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Legal Studies Research Paper No. 459

Women's Rights

Dianne Otto

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WOMEN'S RIGHTS

Dianne Otto

Summary

International human rights law prohibits discrimination against women in their enjoyment of all human rights and fundamental freedoms. While non-discrimination is an essential component to the realisation of women's rights, its comparative approach measures women's equality against men's enjoyment of rights, reinforcing the masculinity of the universal subject of human rights law, whose rights are fully promoted and explicitly protected. To the extent that violations experienced exclusively or primarily by women are expressly recognised in the founding human rights instruments, they are treated as a sub-category of the universal and formulated as 'protective' measures rather than as human rights. There have been many efforts to address the resulting marginalisation of women's rights, including the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the mainstreaming of women's human rights. While these efforts have been successful in many respects, there are continuing conceptual and practical problems including, not only the limitations of anti-discrimination law, but the danger that specific recognition of women's rights violations may simply reproduce women's secondary status.

1. Introduction

In 1945, the Charter of the United Nations (UN Charter) recognised the principle that human rights and fundamental freedoms should be enjoyed by everyone 'without

distinction as to ... sex'.¹ Since then, international human rights instruments have repeatedly affirmed that women and men must equally enjoy the human rights they enumerate, without discrimination on the ground of sex.² The new era of universal human rights promised women, for the first time in international law, the full recognition of their humanity, marking a decisive break with the long-standing legal representation of women as lacking full legal and civil capacity. Significantly, the promise of equality also extended to the private realm of the family.³ Women were no longer to be treated as the dependents of men, or as the property of their fathers or husbands.

Yet there has been widespread resistance to taking these obligations seriously, as evidenced by the many sweeping reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁴ some of which clearly defeat its object and purpose.⁵ As former UN High Commissioner for Human Rights, Louise Arbour, said in a statement to the Human Rights Council in 2008, 'women and girls continue to be regarded as lesser beings in many corners of the world', despite the adoption of the Universal Declaration of Human Rights (UDHR) 60 years earlier.⁶ Restrictions on women's freedom of movement, discriminatory property and inheritance laws, and practises such as male guardianship continue to 'put women at

¹ *Charter of the United Nations*, UNTS, art 1(4).

² See, for example, *Universal Declaration of Human Rights* (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 2; *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2(2) and 3; *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) arts 2(1) and 3.

³ UDHR ibid art 16(1). See further ICCPR ibid art 23(4).

⁴ *International Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW).

⁵ B Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women', (1991) 85 *AJIL* 281; R Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', (1990) 30 *Va J In' L* 643.

⁶ 'Statement by Louise Arbour, UN High Commissioner for Human Rights, on the occasion of the 8th Session of the Human Rights Council', Meeting on Human Rights of Women, Geneva, 5 June 2008.

the risk of being subjected to abuse, violence and oppression, both inside and outside their homes'.⁷ In some countries, past hard-won advances towards the recognition of women's rights are now under threat, or have been wound back, in the face of cultural or religious 'fundamentalisms'⁸ or in the name of thwarting international terrorism.⁹

The grim reality is that women fare considerably worse than men on almost every indicator of social well-being, despite the assumption by all states of at least some international legal obligations to promote their equal enjoyment of human rights, and despite many good intentions. Violence against women continues to be pervasive around the world, endangering women's lives in both public and private spheres.¹⁰

The World Health Organisation estimates that, every day, 1,500 women and girls die of preventable complications related to pregnancy and child-birth.¹¹ As an international group of eminent global leaders, brought together by Nelson Mandela, recently observed, religious teachings and customary practises 'have been [mis]used throughout the centuries to justify and entrench inequality and discrimination against women and girls', denying them 'fair access to education, health, employment, property and influence within their own communities'.¹² Women's inequality is still widely regarded as 'natural' and as prescribed by religious teachings and cultural traditions.

⁷ Ibid.

⁸ Report of the Secretary-General, 'In-depth study on all forms of violence against women', A/61/122/Add.1, 6 July 2006, para 58.

⁹ S Faludi, *The Terror Dream: Fear and Fantasy in Post-9/11 America* (Scribe, Melbourne 2008).

¹⁰ Report of the Secretary-General (n 8) paras 363-364.

¹¹ Human Rights Council, 'Preventable maternal mortality and morbidity and human rights', Res 11/8, 27th meeting, 17 June 2008, paras 1 and 2.

¹² The Elders, 'Equality for Women and Girls', 2 July 2009, <http://www.theelders.org/womens-initiatives>.

Although the lack of political will presents an extremely significant barrier to the realisation of women's rights and equality, it is not the only problem. International human rights law itself presents some obstacles. As Costas Douzinas has observed, human rights 'construct humans', rather than the reverse, and therefore '[a] human being is someone who can successfully claim rights'.¹³ This presents a conundrum for women's human rights advocates because, in crafting laws that respond to the gendered realities of women's lives, there is the risk of reconstituting gender stereotypes through reproducing those realities, rather than challenging them. At the same time, 'special' measures designed to address women's specific injuries and disadvantage continue to affirm the maleness of the universal subject of human rights law, who needs no special enumeration of his gender-specific injuries.¹⁴ Hilary Charlesworth has called this the 'paradox of feminism'; whether women's rights are best protected through general norms that treat women as the same as men, or through specific norms applicable only to women.¹⁵ Ultimately, the paradox forces us to ask hard questions about how women's inclusion as full subjects of the universal regime of human rights law might be achieved.

