |      |                                                                                                                                                                                                                              |
|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1945 | United Nations Charter reaffirms 'faith in fundamental human rights ... in the equal rights of men and women' (Preamble).                                                                                                    |
| 1947 | Commission on the Status of Women (CSW) is established to initiate and monitor UN action on behalf of women.                                                                                                                 |
| 1948 | Universal Declaration of Human Rights proclaims that 'everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex' (Article 2).             |
| 1954 | General Assembly recognises that women are 'subject to ancient laws, customs and Practices' inconsistent with the Declaration and calls on governments to 'abolish' them (Res. 843, IX).                                     |
| 1963 | General Assembly, noting continued discrimination, calls for a draft of a Declaration on the Elimination of Discrimination against Women (Res. 1921, XVII).                                                                  |
| 1966 | Commission on the Status of Women submits draft to General Assembly, which returns it for revision 'bearing in mind the amendments which have been submitted' (Res. 2199, XXI).                                              |
| 1967 | General Assembly adopts the revised Declaration on the Elimination of Discrimination against Women 'to ensure the universal recognition in law and in fact of the principle of equality of men and women' (Res. 2263, XXII). |
| 1968 | Economic and Social Council initiates reporting system on implementation by governments of Declaration's provisions (ECOSOC Res. 1325, XLIV).                                                                                |
| 1970 | General Assembly urges 'the ratification of or accession to the relevant international instruments relating to the status of women' (Res. 2716, XXV).                                                                        |
| 1972 | The UN Secretary-General asks for the views of governments on the 'nature and content of a new instrument.'                                                                                                                  |
| 1973 | ECOSOC appoints a 15-member working group to begin drafting a convention with effective procedures for its implementation.                                                                                                   |
| 1975 | International Women's Year World Plan of Action calls for 'the preparation and adoption of the convention on the elimination of discrimination against women with effective procedures for its implementation' (Item 198).   |
| 1977 | General Assembly appoints Working Group of the Whole 'to continue consideration' of the draft convention (Res. 32/136).                                                                                                      |
| 1978 | General Assembly recommends the working group complete its task (Res. 33/177).                                                                                                                                               |
| 1979 | General Assembly adopts completed draft and invites signatures and ratifications (Res. 34/180).                                                                                                                              |
| 1981 | Convention on the Elimination of All Forms of Discrimination against Women enters into force with the required 20 ratifications.                                                                                             |

(Source: Rights of Women: Workbook in Pietilä & Vickers 1994, p. 127)

The concept of CEDAW as a separate convention for women's rights arose from a perception that the human rights contained in the 1948 Universal Declaration of Human Rights (UDHR) and associated Covenants were not adequately being applied to women (Pietilä 2007, p. 27). This is despite the fact that significant efforts had been made within the text of the UDHR to promote gender equality, a result that was not achieved without struggle (Morsink 1991, p. 230). Overall, the UDHR would have significantly less authority today if the content and wording of the original drafts had not been influenced by those lobbying for the inclusion of women's rights (Morsink 1991, p. 256). The UDHR provided a starting point from which has flowed many of the binding provisions in international law for the protection of rights (Morsink 1999, p. xi). As Zwingel explains, '(t)he codification of human rights departs from the Universal Declaration of Human Rights and finds its expression in a number of Covenants and Conventions' (2005b, p. 78).

A brief discussion of the treatment of women's rights within the UDHR will be outlined here as the rights contained in the UDHR historically provided an important precursor for CEDAW. One of the first tasks of the CSW had been to provide input on the draft articles for the Universal Declaration of Human Rights (Division for the Advancement of Women 2006, p. 4). Consistent lobbying efforts by the CSW representatives and Soviet delegates were responsible for the strong thread of gender equality. The Declaration reflects this through the deliberate use of inclusive terms such as 'everyone' and 'no one' throughout, and the reference to 'the equal rights of men and women' in the preamble (Morsink 1991). The strong influence of women's rights perspectives was evident in the drafting process through the retention of several important clauses including the references to 'equal suffrage', 'equal pay for equal work', and the right of all persons to an individual legal identity (to clarify the legal status of wives in some countries) (Zwingel 2005b, p. 84). These clauses are couched in terms emphasising non-discrimination. While sex discrimination was explicitly mentioned by women delegates, who often argued for more specific wording, the final clauses were a compromise expressing a general intention rather than mentioning women in particular (Morsink 1991, pp. 252-5). Other important clauses were those pertaining to marriage. They referred to 'men and women of full age' being entitled to 'equal rights as to marriage, during marriage and at its dissolution', and stated that a marriage must have 'free and full consent' of both parties. In particular, the question of

divorce was contentious but was included. Morsink comments that '(t)he drafters treated the question of divorce as one of non-discrimination rather than as itself a basic and independent human right' (1991, p. 249).

From a women's rights perspective, several concerns and omissions remained in the original wording of the UDHR. The Declaration contains statements supporting the family as a 'natural and fundamental group unit of society' (UDHR Article 16/3) and outlining a 'right to a standard of living adequate for the health and well-being of himself and of his family' (UDHR Article 25/1). The use of the word 'natural' was designed to exclude the possibility of non-heterosexual families and invites concerns that women might be viewed as subsumed within the family unit. These concerns are further heightened by the reference to the family wage, presuming a male breadwinner (Morsink 1991). This position in the UDHR on the family wage recalls that of the 1907 *Harvester* judgement, which established a basic wage in Australia based on living costs for a family of five: ostensibly a male breadwinner, female homemaker and three children (Devereux 2005, p. 41). Also, all provisions in the UDHR were limited to the public sphere, made explicit by the right to privacy in Article 12.

In the period after the adoption of the UDHR a number of attempts were made to codify the intent of the Declaration by enshrining specific rights for women within international law. Zwingel states that the CSW 'initiated conventions in fields identified by Commission members as the most important for improving the status of women' (Zwingel 2005b, p. 84). These included the adoption of conventions that supported women's political and marriage rights, rights to non-discrimination in regard to education and employment and a condemnation of trafficking and exploitation through prostitution. However, many other issues surrounding women's rights were extremely contentious, and attempts to reach joint agreements were often blocked (Pietilä 2007, p. 28; Zwingel 2005b, p. 84). Acknowledging the continued unequal treatment of women, the General Assembly recalled the principles outlined in the UN Charter and UDHR in 1954 when it urged member states to abolish 'customs, ancient laws and practices relating to marriage and the family which are inconsistent with these principles' (United Nations General Assembly 1954).

In 1963, the General Assembly requested a draft of a Declaration on the Elimination of Discrimination against Women (DEDAW). This was in response to a

request that was co-sponsored by 22 countries,<sup>22</sup> primarily from developing countries and Eastern Europe. Shaheed is of the opinion that ‘these particular countries made the request because they understood that discrimination against women is a major obstacle to development’ (2010, p. 194). While noting that some progress had been made toward equal rights, the General Assembly agreed that discrimination continued in various fields ‘in fact if not in law’ and requested that the Commission on the Status of Women be invited to ‘prepare a draft declaration on the elimination of discrimination against women’ (United Nations General Assembly 1963). DEDAW was drafted by the CSW and adopted in 1967 by the UN General Assembly.

A number of countries (mostly from the third-world) indicated their support for a Convention in order to bind their national legislation to an internationally determined standard. However, western countries (including the US and UK) were less than enthusiastic (Shahani 2004, p. 31; Tinker & Fraser 2004, p. xvi). After the First World Conference on Women, held at Mexico City in 1975, the UN General Assembly announced the UN Decade for Women (1976–85) and there was increased incentive to draft the Convention. In the same year, Leticia Ramos Shahani of the Philippines boldly provided a draft convention to the CSW working group without gaining official endorsement for it from her government. If she had, they would have raised a number of objections regarding issues not yet endorsed or reflected by Philippines law. This draft formed the basis of CEDAW and, in Shahani’s view, her unorthodox approach strengthened the final document (Shahani 2004, pp. 31-2; Tinker & Fraser 2004, p. xvi). Arvonne Fraser reflects on how this affected the approach of the CSW when she comments:

Taking up the Philippines delegate’s strategy of drafting with no commitments from their governments, the group decided not to attribute positions taken on specific articles or language to a particular delegate, thus allowing free discussion among the members. This created what later feminist historians called a ‘free space’ for UN women who believed a legally binding convention was the desired goal (1999, p. 894).

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<sup>22</sup> Afghanistan, Algeria, Argentina, Austria, Cameroon, Chile, Columbia, Czechoslovakia, Gabon, Guinea, Indonesia, Iran, Mali, Mexico, Mongolia, Morocco, Pakistan, Panama, the Philippines, Poland, Togo and Venezuela (Shaheed 2010, p. 194).



Bunch asserts that ‘CEDAW is one of the most integrated Conventions’ (Bunch, in International Women’s Rights Action Watch Asia Pacific & Center for Women’s Global Leadership 2009, p. 2), through its inclusion of economic, social and cultural rights for women as well as civil and political rights. As such, it represented a new way of codifying a human rights perspective, one that placed women’s rights with a societal context and that was less focussed on a purely legal concept. In particular, it required that governments act to ensure that women were not discriminated against in the private sphere, as well as the public sphere (United Nations Department of Public Information 1996, p. 42; Zwingel 2005b, p. 105). Various authors have highlighted different facets of the various influences on CEDAW’s drafting processes. Arvonne Fraser considers that CEDAW was a unique opportunity for the women in the CSW to draft a document that expressed ‘an understanding of their common problems and ways to alleviate them’ (1995, p. 77). She describes as a feminist victory the accomplishment of women delegates in persuading the relevant UN bodies to pass the Convention, although she notes that ‘the record of discussion and debate never contained the word *feminist*’ (Fraser, AS 1995, p. 78). While not oriented towards the UN, the second wave of the feminist movement in the late 1960’s and 1970s nevertheless influenced it through its impact on NGOs participating in the CSW. The designation of 1975 as International Women’s Year, the conference in Mexico City that adopted a World Plan of Action for the Implementation of the Objectives of International Women’s Year and the establishment of a UN Decade for Women from 1975–1985 all reflect the increasing momentum for women’s rights in the United Nations framework in the period around the drafting of CEDAW (Fraser, AS 1999; Pietilä 2007; United Nations Department of Public Information 1996, p. 43; Zwingel 2005b). Rehof (1993) describes the CEDAW process as the negotiation of an agreement on a sensitive and contentious topic against a backdrop of competing ideologies. In particular, this included:

competition between communist ideologies and western concepts of democracy and the market economy ... [and the] ... confrontation between Islamic conceptions of the relationship between religion and law and the role of women in society and the family, and western emphasis on individual and enforceable rights belonging to women (Rehof 1993, p. 2).

Zwingel states that:

There were doubtless a number of women delegates who pushed for a better representation of women's concerns in the human rights framework. However not all female delegates fought for the same cause; depending on their national, political, cultural and religious backgrounds they had widely differing opinions on what women's interests actually are. Therefore it is more precise to interpret the Convention as a success of a specific sector of women delegates, namely those with secular backgrounds, coming predominately from western and socialist, and to a lesser extent from developing states (2005b, p. 104).

As with all United Nations Declarations and Conventions, the final text is the result of a long process. Zwingel (2005b) identifies five significant areas of debate during the drafting of CEDAW that required different degrees of compromise and negotiation. These were:

*the strength of the enforcement mechanism ... the conflict between religions and western secular notions of society and gender relations ... the understanding of discrimination against women versus discrimination based on gender ... a confrontation between capitalist and socialist views on women's rights ... [and] the different priorities of industrialised versus developing countries [emphasis in original] (Zwingel 2005b, p. 105).*

In addition to the explicit concerns raised, other issues that affected the final document may not have been able to be debated openly. According to Rehof (1993, p. 2) this would have included a range of anxieties: that the Convention would tie states into a more effective implementation than they preferred; that the implementation would be too expensive; and that the cultural and social norms of their countries would be affected. As a result, some phrasing was left intentionally vague in order to accommodate these concerns. Cartwright (2007) has noted that there was significant opposition to a new human rights treaty, especially one that was focussed on women. CEDAW was also constrained by a more limited understanding of the range of women's rights abuses, such as violence against women, making the Convention a product of its era (Cartwright 2007, p. 30).

CEDAW was drafted in time for it to be presented to the World Conference of the UN Decade for Women in Copenhagen in 1980, mid-way through the UN Decade for

Women. In order for this to occur, it had to pass through the CSW to ECOSOC and then to the General Assembly. The initial draft circulated by the CSW in 1974 attracted comment from 40 governments, 10 NGOs and four specialist agencies. The draft then passed through ECOSOC to the Third Committee of the General Assembly where there was a protracted debate that reflected:

the many remaining obstacles to women's advancement ... the elimination of discrimination in law; rights in marriage and the family, and in education, employment, and rural development; and health-care services and bank loans and credit (United Nations Department of Public Information 1996, p. 41).

Attempts were made to address these concerns and others regarding the processes for implementation and expressing reservations, but contentious issues remained. Despite the opinion of some delegations that the process of resolving these differences should continue and a proposal that the vote be delayed, CEDAW was adopted by the General Assembly in 1979. The vote of 130 in favour, none against and 11 abstaining belied the overall dissatisfaction with the final document (United Nations Department of Public Information 1996, p. 41). Sixty-four countries<sup>23</sup> formally signed CEDAW at the 1980 Copenhagen conference out of a total of 145 member states attending, and it entered into force in 1981 with the ratification of the 20 states required (Division for the Advancement of Women 2007; United Nations Department of Public Information 1996, p. 42). Burrows (1986, p. 88) has also commented that the rush to prepare CEDAW for signatures at the conference may have contributed to some of the weaknesses in the document.

### 5.3 Reservations

A summary of the types of reservations made to CEDAW and the number of state parties making reservations on those grounds are listed in **Figure 5** on the following page. Some state parties have made reservations on a number of grounds. The large number and type of reservations to CEDAW have often been referred to as undermining the treaty, but with little explanation of how they might do so, apart from general statements that they often contradict core provisions (Mayer 1995, p. 179; Riddle 2002, p. 606). Consequently the reservations to CEDAW are worth closer scrutiny.

