International Law and Human Rights of Women: A Perspective

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CERTIFICATE

Certified that this dissertation entitled, **"International Law and Human Rights of Women: A Perspective"** which is being submitted by Ms. Deepti Handa, in partial fulfilment of the requirement for the award of the Degree of **Master of Philosophy** has not been previously submitted for any degree of this University or any other university and is her original work..

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CONTENTS

CHAPTER - I

INTRODUCTION

The universality of the norms and rules of international law has come under scrutiny from various quarters over the years. Cultural relativism and differences in the levels of economic development of countries, have challenged some of its basic provisions. This is more so the case with international human rights law. On the one hand, a large number of different groups of people have sought to get their needs and interests recognised as human rights, on the other, varied perspectives have emerged that have approached the present regime in varied ways.

In the last few years a major critique of contemporary international law in general and international human rights law in particular, has emerged in the writings of scholars writing from a feminist perspective. Though, there are significant differences in their approaches, all of them point generally to the discriminatory effect of the rules of international law on women.

According to them, international law as it has developed, has failed to reflect adequately the experiences of women and to answer some of their most vital needs and concerns. This becomes all the more relevant with respect to international human rights law as it aims to protect and promote the interests of all human beings irrespective of distinctions such as race, colour, sex, language, religion etc.

Amongst the various groups whose interests the international human rights regime seeks to protect, women constitute a prominent category. Yet glaring inequality

and discrimination against women persist around the globe. While the exact nature of violations may differ from society to society and the abuses may be manifested in varied laws, customs, traditions and practices, gross violations of the basic human rights of women, exist in almost all societies of the world. Infact in many cases it has been found that,the condition of women has actually deteriorated over the years. In Particular in developing countries, due to the lack of resources, economic deprivation of women aggravates historically entrenched discrimination against them. As many feminist scholars have observed, these women face a situation of 'double oppression'. Be it education, employment or health most of their basic needs are difficult to be met.

While the situation of women in the poorer regions of the world is disadvantaged, women in the more prosperous countries also face severe discrimination. This makes the feminist, critiques particularly relevant. As indicated above, inspite of differences amongst them, feminists focus on gender discrimination as the field of analysis. According to them patriarchy dominates the state structures and this is the case around the world. Whatever the differences with respect to race, nationality, religion and other categories, women face relatively inferior status as compared to men in all communities.

According to the feminists,the patriarchal structures at the state level are reflected at the international level. As a result the concepts and norms that are advocated, favour men more than they do women. Specifically with respect to international law, it is held that both its organisational and normative structures exclude the perspectives of women to a large extent.

Infact from the stand point of women's interests, the prevailing nation state-system itself is questioned. The approaches that have dominated the definition of priorities are said to be based on assumptions,that by their very nature cannot cater to serve adequately the needs of women. As international law is influenced by these approaches, it also seems to be gender partial. This is held to be the case with most of it's branches. As they affect the rights and interests of women as much as international human rights law itself, it is imperative that they are also examined in order to discern their impact an women.

The present study attempts an overview of the contemporary international legal structure from the stand point of women's human rights. In doing so, it would take into account the feminist perspectives that have challenged the present system. Also it would briefly consider the different feminist approaches to the system.

Also, the work seeks to broadly analyse the evolution of women's rights in international human rights law itself. In this respect it would analyse the principal international human rights instruments .

While the Universal Declaration of Human Rights (1948), the International Convenaent on Economic, Social and cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966), did deal with the question of gender equality and there have been other instruments dealing with gender discrimination in particular areas, it was only in 1979, that the Convention on the Elimination of all forms of Discrimination against women was adopted.

The 'Women's Convention' as it is called, goes much further than the earlier instruments. It obligates the states to take affirmative action, through legislative, administrative and other measures in order to remove discrimination against women in various fields. The definition of discrimination included in the convention is a broad one. It refers not only to the 'purpose', but also to the 'effect' of "any distinction, exclusion or restriction, made an the basis of sex", which impairs or nullifies, the enjoyment of equal rights by men and women (Article 1). In addition, it takes into account the actions of not only the state actors, but also the non-state actors (Article 2e).

Yet even after two decades of the adoption of the 'Women's Convention' the actual success achieved in removing gender discrimination can be said to have been limited. In many crucial areas the oppression and exploitation of women continue and abuses are perpetrated against them. Especially gender specific violence manifested in different ways at various levels of society has become an issue of prominence in the last decade or so. In this respect the General Assembly adopted the 'Declaration on the Elimination of Violence against Women' in 1993.