This chapter examines the many efforts to promote women's equality and rights through international human rights law, and discusses some of the ongoing dilemmas about how best to achieve the full inclusion of women. Section 2 describes the treatment of women in international law prior to the adoption of the UN Charter, in order to emphasise the significance of the shift to the promotion of women's equality.

¹³ C Douzinas, 'The End(s) of Human Rights', (2002) 26 *Melb U L Rev* 445, 457.

¹⁴ D Otto, 'Lost in translation: re-scripting the sexed subject of international human rights law', in A Orford (ed.), *International Law and Its Others* (CUP, Cambridge 2006) 318-356.

¹⁵ H Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', (2005) 18 *Harv Hum Rts J* 1.

It examines the non-discrimination approach favoured by the drafters of the founding human rights instruments, highlighting its importance as well as some of its limitations. Section 3 examines the innovative approach taken in CEDAW, whose drafters aimed to address the problems attending the concept of non-discrimination by promoting a strong version of women's substantive equality. Yet while CEDAW fostered a better understanding of the measures that may be necessary to achieve women's equal enjoyment of human rights, it also reinforced the marginalisation of women's rights conceptually, and in the work of the other human rights treaty bodies. To tackle this marginalisation, a new strategy of 'gender mainstreaming' was adopted during the 1990s, which sought to reinterpret mainstream human rights to be inclusive of women's experience, and is examined in Section 4. The chapter concludes, in Section 5, by drawing attention to some continuing obstacles presented by the law itself, which prevent women from successfully claiming and enjoying human rights.

1. A New Era of Non-Discrimination on the Ground of Sex and Equality with Men

While the UN Charter was the first international treaty to promote women's equality with men, it was not the first time that women were constituted as a category in international law. This section will briefly describe how women appeared in earlier international legal texts before examining how women's rights were recognised by the foundational human rights instruments. While the idea of women's equality with men was a radical and visionary development, of great importance to women (and men), it is argued that this approach failed to acknowledge the specificity of many human

rights violations suffered exclusively or predominantly by women and therefore failed to construct them as fully human.

Before 1945, international law had taken a paternalistic or 'protective' approach to women, treating them as the property, extension or dependents of men, as primarily mothers and wives, and as incapable of full autonomy and agency.¹⁶ Women were valued for their pre-marriage chastity, their prioritisation of motherhood and domesticity, and their acceptance of the heterosexual family hierarchy and the paternal protection of the state and its laws. The laws of war, for example, required an occupying power to respect 'family honour and rights,' treating women as part of (male) family property and reputation to be protected by the law.¹⁷ Early international labour conventions prohibited women from certain types of work, like night work and mining, on the basis that this interfered with their domestic and reproductive responsibilities.¹⁸ Anti-trafficking conventions made women's consent to working in the sex industry irrelevant, thereby treating all sex workers as victims, needing rescue and rehabilitation.¹⁹ None of these conventions constructed women as rights bearers. Instead, women were granted 'protections', sometimes in the form of 'privileged' treatment, because of their socially ascribed secondary status.

¹⁶ N Kaufman Hevener, 'International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women', (1978) 1 *Harv Women's L J* 131, 133-40.

¹⁷ See *Convention Respecting the Laws and Customs of War on Land* (Hague Convention II), 29 July 1899, art 46; and *Convention Respecting the Laws and Customs of War on Land* (Hague Convention IV), 18 October 1907, 36 Stat 2277, 1 Bevans 631, art 46.

¹⁸ See, for example, International Labour Organisation, *Maternity Protection Convention* 1919 (Convention 3); International Labour Organisation, *Convention Concerning Night Work of Women Employed in Industry*, 1919 (Convention 4); International Labour Organisation, *Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds* 1935 (Convention 45).

¹⁹ *International Agreement for the Suppression of the White Slave Traffic* 1904, 1 LNTS 83; *International Convention for the Suppression of White Slave Traffic* 1910, 1912 Gr Brit T S No.20 at 267; *International Convention for the Suppression of the Traffic in Women and Children* 1921, 9 LNTS 415; *Convention for the Suppression of the Traffic in Women of Full Age* 1933, 53 UNTS 13. See further, J Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in the Contemporary Discourses of Trafficking in Women' (2000) *Gender Issues* 23, 24.

Following World War II, the shift from protectionism to universal human rights promised to recognise women as fully human, for the first time, by granting them the same human rights as men. The primary means for achieving women's equality, adopted by the drafters of the *Universal Declaration of Human Rights* (UDHR), was to prohibit discrimination based on sex in the enjoyment of universal rights and freedoms.²⁰ This approach was chosen instead of recognising rights that were specific to women's experience, fearing the latter would compromise the idea of 'universality' and wrongly emphasise women's difference from men rather than their common humanity.²¹ In transforming the UDHR into legally binding instruments, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) followed suit, relying largely on the prohibition of sex discrimination in the enjoyment of the rights they enumerated to achieve women's equality.²² As the Covenants did not define 'discrimination' or 'equality', it was not clear whether states parties were expected to achieve formal or substantive equality (see chpt 13 for discussion of these terms). However, an additional provision was included as common article 3 of the Covenants, which required states parties to ensure 'the equal right of men and women to the enjoyment of all ... [rights] set forth in the present Covenant', indicating that special attention must be paid to achieving women's equality and, by the use of the term 'enjoyment', suggesting that equality in outcome (substantive equality) was the goal.

²⁰ UDHR (n 2) art 2. This kind of non-discrimination provision is described as a 'subordinate norm' in chpt 14, because it prohibits discrimination only with respect to the rights and freedoms set out in the instrument.