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<sup>23</sup> The official United Nations figure is 64 (United Nations Department of Public Information 1996, p. 42), but elsewhere different figures are used. Arvonne Fraser (1999, p. 900) considers 57 nations to have signed, Jaquette (1995, p. 51) suggests 60 (with a note that 52 and 53 are figures used elsewhere). The reason for this confusion is not clear, but all the numbers indicate sufficient support.

<b>Figure 5: Reservations to CEDAW</b>	
Number of state parties making reservations	Categories
30	Equal rights in marriage or the family
22	Compatibility with religious laws or traditional codes
20	Equality of nationality
17	Elimination of discrimination
8	Equal rights to choose residence
7	Equality in employment
19	Other

(Source: UN Women 2011-2012b, p. 3)

Reservations undermine CEDAW in two ways. The first is through undermining the overall integrity of the treaty and thus, its normativity. This problem is the subject of this section. The second way that reservations undermine CEDAW is by giving undue credibility to cultural and religious objections. This issue will be addressed in Chapter 6 as part of the detailed analysis of the CEDAW treaty itself.

Riddle (2002) has written extensively about the reservations process and how they might be addressed through the process of reporting to the CEDAW committee. She argues that there is a ‘failure of CEDAW’s reservation system to preserve its integrity’ (2002, p. 606). By this, she means not only that the reservations themselves have the potential to render the treaty impotent but also that that the reporting system through which the CEDAW Committee encourages the removal of reservations is ineffective. This situation has been inadequately addressed through CEDAW’s reporting system (Riddle 2002, p. 606). CEDAW has a relatively weak Committee with limited powers and a short meeting schedule that generates an enormous backlog. Many states do not file reports on time and there is no guarantee of their accuracy (Hoq 2000, p. 687; Riddle 2002, p. 629). The Committee does not have the ability to comment in writing on country reports, nor to decide which reservations are incompatible with CEDAW. It is limited to making public comments on country reports, which it can use to raise issues and attempt to persuade or embarrass member states regarding their progress towards implementing CEDAW (Riddle 2002, pp. 630-1).

In contrast to the view that reservations are detrimental, Neuwirth (2005, p. 27) argues that reservations do not substantially affect the way in which the Committee approaches its discussion of country reports. Also, former CEDAW Committee Chairperson Acar (2009) argues that the Committee has increased its general effectiveness and does not think that reservations have a significant impact on the standing of the Convention. She believes that:

Despite the debilitating reality of continuing reservations, the Convention now has a crucial impact around the world in defining and legitimizing standards of 'right' and 'wrong' for women's rights. Nothing reveals this situation better than the fact that even states that have entered many reservations (some of which are clearly against the 'object and purpose' of the Convention), rarely, if ever, have been known to cite their reservations as reasons for not implementing the Convention (Acar 2009, p. 7).

However, few countries have removed their reservations to CEDAW (Arat 2008; Riddle 2002, p. 630). For example, in 2011 Tunisia was first country in the region of the Middle East and North Africa to remove its reservations to CEDAW. Additionally it is also one of only four countries in that region to adopt the Optional Protocol to CEDAW (Human Rights Watch 2011). Riddle sheds some light on the motivation behind reservations when she states that 'in order to avoid adhering to provisions it does not intend to implement, a state will try to define its obligations as narrowly as possible' (2002, p. 618). Yet she suggests that, from a legal point of view:

CEDAW has undoubtedly benefited from allowing signatory states to make broad reservations in that it has maximised the number of ratifications, and thereby maximised universality [of membership]. These broad reservations, however, undermine CEDAW's effectiveness and compromise the integrity of the document (Riddle 2002, p. 622).

The large numbers of reservations have significantly affected CEDAW's standing as an expression of human rights. For an international treaty, a greater numbers of signatories ostensibly give greater effect to the laws arising from it. However, due to its reservations, CEDAW has been caught in the middle of perspectives, integrity and universality of membership. The reservations system has been shown to be ineffectual

in negotiating these issues because it ‘necessarily worked under the assumption that universality was the ultimate goal of treaty law’ (Riddle 2002, p. 623). This has led to an odd state of affairs in regard to the raising of objections to reservations. If a state were to be prevented from signing the treaty because there were objections to its reservations, then it would not be legally bound by any provisions at all. From a legal perspective, the only way to enforce the treaty is to adopt a ‘warts and all’ approach to accepting reservations (Riddle 2002, p. 624). There are no alternatives that might promote greater integrity, for example a provision for state parties to decide collectively whether reservations are antithetical to the treaty (such as the process for the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which has a two thirds majority vote). While individual states may object, state objections have not been consistent and sometimes have been affected by political considerations. States may object but can still vote in favour of a reservation. Also, no explicit criteria for judging the validity of reservations exist, although the Committee provides some commentary on them through its comments during the reporting process (Riddle 2002). Still, Neuwirth (2005, p. 42) has noted a positive sign. There has been an increase in the number of state objections to reservations made by other states after the 1995 United Nations Fourth World Conference on Women (known as the Beijing Conference). The Platform for Action arising from it contained a call on governments to limit, review and withdraw reservations to CEDAW.

Riddle (2002) has raised the following dilemma. As a human rights treaty in international law, CEDAW has normative implications. There is no motivation for another state to object to reservations as this could result in de facto support of the reasons for the objection. Conversely, by permitting reservations, states allow others to be party to the treaty without having to adhere to it, thereby undermining the normative force of the convention. To find a way out of this paradox, the question of integrity must be considered further.

As human-rights-in-progress, women’s rights must aspire to embody the key characteristics described in Chapter 2, that is, to be universal, moral, claimable and normative. Regardless of CEDAW’s limitations, the treaty contains at least a significant portion of what women’s rights should entail. However, by opting for such an unresolvable reservations system, the aspiration for CEDAW to be both universal and

moral is compromised, thereby making its ability to be claimable and normative impossible. Moreover, the ability of the rights contained in CEDAW to be paramount is also compromised by the lack of provision for compulsory review of reservations. This means that they often become frozen in time. Consequently, CEDAW loses some of its ability to become progressively more normative and accepted. Riddle has suggested that a similar process to that of CERD be instituted so that determining the incompatibility of reservations can occur through a two-thirds majority vote by state parties, and she notes that the original proposal for CEDAW included an equivalent procedure. This procedure has been effective for CERD which has only four reservations modifying treaty obligations (Riddle 2002, p. 635). She also notes that another opportunity for revisiting the reservations exists through the individual complaints procedure of the OP-CEDAW (Riddle 2002, p. 637). This is likely to be in cases where reservations are the subject of a specific complaint (Hoq 2000, p. 704). However, a process of wholesale revision would be greatly preferable to this piecemeal process. Improving the method for revision and eventual removal of reservations would greatly improve the integrity of the treaty. As it stands, the lack of a satisfactory resolution to this question suggests that the United Nations values the near-universal membership of CEDAW over its integrity.

#### **5.4 Developments since CEDAW**

Before examining CEDAW itself in detail in Chapter 6, some of the developments since it entered into force in 1981 should be noted. The first of these is the role of General Recommendations. This practice enables the CEDAW Committee to further clarify and explain the provisions of the Convention (Chinkin 2010, p. 6). As of the 49<sup>th</sup> Session of CEDAW in July 2011, 29 General Recommendations have been adopted by the Committee (Women's Resource Centre 2011). General Recommendations are considered 'soft law' and according to Schopp-Schilling, '(s)ome states parties do not accept General Recommendations as legally binding, although UN treaty bodies, including the CEDAW Committee, expect states parties to act on them in good faith' (2004, p. 6). Some view the extent of General Recommendations as proof of the ongoing dynamism of CEDAW's work and interpretation (Arat 2008; Chinkin 2010; International Women's Rights Action Watch Asia Pacific & Center for Women's Global Leadership 2009, p. 2). However, some of these recommendations can also be seen as indications of significant omissions and weaknesses within CEDAW itself. General Recommendations 12 and 19, for example, sought to rectify the omission

within CEDAW of reference to violence against women. General Recommendations provide further clarification and detail for some, but not all, of the weaknesses of CEDAW. Also, there is the risk that CEDAW may become increasingly incoherent if there is an over-reliance on the practice of linking more and more General Recommendations to the general provisions under Article 1 aimed at ending discrimination. This would be more likely to prove a need for an updated treaty rather than the ongoing ability of CEDAW to fulfil this role.

The issue of violence against women, one of the most significant raised in General Recommendations, has been the subject of a further international treaty, the Declaration on the Elimination of Violence against Women (DEVAW). Adopted by the UN General Assembly in December 1993 (Office of the High Commissioner for Human Rights 2007), DEVAW is one of the two most important additions to women's international human rights provisions since the signing of CEDAW, the other being, of course, the Optional Protocol to CEDAW. While DEVAW has been part of a successful strategy that has used human rights to highlight and challenge violence against women (Elson 2006, p. 101), the treaty itself is not without criticism. Charlesworth notes that:

Apart from a brief preambular reference, the Declaration does not define violence against women as a human right violation, but presents it implicitly as a discrete category of harm, on a different (and lesser) plane than serious human rights violations (1995, p. 108).

This concern about the weaker language of DEVAW will be mentioned again in Chapters 6 and 7. Also, as a declaration, DEVAW is non-binding. Nevertheless, the existence of a separate international treaty is an important step towards the acknowledgement that violence against women truly is a violation of human rights.

As indicated, the second important addition to women's international human rights provisions is the Optional Protocol to CEDAW (OP-CEDAW), which was adopted by the General Assembly on March 12, 1999 and entered into force on December 22, 2000 (Hoq 2000, p. 677). It provides two additional mechanisms for enforcing CEDAW when states are party to both CEDAW and OP-CEDAW; a communications procedure that provides the opportunity (after domestic remedies are exhausted) for individuals or groups to complain directly to the CEDAW Committee



about violations, and an inquiry procedure that allows the CEDAW committee to investigate allegations of systematic or extreme violations (Division for the Advancement of Women 2009b; Hoq 2000, p. 678; Mooney Cotter 2004, p. 60). Compared to the original limited process whereby the Committee could comment on country reports, or a state party could (theoretically) raise a dispute in interpretation, the Optional Protocol provides stronger enforcement mechanisms (Hoq 2000, pp. 684-5). It brings CEDAW into line with a number of other international treaties. Hoq believes that the expertise of the CEDAW Committee in dealing with women's human rights concerns will be valuable in allowing 'for a development of a gender jurisprudence that can be persuasive throughout the human rights system' (2000, p. 702). Provided that OP-CEDAW is widely adopted, Hoq argues that, as the interpretation of women's rights and their normative force increases, the Optional Protocol provides an important legal avenue for women internationally in that it 'encourages an open debate between women as claimants and States as directly accountable to these [rights] claims' (2000, p. 725). Currently the Optional Protocol has 79 signatories and 104 parties (United Nations Treaty Collection 2012d). MacKinnon (2006) also agrees that, as the Optional Protocol provides women with a new legal means to make direct complaints, it has the potential to be a powerful tool for advancing women's equality and human rights.

An investigation of the effectiveness of the Optional Protocol would be a useful avenue for future study beyond the scope of this thesis. In particular, it should be considered whether the addition of an enforcement mechanism has unequivocally strengthened the international standing of CEDAW and whether or not it has assisted the ongoing interpretation of women's rights through promoting interaction between women and states. This effectiveness is also partly dependent on the willingness and ability of the CEDAW Committee to take a transformational approach to the status quo, a result that is by no means guaranteed. For example, Cusack and Timmer (2011) argue that in its consideration under the Optional Protocol of the rape case *Karen Tayag Vertido v The Philippines*, the CEDAW Committee failed to reject the status quo on gender stereotyping by the Philippines judiciary in rape cases. They ignored the systemic nature of such stereotyping and neglected to point out the state parties obligation for due diligence in regard to it (Cusack & Timmer 2011, p. 342).

Regardless, the number of cases brought before the CEDAW committee can only be miniscule in proportion to the injustices that exist world-wide. By December 2008, only 10 cases had been brought before the committee, with half declared inadmissible due to the existence of further unused domestic procedures. Of the remaining five, four were found to have violated the Convention. However, two of these cases were on behalf of domestic violence victims already deceased, so only two living women received a remedy for their case (Ramaseshan 2009). While acknowledging some frustration, Facio (in Ramaseshan 2009) argues that the OP-CEDAW should be supported as a hard-won victory in gaining a complaints procedure, and that such legal tools can only have transformative potential through use. It remains to be seen whether this is will be the case.

As already noted, the United Nations has been criticised in the past for its inadequate response to women's rights concerns, particularly since the 1993 Vienna Conference. Responsibilities for women's rights were confined to under-resourced women's agencies with little power and the United Nations itself contains significant gender imbalances. In order to address these concerns three concurrent strategies have been adopted: *gender mainstreaming* (integrating gender concerns in all aspects of the UN's work), *gender balance* (equal numbers of women employed at the UN, especially where under-represented in higher positions) and *gender architecture reform* (integrating all UN women's rights structures into one new agency – UN Women). Gender mainstreaming is not always well understood in UN organisations, and it is argued, represents a shift away from a transformational 'agenda-setting' approach towards an 'integrationist discourse' that leaves existing unequal agendas in place (Krook & True 2010, pp. 18-9). Regarding the equality of UN's women employees, little has changed since 1994 when their marginalisation was first labelled by Charlesworth (1994a, p. 429) as a violation of CEDAW, despite the ongoing attention paid to this problem and the development of gender balance strategies..

Through the consolidation of women's rights agencies, significant gender architecture reform has taken place. UN Women has taken over the UN's women's rights work from 2011 onwards, including overseeing both gender mainstreaming and gender balance. While it is too early to assess the effectiveness of UN Women, it is not clear that a new agency will necessarily solve existing problems with the UN's work on

women's rights. Nevertheless, a least one commentator says that 'it is a once in a lifetime opportunity to change the *status quo* (emphasis in original) with regard to women's rights and gender equality' (Rosche 2011, p. 114).

## **5.5 Conclusion**

CEDAW's history reflects efforts to forge a compromise between the highly sensitive and contentious nature of women's rights issues internationally and the United Nations' attempts to incorporate women's rights. This chapter has shown that it is possible to point to any number of past weaknesses in these efforts, including disagreements on inclusions, vague or hasty drafting, extensive reservations, weak committee processes and inadequate institutional support within the UN. However, while there are many frustrations, CEDAW remains central to the work of the United Nations on issues of women's rights. With the adoption of OP-CEDAW, the Convention's implementation mechanism has been strengthened. CEDAW is an important part of the historical process of codifying and achieving women's rights, but it must not be viewed uncritically if it is to fulfil its full potential as a tool. In Chapter 6, I will aid this critical examination by considering CEDAW's weaknesses and strengths in detail.