Evidently as far as legal provisions are concerned a lot many of them have been there,seeking to achieve equality amongst the sexes. Still their relative failure in achieving the stated objectives,brings into question their substantive norms and the enforcement mechanisms. Infact non-discrimination or elimination of discrimination on the basis of sex is sought to be secured by all the mentioned instruments, both general and specific. But as far as established regimes or enforcement mechanisms are

concerned, they exist differently under different instrument. Making imperative their examination in order to find out their relative success in meeting the goal i.e., one needs to discern if the segregation of women's issues as a specialized area of concern has proved to be beneficial. A historical analysis might be useful in this respect, as it would try to bring out the prominent causes that shaped the development of the regime over the years. This would enable one to see if the original expectations have been met.

But as the proposed study is meant to be an overview, it would not deal in detail with the instruments concerned with particular manifestations of discrimination on the basis of sex or promoting specific interests of women (for example, the ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951; the Convention on the Political Rights of Women, 1952; or the UNESCO Convention against Discrimination in Education, 1960).

The study is divided into four chapters. Chapter two will focus on feminist perspectives and contemporary international law. It will examine, albeit briefly, the different feminist approaches to the international legal structure, with particular reference to human rights of women. It would take into account both the organisational as well as the normative aspects of the structure. Chapter three will trace the evolution of different instruments concerned with the rights of women, in the period after 1945. It would also consider briefly the contemporary critiques of the traditional approaches to human rights at the international level. This is deemed to be important because of the fact that, it is these approaches that have defined the character and effectiveness of

the international human rights regime historically and still continue to dominate the present human rights debate. The position of women within these approaches or the strategies advocated by them to deal with their specific concerns, are of crucial importance. In the light of these critiques, the analysis of the evolution of the following instruments would be conducted viz, the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Elimination of all forms of Discrimination against Women (1979) and the Declaration on the Elimination of Violence against women (1993). A brief discussion of the effectiveness of the major enforcement mechanisms would accompany the analysis. Finally, Chapter four will contain the conclusions of the study.

CHAPTER - II

FEMINIST PERSPECTIVES AND CONTEMPORARY INTERNATIONAL LAW

INTRODUCTION

The last decade has been a decade of change and flux in international relations. Old rivalries have been taken over by new ones, nation-states have disintegrated and re-integrated, the nature of problems facing both international law and organization has undergone a substantial transformation. In the words of Christine Chinkin "the adequacy and relevance of traditional international legal doctrine have been strongly challenged, as states have embraced greater integration on the one hand and, on the other, have fought rearguard actions against the demands of nationalism, the effects of terrorism and environmental degradation and decreasing economic autonomy."[1] As a result of this, a number of new approaches have emerged that have questioned, both the normative and organizational structure of contemporary international law. Amongst these new approaches, the most prominent have been the feminist approaches.

Though feminist jurisprudence as a field of study with respect to the domestic legal system emerged much earlier, it was only in the eighties that the first feminist critiques of Public International Law were published.[2] Prior to this only international

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1 Christine Chinkin, "Feminist Interventions into International Law", *Adelaide Law Review*, vol. 19, no. 1 (1997), p. 14.

2 The ground breaking article, "Feminist Approaches to International law" by, Hilary Charlesworth, Christine Chinkin and Shelley Wright was published in the *American Journal of International Law*, 1991.

human rights law was subjected to feminist scrutiny. However, over the years the feminist scholars have analyzed various other areas of international law including, international economic and trade law, international humanitarian law, refugee law, and the law relating to the use of force. In general, the feminist critiques have tried to explore the impact of the rules of international law on women and their adequacy in serving women's interests.

Traditionally, a feminist has been understood to be a person, who is a "supporter of women's claims to be given rights equal to those of men"[3] or a person who works "on behalf of women's rights and interests".[4] Though, after the emergence in the late 1960s of systematic feminist thought and ideology, this term has come to be associated with persons believing in particular strands of feminist thinking.[5] For the purposes of the present dissertation, unless otherwise specified, a feminist perspective may be considered to be a perspective that examines various international legal norms and rules so as to identify their overt or covert bearing on women, particularly with respect to gender bias.[6]

The consideration of various feminist perspectives on international law requires at first an understanding of the historical reasons that were instrumental in the

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3 *The Oxford Minidictionary*, 3rd edn. (1991).

4 *Webster's seventh New Collegiate Dictionary* (1971).

5 See, Olive Banks, *Faces of Feminism: A Study of Feminism as a Social Movement* (Oxford, 1981).

6 Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals; Text and Materials* (Oxford, 1996), p. 903.

emergence of feminist thinking.