²¹ J Morsink, 'Women's Rights in the Universal Declaration' (1991) 13 *Hum Rts Q* 229. For a critical analysis see H Bequaert Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights' in C Gould (ed.), *Beyond Dominance: New Perspectives on Women and Philosophy* (Rowman and Allanheld, Totowa NJ 1983) 250.

²² ICESCR (n 2) art 2(2); ICCPR (n 2) art 2(1).

The obligation to ensure that women enjoy the same rights as men was a very significant step for women. States parties were required to treat women and men alike when they are in a comparable situation. Think, for example, of the importance to women of the universal franchise, the freedom to move and to express their opinions to the same extent as men, of equal pay and education on the same basis as men. In addition, the unprecedented acknowledgment that women and men 'are entitled to equal rights as to marriage, during marriage and at its dissolution',²³ broke through the tradition in liberal legal thinking that exempted the private sphere from legal scrutiny,²⁴ although this development was in tension with state's responsibilities to protect the institution of the family and enshrine the right to privacy within families.²⁵ For many non-western women, the issue of private actors violating their rights was not only a concern within their communitarian and extended-family networks, but also an issue of the unregulated activities of global private actors, like transnational corporations and banks.²⁶ These developments left little doubt that the differences between women and men that had previously been treated as immutable and used to justify women's inequality, were to be understood as socially constructed and therefore changeable. International human rights law had the potential to challenge the 'naturalness' of many discriminatory beliefs and practises, and assist in the task of changing oppressive stereotypes about 'women' and, simultaneously, challenging dominating stereotypes about 'men'. While clearly ground-breaking, the preferred method of realising women's full humanity by promoting their equal and non-

²³ UDHR (n 2) art 16(1); ICCPR (n 2) art 23(4).

²⁴ C Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R J Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Philadelphia 1994) 85.

²⁵ UDHR (n 2) arts 12 and 16(3); ICCPR (n 2) arts 17(1) and 23(1).

²⁶ J Oloka-Onyango and S Tamale, "'The Personal is Political' or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *Hum Rts Q* 691, 702.

discriminatory enjoyment of human rights soon proved to have a number of problems, both conceptually and in practise.

Conceptually, without clear guidance from the text of the Covenants, non-discrimination was interpreted as a formal (de jure) rather than substantive (de facto) obligation, which required women to be granted the same rights as men, regardless of whether this achieved equality of outcome. Treating women in the same way as men works well when women's and men's experience of human rights violations are directly comparable, as in the first communication about sex discrimination considered by the Human Rights Committee (HRC), under the Optional Protocol to the ICCPR that allows individual complaints. The communication was brought by a group of Mauritian women, complaining that legislation discriminated against women because it granted automatic residency to the foreign wives of Mauritian men while it denied automatic residency to the foreign husbands of Mauritian women.²⁷ On these facts, the HRC easily found that the legislation made an 'adverse distinction based on sex' because it adversely affected married women's enjoyment of ICCPR rights related to privacy and family life, as compared to married men.²⁸

However, a comparison with the rights that men enjoy does not help in situations where women's experience is substantially different from men's, as in the case of the right to work. Rights recognised by ICESCR that protect the right to work assume a male model of employment, which makes women's unremunerated work in the family

²⁷ Aumeeruddy-Cziffra et al v Mauritius, Communication No 35/1978, 9 April 1981.

²⁸ Ibid paras 9.2(b)(i)8 and 9.2(b)(ii)4.

and their poorly remunerated work in the informal sector invisible.²⁹ This approach also fails to take account of women's often interrupted patterns of paid work, the problem of gender segregation in the workforce and the need for maternity leave and childcare provision. A further problem with the comparative approach of equality and non-discrimination is that when the Covenants depart from it by explicitly referring to women's different experience, international law's discursive heritage of treating women protectively tends to re-emerge, as in the requirement that state parties ensure 'special protection' (rather than rights) for mothers for a period before and after childbirth.³⁰ Including women by granting 'special' treatment to the specificities of their lives, constructs women's experience as non-universal, which has the effect of buttressing the masculinity of the universal. The ICESCR also describes the right of everyone to an adequate standard of living 'for himself [sic] and his family',³¹ breathing life into the erroneous stereotype that all women are dependent on male household bread-winners, although the Committee on Economic, Social and Cultural Rights has since rejected this interpretation.³²

In practice, drawing formal comparisons between women and men proved to be a blunt means of promoting women's substantive equality. The narrow focus of a comparison does not take account of the need to redress the institutionalised history of discrimination and disadvantage that often affects women's ability to exercise their rights in the same way as men, for example, by ensuring they have the information, autonomy and mobility to exercise their right to vote. A formal comparison also

²⁹ ICESCR (n 2) arts 6, 7 and 8. See further, Expert Group Report, *Promoting Women's Enjoyment of their Economic and Social Rights*, Abo/Turku, Finland, 1-4 December 1997, UN DAW EGM/WESR/1997/Report, paras 46-48.

³⁰ ICESCR (n 2) art 10(2).

³¹ *Ibid* art 11(1).

³² CESCR, General Comment No. 4, The right to adequate housing (art 11(1) of the Covenant' (1991) para 6.

ignores the need to create enabling circumstances that will make women's equal enjoyment of rights possible, which may involve changing deeply embedded social and cultural attitudes that stigmatise or punish women for exercising their rights. The limitations of relying on the prohibition of sex discrimination to do all the work of ensuring that women fully enjoy universal human rights and fundamental freedoms was soon apparent.³³ In addition to interpreting equality as a formal rather than substantive obligation, women's human rights violations were rarely addressed by human right treaty bodies in the early years of their operation because it did not force them to rethink their own gendered frameworks, and human rights nongovernmental organisations (NGOs) were preoccupied with addressing Cold War violations experienced by men in the public sphere, such as the freedom of political expression, and the release of political prisoners.