## **Chapter 6 – CEDAW as a ‘bill of rights for women’**

### **6.1 Introduction**

There has been a general reluctance to scrutinise the foundations of human rights law due to perceptions of its vulnerability (Charlesworth 1994b, p. 63). Similarly, CEDAW seems to have been given almost reverential treatment. Many authors outline its importance and discuss implementation or various contextual and historical matters, but they do not subject the content of the Convention itself to much critical scrutiny (see for example Brautigam 2002; Galey 1994; Schöpp-Schilling & Flinterman 2007; Shivdas & Coleman 2010; Vohra-Gupta 2010; Zwingel 2005b). This is understandable given the importance of CEDAW in lending international relevance and legitimacy to women’s concerns. Also, given the controversial nature of CEDAW (as shown by the large number of reservations to it), there seems to be a concern that any overt criticism might undermine its status further. Where analyses of CEDAW’s substance do exist they are often ancillary (see for example Brooks 2002; Charlesworth 1994b, 1994c, 1995; Charlesworth, Chinkin & Wright 1991; Edwards 2011; MacKinnon 2006; Mayer 1995; Peach 2005), though there are a handful of authors who have made more detailed investigative contributions (Burrows 1986; Howard-Hassmann 2002; Kaufman & Lindquist 1995; Roth 2002), some of which are unsatisfying (Hernandez-Truyol 2011; Rosenblum 2011). The literature on CEDAW must be examined with this context in mind.

The aim of this chapter is to consider whether CEDAW comprehensively fulfils the responsibilities of an ‘international bill of rights for women’, a status ascribed to it by the Office of the High Commissioner for Human Rights (2009) (see also Chapter 1, section 1.1). This role includes defining equality, guiding action and codifying comprehensive rights for women. If CEDAW is to be compared to the International Bill of Human Rights, it must embody all the characteristics of its main instruments (the UDHR and binding Covenants). It should provide a foundation for women’s rights which, as argued in Chapter 2, should be universal, moral, claimable and normative as well as codify a comprehensive set of rights. Also, given the criticisms raised in Chapter 4 of the exclusion of women from the human rights concept, if CEDAW is to be effective it must situate women unequivocally as being the claimants of human rights.

Finally, as argued in Chapters 2 and 4, it must reflect the capacity to be universal, yet flexible.

It will be argued that, while CEDAW has a number of strengths, it has many significant weaknesses. While conducting my own investigation into CEDAWs strengths and weaknesses, I will also be assessing the views of other commentators in regard to the strengths and weakness that they have perceived. I will first consider whether the rights covered by CEDAW are sufficiently extensive. To do this, I will refer to the bivalent nature of gender described by Nancy Fraser (1999), who argues that women require both social recognition and economic redistribution in order to have full access to rights and justice (see also Chapter 4, section 4.2). Then I will discuss the focus on discrimination and how the use of language in the Convention points to barriers and contradictions in its approach to women's rights. CEDAW will be examined in light of debates about sex and gender, culture and religion. I will then consider the relationship of CEDAW to women and the state. Importantly, I will question whether CEDAW successfully recasts the human claimant of rights as a woman. I will assess whether, as Roth (2002) and Merola (2004) suggest, CEDAW promotes social change based on a collective view of women's inequality (thereby challenging traditional liberalism). The potential for a capabilities approach to enhance CEDAW's effectiveness is presented in brief, but a full exploration is beyond the scope of this thesis. This will partly complete the objectives set for this thesis in Chapter 1, section 1.2. It will do so with reference to the discussion of human rights contained in Chapter 2, section 2.2.

## **6.2 Recognition or Redistribution?**

One of the strengths of CEDAW is its integrated nature, with its inclusion of political, civil, social, cultural and economic rights. The Preamble and Articles 1 and 3 contain general injunctions in support of this list of rights, with various articles spelling out more specific details. **Figure 6** on the following page shows the breadth of the rights contained in CEDAW.

Many clauses contain rights that can be interpreted as cutting across the traditional divisions between first and second generation rights, and between negative and positive rights. Donnelly (2003, p. 27), highlights the clumsiness of the traditional divisions and this is evident when attempting to categorise the rights contained in CEDAW.

**Figure 6: Overview of CEDAW<sup>24</sup>**

<p><b>PART I</b></p> <p>Article 1 - Discrimination          Article 2 - Policy measures          Article 3 - Guarantee of basic human rights and fundamental freedoms          Article 4 - Special measures          Article 5 - Sex role stereotyping &amp; prejudice          Article 6 – Prostitution</p>	<p><b>PART II</b></p> <p>Article 7 - Political and public life          Article 8 - Representation          Article 9 - Nationality</p>
<p><b>PART III</b></p> <p>Article 10 - Education          Article 11 - Employment          Article 12 - Health          Article 13 - Economic and social benefits          Article 14 - Rural women</p>	<p><b>PART IV</b></p> <p>Article 15 - Law          Article 16 - Marriage and family life</p>
<p><b>PART V</b></p> <p>Article 17 - Committee on the Elimination of Discrimination against Women          Article 18 - National Reports          Article 19 - Rules of procedure          Article 20 - Committee meetings          Article 21 - Committee reports          Article 22 - Role of specialised agencies</p>	<p><b>PART VI</b></p> <p>Article 23 - Effect on other treaties          Article 24 - Commitment of States parties          Articles 25 to 30 - Administration of the Convention</p>

For example, Article 11 not only discusses measures to eliminate discrimination against women in employment (negative, first generation rights) but also reaffirms the right to work of all human beings, while adding specific economic rights to equal remuneration, a right to social security and maternity leave (positive, second generation rights). Many clauses in CEDAW show similar levels of crossover between these types of rights. This is an acknowledgement of what Nancy Fraser (1999) has termed the ‘bivalent’ nature of gender as a form of social differentiation. As previously noted in Chapter 4, gender discrimination has both an economic basis, where women’s labour is

<sup>24</sup> See Appendix A for full text of CEDAW (United Nations General Assembly 1979).

exploited through unpaid domestic and reproductive work in the private sphere and lower paid, lower status jobs in the public sphere, and a cultural basis that devalues women and leads to various forms of subordination, abuse and denial of rights. These different categories require different types of remedy: *redistribution* to address the economic aspects and *recognition* to address the cultural aspects (Fraser, N 1999, p. 31). Consequently, a discussion of CEDAW in relation to these two concepts will assist in assessments of how comprehensive the Convention is in its attempts to set out an appropriate list of rights.

As illustrated by Article 11, the Convention specifies measures for both recognition and redistribution. Nevertheless, the introduction to the Convention (Office of the High Commissioner for Human Rights 2009) acknowledges that, within CEDAW, the greatest attention is paid to women's legal civil and political rights. Other significant areas of focus are women's reproductive rights and rights in the family and the restrictions often placed on women by culture and tradition. It should be no surprise, therefore, that CEDAW is heavily weighted towards recognition. There are a number of articles that solely focus on measures of recognition to eliminate discrimination: Article 5 on stereotypes and prejudices, Article 6 on trafficking and prostitution, Article 7 on political equality and Article 15 on legal rights. Article 2 on legislative measures might have redistributive outcomes, depending on the legislation passed by states but this would be at their discretion.

Redistribution is often implied rather than stated. Social services and full access to health care and education require an economic component that receives no overt acknowledgement within CEDAW. Where measures of redistribution are specifically mentioned it is within a very narrow equality framework, usually a single clause as part of an article that also outlines measures of recognition. Some examples: Article 10 on equal access to education includes '(d) access to benefit from scholarships and other study grants'; Article 11 on work includes 1(d) on equal pay and benefits, 1(e) on social security and 2(c) on childcare; Article 13 on economic and social benefits, includes (a) family benefits and (b) credit; and Article 16 on marriage includes (h) equal rights of spouses to property and financial decision-making. All of these provisions focus on particular cases of redistribution designed to help facilitate equality with men.

However, there are three notable exceptions to this. In Article 11 section 2(b), state parties are instructed to ‘introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances’. Also, the second part of Article 12 states:

Notwithstanding the provisions of paragraph I of this article [equal health care], States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, which granting free services where necessary, as well as adequate nutrition during pregnancy and lactation

These clauses identify redistribution measures geared towards the specific needs of women. The article that most thoroughly and specifically addresses redistribution measures is Article 14 on the needs of rural women. There is an acknowledgement of:

the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy.

As will be discussed further in the following paragraphs, this clause provides an acknowledgement of women’s specific circumstances and multiple roles not found elsewhere within CEDAW. The redistribution measures in Article 14 include recommendations that rural women:

participate in and benefit from rural development ... have access to adequate health care facilities ... benefit directly from social security programmes ... obtain all types of training and education ... have access to agricultural credit and loans, marketing facilities, appropriate technology ... [and] enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

The focus of this article is not just on equality but on the needs of this group of women, including the specification of the need for ‘adequate’, instead of just ‘equal’, support, a term only used in one other clause – Article 12 specifying ‘adequate nutrition’ for pregnant and lactating women.



Article 14 is worth considering in detail, as it illustrates in particular some anomalies in the ways that women's economic role in the family is portrayed. First, the wording of this clause in regard to women's economic role invites critical comparisons with the rest of the Convention. While there is mention in the Preamble that 'in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs', this general statement is not followed up in the articles of the Convention in regard to the specific need to alleviate women's poverty, except by implication in Article 14. While the importance of rural women's economic role is made clear in Article 14, there is no mention in other articles of the specific economic vulnerabilities or contributions of women more generally. Article 23 of the UDHR emphasises the right to work, equal pay and 'favourable remuneration ensuring for himself and his family an existence worthy of human dignity', while Articles 6 and 7 of the ICESCR also outline similar conditions using less gender specific wording in setting out the right of everyone to work that provides 'a decent living for themselves and their families' (United Nations General Assembly 1966b). In contrast, the focus of Article 11 in CEDAW does not use this 'family wage' approach, although a number of other human rights are invoked in regard to work. Article 11 does not mention fair remuneration, or a decent living, but it focuses instead on the elimination of discrimination and the creation of equality with men. This is a serious oversight within CEDAW, given the tendency for women to be concentrated in lower paid, lower status employment and the increased vulnerability of female headed households (Holmes & Jones 2011).

Also, if 'non-monetised' work can be understood to include unpaid care and domestic work, it also seems like an anomaly that only rural women should be specifically recognised for making this contribution. Even for rural women, this work is acknowledged in name only as none of the provisions in Article 14 address this question. Charlesworth (1995, p. 108) notes that Article 7 of the ICESCR, while emphasising equality, only defines fair, decent work and conditions within the public sphere, ignoring the vast amounts of work done by women within the private sphere. Within CEDAW, there seems to have been a partial and insufficient attempt to address this question. In the Preamble, CEDAW acknowledges 'the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised', but other than in Article 14 the text of CEDAW provides no indication that

some of this contribution may have an economic as well as social worth. While an important provision in this regard, maternity leave is a temporary acknowledgement of women's childbearing role and a subtle statement that women's main economic contribution is through paid employment.

On the issue of caring for children, the Preamble also states that 'the upbringing of children requires a sharing of responsibility between men and women and society as a whole' and that this requires a change in traditional family roles of men and women. In the online introduction to the Convention, the Office of the High Commissioner for Human Rights (2009) seems to be urging an interpretation of CEDAW that is not fully present in the Convention itself. The OHCHR states that:

provisions for maternity protection and child-care are *proclaimed as essential rights* and are incorporated into all areas of the Convention, whether dealing with employment, family law, health care or education. Society's obligation extends to offering social services, especially child-care facilities that allow individuals to combine family responsibilities with work and participation in public life [emphasis added] (Office of the High Commissioner for Human Rights 2009).

However, while it is true that there is considerable attention paid to maternity, child-care is mentioned only in one clause, Article 11 (c) in which state parties are directed to:

*encourage* the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities [emphasis added].

This hardly constitutes an acknowledgement of the primary role that women play in the care of children and 'encouragement' is scarcely consistent with the proclamation of childcare as an essential right. Doubtless the intent of this clause is, in part, to encapsulate the vision of more equal responsibility between men and women that is urged in the Preamble. However, in addition to making the fundamental issue of women's role in child-rearing barely visible in the Convention and making child-care a matter of encouragement, this provision provides an incomplete measure of both recognition and redistribution.

The vague and general nature of the provisions in the Convention seems less designed to draw attention to or improve women's overall economic position than to remedy specific injustices (equal pay for equal work and maternity leave). This vagueness might have been designed to allow considerable flexibility of interpretation, due to the promotional nature of the treaty. However, given the persistence of women's unequal economic position overall, it seems that CEDAW does little to prevent many larger economic injustices remaining more or less intact. CEDAW is considerably more focussed on recognition and represents a very conservative approach towards redistribution. Given that CEDAW is primarily about providing recognition, the following sections will be considering in detail the approach taken by CEDAW towards dismantling the social and cultural bases of women's oppression.

### **6.3 Discrimination**

As noted by Burrows (1986, p. 80) and Gould (2008, p. 658), CEDAW focuses on the prohibition of discrimination against women rather than providing a specific list of rights for women. The title of the Convention and most clauses refer to the 'elimination of discrimination against women', with discrimination defined in Article 1:

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Many feminists have observed that women's concerns may be inadequately reflected by an approach that focuses on equality (Brooks 2002; Charlesworth 1994b; Charlesworth, Chinkin & Wright 1991; Kaufman & Lindquist 1995). Charlesworth comments:

The measure of equality in Article 1 is still a male one. And the discriminations it prohibits is confined to accepted human rights and fundamental freedoms. If these rights and freedoms can be shown to be defined in a gendered way, access to them will be unlikely to promote any form of real equality ... The male-centred view of equality is tacitly reinforced by the Convention's focus on public life, the

economy, law, education and its very limited recognition that oppression within the private sphere, that of the domestic and family worlds, contributes to women's inequality (1994b, p. 64).