The concern with women's rights has a long history. As far as the western world is concerned it can be traced back to the eighteenth century, the period of the 'Enlightenment' where the modern rights movement was born. Yet, formal women's organising in support of equality in civil and political fields gained momentum, only by late nineteenth and early twentieth centuries. This was the time of, the 'suffragist movement' or the movement for the 'right to vote'. Demands regarding women's equality during this so called 'first phase' of the women's movement centered on issues like equal political participation, equality with respect to educational opportunities, freedom of speech and expression and other civil liberties i.e., all the issues concerned with equality '*de jure*'.[7] This period is generally referred to as that of, 'liberal feminism'.[8]

It was only through experience that the inadequacy of the liberal approach, with its emphasis on formal legal equality, was realized. The disaffection with this approach and the fact of continuing discrimination against women, led to the emergence in the sixties, of the 'second phase' of the women's movement. It was during this phase that the terms 'feminist' or 'feminism' came to be used more extensively. The demands raised during this period were much more radical, questioning the traditional belief systems regarding sex roles in society and the discriminatory processes of gender

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7 Colier's Encyclopedia, vol. 23 (New York, 1983), p. 561-4.

8 Though 'liberal feminists' is a term that is used to refer to persons identifying with the ideology of this phase even now.

construction.[9] The years since then have not only seen social activism, demanding a relook at concepts like equality and gender neutrality, but also intensive academic activity, trying to give theoretical explanations for women's place in society and culture and the causes of their oppression.[10]

Over the years a range of feminist perspectives have emerged challenging not only the fundamental assumptions on which various social, political and economic orders are based, but also the modes of epistemological enquiry.[11] They scrutinise the various traditional academic disciplines from the stand point of women's interest. Their basic contention is that the historical fact of discrimination against women is reflected, not only in the socio-political structures of societies as they have evolved, but also in the structure of these traditional disciplines, the principles that they imbibe and the norms or values that they seek to promote.

A feminist might be a person who is either identified as a liberal, a Marxist, a socialist, a radical or someone adhering to some other chronological/political or epistemological strand of feminist thought,[12] In addition as far as the feminist approaches to the present structure of international law and relations are concerned, the dichotomy that exists, is the one between the feminists from the third world and those

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9 Jean L. Cohen "About Women and Rights", *Dissent*, Winter (1991), p. 373.

10 *Encyclopedia of Sociology*, vol. 2 (New York, 1992), p. 695.

11 Marysia Zalewski, "Feminist Theory and international Relations" in Bowker and Brown, eds., *From Cold War to Collapse, World Politics in the 1980s* (Cambridge, 1992), p. 21.

12 ibid, p. 18.

from the developed countries. But though such vast amount of diversity exists between the various feminist approaches, there are certain basic characteristics that distinguish every feminist say, from a non-feminist.

At the very least, firstly, every feminist is sensitive to the sexism operating in society wherein women face discrimination because of their sex.[13] Secondly, feminists stress on gender as a socially constructed category i.e., according to them natural biological differences amongst people are given social meanings and their capabilities are determined in a generic sense and not on the basis of individual merit.[14] Thirdly, though it has come to be recognised that the nature of discrimination that women suffer, as part of different class, racial or ethnic groups, differs, feminists agree that at a fundamental level, women by themselves can be considered a social group "experiencing a shared oppression".[15] Just as class conflict is central to a Marxist scholar the focus of a feminist is on unequal gender relations.

In light of the above, one can try and look at the major points with respect to a feminist critique of the international legal system. To begin with, as explained earlier, a feminist scrutiny of the international legal instruments tries to expose any inherent gender biases in them. Specifically, a feminist critique tries to discern if the system

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13 Juliet Mitchell and Ann Oakley, *eds., What is Feminism?* (Oxford, 1986), p. 8.

14 Myres S. McDougal, Harold D. Lasswel and Lung-Chu Chen, *Human Rights and World Public Order* (New Haven and London, 1980), p.616.

15 Robyn Rowland, *Women Who Do and Women Who Don't Join the Women's Movement*, (London, 1984), p. 27.

plays a role in creating and perpetuating the unequal position of women.[16] According to them, as men and women are situated differently in society, the effect of the rules of international law are also felt differently. Even though international legal rules appear neutral on surface, a gender analysis of their impact reveals their disparate effects on men and women. Alternatively, these rules may not reflect the aspirations or serve the interests of men and women equally. In addition, most feminists while critiquing the present system are concerned not only with the manifestations of direct discrimination against women, which is easy to discern, but also, they take into account the various structural factors that prove to be the major obstacles as far as the mitigation of gender discrimination is concerned.

Though, the feminists do not try to "provide universal explanations for the oppression of women world wide",[17] they do try to single out certain common features which depict the discriminatory effect of the rules of international law on them. According to them, the inability of the present national and international legal systems to protect and promote the interests of women effectively can be traced to their historically evolved gendered nature. As women were not equal partners, in fact they were in a subordinate position, as far as the drafting of the present rules and procedures is concerned, the present system does not represent adequately their

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16 Hilary Charlesworth, Christine Chinkin and Shelley wright, "Feminist Approaches to International Law", *American Journal of International Law*, vol. 85 (1991), p. 613.