2. The Substantive Equality Approach of CEDAW

In an attempt to counter the marginalisation of women within the general framework and application of international human rights law, CEDAW was adopted by the UN General Assembly and opened for ratification in 1979. Although CEDAW takes the same general approach as the Covenants by promoting sex non-discrimination and women's equality with men, it highlights the specificity of women's experience of discrimination and advances a strong form of women's substantive equality as the international norm. This section discusses the positive features of the approach to women's rights taken by CEDAW and then examines some of its limitations. It begins with a discussion of three strategies adopted by CEDAW to promote a robust understanding of women's equality: the adoption of a comprehensive definition of

³³ V Spike Petersen, 'Whose Rights? A Critique of the 'Givens' in Human Rights Discourse', (1990) 15 *Alternatives* 303

discrimination against women, the promotion of the use of temporary and permanent ‘special measures’ to address the institutionalised effects of women’s historical disadvantage and to counter disadvantage that might otherwise be associated with women’s reproductive functions, and the requirement that states parties tackle the causes of women’s inequality by promoting social change in all spheres of life, including in families.

The first step towards advancing women’s substantive equality is the provision of a comprehensive definition of ‘discrimination against women’ in article 1:

...[it] 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.

The definition covers a wide range of conduct and, importantly, prohibits discriminatory treatment (direct discrimination) as well as discriminatory outcome (indirect discrimination), and intended (purposive) discrimination as well as unintended discrimination (discrimination in effect). Both ‘sex’ and ‘marital status’ are specified as prohibited grounds of discrimination against women, and it should further be noted that some other provisions in CEDAW also prohibit discrimination on the grounds of ‘pregnancy’ and ‘maternity’, as in article 11(2) in the field of employment.

The definition specifically promotes substantive equality by requiring that women must be able to ‘enjoy’ or ‘exercise’ their human rights and fundamental freedoms,

and makes it clear that the prohibition of discrimination against women applies to all fields of life, not just the public sphere. Indeed, the application of CEDAW to private actors is made explicit in many places in the text.³⁴ The CEDAW Committee, which monitors its implementation, has made it clear that states parties have the obligation to act with ‘due diligence’ to ensure that private actors do not violate CEDAW.³⁵ The Committee has also reinforced a substantive approach to women’s equality in its interpretations of CEDAW, constituting a more gender-inclusive subject of human rights law. For example, the Committee has urged states parties to adopt criteria in the determination of equal pay that facilitate the comparison of the *value* of the work usually done by women with the *value* of those more highly paid jobs usually done by men,³⁶ and to implement health measures that address ‘the distinctive features and factors that differ for women in comparison with men’.³⁷

The second way that CEDAW reinforces the norm of women’s substantive equality is by making it clear that non-identical treatment aimed at addressing women’s specific experiences of disadvantage may be necessary to hasten the achievement of women’s equality. The CEDAW distinguishes between temporary and permanent measures. Article 4(1) promotes the use of ‘special temporary measures’ (also known as ‘affirmative action’, ‘positive action’ or ‘reverse discrimination’), which are directed towards ‘accelerating de facto equality between women and men’ by remedying the effects of past or present discrimination against women and promoting the structural, social and cultural changes necessary to support the realisation of women’s

³⁴ See for example, articles 2(e), 2(f), 3, 5 and 6.

³⁵ CEDAW, ‘General Recommendation No 19, Violence against women’ (1992) para 9.

³⁶ CEDAW, ‘General Recommendation No 13: Equal remuneration for work of equal value’ (1989) para 2.

³⁷ CEDAW, ‘General Recommendation No 24: Article 12 - women and health’ (1999) para 12.

substantive equality.³⁸ Such discriminatory measures are not prohibited, as long as they do not entail ‘the maintenance of unequal or separate standards’ for women and men and are discontinued when their objectives have been achieved. Thus ‘temporary’ may result in application of the measures for a sustained period of time, until their objectives have been realised.³⁹ Some specific references to temporary special measures can be found in the text of CEDAW, such as measures in the field of education that increase women’s functional literacy (article 10(c)) and reduce the drop-out rates of female students (article 10(f)). On many occasions the CEDAW Committee has advocated special temporary measures, like the adoption of quotas to achieve gender balance in political bodies.⁴⁰

The CEDAW supports permanent ‘special measures’ to ensure that non-identical treatment of women due to their biological differences from men is not considered discriminatory and does not work to their disadvantage. Article 4(2) makes it clear that measures ‘aimed at protecting maternity’ are not discriminatory, and the point is reinforced by other more specific provisions including measures safeguarding women’s reproductive capacities in the field of employment (article 11(1)(f)) and measures that provide women with appropriate reproductive health services (article 12(2)). Recognising that these provisions have a ‘protective’ orientation, the CEDAW Committee has emphasised that the term ‘special’, when used in the context of CEDAW, breaks with the past paternalistic usage of the term to indicate that a group

³⁸ See further, CEDAW, ‘General Recommendation No 25: Article 4, paragraph 1, of the Convention (temporary special measures)’ (2004).

³⁹ Ibid para 20.