In CEDAW, the focus on eliminating of discrimination is primarily based on achieving parity: the same approach to discrimination taken in other international human rights agreements. However, for women, the context in which this is to be achieved is strongly gendered. While CEDAW covers both equality of opportunity and outcome (formal and de facto inequality), it presumes that all women wish to conform to the traditional liberal model of autonomous, male individuals within the public sphere and ignores the highly gender specific economic and social contexts in which 'men and women are simply running different races' (Lacey, in Charlesworth 1994b, p. 64). There is a lack of acknowledgement that social and political structures and relations, or the state itself, may create obstacles to equality or, that, as succinctly stated by (Kaufman & Lindquist), '(e)quality is a blunted instrument for women in a world in which the male standard provides the measure' (Kaufman & Lindquist 1995, p. 121).

On the other hand, in their critique of the gender-neutral treaty language used in CEDAW, Kaufman and Lindquist (1995) have also highlighted the contrasts between the 'gender-neutral' language used in some areas and the 'corrective' language used in other areas. Corrective language has several advantages over a gender-neutral approach because it addresses concerns specific to women, does not use a male centred norm as its reference for solutions, and suggests active ways to achieve fairness rather than a passive removal of discriminatory practices (Kaufman & Lindquist 1995, pp. 14-5). In evaluating the use of both types of language within CEDAW, they contend that '(t)he Women's Convention has, to a great extent, incorporated ... provisions [aimed at specific wrongs] into its otherwise gender-neutral framework' (Kaufman & Lindquist 1995, p. 124).

For example they point out that the language in Article 12 moves from advocating gender-neutral non-discrimination in part 1 to a corrective acknowledgement that this will not be enough in part 2, which states:

*Notwithstanding the provisions of paragraph 1 of this article*, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period (emphasis added by Kaufman & Lindquist 1995, p. 124).

Other corrective provisions highlighted include those in Article 10 that advocate support for female education through reducing drop-out rates and providing programmes for women and girls who left prematurely and the support for maternity leave in Article 11. In Article 14 there is support for rural women to organise self-help groups, an acknowledgement that women's self-organisation may be necessary in order for them to gain a voice and advance the process of obtaining some political power on an equal basis (Kaufman & Lindquist 1995, p. 121). Regrettably though, Kaufman and Lindquist have not succeeded in proving that CEDAW has succeeded to a 'great extent' (1995, p. 24) in incorporating corrective provisions aimed at specific wrongs, only that it has done so to some extent. Elimination of discrimination is by far the dominant approach. Also, the highlighted features of Article 14 again show that this article contains a more women-centred approach than does much of CEDAW. If CEDAW reflected the approach taken to this clause more consistently throughout, it would be less open to criticism for its limitations.

One of the more interesting features of CEDAW also highlighted by Kaufman and Lindquist is the corrective potential of Article 4. Article 4 allows for the adoption of 'temporary special measures' designed to promote and speed progress towards equality, with the special practices to be discontinued once the objectives are met. Due to the limited scope of this clause, Charlesworth is somewhat dismissive of potential gains for women that could be achieved through it. She states that:

The Convention's sanction of affirmative action programs in Article 4 similarly assumes that these measures will be temporary techniques to allow women eventually to perform exactly like men (Charlesworth 1994b, p. 64).

Nevertheless such a corrective approach could have a far-reaching positive effect if it were taken seriously, even if applied within the limitations of Article 4 (which specifies that unequal standards would be temporary measures until equality is reached). Charlesworth and Saloom highlight the problem of a lack of women within international law and politics (Charlesworth 1995, p. 105; Saloom 2006, p. 165). If Article 4 were to

be taken seriously in these arenas, a significant barrier to women's full participation in civil society as it currently operates could be substantially reduced. The integration of economic, social and cultural rights with civil and political rights is vital for women (Bunch 1990, p. 488). If interpretations of Article 4 were used to their fullest extent to end discrimination, many women globally would benefit from educational opportunities and other forms of social support designed to facilitate equal participation. Such an approach could move from passive measures to provide formal equality, which women may not be in a position to take advantage of, to a more active process of removing barriers for women. Hoq suggests that:

A re-characterisation of the test of discrimination from that of 'similarity/difference' to that of 'disadvantage' would overcome many of the shortcomings of the current application of the non-discrimination model of equality (2000, p. 722).

While an anti-discrimination approach may not address the full breadth of women's concerns, the astute application of Article 4, even with its current limitations, could create radical changes for women in many circumstances world-wide. This might only be a partial victory, but it would be a substantial one.

Kaufman and Lindquist are concerned that 'a strategy based solely on the acquisition of equal legal rights using current 'male' rights as standard may provide benefits for women that are more symbolic than actual' (Kaufman & Lindquist 1995, p. 118). Many feminists have made similar observations. For example, Brooks believes that 'CEDAW suggests that nothing need be changed except stereotypes and formal barriers: just let the women in and that's that' (2002, p. 351). Such considerations will continue to provide some essential direction as approaches to international standards to women's rights evolve. However, it is important not to lose sight of the fact that in places where women do not have the same legal rights as men, these rights are significant. Given that feminist criticisms of an anti-discrimination focus strongly emphasise the incompleteness of this approach, it is important to acknowledge that this incompleteness need not render it entirely useless, particularly if Article 4 is invoked to its fullest extent.

Like much of the work of the UN on women's concerns, CEDAW sits firmly within a liberal feminist approach to achieving equality and rights for women. Liberal feminists aim to work within the legal system as it stands and believe that the current system can be modified so as to incorporate women's needs (Peach 2005, p. 89). This approach emphasises equality with men and calls for the law to fully realise its premise of objectivity in regard to women (Charlesworth 1994b, p. 63). According to Charlesworth, the approach of liberal feminists:

adopts the vocabulary, epistemology, and political theory of the law as it currently operates ... Such an approach characterises much of the existing women's international human rights law ... to place women in the same position as men in the public sphere. The activities of the Commission on the Status of Women generally have also been informed by such an approach (1994b, pp. 63-4).

Peach also notes that the focus is 'not to figure out how to obligate states by law to end discrimination. This has been done. It is, rather, to force states to honour their legal obligations' (2005, p. 87). The limitation of this strategy is that it does not acknowledge the depth of the structural and systemic features of discrimination and for the power imbalances between genders (Cook 1994, p. 5). However, despite the limitations of its liberal feminist approach, CEDAW still poses some significant challenges to the status quo. This is illustrated by the resistance to the use of Article 4.

The existence of Article 4 on special measures does not guarantee its application. Even within the UN itself, the international body most obliged to be standard setting in regard to gender equality, there is considerable reluctance to use preferential hiring practices as special measures to address a woeful gender imbalance among staff, particularly at the higher levels. While a specific policy for the mandatory implementation of special measures in the staff appointment process has been in place since 1999, this has been neutralised in practice by lack of accountability and inadequate implementation (Inter-Agency Network on Woman and Gender Equality 2011, p. 15). So, even if a legal provision such as Article 4 appears to be potentially useful, it is ineffective if there is no significant challenge to the balance of power. CEDAW could be used more effectively if such challenges were made as a result of increased political pressure from women globally.

Lastly, it is important to consider the effect on its moral authority of CEDAW's approach to anti-discrimination. As shown by MacKinnon (2006), CEDAW does not represent the only possible formulation of an anti-discrimination treaty. MacKinnon makes an important, and scathing, comparison between the language used in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and that of CEDAW. She indicates that the language of the CERD supports the wholesale rejection of racism by stating that any basis for racial discrimination is scientifically false, but notes that the language of CEDAW falls short of rejecting sexism to this extent. CEDAW does not categorically state that sexism is inaccurate but, more abstractly, that it 'violates equality principles' (MacKinnon 2006, p. 11) and limits women's broader ability to participate in civil society. She writes:

CERD's formulation does not just turn up the rhetorical heat. It grounds a politics of equality in the world of reality. The only reason not to reject racism itself is left exposed as the interest of one racial group seeking to dominate another. Racism is naked: the ideology of the self-interest of bigots. The CEDAW preamble, by distinction, rejects sexism principally not as false and inherently without basis but as a barrier to other rights, hence derivative, and an inefficient use of human resources. Sex equality inhabits the realm of the good idea, the right view, a guide to proper thought and action rather than being the only position consistent with the evidence. The operational language of CEDAW squarely addresses many concrete problems ... (b)ut on the level of express principle, CEDAW never says that sexism is a lie. It does not say that there is no justification for the inferiority of women in theory or practice anywhere (MacKinnon 2006, p. 11).

This failure to make sexism morally equivalent to racial discrimination is important, especially as CEDAW was drafted after the CERD and borrows much of its structure from it.

The things that were not translated from the CERD were the strength of its language, the strength of its implementation procedures and its reservation procedures, making CEDAW clearly unequal to it. Within international law, Charlesworth (1994b, p. 65) notes that such attitudes at the state level create a barrier for women, as racial oppression is taken more seriously than gender based oppression. Arguably, this lack of ability to tackle sexism head-on, to tackle women's human rights head-on, is what,



more than anything else has left CEDAW in a weaker moral position than the UDHR. Whatever flaws the UDHR might have, there is a moral strength at its core: unequivocal rights for all people everywhere. This core has withstood more than 60 years of subsequent interpretation. No such core exists in CEDAW on the question of rights for women, as will become clear later in this chapter. Currently a significant problem linked to CEDAW's anti-discrimination focus is that it has been used to argue that men and other groups are just as worthy of protection under CEDAW as are women. This backlash against the focus of CEDAW on women will be discussed further in the following section, in regard to the works of Rosenblum (2011) and Hernandez-Truyol (2011).

#### **6.4 Biology, Sex and Gender**

CEDAW codifies rights on a number of issues of significance to women as a biological sex: pregnancy (Article 11 (2a) and 2(d), Article 12 (2)), maternity (preamble, Article 4 (2), Article 5 (b)) and family planning (Article 16 (e)). Among human rights treaties, CEDAW is unique in its affirmation of women's reproductive rights, although the clause on family planning was carefully worded in order tacitly to support abortion rights without directly mentioning them. Questions of biology, sex and gender are the subject of much feminist debate, so a discussion of their importance in regard to CEDAW is worth some exploration.

Howard-Hassmann (2002) argues that the only right in CEDAW that is exclusive to women is that of abortion (an issue avoided by international law). The rest are universal. She argues that women are 'sociological individuals' (Howard-Hassmann 2002, p. 240) who have separate identities, as do men, therefore those who argue that women's rights are collective rights are confusing interest with identity. Howard-Hassman focuses on debunking the idea that women's identities are more embedded in social, cultural and religious life than are those of men. Nevertheless, she does agree that women's rights must be achieved collectively. It is not completely clear why Howard-Hassman excludes other rights with a biological basis from being women-specific rights (pregnancy and maternity) though she does argue that men also need reproductive rights and parental leave from work to care for children (Howard-Hassmann 2002, p. 232). This strict parallel seems unrealistic due to the physical demands of both pregnancy and motherhood and also in regard to the social roles that

the vast majority of women are required to fulfil. However, it is worth considering her assertion that women's rights are just human rights that were previously neglected and the consequences of her approach to women's rights as universal (Howard-Hassmann 2002, p. 239).

In contrast to Howard-Hassman, MacKinnon (2006) argues that, given the gendered nature of the human rights system, and the hierarchy given to generations of rights, women's rights must be viewed collectively. She writes:

Women are men's unequals as groups. Real equality rights are collective in the sense of being group-based in their essential nature. Individuals may suffer discrimination one at a time, but the basis for their injury is group membership. Lacking effective guarantees of economic and social rights, women have found political and civil rights, however crucial, to be largely inaccessible and superficial. The [human rights] generational distinctions and their [hierarchical] rankings, questionable for men, are clearly based on gendered assumptions, perceptions and priorities (MacKinnon 2006, pp. 5-6).

This takes the matter of women's collective inequality beyond that of mere interest. Of course, it is true that women are individuals but the collective experience of discrimination is thrust upon them due to their group membership and regardless of their individual identities. The myth of women's special relationship to culture is worth debunking, but it does not then follow that simply expanding universal rights into the neglected private sphere, as Howard-Hassman suggests, will solve all the problems that women face. As argued throughout this thesis, the universal human rights concept has itself been constructed in a gendered way. Even CEDAW, which has considerable reach into the private sphere, does not address all the pressing problems that women face. Violence against women is the primary example. Given the social depth of discrimination and inequality and the resistance to change that women encounter, simply including women in the existing vision of universal rights will not be enough.

The basic premise of CEDAW has also come into dispute: its focus on women as a category. Rosenblum (2011) argues that the lack of a specific definition of 'woman' in CEDAW is a serious oversight and that CEDAW's emphasis on women is problematic. He suggests that relying on the category of women without a definition 'pretends to

attain universality while inhibiting variation' (Rosenblum 2011, p. 118). According to Rosenblum this reinforces a binary division between men and women. This common belief that there are two sexes does not reflect the many genders constituted by culture, biology and genetics along a continuum (Rosenblum 2011, p. 135). Consequently, Rosenblum argues that '(f)ocusing only on 'improving women's lives' serves to reinforce the very binary that must be dismantled to achieve change' (2011, p. 104). By making women the centre of the treaty, women are identified as the victims of discrimination, exclusive of all others (Rosenblum 2011, p. 158). This creates ongoing victimhood and a need for paternal state protection, both denying women's agency and often also their complicity in perpetrating or enabling gender inequality (Rosenblum 2011, pp. 169, 172). Rosenblum (2011, pp. 175,184) argues that transgender people also require recognition in international law (which CEDAW denies by perpetuating a gender binary) and also that masculinity does harm to men. Consequently he argues that CEDAW should be 'unsexed' so that it includes not only the woman-as-victim, but also men, women with agency (non-victims) and transgender people (Rosenblum 2011, p. 193).

Rosenblum proposes that replacing 'women' with 'sex' or 'gender' would encourage a more appropriate focus on all gender-based harms (2011, p. 193). He states:

At the time of CEDAW's adoption, the complexity of sex and gender was only recognised in a few contexts. CEDAW's focus on 'women' enshrines the male/female binary in the core of international law when CEDAW's goals would be better served by seeking the elimination of the categories themselves (Rosenblum 2011, pp. 100-1).