17 Pene Mathew, Dianne Otto and Kristen Walker, "Feminist Interventions in International Law: Reflections on the Past and Strategies for the Future," *Adelaide Law Review*, vol. 19, vol.1, no.1 1997), p.4.

perspectives nor do they cater effectively to their needs and interests. Many of these rules embody biases or prejudices against them and contribute to the perpetuation of discrimination. Also according to the feminists, both the national and international legal systems as they have evolved reinforce each other. The structure at the national level is not only reflected at the international level but in turn, the operation of the nation-state system strengthens the patriarchal or male dominated state structures. In brief, in contemporary international law they hold that the dominance of the male perspective permeates throughout, both with respect to rule formation and rule implementation.

Yet as explained earlier, there is a lot of diversity amongst the feminist themselves, and this is reflected in the different approaches to modern international law. Broadly speaking, these approaches can be categorized as the "mainstream" and the "disengagement" approaches.[18] These approaches are considered in the next section.

DIFFERENT APPROACHES

As mentioned, feminists have approached the international legal system in two distinct ways. On the one hand have been those feminists who have put more faith in working with the given-system of international law. They aim at 'mainstreaming' the concerns of women within the existing structures of rules and organization. On the other hand, there are feminists who believe in the 'politics of disengagement'.

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18 Deborah Stienstra, *Women's Movements and International Organisations* (New York, 1994), p. 147.

According to them the very structure of the present system of international law is discriminatory for women and thus real or material changes cannot be achieved by joining the same. They prefer to stay outside the system and try to work for changes at the structural or fundamental level.

The first approach is generally identified with the liberal feminists.[19] They want that the existing benefits or privileges that men are enjoying, and which have been denied to women as a result of discrimination against them, should be made available to both men and women on the basis of equality. They thus work to reform the extant international, regional or national governmental laws and organisations.[20] As a result of the lack of an adequate response at the national level, an effort is made to get their concerns included within the agenda of the international bodies, so that they can bring pressure on state governments to take serious measures for combating discrimination against women. The governments it is believed cannot disregard the will of the international community that easily and have to respond to these concerns. These feminists work for the adoption of international legal instruments that bring formal obligations on states to end gender discrimination and promote the rights and interests of women. It is as a result of this approach that women have been included in the present international human rights regime. The advancement of women and promotion of their equal rights has been an important consideration for the United Nations over the years. This in fact is pointed out as the major strength of the liberal approach, in

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19 Mathew, Otto and Walker, n. 17, p. 3.

20 Stienstra, n. 18 p. 148.

that the existing normative and organizational set up can be used to highlight the existing inequality of women and discrimination against them. And perhaps, given the deeply entrenched nature of gender discrimination in almost all societies of the world, this approach has been unavoidable to an extent.

But according to the critics of the liberal approach, it is an 'add women and stir'[21] approach that doesn't go far enough in responding to the '*de facto*' inequality that exists against women. The norms or standards that are already there, are sought to be applied 'on a basis of equality to women'. But as has been pointed out by many radical scholars, these norms and standards have been built on a foundation which is deeply marked by discriminatory gender conception. In other words, women cannot just be 'brought in'[22] and be expected to enjoy these standard automatically, just because they have been included in legal instruments. As a result of the inherent discrimination which would continue to exist, only some women who are already in a relatively advantageous position can benefit from this approach. Whereas, in order to bring real changes in the lives of majority of women, the basic socio-economic norms on which the system is based and which are the root causes for the existing gender discrimination, have to be targeted.[23]

The 'radical approach' is referred to as an approach which seeks structural changes in the existing system. This approach points to the patriarchal or male

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21 Zalewski, n. 12, p. 18.

22 ibid, p. 19.

23 Veena Poonacha, *Gender within the Human Rights Discourse* (Bombay, 1995), p. 40.

dominated structures at all levels of human relationship, as being the major cause for the oppression of women, and emphasize the need to alter them, at their very foundations.[24]

Any legal system is a product of its own times and reflects the socio-economic and cultural context in which it is created. In other words "rules that regulate procedures and priorities in any political system cannot be extricated from the substantive values and interests that led to their construction."[25] Thus, the radical feminists do not look for any far reaching solutions to women's problems within the existing structures of international rules and institutions. They prefer to disengage, as they fear the co-option of their agenda[26] within the existing system i.e., if they join it, which might, in turn, legitimate the existing rules that in the long-run may be harmful for women.

The radical feminists question any notion of 'objectivity' as far as the rules of law are concerned. According to them, it is the male subjective interests that are passed on in the name of objectivity. Women according to them have to rely on their own subjective judgement, in order to discern the validity of the rules.[27] It has been pointed out that, in view of the inability of the existing system to bring substantive

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24 ibid, pp. 49-54.