⁴⁰ CEDAW, ‘General Recommendation No 23, Political and public life’ (1997) para 29.

suffering discrimination is weak or vulnerable, and refers instead to measures designed to serve a specific human rights goal.⁴¹

The third way that CEDAW promotes women's substantive equality is by requiring that states parties address the underlying causes of women's inequality. As acknowledged earlier in this chapter, religious teachings and cultural practises have often been (mis)used to reinforce dominant beliefs about women's secondary status, which has generated systemic discrimination against women, which may be so prevalent that it is perceived as 'natural'. To tackle systemic discrimination, article 5(a) requires states parties to work towards 'the elimination of prejudices and customary and all other practises 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'. This obligation is echoed in other provisions, such as the requirement that gender stereotypes be removed from school programmes and textbooks (article 10(c)) and the deeming of legal instruments to be null and void if they restrict the legal capacity of women (article 15(3)). Article 5(b) builds further on states parties' social change obligations by requiring that they promote change in sex-stereotyped attitudes and practises in families, including by 'recognition of the common responsibility in the upbringing and development of their children'. Some specific aspects of this obligation are also spelt out in other provisions, like the requirement to establish a network of child-care services 'to enable parents to combine family obligations with work responsibilities and participation in public life' (article 11(2)(c)), and access to 'information and advice on family planning' that will help ensure the health and well-being of families (article 10(h)). Although there are good grounds for CEDAW's

⁴¹ CEDAW, General Recommendation No 25 (n 38) para 21.

negative view of social, religious and cultural traditions, it must be remembered that they can also lend valuable support to women's equality.⁴²

The approach taken by CEDAW also has some limitations, four of which I will highlight: its continuing reliance on a comparison with men, the lack of reference to violence against women, the assumption of normative married heterosexuality and the very limited acknowledgment of multiple and intersectional forms of discrimination. The CEDAW Committee has ameliorated many of these problems by treating CEDAW as a dynamic instrument that must be read in light of changing circumstances, and progressively interpreting its provisions in Concluding Observations to States party's periodic reports and in General Recommendations. However, it is difficult for these efforts to completely overcome the limitations in CEDAW's text and approach without supporting interpretations from other human rights bodies and good faith implementation by states parties.

The first limitation is that CEDAW's approach still relies fundamentally on a comparison between women and men, like the Covenants. This is limiting in two main ways. Firstly, it does not allow women to claim rights that men do not enjoy, except as 'special measures'. Consider the example of women's reproductive rights, like access to information, advice and services related to family planning (articles 10(h) and 12(1)) and the right to 'decide freely and responsibly [sic] on the number and spacing of their children' (article 16(1)(e)), which are all to be enjoyed 'on a basis of equality of men and women'. This leaves little room, if any, for recognition of

⁴² C Nyamu-Musembi, 'Are Local Norms and Practises Fences or Pathways? The Example of Women's Property Rights', in A An-Na'im (ed.), *Cultural Transformation and Human Rights in Africa* (Zed Books, London 2002) 126; LA Obiora, 'Feminism, Globalization, and Culture: After Beijing' (1997) 4 *Glob Legal Stud J* 355.

women's specific, stand-alone reproductive rights, like contraception and abortion, unless they qualify as 'measures protecting maternity' (art 4(2)). Secondly, CEDAW's reliance on comparing women with similarly situated men does not address discrimination between different groups of women. For example, denying unmarried women access to reproductive technologies is prohibited by CEDAW only if unmarried men (the relevant comparator) are able to access the technology. The comparison does not do justice to women's interests because men have very different needs for reproductive assistance than women. Another example is the cultural practise of evicting a widow from her deceased husband's family home, which is clearly adverse treatment due to sex and marital status, but is not discrimination prohibited by CEDAW because there is no relevant male comparator. It is generally not the practise that husbands live in the family home of their wives, let alone face eviction if they are widowed.

A second limitation of CEDAW is its lack of reference to violence against women, which is a silence that may be explained by the reliance on a comparative model, because gendered violence does not affect men in the same way as women. The failure in CEDAW to make specific reference to rights associated with security of the person suggests that at the time of drafting, such abuses were thought of as primarily affecting men. Much has changed since then, and gendered violence has come to be recognised as 'one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'.⁴³ The CEDAW Committee addressed this omission in General Recommendation 19 by recognising gender-based violence as a form of 'discrimination against women' that is prohibited by CEDAW and,

⁴³ *Declaration on the Elimination of Violence Against Women*, UNGA Res 48/104, 20 December 1993, preamble para 6.

therefore, that violence ‘directed against a woman because she is a woman or that affects women disproportionately’ will breach specific CEDAW provisions, even though they do not expressly make reference to violence.⁴⁴ This approach has been applied in the jurisprudence of the CEDAW Committee under its Optional Protocol procedure,⁴⁵ which has found violations of articles 1, 2, 3, 5(a) and 16 where states parties have not met the standard of due diligence in protecting the complainants from domestic violence.⁴⁶ Treating violence against women as a form of discrimination is an effective way to ensure that CEDAW obligations encompass the issue. However, the anti-discrimination framework prevents the CEDAW Committee from recognising gendered violence as a direct human rights violation, such as a violation of the right to life or the right to be free from torture or cruel, inhuman and degrading treatment, without the complication of a comparison with men.

A third limitation is that, like the Covenants, CEDAW assumes that women’s experience of family life is married and heterosexual (article 16(1)), except in their rights as a parent which are to be enjoyed regardless of marital status (article 16(1)(d)). One result of the emphasis on ‘marriage’ and the equal rights of ‘spouses’ is that the diversity of family forms within which women live, including customary and de facto heterosexual and lesbian partnerships, is rendered invisible.

Consequently, the text ignores human rights violations that take place within different family formations, like the unequal sharing of income and assets in a customary marriage or violence in a lesbian relationship, and fails to protect women’s equal rights when a non-marital relationship breaks down. The CEDAW Committee has

⁴⁴ CEDAW, General Recommendation No 19 (n 35) paras 1 and 6.