Sex generally refers to biological difference, while gender assigns particular social and cultural traits on the basis of biological sex. Rosenblum (2011, p. 151) prefers these terms on the grounds that they move beyond the focus on one side of the binary division. He asserts that 'Unsexing CEDAW would flip the architecture of international women's human rights to focus on gender, with women included under that rights umbrella' (Rosenblum 2011, p. 193). Ultimately he suggests that CEDAW's focus on women places it outside the discourse of universal human rights and that replacing 'women' with 'sex' or 'gender' would allow CEDAW to be invoked more productively

as part of the core business of international human rights law (Rosenblum 2011, pp. 106,145).

There are a myriad of problems with Rosenblum's approach. To begin with, his post-modern stance overtly produces what MacKinnon calls 'feminism without women' (2006, p. 61). It is an abstract critique that bears little resemblance to the social realities in which women experience discrimination and inequality as a group (Hernandez-Truyol 2011, p. 200; MacKinnon 2006, p. 61). While Rosenblum is correct that gender is a continuum, biologically the percentage of those in the overlap between male and female genders is small.<sup>25</sup> Overwhelmingly, women are socially placed into a disadvantaged group based on the appearance of biological membership of the category 'women' and the resulting gender bias attached to this appearance. Hernandez-Truyol argues that although women cannot be viewed as a 'singular, essential category' (2011, p. 197), at the same time '(p)eople who are perceived to comprise the category 'women' are less likely to enjoy the trappings of full personhood' (Hernandez-Truyol 2011, p. 200). Other non-biological factors that contribute to gender do not change the fact that women themselves have identified a common thread in their social experiences of oppression and inequality (MacKinnon 2006, p. 45).

The approach of shifting the focus from women to gender has already been tried in the international development arena since the 1980s, with unsatisfactory results. This move seems similar to what Rosenblum has suggested. As applied in gender and development (GAD), the approach:

conceptualised gender as a dynamic social construct reflected in greater appreciation of diversity ... [in order to] address the bases of inequalities between women and men, and redistribute the power inherent in gender relations (McIlwaine & Datta 2003, p. 370).

It was thought that a more thorough analysis would help to generate change in power relations, but the anticipated benefits of this shift have not occurred. More often there has been a range of problems: de-politicisation, confusion about how to apply a gender approach and instrumentalism, which subsumes gender issues into existing

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<sup>25</sup> Blackless et al. (2000) describe humans as being incompletely dimorphic. They indicate that the continuum between male and female consists of two bell curves overlapping by up to two percent, with those in the overlap considered to be intersex (Blackless et al. 2000, p. 162).

agendas and thereby supports the status quo (McIlwaine & Datta 2003). As a result, some of the feminists involved in GAD consider that:

the move from women to gender constitutes nothing more than a strategic retreat in the face of the conservative backlash<sup>26</sup> against feminism ... [it] has rarely challenged the goal of modernisation. Thus, there have been few calls for explicit change or transformation of social and political structures (McIlwaine & Datta 2003, p. 371).

It seems likely that Rosenblum's approach would have a similarly negative outcome. Another problem with removing women and replacing them with 'sex' or 'gender' is that this will obscure political clarity about the purpose of the Convention. The experience in GAD suggests that once an abstract approach such as gender replaces the rights and needs of real people or, in this case, real women, theory is prioritised over justice and form over content. In referring to the CERD as a model, Rosenblum attempts to avert this problem by asserting that the deliberate lack of reference to specific races forms the strength of the Convention (Rosenblum 2011, p. 149). However, the strength of the CERD relies on the unequivocal rejection of discrimination against people as members of racial groups, of which there are a number. As noted above, MacKinnon points out that these groups are socially constituted by their shared experience of injury. Rosenblum's proposal to remove women collectively from focus is significantly different. The CERD does not use its lack of specification to obscure or minimise the experience of any particular group, while replacing women with 'sex' or 'gender' in CEDAW would do just that. Also, as noted elsewhere, at the state level racial discrimination is taken more seriously than is the oppression of women. Removing women from CEDAW would not assist in changing this perception. However, Rosenblum also notes the potential of Article 5(a) to incorporate issues of gender analysis by encouraging the modification of stereotypes and of social and cultural patterns for both men and women (Rosenblum 2011, p. 181). There is no reason why this clause could not be used to greater effect to address many of the issues raised by Rosenblum without destroying the central focus and, therefore, the usefulness of the CEDAW convention.

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<sup>26</sup> The backlash has been identified as a political and ideological trend that encompasses a range of positions that resist or reject feminism: among other things it has been suggested, that women are made unhappy by the gains of feminism and that equality has been achieved, even to the point that men are now oppressed (Code 2000, p. 37; Faludi 1992).

Despite her insistence that the category of women should remain, the approach of Hernandez-Truyol to CEDAW is also problematic. In rejecting the methodology but not the substance of Rosenblum's perspective, she argues that, while a focus on women should be retained, additions and re-interpretations should be used to expand CEDAW so that it is also able to 'cover men as well as issues of gender, gender identity, and sexuality categories' (Hernandez-Truyol 2011, p. 218). Instead of 'unsexing CEDAW' it should be super-sexed. So instead of removing reference to women, Hernandez-Truyol achieves the same neutralising effect by adding everyone else in. Both Rosenblum and Hernandez-Truyol are keen to see broader sexual and gender identities included into an international treaty. This is a worthy goal. However, Rosenblum notes that, if CEDAW were modified in this way, many conservative countries might make further reservations to it (Rosenblum 2011, p. 162). The question is whether modifying CEDAW would assist this goal or whether it would simply wind back any moral or practical gains that have already been made. Human rights can be seen as a historical continuum reflecting a process of change. The rights in the UDHR are least contested, CEDAW is somewhere in the middle and sexual orientation and gender diversity rights are hotly contested. It would be more useful to use CEDAW more actively to protect those women already under its jurisdiction (lesbians and transgender women) in order to pave the way for further international acceptance and a specific international treaty on sexual orientation and gender diversity that has broader coverage. It is curious that neither Rosenblum nor Hernandez-Truyol consider this possibility. There is clearly a gap to be filled at the international level, but their arguments that CEDAW should be used to fill it are, at best, unconvincing. If CEDAW is to have continued potential as a moral, legal and political tool then it needs to retain its activist support base for women's rights. The substantial changes suggested by Rosenblum and Hernandez-Truyol would be hard to sell on the ground and would most likely lead to confusion and fragmentation.

In the end Hernandez-Truyol and Rosenblum agree. The main flaw in CEDAW is its inability to protect vulnerable men (Hernandez-Truyol 2011, p. 223; Rosenblum 2011). However, this is not what CEDAW was created to achieve and there are many other international treaties that can serve this purpose. Many of these vulnerabilities are important and there are many ways that solidarity could be extended, particularly through thoughtful use of the provisions in Article 5(a). CEDAW is not the be-all and

end-all of international agreements, and its modification should not become an unhealthy focus of attention when more productive avenues for addressing important issues of inequality exist, for women and for men. Any of the suggested changes to CEDAW would obscure and marginalise women's rights, not enhance them.

Rosenblum's suggestion to replace 'women' with 'sex' or 'gender' in order to situate CEDAW within universal human rights shows an acceptance of the limitations of the current 'universal' human being gendered male; limitations that Rosenblum does not acknowledge. If the 'universal' were already fully inclusive of women his argument might have more credibility. Equally, Hernandez-Truyol's solution is uncritical of the male-gendered limitations of current 'universalism'.

## **6.5 Culture and Religion**

The approach to culture and religion taken in CEDAW is most clearly articulated in Article 5(a) which directs States to:

take all appropriate measures ... (t)o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

However as previously illustrated in Figure 5 (see Chapter 5, section 5.3) the largest numbers of reservations are on matters attributed to either culture or religion, particularly in regard to women's rights in marriage and the family.<sup>27</sup> Raday (2003) defines culture, religion and gender as interrelated. Culture is a macroconcept, while religion is an aspect of culture and gender roles are derived from both culture and religion. She argues that the clash of culture and religion with gender equality norms occur where the 'cultural norms are at variance with the human rights culture ... [signifying] the traditional and patriarchal' (Raday 2003, p. 666) and that this conflict illustrates two different views of culture, either 'static and homogenous' or changing and 'rife with conflicts and inconsistencies' (Raday 2003, p. 667).

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<sup>27</sup> Many reservations are made under Article 16 (marriage and family life) but it is interesting to note that only 4 countries entered reservations to Article 5(a), perhaps due to a lack of awareness that culture also includes religious norms and practices for the purpose of international law (Raday 2003, p. 680).

As previously indicated in Chapter 4, the complications for women's rights on questions of culture and religion come from at least two political directions. On one side, women's rights are considered incompatible with culture and religion and a danger to these ways of life. This is often more related to the requirements of the powerful within that culture or religion and a desire to maintain political control through these concepts (Mayer 1995; Phillips 2005; Rao 1995). On the other side, accusations about lack of women's equality are often used as political tools to condemn others and to maintain cultural and religious stereotypes, as well as to promote other political agendas such as military interventions (Eisenstein 2007). Narayan (1998) reminds us that, historically 'western values' such as rights for women were not automatically applied across all western contexts. They have only been accepted as the result of political struggles in both western and non-western contexts, as women came to see their applicability in their own circumstances. She cautions feminists about essentialising western and third-world differences in the name of culture and argues that both subsuming of cultures (everyone is fundamentally like us) and an 'othering' of cultures (everyone is fundamentally unlike us) have been used as colonial and imperialist tools. The result of such political disputes is that, as Raday points out, the clash between women's rights and cultural and religious positions has become one of the most 'intractable' in the international arena (2003, p. 665).

It has already been noted that there is a vast difference between the UDHR and CEDAW in the ways that cultural differences are perceived. Objections to the human rights in the UDHR are considered morally suspect (Normand & Zaidi 2008). Many matters previously dismissed as culture are now seen as human rights violations (Hafner-Burton, Tsutsui & Meyer 2008). While there are still some tensions between cultural relativists and universalists, in practice human rights are widely accepted (Normand & Zaidi 2008) and justified through the identification of commonalities across cultures (Sen 2001; Vizard 2000) and agreement on behalf of the drafters (Morsink 1999, 2009). Despite the problems with implementation, the moral authority of human rights is unassailable. Within the UDHR there are both provisions for non-discrimination (Article 2) and for religious (Article 18) and cultural freedoms (Article 27). Nonetheless, a hierarchy between these rights is implicitly introduced through Article 18 (3) of the ICCPR, which states that:



Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others (United Nations General Assembly 1966a).

CEDAW outlines this hierarchy even more explicitly (Raday 2003, p. 678). The position of CEDAW in Article 5(a) on discriminatory cultural and social practices aims to establish the primacy and universal moral authority of a position of non-discrimination and equality for women. However, because they are accepted as grounds for reservations, cultural and religious objections to CEDAW have been emphasised and legitimised. Again, this threatens the ability of CEDAW to become more normative by jeopardising the moral basis of its provisions and declaring them non-universal on cultural and religious grounds. Charlesworth (1995, p. 108) notes that culture and religion have often been judged as being private matters outside the scope of human rights law and that, in practice, cultural and religious freedom overwhelmingly has had priority over women's rights in both international and domestic arenas.

The cultural and religious reservations to CEDAW have been made by state parties, not by women. On behalf of women, the reserving states have made the decision that the cultural and religious practices have priority. Given the highly male-dominated nature of states this seems at best undemocratic and at worst a denial of many women's access to non-discrimination on the basis of sweeping cultural claims that they may or may not agree with. Again this illustrates the problem that CEDAW does not state women's rights explicitly and its complete reliance on state parties, morally and practically, to ensure access to rights. In acknowledging the possibility of clashes between human rights, Sen (2009, pp. 386-7) argues that there should be public and unhindered debate about how rights should be integrated and evaluated against one another. Such reasoning should fulfil requirements of objectivity and survive critical scrutiny. If, for example, both the political circumstances referred to above (whether retaining power or gaining political leverage) were subject to such scrutiny, some of the hidden agendas would be brought to light and issues of clashes between rights would be able to be discussed on their own merits. The Optional Protocol to CEDAW has some potential to provide a forum for such public debate and, provided their state party is a signatory to it, women individually and collectively may have the opportunity to engage

with their own state about the content of cultural and religious reservations to CEDAW. However, to some extent at least, the process of enabling a genuinely free debate on these issues is a circular one. First, women need to have access to infrastructure such as education that will promote their participation and also the autonomy to take up the opportunity (Fraser, AS 1999, p. 904; Raday 2003, p. 710). In addition, as Raday comments:

Consent cannot be taken to validate any practice that denies women the most basic of their human rights and that undermines their very personhood and their capacity for dissent; such practices are repugnant and invalid (2003, p. 710).

While important attempts have been made to be sensitive to cultural diversity and to acknowledge differences and the social importance of various ways of life (Nussbaum, in Raday 2003, p. 706), the rights of women to equality and non-discrimination must take ultimately priority over cultural and religious considerations. The statement at the 1995 Beijing Conference rejecting cultural violations of women's rights is clear:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms (United Nations 1995, p. 8).

The conference statement also refers to the need to eliminate harmful attitudes and practices (United Nations 1995, p. 42).

To make women's rights human rights is to make them increasingly more universal, moral, claimable and normative. Clearly, allowing cultural and religious considerations to trump the rights contained in CEDAW negates this process. While cultural and religious differences between groups and between women are important, their significance must be delimited in regard to woman's human rights norms (Peach 2005, p. 89).

In part, the universal consensus on women's rights is a matter of perspective. As previously noted in Chapter 3, the moral universality of the UDHR is often explained by

historical observations of overlapping agreement on principles, even if the justifications are not always the same. One might make similar points on the overlapping global consensus on women's rights. While the feminist history drawn upon for this comparison would generally be more recent than that of human rights, there is ample evidence of the global appeal of the women's movement even when local and particular contexts are taken into account. The difference here is of course that issues of women's rights and justice are gendered whereas ostensibly universal ones are not. This is just another way that women are currently defined as being outside of the 'universal'.