25 Michael Parenti, "Power and Pluralism: A view from the Bottom", *The Journal of Politics*, vol. 32, no. 3 (1970), p. 529.

26 Mathew, Otto and Walker, n. 17 p. 3.

27 Ann. C. Scales, "The Emergence of Feminist Jurisprudence: An Essay", *The Yale Law Journal*, vol. 95, no. 7, (1986), pp. 1376-1380.

changes in the lives of women or to identify the shortcomings of the system, one has to perforce look at the radical critiques, so that the system can be reformed in the real sense of the term.

While there are basic differences between the "mainstream" and the "dissengagement" approaches, both have attracted the advocates of women's interests, since the early days of the women's movement at the international level.[28] In fact this is the dilemma that feminists continuously face. It is imperative that they critique the present system, but at the same time they also want to ensure that the legal guarantees included within the system, especially with respect to women's rights, are implemented effectively. Perhaps there is a need to occupy the middle ground. As it has been pointed out "While states certainly should be made to implement the promises they have made thus far to promote the rights of women, international law currently offers only a partial response to women's perspectives".[29]

Thus, just because the feminists point out the short-comings of the present system, it should not be held against them that they demand the fulfillment of existing obligations undertaken by states. However, in the long run a more adequate response to women's concerns might require taking the observations of the disengagement school seriously. Especially with regard to international human rights law, incisive critiques have been presented, some of which are considered in the next chapter. But then again, human rights is just one branch of international law, whereas the rights or

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28 Steinstra, n. 18, p. 149.

29 Mathew, Otto and Walker, n. 17, pp. 3-4.

interests of women like that of other individuals are affected as much by the operation of international law in other fields. Furthermore, in as much as the international human rights law itself is a part of the whole, its effectiveness is impinged upon by the normative and organizational structure of international law, in general.

In view of the above, it is imperative that the international legal structure in general, in so far as it impinges on the interests of women, is briefly considered, before ascertaining the effectiveness of the international human rights regime in protecting and promoting women's rights.

THE INTERNATIONAL LEGAL STRUCTURE

Contemporary International law is a product of the modern territorial nation-state system. Since its establishment in Europe during the 17th century, the whole world has been divided into 'sovereign, independent' nation-states. They are the primary subjects of international law. It is they who enter into international commitments with other actors, whether binding or non-binding and it is the state practice that is taken into account for ascertaining the principles of customary international law. Though within a state a number of different agencies perform the various 'state' functions, externally a state is perceived as a monolithic entity, acting with a single purpose and speaking with a single voice.[30]

Over the years, not only the feminists but a number of other international relations scholars, who have analyzed the working of the present nation state system,

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30 Chinkin, n. 1, p. 23.

have objected to this kind of treatment of the state as a single unit. According to them, a state is an abstract entity,[31] it is the institutions of governance and the people who man these institutions that are relevant for the purposes of assessing state conduct. Specifically, from the point of view of international law, it might be added that the international obligations of states or the rules of international law accepted by states, are entered into by certain specific actors within these states,though the impact of these rules may be varied for the differently placed groups of people. These two basic facts can be taken as the starting points of a feminist critique of the present international legal structure, both normative and organizational. But then again, regimes or rule governed conduct of states is only a part of the overall structure of international relations that determine in the first place the content of these rules, though the rules also in turn play an integral part in shaping the structure. Thus, in order to discern the role and functions of the international legal system we have to first consider, albeit briefly, the character of the present system of international relations focussing specifically on the feminist critique of the traditional approaches that have dominated this system.

THE NATION-STATE SYSTEM

According to the feminists, the treatment of states as sovereign, independent

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31 For instance, as Sandra Whitworth points out "...many of the issues raised by feminists about International Relations have previously or are currently being raised by specialists in International Political Economy." Sandra Whitworth, "*Theory as Exclusion: Gender and International Political Economy*" in Geoffrey R. D. Undersell, ed., International Political Economy, Conceptizing the Changing Global Order.

units acting as single agents, is an ideological position that has come to dominate the present system of international relations. Both the traditional international relations theories of Idealism and Realism treat the states as such. For these approaches states are the principal actors on the international stage. Though, idealism considers states as accountable agents, realism does not share this view.[32] It is the realist approach that has had the pre-dominant influence on the development of contemporary international relations. For realism, the concepts of power and conflict of interest are central. According to it, states are rational autonomous actors interacting with each other under conditions of anarchy, with their basic motivation being enhancement of national power for the purposes of self-preservation.[33] Though, inside state communities exist bound by certain norms and principles, externally the states are exempt from any moral obligations.[34]

According to the feminists, this atomistic view of states espoused by the realist theory, obscures the fact that in reality we live in an interdependent world and in every state, it is the people in positions of power who really make the choices about mutual relationships with the people of other states. As women have traditionally been in a subordinate position and excluded from this so called world of 'high politics',

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32 Onora O 'Neill, "Justice, Gender and International Boundaries" *British Journal of Political Science*, vol. 20, no. 4 (1990), p.448.