⁴⁵ *Optional Protocol to CEDAW*, A/RES/54/4, 14 October 1999, entered into force Dec. 22, 2000.

⁴⁶ *AT v Hungary*, Communication No 2/2003, 26 January 2005, UN Doc A/60/38, Annex III; *Goekce v Austria*, Communication No 5/2005, 6 August 2007, CEDAW/C/39/D/5/2005; *Yildirim v Austria*, Communication No 6/2005, 1 October 2007, CEDAW/C/39/D/6/2005.

gone some way towards rectifying this problem by acknowledging that various forms of the family exist, by using the terminology of ‘spouse or partner’,⁴⁷ and by insisting that women and men are treated equally in families, whatever form they take,⁴⁸ but it has not yet dealt explicitly with the issue of same-sex partnerships. A second result of CEDAW’s normative focus on heterosexual marriage is that women’s sexuality is reduced to procreative concerns, like family planning and the spacing of children. This means that CEDAW also fails to address the discrimination that many women face for expressing their sexuality outside of marriage, whether in committed relationships, in pursuit of sexual pleasure, as lovers of other women, or as sex workers.

The fourth limitation is that CEDAW largely treats ‘women’ as a homogeneous group who share the same experience of discrimination. Yet sex discrimination can intersect with other forms of discrimination and create experiences of discrimination that are not fully comprehended by the concept of sex discrimination. This has been called ‘compound’ or ‘intersectional’ discrimination,⁴⁹ and its most extreme forms are experienced by the most disadvantaged groups of women. While CEDAW makes some limited distinctions between women, on the basis of maternity, and age in respect of child marriage, there is only one significant exception to the general pattern. Article 14 requires that states parties ‘take into account the specific problems faced by rural women and the significant roles which rural women play in the

⁴⁷ See, for example, CEDAW, General Recommendation No 21, Equality in marriage and family relations’ (1994) para 22.

⁴⁸ Ibid paras 13, 18, 29, 33 and 39.

⁴⁹ K Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *U Chi Legal F* 139.

economic survival of their families’,⁵⁰ and many of the rights it enumerates do not rely on a comparison with men. This usefully enables the CEDAW Committee to draw comparisons between rural and urban women, and the Committee has interpreted ‘rural’ very broadly in many of its Concluding Observations in order to discuss intersectional forms of discrimination faced by rural women, such as age, ethnic, caste and indigenous discrimination.⁵¹ While only occasionally used terms like ‘multiple’ or ‘double’ discrimination, the CEDAW Committee has also drawn attention to discrimination faced by specific groups in the context of article 5(a), which requires modification of social and cultural attitudes and practises that are inconsistent with women’s equality.⁵² A number of General Recommendations have been adopted that focus on CEDAW’s application to specific groups of women,⁵³ and others have stressed that special attention must be paid to the needs of women belonging to vulnerable and disadvantaged groups.⁵⁴ Despite this, the CEDAW Committee has not yet drawn attention to the intersectionality of the discrimination experienced by complainants under the Optional Protocol, despite four of its first five decisions on the merits involving immigrant or minority women.⁵⁵

There is little doubt that the almost universal ratification of CEDAW,⁵⁶ the work of the CEDAW Committee, and the efforts of many women’s rights and human rights

⁵⁰ There is also a reference to ‘rural women’ in CEDAW article 10(a) about vocational guidance and access to studies.

⁵¹ See, for example, India. 01/02/2000, A/54/38, paras 51-53; China 03/02/99, A/54/38, para 294.

⁵² See, for example, Sweden. 31/07/2001, A/56/38, para 356.

⁵³ CEDAW, ‘General Recommendation No 18, Disabled women’ (1991); ‘General Recommendation No 26 on women migrant workers’ (2008); General Recommendation on older women (forthcoming).

⁵⁴ CEDAW, ‘General Recommendation No 24, Women and Health (article 12),’ (1999) para 6.

⁵⁵ See *Nguyen v The Netherlands*, Communication No 3/2004, 14 August 2006, CEDAW A/61/38; *Szjijarto v Hungary*, Communication No 4/2004, 14 August 2006, CEDAW A/61/36; *Goekce v Austria* (n 46); *Yildirim v Austria* (n 46).

⁵⁶ CEDAW had 186 States parties at 20 July 2009.

NGOs,⁵⁷ has advanced the project of making international human rights law more gender inclusive. However, the adoption of a specialist women's rights treaty also, in many respects, reinforced women's marginalisation. As the most highly reserved of all the human rights treaties, CEDAW tends to undermine the idea that women's equality and rights are universal. Rather than prompting the other human rights treaty committees to take women's rights more seriously, it had the opposite effect of ghettoising women's rights in CEDAW.⁵⁸ Exacerbating its isolation, the CEDAW Committee met in New York until recently, rather than in Geneva where all the other treaty committees met,⁵⁹ making it difficult to mainstream the CEDAW Committee's interpretative work and coordinate approaches to women's equality and rights across the regime. While a specific convention focussing on women's equality was necessary to address women's marginalisation in international human rights law, it was not sufficient.

3. Mainstreaming Women's Human Rights

As a result of CEDAW's limited impact, another major effort to advance the prospects of women successfully claiming their human rights emerged, which refocused attention on the general human rights instruments and promoted the 'mainstreaming' of women's human rights.⁶⁰ 'Gender mainstreaming' was adopted as

⁵⁷ S Dairiam, 'From Global to Local: The Involvement of NGOs', in HB Schopp-Schilling (ed.), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination Against Women* (Feminist Press, New York 2007) 313.