## **6.6 The woman and the state in CEDAW**

Related to its anti-discrimination focus, one of the significant features of CEDAW is its strong emphasis on the actions of state parties. All international instruments are ostensibly directed at the actions of state parties. However, when CEDAW is compared to that in the three instruments that make up the International Bill of Human Rights, some interesting comparisons emerge. In CEDAW, almost every article begins with a description of what state parties are to do. For example: Article 2 'State parties condemn ...', Article 3, 'State parties shall ...', Article 4, 'Adoption by State parties of ...' and so on. In contrast, the Universal Declaration of Human Rights (UDHR) is focussed on the individual, beginning each article with the terms 'everyone', 'all' and 'no one' (United Nations General Assembly 1948), while the International Covenant on Civil and Political Rights (ICCPR) similarly refers to the rights of individuals in Article 1 and Articles 6-27 (United Nations General Assembly 1966a). Like CEDAW, the terminology of the International Covenant on Economic, Social and Cultural Rights (ICESCR) primarily focuses on state parties, apart from Article 1 which it shares with the ICCPR (United Nations General Assembly 1966b). These differences are not purely semantic. As a non-binding Declaration, all rights were expressed in the UDHR as inherent, inalienable human rights. Once the rights were split into two enforceable Covenants, the civil and political rights of the ICCPR were effectively accorded primacy by the use of stricter enforcement provisions couched in 'the more forceful language of obligation' (Chinkin 1998, p. 113). The social, economic and cultural rights in the ICESCR are to be achieved progressively (Article 2(1) ICESCR, United Nations General Assembly 1966b) while those in the ICCPR are to be respected and ensured (Article 2(1) ICCPR, United Nations General Assembly 1966a).

Part of the original impetus for CEDAW came from the view of women advocating for the Convention that the two Covenants (along with the Convention on the Elimination of All Forms of Racial Discrimination) did not deal effectively with women's rights. In particular, all of these instruments dealt only with acts in the public sphere. CEDAW filled in the gaps left by these instruments, most notably by extending the notions of discrimination and rights to acts in the private sphere (Evatt 2002, p. 516). Nevertheless, as previously noted in this chapter, section 6.3, there are limitations to its focus on the private sphere. The preamble to CEDAW explicitly predicates the Convention on the rights set out in the UDHR and the two Covenants, but it expresses concern that despite the measures contained in these and other edicts and recommendations by the UN and its agencies, that 'extensive discrimination continues to exist' (CEDAW Preamble).

However, by focussing on the elimination of discrimination, and on the actions of state parties to take action to eliminate it, the exact nature of the rights women might conceivably claim was never addressed. As Burrows notes:

In the context of international law it is perhaps misleading to speak of women's rights, because throughout the substantial body of law which relates to the status of women there has been no attempt to define the exact sphere of women's rights nor to enumerate those rights which might be said to be peculiar to women. Existing international declarations and covenants concentrate on the problem of outlawing discrimination in a law and in practice, providing that the rights which the international community recognises as being human rights ... [from the ICCPR and ICECSR] ... shall be available to all irrespective of their sex (1986, p. 80).

The CERD provided a partial blueprint for the approach that was taken in drafting CEDAW and the focus on anti-discrimination was without a defining emphasis on women's rights. In the lead up to the World Conference when CEDAW was adopted, preparation was rushed in order for it to be ready for signatories. This timeline appeared to be main motivating factor rather than the need for a thorough attempt to codify rights for women (Burrows 1986, p. 88). As the preamble and provisions such as Article 11 attest, CEDAW is unable to stand alone and must be read as an addition to the UDHR and Covenants. This makes CEDAW inadequate as a comprehensive 'international bill of rights for women'. As the provisions of the International Bill of Human Rights

enshrine the central 'universal' vision of human beings that is gendered male, this makes the attachment of CEDAW to them clumsy and incomplete.

The 'woman' in CEDAW is missing in other ways as well. CEDAW never overtly frames rights as belonging to women as individuals unless this is in regard to human rights duplicated elsewhere (Article 11(a) or, by implication, Article 16 as marriage rights refer to a contract between two individuals). In CEDAW, rights are always mediated through state action. Women are the recipients, not human claimants, of its provisions. One of the moral strengths of the UDHR is the ability of each individual human being to claim rights. This failure to fully recast the claimant of human rights as female undermines CEDAW's legitimacy.

This impression is strengthened by the original enforcement mechanism of CEDAW, a weak procedure requiring periodic reporting (Article 18) in contrast to the strong mechanisms in the CERD. In the CERD, states could make complaints about another's violations (Articles 11-13) and an individual could make a complaint against a state. To some extent, the adoption of the Optional Protocol to CEDAW makes clearer the application of the provisions in CEDAW to women as individual rights holders. Since 2000, individual women or groups have been able submit complaints to the CEDAW Committee, and the Committee can also initiate inquiries into systematic violations, significantly strengthening the enforcement mechanisms of the Convention. Nevertheless, were CEDAW framed along the same lines as the UDHR and ICCPR, with clauses that stated rights clearly (for example, 'All women have the right to paid maternity leave'), it would be a very different document and have much greater moral authority. It seems no accident that CEDAW shares the focus on state parties of the weaker of the two international Covenants, the ICESCR, which enshrines positive, second generation rights. In Article 2 of CEDAW, '(s)tate parties condemn discrimination and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women', presumably a stronger instruction than that of 'progressive achievement' in the ICESCR (Article 2(1) ICESCR, United Nations General Assembly 1966b) while still, to an extent, implying that the CEDAW implementation process will be processed at an 'appropriate', state-determined pace. As discussed in Chapter 3, the hierarchy between first and second generation rights is reinforced by the use of the language of individual rights to refer to civil and political

rights in the ICCPR and language focussing on state action for the economic, social and cultural rights of the ICESCR (Normand & Zaidi 2008, p. 207). States are instructed to take 'all appropriate measures' in order to eradicate discrimination. These include the introduction of domestic legislation, but they are not limited to it. Also, in defining discrimination, Article 1 includes the words 'or any other field' after the list of categories of rights, thereby indicating that the Convention is intended to allow future flexibility of interpretation. This flexibility has the potential to be useful. However, the normative content for the requirement for states to condemn discrimination is not clear, though it could perhaps be interpreted as being fulfilled through the pursuit of non-discriminatory policies (Burrows 1986, pp. 91-2).

CEDAW has many silences and omissions. In summing up the need for women's rights as human rights, Charlotte Bunch says the following:

The physical territory of this political struggle over what constitutes women's human rights is women's bodies. The importance of control over women can be seen in the intensity of resistance to laws and social changes that put control of women's bodies in women's hands: reproductive rights, freedom of sexuality whether heterosexual or lesbian, laws that criminalise rape in marriage, etc. Denial of reproductive rights and homophobia are also political means of maintaining control over women and perpetuating sex roles and thus have human rights implications. The physical abuse of women is a reminder of this territorial domination and is sometimes accompanied by other forms of human rights abuse such as slavery (forced prostitution), sexual terrorism (rape), imprisonment (confinement to the home), and torture (systematic battery) (1990, p. 491).

If women's bodies are the terrain of women's rights battles, then CEDAW is surprisingly inadequate. The Convention contains nothing on violence, rape or freedom of sexuality and it is silent on abortion. Race and class receive no mention in CEDAW. Edwards (2011, p. 25) notes that that despite duplicating many human rights conditions, CEDAW did not include reference to women as holding a right to life, liberty, security of person and freedom from torture. Once more this suggests that women's main role is not that of a political actor in the public sphere, but instead is that of an adjunct, a subordinate or a victim. As discussed previously in Chapter 5, CEDAW has attempted to remedy many of these issues by passing General Recommendations but this is likely

to become increasingly clumsy. For example, while General Recommendations 12 and 19 have addressed violence against women as discriminatory, philosophically this seems akin to suggesting that a deadly hit-and-run should be addressed primarily through the rules for traffic violations. As previously noted in Chapter 5, the language of DEVAW similarly describes violence against women as a discrete and lesser form of rights violation (Charlesworth 1995, p. 108).

From a current perspective CEDAW looks quite dated, westernised and representative of a liberal feminist view. With its focus on discrimination rather than on the rights of women, interpretations of CEDAW have not been able to grow in the same way as those of the UDHR. If CEDAW were to be drafted today then many of these silences and omissions would need to be remedied. Also it would need to reflect more thoroughly the needs of a broader spectrum of women, allowing for flexibility and diversity while acknowledging women's rights as human rights. The concerns about women's physical autonomy and control of their bodies would need to be addressed and the question of abortion confronted.

While the integration of rights is acknowledged, this could be reflected more effectively in CEDAW to permit it to address redistribution measures. Some additional examples come to mind; the need to reflect the concerns of women in western and non-western, industrialised and non-industrialised contexts, a more nuanced approach to issues about women and work including such work life concerns as the social burden of domestic work and care for the young, old and unwell, which falls overwhelmingly on women. While culture and religion are touched on in CEDAW, a clarification of women's religious freedom and autonomy might be useful, given the debates about issues such as young women wearing the hijab in schools. These examples by no means form a complete list, and a more thorough attempt would need to be made to reflect the needs for equality, justice and a decent life for women globally. As previously indicated the level of detail in Article 14 on the needs of rural women is currently an anomaly within CEDAW and not necessarily fully comprehensive, but it shows that it is possible to provide such direction through a treaty. Due to the focus on removing stereotypes and the acknowledgment of the need for more equal roles in the traditional family, CEDAW goes beyond the public/private distinction. In this, and many other respects it is a significant advance on other treaties. However, CEDAW is not sufficiently robust on

issues of rights for women. This impedes its moral and normative force as well as the ability of women to make rights claims through its provisions.

CEDAW is sometimes interpreted as being potentially more radical than it first appears. Both Roth (2002) and Merola (2004) assert that there are tensions within the Convention. These represent a contrast within human rights discourse between the traditional view of individualised, neutral, negative liberty and non-interference, and feminist concepts of rights for women as positive liberties. This argument centres on both the acknowledgements within CEDAW that if women's equality is to be fully realised, significant social changes are required, and the obligations of states to take action to bring about these changes. Roth acknowledges that, given feminist critiques of the state, a reliance on them as a source of change may seem counterintuitive. He argues that 'alternative instruments of societal reform are in short supply' and that states are more likely to be responsive to 'democratisation' than are other social or cultural institutions, making a focus on state action a viable feminist goal (Roth 2002, p. 213 footnote). This view is not inconsistent with the multi-pronged approach taken by feminist activists. As mentioned above in Chapter 2, feminist activists combine a focus on legal changes at state and international levels with a range of local and grassroots activities ranging from training, support and education to political activities in order to reach their goals (Ackerly 2001, pp. 316-7).

In particular, Roth refers to the type of approach taken in Article 5 (a), the active role of state parties in taking all appropriate measures to 'modify the social and cultural patterns of conduct of men and women' in order to eliminate prejudice, discriminatory practices and stereotyped roles. Roth (2002, p. 192) argues that this shows that CEDAW takes a collective approach to women's rights. If the Convention is applied to its fullest extent, this must be both by attempting to transform women's collective social circumstances rather than focussing solely on individual, legal rights, and also by imposing a collective view of a social good on to all aspects of life in the private as well as public spheres. Roth states that:

The pursuit of positive liberty for women, on effectively equal terms with men, is in tension with the liberal-neutralist commitment to a qualitative limitation on the reach of collective decision-making in social life. Without adopting a 'comprehensive doctrine of human flourishing' – or at least ruling out some such



doctrines *ab initio* – a State can hardly hope to fulfil its obligation ‘to modify the social and cultural patterns of conduct of men and women ... Because the main obstacles to women’s flourishing derive from the present organization of economic, social, and cultural life, rather than from discrete encroachments by the state apparatus, the conditions of women’s flourishing cannot be pursued without a preconceived notion of what women need to be free to do and to be – and indeed, of what the society needs to be if it is to be adapted to the intrinsic needs and characteristics of men and women equally. ‘Prejudices’ and ‘stereotyped roles’ can be so characterised only once a particular conception – or determinate range of conceptions–of women’s flourishing has been authoritatively adopted (2002, p. 211).

Roth is correct in highlighting the importance of a collective approach; after all, individual rights are achieved collectively. However, it is a mistake to view the overall focus of CEDAW’s provisions on the state as a potential strength rather than a weakness. CEDAW may have the potential to shake up some aspects of the status quo by enabling collective challenges to the traditional liberal model of autonomous, male individuals within the public sphere. However, in practice it is not clear that CEDAW challenges state sovereignty through the collectivist vision Roth espouses. All human rights regimes are promotional and rely on the state for implementation. The difference with CEDAW is that women’s rights are solely mediated through the state and are insufficiently constituted as human rights through their attachment to other male-defined instruments. The problem of the missing ‘woman’ in CEDAW is still significant for the reasons outlined above – the individual woman whose unique human rights demand to be honoured in their own right and for no other reason that she is a woman. If one of the substantial strengths of the human rights concepts is that they are the inalienable rights of every individual, then this must be guaranteed to women first. If women are not yet seen as human, collective challenges can never be mounted from a position of strength.

Nevertheless, Roth puts forward an impressive argument that CEDAW imposes a view of the social good that demands the adoption of a doctrine of human, and women’s, flourishing. Given that CEDAW focuses on the elimination of discrimination rather than on rights and has a number of significant silences and omissions, it does not

itself provide such a vision of women's flourishing. This project has been taken up by, among others, Martha Nussbaum.

## **6.7 Capabilities and CEDAW**

Many of the obvious limitations to current conceptions of women's human rights have been addressed by Martha Nussbaum's 'capabilities approach'. Her approach stems from her philosophical reflections on human functioning based on the work of Aristotle, Marx and others, and also from collaborations with Amartya Sen (Nussbaum 2000a, 2000b). It sets out conditions that give people the capability to have a truly human quality of life: a position that has obvious importance for women and other disadvantaged groups. Additionally, she argues for an ethical foundation for all decisions made on public policy and development: an important consideration for realising social and economic gains (Nussbaum 2001, p. 142). Nussbaum provides a list of key capabilities which she proposes as a political tool to help to clarify requirements for justice. Sen uses capabilities in a more general way to evaluate the relative merit of different life opportunities (Nussbaum 2000b, 2007, 2011; Sen 2009, p. 232). Nussbaum's list is a concrete approach that can be compared more easily to that of human rights treaties, so her work will be the focus here rather than that of Sen.