33 Geoffrey R. D. Underhill, "Conceptualizing the Changing Global Order" in Geoffrey R.D. Underhill, ed. *International Political Economy, Conceptualizing the Changing Global Order*.

34 O'Neill, n. 32, p. 448.

[35]their perspectives or experiences have not been included in the various norms set by this international interaction. Both the definition of interests and priorities have been laid down by men. As a result, though gender relations form an integral part of the international relations structure, they have failed to become an issue of importance as far as global politics is concerned.

According to the feminists, the partiarchal or male dominated structures within the states ensure the continued invisibility of women from the international stage. These are based on historically evolved 'power relations' between men and women with each sex identified with certain definite social functions and assigned a particular status in societies. These socially learned roles are not only complexly intertwined with the socio-economic structures of the society, but also they have become so deeply entrenched within the psyche of the individuals that it becomes difficult to break them. As a result, the areas of social life with which women have not been traditionally associated, continue to be difficult for them to access.

But then again, the patriarchal structures at the state level are sustained by the working of the nation-state system at the international level. The feminists hold that the "states are patriarchal structures not only because they exclude women from elite positions and decision-making roles, but also because they are based on the concentration of power in and control by an elite and the domestic legitimation of a monopoly over the use of force to maintain that control".[36] This basic structure is

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35 Whitworth, n. 31, p. 117.

36 Charlesworth, Chinkin and Wright, n. 16 p. 615.

re-inforced by the existing international system, where it is again only the elite of these states that interact and the use of force and power are central elements. This perhaps is the reason why the feminists point out that the present 'statist' system as it has evolved, can serve only the interests of men.[37] With the agenda of polity largely determined by them women's issues continue to be relegated to a secondary position.

The anti-statist position of the feminists has been challenged by a number of scholars. According to them, by pitting women against the state and the present institutions of governance it might make it difficult for them to bring about change by using these structures. Though they accept that the present state structure are indeed patriarchal they also point out that the feminists at least the more radical ones, have not as yet come up with a viable strategy to overthrow this structure. What they envisage is an utopian future but do not provide any really practical ways of achieving it. For these critics feminist theory is not yet a complete theory. Also, according to them the state as it has historically evolved is a patriarchal structure but it is constantly evolving; to them the states' position in gender politics is not fixed.[38]

The debate highlights the complexity of the issues involved as far as the relationship between state and gender is concerned. For the purposes of the present study, which is a limited exercise, both the points of view would be taken into account in order to point out the shortcomings of the present international legal structure.

According to the liberal feminists, discrimination against women is a result of

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37 Ibid.

38 R.W. Connell, "The State, Gender and Sexual politics: Theory and appraisal", *Theory and Society*, vol. 19, (1990), pp. 507-544.

"erroneous and misogynist beliefs about women" which can be corrected by giving them equal rights. But the radical feminists identify the inequality between the sexes and the dominance of women by men as the root cause of all other oppression, both at the national and international levels. For them the "personal is political". According to them, the power play that exists at the international or any other level cannot be delinked from that existing in relations between men and women. For these feminists, women are associated with the 'ethic of care' and the values of nurturance and preservation,[39] as opposed to those of power and dominance. They talk of a 'different voice' of women. Though, according to some other scholars such kind of arguments are essentialist arguments and might even serve to reinforce the harmful gender distinctions already prevalent.[40]

Yet, it is pointed out that, as long as men and women share different life experiences and perform different roles, these have to be incorporated in various laws and policies in order to give them universal validity. But again, especially at the international level the major obstacle to taking cognizance of women's issues and their contributions is their lack of visibility. Also, with the importance of contributions adjudged in terms of participation in decision making, economic influence etc. women, who are in a relatively disadvantageous position with regard to these yardsticks, tend to get ignored. As pointed out by Michael Parenti, "our modes of analysis have defined the scope of our research so as to exclude the less visible activites of the

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39 Zalewski, n. 11, pp. 20-21.