⁵⁸ A Brynes, 'The "Other" Human Rights Treaty Body: The work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 *Yale J Int'l L* 1; L Reanda, 'Human Rights and Women's Wrongs: the United Nations Approach' (1981) 3 *Hum Rts Q* 11.

⁵⁹ This practise was changed from 1 January 2008, when responsibility for servicing the CEDAW Committee was transferred from the Division for the Advancement of Women (DAW) in New York to the Office of the High Commissioner for Human Rights in Geneva, which also services the other human rights treaty bodies.

⁶⁰ C Bunch, 'Women's Rights as Human Rights: Towards a Re-Vision of Human Rights' (1990) 12 *Hum Rts Q* 486; S Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Iustus Forlag, Uppsala 2004).

a system-wide strategy by the 1993 Vienna World Conference on Human Rights and reaffirmed by the 1995 Beijing World Conference on Women. These developments prompted the chairpersons of the human rights treaty committees to commit to fully integrating gender perspectives into their working methods.⁶¹ This led eventually to the adoption of General Comments by four treaty committees, which aim to comprehensively incorporate women's experience of human rights violations into the coverage of their respective treaty texts. This section examines each of these General Comments, noting the diversity of thinking about how to achieve gender mainstreaming that emerges. It also highlights the tenacity of protective representations of women, especially in the context of addressing gendered violence, and concludes that women are not yet constructed as fully human by international human rights law.

The Human Rights Committee (HRC), which monitors the ICCPR, led the way with the adoption of General Comment 28 on equality between men and women in 2000.⁶² The General Comment works through each of the ICCPR rights, bringing gender-specific violations into the mainstream by re-imagining the subject of the ICCPR as a woman. For example, it is recognised that the right to life (article 6) may be violated if women have no option but to resort to backyard abortions or if they are living in extreme poverty,⁶³ and the right to be free from torture and other cruel, inhuman and degrading treatment (article 7) may be violated if a state party fails to protect women from domestic violence.⁶⁴ The General Comment clearly promotes women's equality

⁶¹ *Report of the Sixth Meeting of Persons Chairing the Human Rights Treaty*, UN Doc. A/50/505 (1995) para 34(a)-(f).

⁶² HRC, 'General Comment 28: Article 3 (Equality of Rights between Men and Women)' (2000), UN Doc HRI/GEN/1/Rev 5, 29 March 2000.

⁶³ *Ibid*, para 10.

⁶⁴ *Ibid*, para 11.

as a substantive concept and accepts that different treatment of women and men may be necessary to achieve equality. The result is an ambitious and creative ‘feminisation’ of ICCPR rights.⁶⁵ However, some of the problems associated with seeking to include women by reference to their ‘difference’ are also evident. The extensive cataloguing of women’s specific injuries and disadvantages, particularly the emphasis on violence, threatens to reproduce women’s marginalisation by inviting protective responses. Indeed, the frequent use of the language of ‘protection’ is disquieting.⁶⁶ It recalls the historically conditioned tendency to slide into protective responses when thinking about women as ‘victims’ of gendered and sexual violence, working against legal responses that empower women as full subjects of human rights law.

The Committee on Racial Discrimination, which monitors implementation of the *Convention on the Elimination of Racial Discrimination* (CERD), was initially resistant to the idea of gender mainstreaming.⁶⁷ However, it eventually adopted General Recommendation XXV on the ‘gender-related dimensions of racial discrimination’.⁶⁸ Rather than identifying the gender issues associated with each of the substantive rights recognised by CERD, as in ICCPR General Comment 28, it elaborates a methodology for analysing the relationship between gender and racial discrimination, which will enable the Committee to develop ‘a more systematic and

⁶⁵ See further, D Otto, “‘Gender Comment’: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?”, (2002) 14 *Can J Women & L* 1.

⁶⁶ HRC, General Comment 28 (n 62) paras 8, 10, 11, 12, 16 and 22.

⁶⁷ LA Crooms, ‘Indivisible Rights and Intersectional Identities or, “What Do Women’s Human Rights Have to Do with the Race Convention?”’ (1997) 40 *Howard L J* 619; A Gallagher, ‘Ending Marginalisation: Strategies for Incorporating Women into the UN Human Rights System’ (1997) 19 *Hum Rts Q* 283.

⁶⁸ CERD, ‘General Recommendation XXV: Gender-Related Dimensions of Racial Discrimination’ (2001), 56th Session, 2000, UN Doc. HRI/GEN/1/Rev.5, 26 April 2001.

consistent approach', in conjunction with States parties.⁶⁹ The method requires particular consideration of gender in (1) the form and manifestation of racial discrimination; (2) the circumstances in which it occurs; (3) its consequences; and (4) the availability and accessibility of remedies.⁷⁰ This approach opens the way to a deeper understanding of the structural dimensions of the intersection of race and gender discrimination and how they work together to intensify women's inequality. The methodology is very flexible, allowing for diverse and shifting conceptions of race, which, like gender, is socially constructed. However, like General Comment 28, the few examples of the intersectional discrimination provided are dominated by a concern with addressing violence against women,⁷¹ also running the risk of eliciting protective responses. General Recommendation XXV is notable for its use of the language of 'gender'. The discourse of gender has the advantage of acknowledging the relational quality of the gender stereotypes that privilege men and disadvantage women, and thus points to the necessity of changing the stereotypes that benefit men as well as those that normalise women's disadvantage. On the other hand, the language of gender has its dangers, foremost among them being the tendency for men's interests to again dominate.⁷²

The risk that 'gender' mainstreaming will refocus attention away from women's disadvantage and back on men is evident in General Comment 16, adopted in 2005 by the Committee on Economic, Social and Cultural Rights, which monitors the

⁶⁹ Ibid para 3.