Her approach has the advantage of acknowledging commonality in human requirements for flourishing while also being flexible enough to accommodate differences (Sayer 2004). Charlesworth has described Nussbaum's capabilities as 'a more detailed, and modern, prescription than offered by international human rights treaties' (Charlesworth 2000, pp. 68-9) that could easily be integrated into the work of existing bodies that monitor treaty compliance. In fact the work of both Sen and Nussbaum has had a strong influence on United Nations development bodies and other agencies since 1990. The language of capabilities<sup>28</sup> is becoming more prominent and there is an increasing acknowledgement that women's overall empowerment is linked to socioeconomic development outcomes (Charlesworth 2000; Dean, H 2004a, p. 11; Division for the Advancement of Women 2008; Freeman 2002, p. 177; Kapitsa 2008; Nussbaum 2007). The broad application of a capabilities approach would more clearly shift the focus of compliance away from legal protections alone and towards an

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<sup>28</sup> However, Hartley Dean (2004a) notes that this may be in a limited, conservative and apolitical context. For example, he asserts that the approach to capabilities in the remainder of the UNDP Human Development Report 2000 is different to Sen's introductory comments in that it used the term in a way 'akin to that of human or social capital ... (d)velopment is assumed self-evidently to require economic growth and rights to require liberal democracy' (Dean, H 2004a, p. 11).

assessment of whether women have access to conditions that allow full human functioning (Charlesworth 2000). A full exploration of the potential usefulness of Nussbaum's capabilities approach is beyond the scope of this thesis. Its central tenets will be outlined here along with a summary of its potential for resolving many of the criticisms raised. However, while capabilities are conceptually useful, rights are still needed in order to give them force.

Nussbaum has identified a list of 10 central human capabilities (2007, pp. 23-4)<sup>29</sup> that are universal enough to support truly human flourishing. These are life; bodily health; bodily integrity; sensory development and expression along with imagination and thought; emotional health; practical reason; affiliation (personal and political); relationships with other species and nature; play; and control over one's material and social environment (Nussbaum 2007, p. 21). Nussbaum acknowledges that this list is not fixed and that further additions might be useful (Nussbaum 1995, p. 74; 2011). She rejects the distinction between first and second generation rights, and similarly to Donnelly (2003, p. 30), agrees that '(a)ll rights, understood as entitlements to capabilities, have material and social preconditions and all require government action' (Nussbaum 2007, p. 21). Also the list of 10 capabilities has much in common with the human rights contained in the UDHR (Leahy 2011, p. 53). For women the advantages of the capabilities list are many: bodily integrity, autonomy and capabilities that would require recognition and redistribution are all included in one form or another. One major advantage of the capabilities approach is that it successfully includes the experiences of women as full human beings into a universally applicable package. Some argue that it does this incompletely. For example, Leahy (2011) argues that capabilities in particular must address the issue of care for the young, old and ill as this is a social role that women are most often called on to play. Leahy adds four additional capabilities to those of Nussbaum: care, living with others, equality, and sustainability (Leahy 2011, p. 234). She argues that care and equality are linked. Obligations to provide care, as well as the ability to receive it, must be shared equally for women's freedom not to be compromised (Leahy 2011, p. 264). However, as Leahy points out, such additions are not incompatible with Nussbaum's vision of her capabilities list as open to modification.

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<sup>29</sup> See Appendix C for Nussbaum's full list of central human capabilities.

Charlesworth also queries the link in Nussbaum's work between feminist internationalism and universalism, suggesting that an unfixed list is a broader use of universality than is used in international law, where universal and relative values are often counter-posed. Charlesworth (2000, p. 75) prefers an approach of 'transversalism', an emphasis on dialogue, acknowledgement of complexity and multiple contexts, allowing room for an acknowledgement of the particular. There is the danger that the strength of universality might be lost through transversalism if the emphasis became too heavily weighted towards differences rather than commonalities. However, as discussed in Chapter 2, it is possible to find a way out of the deadlock between relativism and universalism by employing what Duquette calls a 'pragmatic and historicist' approach or the 'weak ontology' perspective of White (Duquette 2005, p. 67; White 2000). These incorporate reasonable assumptions about human commonality and requirements for life but allow for their modification, with universal rights retaining moral force and relevance while still evolving through a dialectical (Donnelly 2003, p. 15) historical process. As previously explained in Chapter 4, a range of current feminist approaches also tend towards a 'thin' universalism.

Nussbaum argues that the political basis of her capabilities approach is that 'human abilities exert a moral claim that they should be developed' (2000a, p. 233). In articulating the relationship between rights and capabilities she argues that they are closely linked but that 'the language of capabilities gives important precision and supplementation to the language of rights' (Nussbaum 2008, p. 601). This relationship is important. From an international law point of view Charlesworth (2000, p. 77) notes that, on its own, the language of capabilities removes the force from some concepts. While capabilities are an important development in the conception of human flourishing and serve a useful purpose in bringing women as human beings more fully into a universal concept, they still need to be paired with rights in order to be realised. Hartley Dean argues that:

Rights represent a mode of discursive struggle. Rights provide a medium through which demands may be framed and concessions secured. Ultimately, rights are negotiated, not determinate; they are constitutive of our personhood, not contingent upon it. It is through rights we can give expression to our needs, on the one hand, and our capabilities, on the other (2004b, pp. 200-1).

Hartley Dean argues that rights perform an essential function by translating capabilities into needs that must be met as societal preconditions for capability achievement. Equally, rights make these needs into normative standards, enabling capabilities. He suggests that rights are essential to this process as an 'ethical device' (Dean, H 2004b, p. 204). If Nussbaum's capabilities approach (with modifications where appropriate) were to be fully integrated into CEDAW's operation as a vision of human flourishing, this would be a step forward if states could be prevailed upon to implement Article 5 (a) more actively, as Roth (2002) suggests. While the increased international visibility of the capabilities approach is useful, without the concrete demands of rights, capabilities would be much less effective.

To be most effective as a human rights instrument, CEDAW needs to be universal, moral, normative and claimable. Linking CEDAW with a capabilities approach has the potential to assist in the first three of these areas and strengthen the moral authority of women's rights as human rights. As noted previously, further research in this area is required beyond the scope of this thesis. As indicated in Chapter 2, claimability involves a complex series of interlocking processes, institutions, responsible agents and claimants within a context of political change from above and from below. While the practical means of making them real are at the heart of women's rights, the moral strength of rights provides much of the force to keep it beating.

## **6.8 Conclusion**

In this chapter I have argued that CEDAW has strengths but many significant flaws. While addressing both recognition and redistribution, it is weighted towards recognition. It has a weak approach to discrimination with less moral force, and its equality based approach does not reflect women's different life conditions. Reservations have been allowed to undermine its normative force in favour of cultural and religious considerations, and the woman as the human claimant of rights is missing from CEDAW. Nevertheless,, there is the potential for several provisions to be used to good effect, particularly in regard to special measures and the removal of stereotypes. Consequently, as an important legal tool for women's human rights, it must be protected from proposals to remove or reduce its focus on women. The use of Nussbaum's capabilities approach in concert with CEDAW has the potential to alleviate many of its

flaws and improve its moral normativity and universality, a potential which should be explored through future research

## Chapter 7 – Conclusion: Demanding to be human

CEDAW was adopted in 1979, more than 30 years ago. As a UN human rights treaty, it was designed as a tool to advance women's rights by promoting the elimination of discrimination. Like other human rights regimes it is a mechanism 'to build common normative ground' (Zwingel 2005b, p. 26). This thesis has shown that while CEDAW has been central to international efforts to achieve rights and equality for women, it has rarely been examined critically. This reluctance to examine CEDAW critically is problematic because the treaty then becomes a rarefied symbol of women's rights and equality rather than a living instrument assessed on its merits normatively and in terms of results.

As the Universal Declaration of Human Rights sets the standard by which the success and moral authority of human rights treaties can be measured, and CEDAW has been compared to an 'international bill of rights for women' (Office of the High Commissioner for Human Rights 2009), this thesis has used philosophical enquiry to set out a comparison between CEDAW and the International Bill of Human Rights (the non-binding UDHR and binding Covenants). Similarities and some significant differences have been found. As a UN treaty, CEDAW fits within the UDHR model of rights: it addresses first and second generation rights (civil, political, social, economic, and cultural) and it is promotional in that it relies on state parties for implementation (Donnelly 2003; Zwingel 2005b). Procedurally, its treaty bodies and processes are also similar to those of other human rights treaties. However this thesis, has established that the CEDAW treaty itself is unequal to equivalent human rights treaties. In particular, CEDAW compares unfavourably with the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The most glaring difference between CEDAW and comparable instruments is the large number of reservations, the most of any international treaty (Arat 2008; Mayer 1995; UN Women 2011-2012b). Many of these contradict the 'object and purpose of the treaty' under Article 28 of CEDAW (Arat 2008, p. 179; Mayer 1995). While technically it has the commitment of a large number of state parties, in practice this is far from the case. CEDAW's reservations procedure undermines the moral authority of

the treaty in two ways. First, the reservations process fails to protect the treaty's integrity by enshrining the conditional nature of state commitments. There is no collective process for deciding the validity of a reservation and no adequate process for their review (Riddle 2002). Second, CEDAW capitulates to conservative state positions by allowing multiple reservations on cultural and religious grounds. This creates a de-facto hierarchy of rights that prioritises cultural and religious considerations over women's right to non-discrimination and undermines the normative potential of the treaty. A de-facto hierarchy of rights is in direct contradiction not only to CEDAW, but also to Article 18(3) of the International Covenant on Civil and Political Rights (ICCPR) in which freedom of religion is limited if it impinges on the rights and freedoms of others (Raday 2003). This also sends an additional message that it is morally acceptable to reject CEDAW's universality on cultural and religious grounds. Such reasoning is not deemed acceptable in regard to objections to the UDHR and would be considered morally suspect (Hafner-Burton, Tsutsui & Meyer 2008, p. 116; Normand & Zaidi 2008, p. 9).

Historically the difficulties surrounding CEDAW have been the subject of much comment: pointing to a hasty drafting process (Burrows 1986); a relatively weak Committee, hamstrung by short meeting times and interaction with state parties limited to public comments on country reports (Riddle 2002); and a lack of institutional support within the UN (Donnelly 2003; Lawson 1996; Zwingel 2005a). While there have been new developments such as the Optional Protocol to CEDAW (OP-CEDAW), which provides a new complaints procedure, and renewed support for the UN's work on women's rights through the consolidation of the new agency UN Women, it remains to be seen whether these changes are able to challenge the status quo (MacKinnon 2006; Rosche 2011).

If CEDAW is to be considered an 'international bill of rights for women' it has to fulfil a number of functions. Like the International Bill of Human Rights it should provide both a universal moral statement (akin to the UDHR) and a binding instrument outlining a full spectrum of rights (like both Covenants combined). As an international human rights treaty CEDAW establishes a moral foundation for women's rights. It frames this as the 'elimination of discrimination' and promotes equality with men. The requirement to eliminate discrimination covers political, economic, social, cultural and



civil arenas and also ‘any other field’ (Article 1, CEDAW). This broad scope applies to public and also private spheres, addressing the concern that other international treaties concentrate purely on the public sphere.

However, CEDAW is inadequate as a bill of rights in several respects. Many feminists have argued that it is not comprehensive and has a number of important omissions and silences – the most glaring being the omission of any mention of violence against women. While there is a view that General Recommendations to CEDAW help to fill these gaps and make CEDAW a living instrument by providing further interpretations (Cartwright 2007; Chinkin 2010, p. 6), these are considered ‘soft law’ and are not legally binding (Schöpp-Schilling 2004). Also, it seems likely that, at some point, the level of General Recommendations will make CEDAW unwieldy, especially as they depart further and further from the text, remaining anchored to it only by the non-discrimination clause in Article 1.

CEDAW was never designed to stand alone but to work in tandem with the International Bill of Human Rights to fill in gaps where those rights were not applied appropriately to women, most notably extending rights into the private sphere (Evatt 2002). The preamble specifically states that CEDAW builds on the rights in the UDHR and Covenants and without these as backing, it is patently incomplete as a human rights instrument. This is due to the focus on state parties, who mediate the provisions in CEDAW. Such a focus makes women recipients of its provisions, not agents empowered to employ its human rights provisions as claimants. Without reference to the human being of the UDHR, CEDAW cannot provide any human rights with the kinds of characteristics outlined in Chapter 2. That is, human rights that are universal, moral, claimable and normative.

The fact that CEDAW was designed to work in tandem with the International Bill of Human Rights creates additional problems. In the Universal Declaration model, the human being who claims ‘universal human rights’ is gendered male. The Universal Declaration model (with its emphasis on generations of rights and on the public sphere) does not respond fully to women’s experiences (Charlesworth 1994b, p. 59). While to an extent it recognises discrimination against women in the private sphere, the public sphere is still CEDAW’s primary focus (Charlesworth 1994b, p. 64).

The 'woman' in CEDAW is therefore missing in two ways. First, the non-discrimination approach of CEDAW does not set out rights for women (Burrows 1986; Gould 2008). Second, the allowance of extensive and untouchable cultural and religious reservations to CEDAW places women's rights in a subordinate position, reinforcing the position of women as outside the 'universal' individual human rights of the UDHR. This undermines the goal for CEDAW to provide an internationally recognised moral foundation for women's rights.

CEDAW also relies mainly on the language of equality with a male-centred norm as its reference for solutions. Although this gender-neutral language is supplemented by gender-corrective language, which suggests a more active (and women-centred) approach, the more passive approach of removing discrimination is dominant (Kaufman & Lindquist 1995, pp. 14-5). The provisions in Article 4 that allow temporary special measures to encourage faster progress towards equality have the potential to be more broadly useful, but these may be resisted by the status quo. This is shown in the UN itself by the lack of gender balance in UN hiring practices, despite special measures being in place since 1999. MacKinnon points to another problem with CEDAW. It uses weak language in regard to discrimination compared with the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and fails categorically to reject sexism as false (which the CERD does in regard to race) (MacKinnon 2006, p. 11). Again this places women's rights lower in a hierarchy of rights. Women's oppression is taken less seriously at an international level than is racial oppression (Charlesworth 1994b, p. 65).

Women's rights must be seen as human-rights-in-transition. Viewed as a historical continuum, the human rights concept reflects a dialectical process of change (Donnelly 2003, p. 15). It has been more than 60 years since the UDHR was signed and more than 30 since CEDAW was ratified. Human rights are best described as an ethical system with several elements. At the core of human rights are moral claims. These are, at intervals, enshrined as legal rights and also form the basis of political agitation for further moral and legal rights. Consequently, human rights evolve over time. This can be illustrated through the progress of current human rights claims. While the human rights in the UDHR are little contested, the acceptance of those in CEDAW is somewhere in the middle, and recent calls for rights on the basis of sexual orientation

and gender diversity, such as gay marriage, are strongly contested. Therefore, while current international treaties are important, they cannot be viewed as being the final word on rights.