40 Charlesworth, Chinkin and Wright, n. 17, p. 616.

underprivileged".[41]

For feminist scholars, women's contributions to societies are largely ignored or undervalued, be it their reproductive role, domestic work or any other work in society. This has been clearly visible in the United Nations' treatment of the issue of women and development. In early 1970s, action on women and development was equated to gaining equal access to education, training, employment etc. In mid-70s, the approach was changed to integration of women in development. But by 1980, when it was pointed out, especially by third world women, that the problem was not lack of integration of women into development, as they were already integrated into it, but that the problem was the development process itself, which had to be evaluated and had to proceed from their vantage point, again the approach was changed, now called 'Women and Development'.[42] It showed how women's life and work were ignored and the consequent inability to judge correctly their contributions to society.

As is clear from above, according to the radical feminists, a solution to women's problems, the inequality and discrimination against them cannot be visualized without looking at the basic structural factors that contribute to them. But to deal with these structural causes would require a re-look at the fundamental normative and conceptual assumptions on which the present national and international systems are based. Especially, the gender dimensions of various interstate interactions have to be taken into account.

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41 Parenti, n. 25, p. 507.

42 Steinstra, n. 18 pp. 119-122.

Issues of power, national interest, development, war and peace, democracy, all affect the interests of women and cannot be analyzed fairly without taking into account the welfare of women. But in order for women's voices to be heard as well as their experiences and perspectives to be incorporated, they should be able to participate on the basis of equality with men in all areas of international activity. Especially with regard to international law, which by definition should embody a regime based on universal norms and values, it is imperative that women contribute at all levels of rule making and implementation, as equal partners. But as the next section would show, this is not the case.

THE ORGANIZATIONAL STRUCTURE OF INTERNATIONAL LAW

The continuation of patriarchal structures at the state level, as contended by the feminists and the nature of international politics, has meant that the participation of women at the international level has continued to be dismally low as compared to that of men. Studies have shown that the important decision making positions, in both domestic and international institutions, are overwhelmingly peopled by men: "...very few states have women in significant positions of power, and even in those states that do, the numbers are extremely small. Women are either unrepresented or under-represented in the national and global decision making processes."[43]

Though political empowerment of women is an oft repeated goal of the United

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43 Hilary Charlesworth, "Human Rights as Men's Rights", in Julie Peters and Andrea Wolper ed., *Women's Rights Human Rights: International Feminist Perspectives* (London, 1995), p. 104.

Nations and some achievements have been made with regard to it, in most countries of the world, women lag far behind men in both political and bureaucratic structures. In this century, till 1996, only 24 women have been elected head of state or government and only 10.5 percent women have been parliamentarians.[44] This despite the fact that, the Economic and Social Council of the United Nations endorsed a target of having 30 percent women in positions at decision-making levels by 1995.[45]

At the international level the structures of international organsiations replicate those of states. "Wherever in international institutions major decisions are made concerning global policies and guidelines, women are almost completely absent, despite the often disparate impact of those decisions upon women."[46]

Article 8 of the Charter of the United Nations states: "The United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs".[47] Though the article might seen unnecessary in view of the Charter's re-affirmation of faith in the equal rights of men and women, but given the fact of existing gender inequality and discrimination against them, it was thought to be necessary to include the provision

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44 UN. Doc., Women At a Glance, DPI/1862/Rev. 1, February 1997.

45 UN. Doc., *The Beijing Declaration and Platform for Action*, DPI/1766/Wom-February 1996, p. 109.

46 Rebecca Wallace, *International Human Rights: Text and Materials*, (London, 1997), p. 131.

47 The Charter of the United Nations, DPI/511-93660, August 1995.

explicitly. Even though ultimately the prerogative to choose their representatives belongs to states, it has been recognized that the equal participation of women within the organization at all levels, is essential to give its working and decisions the requisite gender balance.

But as in 1995 the then Secretary General of the United Nations, Boutros Boutros Ghali acknowledged that "the recruitment and promotion of women at the United Nations had failed to live up to the promise of the Charter...while the record of member states was no better, of 185 missions only 6 were headed by women and very few women were diplomats or foreign ministers.[48]

While it has been pointed out that merely increased participation would not necessarily change the substance of decisions or policies, at least in the short-run, it has also been acknowledged that in the long run women's equal participation is the only way of incorporating their experiences and perspectives. According to the Beijing Declaration and Platform for Action, "Women's equal participation in decision making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Without the active participation of women and the incorporation of women's perspective at all levels of decision making, the goals of equality, development and peace cannot be achieved."[49]

But has been as pointed out by most feminist scholars, dominance of the male

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48 Charlesworth, n. 43, p. 104.