⁷⁰ Ibid para 5.

⁷¹ Ibid para 2.

⁷² S Baden and AM Goetz, 'Who Needs [Sex] When You Can Have [Gender]? Conflicting discourses on gender at Beijing', in C Jackson and R Pearson (eds), *Feminist Visions of Development: Gender Analysis and Policy* (Routledge, New York 1998) 19.

ICESCR.⁷³ In many respects, the approach taken is similar to ICCPR General Comment 28, especially in the attention given to identifying the gender dimensions of each of the rights enumerated in ICESCR and the emphasis on addressing gendered violence. Its distinctiveness lies in its identification of men, as well as women, as potentially suffering sex discrimination and inequality in the enjoyment of ICESCR rights. General Comment 16 even suggests that men may be victims of domestic violence perpetrated against them by women.⁷⁴ This position is controversial because it appears to deny the persistent reality of women's inequality *vis a vis* men by approaching sex inequality as a problem without a hierarchy. Ultimately, it is hard to decide whether this is a deeply conservative denial of the systemic nature of women's inequality, or a radical attempt to recognise the social construction of the male/female gender dichotomy and the importance of changing the way 'men' are imagined in the process of reimagining 'women' as equal.

In 2008, the Committee that monitors the implementation of the Convention Against Torture (CAT) adopted a General Comment on implementation obligations which makes some important observations about the gender dimensions of CAT.⁷⁵ It is emphasised that special attention must be given to protecting marginalised groups or individuals who are 'especially at risk of torture', including those who may be at risk because of 'gender, sexual orientation, transgender identity...or any other status or adverse distinction'.⁷⁶ States parties are requested to provide additional information in their periodic reports about the implementation of CAT with respect to women, keeping

⁷³ CESCR, 'General Comment No 28, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)' (2005), E/C.12/2005/4, 11 August 2005.

⁷⁴ *Ibid* para 27.

⁷⁵ CAT, General Comment No 2: Implementation of Article 2 by States Parties' (2008), CAT/C/GC/2, 24 January 2008.

⁷⁶ *Ibid* para 21.

in mind that ‘gender is a key factor’ that can intersect with other characteristics of a person to make them more vulnerable to torture or ill-treatment.⁷⁷ The Committee notes that women are particularly at risk in contexts that include ‘deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes’.⁷⁸ Notably, the Committee uses the terminology of ‘gender’ and takes a similar approach to the ICESCR Committee by observing that men too may be subject to gendered violations of CAT, ‘such as rape or sexual violence and abuse’, and that men and boys, as well as women and girls, may be subject to violations ‘on the basis of their actual or perceived non-conformity with socially determined gender roles’.⁷⁹ Unlike ICESCR General Comment 16, this approach achieves the recognition of gendered human rights violations that are experienced solely or primarily by men, without collapsing the gender hierarchy.

While all the General Comments aimed at gender mainstreaming promote sex non-discrimination and women’s equal enjoyment of human rights in a substantive sense, taking their lead from CEDAW, they also reinterpret mainstream human rights to be more inclusive of women’s experience. These reinterpretations alleviate the need to compare women’s experience with that of men’s by reconstructing the universal standard itself, so that it is more gender inclusive. Positive as these developments are, the real test is whether the Committees are able to integrate their new interpretations into all aspects of their work, and hold States parties accountable for their implementation. Although it is early days, the record so far has been patchy,⁸⁰ and the old urge to protect women rather than recognise their rights continues to be

⁷⁷ Ibid para 22.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Charlesworth (n 15); Kouvo (n 60).

seductive,⁸¹ especially when it comes to women from the Third World.⁸² The cost of women's 'inclusion' may yet prove to be their continuing marginalisation.

4. Conclusion: Continuing Challenges

The history of women's rights in international human rights law reveals a conundrum: how to insist on the recognition of women's specific human rights abuses without reproducing their secondary status and encouraging protective responses. While every effort to more fully recognise women's rights in the development, interpretation and implementation of international human rights law has met with some success, these efforts have also highlighted new challenges. While anti-discrimination law can be a very powerful means of promoting women's enjoyment of human rights, the comparative standard that it relies upon presents quandaries about how best to frame, measure and realise women's substantive equality, which have yet to be resolved. While recognising gendered violence as a violation of women's human rights has been a massive achievement, the historical pull towards embracing protective responses highlights the challenge of promoting, instead, a rights-based response that takes women's sexual injuries seriously while also respecting women's sexual agency. While the need to take account of other forms of discrimination which intersect with or compound discrimination against women is increasingly acknowledged, there remain many conceptual and practical problems about how to make such discrimination legally cognisable and hold states parties accountable for addressing it. Finally, while gender mainstreaming has led to radical reinterpretations of mainstream human rights instruments, emphasising the interdependence of ideas

⁸¹ D Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 *Melb J Int'l L* 11.

⁸² R Kapur, 'The Tragedy of Victimisation Rhetoric: Resurrecting the "Native" Subject in International/Postcolonial Feminist Legal Politics' (2001) 10 *Colum J Gender & L* 333.

about 'men' and 'women' and the realisation that women's equality depends on challenging accepted wisdom about dominant masculinities, it has highlighted the dilemma of how to fully embrace 'gender' as a socially constructed category. While there is still a long way to go before the present day realities of human rights abuses suffered by women become fully legally cognisable, we also need new thinking about legal representations that will challenge the gender stereotypes that underpin gendered human rights abuses.