While there are other salient characteristics, human rights (as an ethical system) must be expressly universal, moral, claimable and normative. These four characteristics give human rights their force. Establishing a universal perspective in a world of differences may seem difficult, but various authors propose arguments that mediate between universalism and cultural relativism. Duquette (2005, p. 70) suggests a ‘pragmatic-historicist’ approach that acknowledges human rights as evolving, while grounding them in shared moral concerns, White (2000) describes various authors’ tendencies to retain universality and flexibility as ‘weak ontology’ and supports its advantages (Ackerly 2001; White 2000). Making human rights claimable is arguably the most difficult. Sen (2001, 2009) suggests that, from a philosophical perspective, rights must generate both perfect and imperfect obligations if the full spread of rights (negative as well as positive) is to be achieved. James (2003) highlights the interlocking forces on the ground – institutions, responsible agents and human rights claimants. A wide range of political actors are also at work at transnational, national, local and grassroots levels with forces exerting pressure from above and from below (Ackerly 2001; Gready 2004, Zwingel 2005b). While human rights are never guaranteed they have continued to expand and develop, showing continued potential for addressing injustices and enhancing human lives. Human rights in general have difficulty becoming claimable, but are more established as universal, moral and normative, while women’s rights in particular still struggle towards achieving all four attributes.

Considering that CEDAW has an unequal status with the UDHR and comparable human rights treaties, it would benefit from an increased moral standing equivalent to that of the UDHR. The UDHR and CEDAW are distinct points along the timeline of both human rights and women’s rights, each representing some of the strengths and weaknesses of the historical period of their drafting and the ideological perspectives that were pushed together during their respective drafting processes. The non-binding vision of universal human rights of the UDHR was forged from competing interests (western, Soviet bloc and developing countries) in shared horror at the holocaust and solidarity after WWII (Morsink 1999). While women fought for, and won the use of non-gender

specific terms throughout the UDHR such as ‘everyone’ and ‘no one’, and there is the specific prohibition of discrimination on the basis of sex, the UDHR still had other flaws from a women’s perspective. For example, it includes the right to privacy within the family (limiting its scope to the public sphere) and it focuses on a ‘breadwinner’ wage (Morsink 1991).

The UDHR was clearly insufficient to provide rights for women within its provisions, leading to a range of other international treaties and, finally, to the drafting of CEDAW – the most significant acknowledgement of a gender bias within the UDHR and arguably also an acknowledgement of the gendered nature of the human rights concept itself. The CEDAW treaty was highly controversial: the result of negotiations by women delegates from diverse national, political, cultural and religious backgrounds, with more general conflicts between ideologies (western, communist, free market and religious) operating in the background (Rehof 1993, p. 2; Zwingel 2005b, p. 104). CEDAW reflects the success of a particular set of delegates, women with secular backgrounds from western, socialist and (less often) from developing states (Zwingel 2005b, p. 104). Along with the rush to prepare CEDAW for signatures at the 1980 World Conference of the UN Decade for Women in Copenhagen (Burrows 1986, p. 88), these competing positions led to weaknesses in the document. Despite its binding nature, CEDAW has a much reduced authority in comparison to the UDHR. This is not only due to the controversial nature of women’s rights and the difficulties with establishing their moral importance as human rights. Women’s rights as human rights pose a whole range of challenges to the status quo in regard to culture, religion and also to the economic and social organisation of society. While CEDAW does not fulfil all of the requirements for both social *recognition* and economic *redistribution* (Fraser, N 1999) that would create full equality and rights for women, it is radical enough to shake up the existing order, as shown by the high number of reservations.

If it is to have ongoing relevance, CEDAW must be evaluated against more recent developments that consider the relationships between human rights, women’s rights and international law. If CEDAW, or any women’s rights instrument, is to reflect human rights as an ethical system, with the characteristics of being universal, moral, claimable, and normative, the question of universality must be answered. That is, we must establish whether all women can be seen to have a level of common, universal interest

or whether women's diversity makes this impossible and undesirable. Feminism has followed a trajectory towards a transnational approach. It incorporates a range of lessons from the feminist movement, including respect for diversity, while reaffirming a level of common struggle. This transnational approach suggests that international feminist solidarity and a level of common struggle are possible, while still encouraging the development of more localised solutions and encouraging democracy and debate through international dialogue. In particular, such an approach rejects the post-modern feminist contention that any attempt to find a universal would only serve continually to displace and marginalise other points of view (Steans 2006, p. 17). The approach also rejects the anti-feminist position of the backlash (Code 2000, p. 37; Faludi 1992).

Intersecting with the transnational feminist view is the approach that 'women's rights are human rights' prominent since the 1993 Vienna Conference. Here women drew attention to the fact that the full range of human rights were not being applied to women, particularly in the case of violence against women (Bunch & Frost 2000; Edwards 2011; Elson 2006; Gallagher 1997). This process has rejuvenated the approach to women's rights within the UN and in particular, has led to the drafting of a new international declaration, the Declaration on the Elimination of Violence against Women (DEVAW) (Elson 2006). The 'women's rights are human rights' approach implicitly acknowledges that the moral authority of human rights would be useful for women in two important ways. It has provided a legitimate mode of collective struggle for women, particularly important since the significant demise of the left (Elson 2006). Human rights also provide a well-recognised and supported discourse that, by illustrating the human rights abuses suffered by women, is able to bypass the success of the anti-feminist backlash in creating anti-feminist sentiment and demobilising women (Brooks 2002, pp. 359-61).

Some of the effects of the backlash illustrate that CEDAW's flawed ability to recast the human claimant of human rights as female should not be overlooked. One of the problems that have arisen in recent years is the tendency towards a 'gender' rather than a 'rights' based approach. The shift from women's rights towards a 'gender' (neutralised) approach has been described as caving in to such a backlash (McIlwaine & Datta 2003). This has led to an instrumentalism in organisations that subsumes women's concerns within existing agendas (Baden & Goetz 1997; Moser & Moser 2005). The

focus of CEDAW on ending discrimination against women has also come been criticised for not being inclusive enough, with suggestions that it should be either 'unsexed' (replacing reference to women with 'sex' or 'gender') (Rosenblum 2011) or 'super-sexed' (adding in other dimensions of discrimination such as sexual identity and gender diversity) (Hernandez-Truyol 2011). While these calls show concern that international instruments should be used effectively for the purpose of ending all discrimination, by neutralising the centrality of women to CEDAW they would be detrimental for women. Subsuming women as the subject of CEDAW either partly (Hernandez-Truyol 2011) or fully (Rosenblum 2011) would encourage further instrumentalism. If a 'gender' approach were employed, experiences within the gender and development arena suggest that it may be used in a purely descriptive way that does not promote rights and leads to demobilisation, instrumentalism and confusion (McIlwaine & Datta 2003). These calls clearly reinforce the view that CEDAW does not function as a 'bill of rights for women'. A true 'bill of rights for women' would not lend itself so easily to suggestions to remove or reduce the focus on women.

CEDAW is sometimes also referred to as the UN Convention on the Rights of Women (Pietilä 2007, p. 27). Along with the characterisation of CEDAW as a 'bill of rights for women', it has been described as 'the expression of the universal standards of women's human rights' (Acar 2009, p. 1). These characterisations suggest that there is no significant difference between the elimination-of-discrimination approach taken in CEDAW and a women's rights approach. Piettla notes that:

In fact, the Convention does not imply any specific women's rights, but is a reflection of the reality that universally recognised human rights are still not enjoyed by women and men. If they were, no convention on the elimination of discrimination against women would be needed. The very necessity of this Convention is revealing and paradoxical, and it bears witness to continuing discrimination (2007, p. 27).

This acknowledges that the main aim of the treaty is not so much to set out women's rights as to outline the elimination of discrimination; not what should happen, but what should not happen. The capabilities approach of Martha Nussbaum has potential to help alleviate this problem if applied in concert with CEDAW. Capabilities are conditions that allow people to live with dignity and a truly human quality of life.

Nussbaum proposes a list of 10 central capabilities which she acknowledges might admit modifications (Nussbaum 2007, p. 21; 2011). Capabilities have a number of advantages. They allow for common human requirements for flourishing while allowing for differences (Sayer 2004). They move away from purely legal protections to encompass assessments of economic and social conditions (Charlesworth 2000). A signal advantage is that they successfully incorporate the experiences and needs of women (such as bodily integrity, for example) into a universal approach. Further research is required to explore the relationship between capabilities and rights and examine the potential for capabilities to enhance both the definition and scope of women's rights.

However, while capabilities 'add precision and supplementation to the language of rights' (Nussbaum 2008, p. 60), they must work in tandem with rights to have force. If capabilities can be seen as the outcome and human needs as the assessment of conditions for their achievement, rights perform a central role between the two. Rights translate capabilities into needs and, conversely, make needs into normative standards that enable capabilities to be fulfilled (Dean, H 2004b). Applied in concert with CEDAW, capabilities could assist in promoting three of the characteristics of effective human rights: that they be universal, moral and normative. While making rights claimable (the fourth characteristic) is complex and often difficult, strengthening these other characteristics makes claimability easier and violations of rights harder to justify.

Through the human rights treaty system the United Nations has a goal to promote human rights and freedoms. It explicitly positions itself as standard setting in regard to women's rights (Office of the Special Advisor on Gender Issues and Advancement of Women & Office of the Focal Point for Women 2010, p. 3). The significant concerns with CEDAW outlined in this thesis, the weaker approach of DEVAW in regard to violence against women (Charlesworth 1995, p. 108) and the problems within the UN structures and processes suggest that there is a worrying level of equivocation about women's rights at the international level. This is despite the prohibitions of discrimination on the grounds of sex in international human rights treaties. International leadership is important, however, particularly because one of the UN's greatest strengths is its moral authority on human rights questions. UN Secretary-General Ban Ki-moon acknowledges that the UN itself is not blameless in regard to women's

inequality and that also much more needs to be done to address these issues across civil society (Ban Ki-moon 2010). CEDAW's provisions have been inadequately translated into equality and justice for women. Nowhere have women achieved full parity with men (Ban Ki-moon 2010; United Nations Development Programme 2010, p. 10). However, there have been some improvements in women's legal rights. Yet, while legal rights are part of the process, an important caveat is that legal rights do not always translate fully into equality and justice (Kaufman & Lindquist 1995, p. 118; UN Women 2011-2012b, p. 1). Peters and Wolper argue that:

If the Women's Convention has been rendered virtually impotent by the addition of reservations antithetical to its spirit and intent it is nonetheless a major step – indeed, a first step – in the promotion of corrective legislation (1995, p. 4).

Human rights embody a process, incomplete without normativity and claimability in practice. Many difficulties arise with the realisation of women's rights, with efforts to address international, national and local concerns complicated by political and economic considerations and trends, including that of globalisation. As a legal tool, a human rights treaty is only one part of the dialectical (Donnelly 2003, p. 30) human rights process. However, it serves as both a signpost (giving direction) and a marker (indicating a point along the way). In noting some of CEDAW's achievements and weaknesses, Okin observes that:

The first declaration specifically aimed at women's human rights, the CEDAW, departs from gender-neutral language to address issues such as maternity leave, pregnancy-related health care, and affirmative action for women in education and employment. However, in the last 20 years it has been increasingly recognised that taking women seriously as equal human rights claimants with men requires considerable rethinking of the concept of human rights (1998, p. 34).

On the one hand, many organisations and individuals have spent a great deal of time and energy over more than three decades in trying to build up the authority of CEDAW. If used effectively in concert with a capabilities approach, CEDAW may have greater potential to address women's concerns. On the other hand, CEDAW has a number of significant flaws and the General Recommendation process may continue to make it unwieldy. Women globally need to consider what else might be required at the



international level, in both law and in international processes, such as UN forums and agencies, to provide greater clarity and direction on issues of women's rights. The continued integration of a capabilities approach seems likely to form part of these solutions, as do additional human rights treaties that unequivocally address women's rights. In this regard, the focus of CEDAW on the elimination of discrimination could be a blessing in disguise. It leaves open a range of possibilities, including setting out women's rights as human rights that women as individuals (on their own or in groups) can unquestionably claim. Whatever is decided, the international authority of human rights must be harnessed as the best moral, legal and political tool currently available for garnering broad support and agreement on matters of equality and justice. Definitively, the process of reshaping the human rights concept must be done so that women are included within it. 'Women's rights are human rights' should no longer be a demand but a matter of fact.

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# Appendix A – CEDAW

## CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

### PREAMBLE

The States Parties to the present Convention,  
Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialised agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialised agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realisation of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## **PART I**

### Article 1

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

#### Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

#### Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

#### Article 5

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

#### Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

## **PART II**

#### Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

#### Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

#### Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

### **PART III**

#### Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same Opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

#### Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;

- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

#### Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

#### Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

#### Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including

their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

#### **PART IV**

##### Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

##### Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## **PART V**

### Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.
7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

#### Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

#### Article 19

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

#### Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee (amendment, status of ratification).

#### Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

#### Article 22

The specialised agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialised agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

### **PART VI**

#### Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.



#### Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.

#### Article 25

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

#### Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

#### Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

#### Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorised, have signed the present Convention.

(Source: United Nations General Assembly 1979)

# Appendix B – UDHR

## UNIVERSAL DECLARATION OF HUMAN RIGHTS

### PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

#### Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

#### Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

#### Article 3

Everyone has the right to life, liberty and security of person.

#### Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

#### Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

#### Article 6

Everyone has the right to recognition everywhere as a person before the law.

#### Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

#### Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

#### Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

#### Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

#### Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

#### Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

#### Article 13

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

#### Article 14

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

#### Article 15

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

#### Article 16

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

#### Article 17

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

#### Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

#### Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

#### Article 20

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

#### Article 21

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### Article 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

#### Article 23

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

#### Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

#### Article 25

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

#### Article 26

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

#### Article 27

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

Article 29

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

(Source: United Nations General Assembly 1948)

## Appendix C – Martha Nussbaum’s Central Human Capabilities

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and to reason-and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development).

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance).

7. Affiliation.

A. Being able to live with and toward others, to recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech).

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.



9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control over One's Environment.

A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation and protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

(Source: Nussbaum 2007, pp. 23-4)