49 *The Beijing Declaration and Platforms for Action*, n. 45, p.109.

perspective as far as the rules and principles of international law are concerned, is ensured as the states continue to be the main actors with respect to the creation of the sources of international law, as delineated under Article 38 of the statute of the International Court of Justice. Though this has sought to be countered through the 'non-governmental organization' movement over the years, still the opportunities for intervention in international law creation remain limited and under the overall control of the states. NGOs are excluded from the formal processes of international law-making unless admitted by states. Even though their representation on official delegations might have increased, states remain the overall arbiters.[50]

The invisibility of women is also striking as far as the implementation, adjudication or progressive development of international law is concerned. For instance, women are still vastly under represented in the specialized United Nations human rights bodies. Apart from the Committee on the Elimination of Discrimination against Women (CEDAW), all of whose members are women, on most of the other bodies including the United Nations Human Rights Committee, the Committee attached to the International Covenant on Economic, Social and Cultural Rights, the Committee against Torture etc., women are in a small minority. Same is the case with the International Court of Justice, where only two women have sat as judges till now[51]

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50 Chinkin, n. 1, pp. 22-23.

51 MS. Rosalyn Higgins has recently be appointed as a Judge on the Court. Prior to this, only Ms. Sujanne Bastid sat as Judge in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), (1985) (*Tunisia V Libya*), 1985 ICJ Rep 192 (Judgment of Dec. 10) cited in Charlesworth, Chinkin and Wright, n.16.

and the International Law Commission, where the position is just as bad.

In view of the above and given the fact that large scale discrimination against women, still persists in almost all societies of the world, it is inevitable that the feminists accuse international law of having an androcentric bias.

INTERNATIONAL LEGAL NORMS

According to the feminists, both the fundamental principles on which international law is based as well as the rules associated with its specialized branches, either do not reflect the reality of women's life or are not applied taking into consideration their interests. Not only do the priorities reflect a male perspective, but many a times these rules themselves are instrumental in perpetuating the unequal status of women. Their basic human, social and economic needs are relegated to a secondary position.

A. Sovereign-Equality

The first and foremost principle on which the present international legal order is based, is the principle of 'sovereign-equality' of states. According to this principle, all nations big or small are legally equal, independent and free from external control. This principle is enshrined in Article 2(1)[52] of the United Nations Charter and is further strengthened by the provisions of 'Article 2(7)'[53] which lays down the

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52 Article 2(1) of the Charter of the United Nations reads: "The organization is based on the principle of sovereign equality of all its members.

53 Article 2(7) of the Charter of the United Nations reads: "Nothing contained in the present charter shall anthorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..."

principle of 'non-intervention in the internal affairs of states', acknowledging thereby that there is a sphere of activity over which the states enjoy autonomy. But as the feminists have pointed out, one cannot adjudge the validity of the principle dealing with it in abstract terms. In order to discern its impact on different groups of people within states, we have to focus on both its content and working over the years. By looking at the instances of its invocation, as well as the areas in which it has been diluted we can ascertain as to in whose interest the principle is working.

Though the prolific development of international human rights law over the years has meant that the scope of the plea for domestic jurisdiction is decreasing, yet states continue to use the rhetoric of non-intervention in order to deflect criticism of their domestic actions. This is particularly true with respect to the rights of women.

According to feminists, in view of the growing interdependence of states the concept of sovereignty is losing its relevance. In particular over the last few years, with the impact of globalization, the inter-linkages between states have increased further. Also, the growing influence of transnational actors has meant the diffusion of the decision making function and difficulty in appropriating accountability. Increasingly, we are living in times of what Chinkin calls, "internationally defined national imperatives".[54] This is particularly true with respect to the continuing gulf between the developed and the developing countries. It does not allow the latter any liberty to take really independent political decisions or to make free economic choices with respect to the welfare of their population. This the feminists pointout makes evident

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54 Chinkin, n. 1, p. 14.

the false presumption of sovereign equality of states. States are not equal and thus, are not sovereign. Accordingly, it might be said that, with the dilution of the actual sovereign ability of states, the continued legal sanctity of the principle betrays a reluctance to forego traditionally enjoyed authority, by those in power within states, in order to control their population.

In addition, with the growing liberatisation a lot of changes are taking place as far as the social and economic structures of states are concerned, making it imperative that the law respond to these changes. For example, as has been pointed out, to the extent that the governments are withdrawing from a number of sectors of the economy and social life and pursuing non-interventionist policies, the traditional objective of international human rights law of protecting the individual from harmful state action, has lost a lot of its relevance.[55] It is the harms that the individuals might suffer at the hands of private actors or within the private sphere which have become relevant than before.

But according to the observation of a number of scholars, whereas the role of the state in social and economic spheres is decreasing, the international human rights doctrine continues to focus on the state as the main violator of human rights of individuals. This, the feminists point out, is the result of the continued dominance of the public-private distinction in international law which is particularly harmful for the interests of women.

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55 ibid, p. 21.

B. The Public-Private Distinction

The public private distinction permeates international law at all levels, be it the public international law-private international law divide or the separation of the domestic sphere of jurisdiction from those areas where international law operates.[56] Traditionally, the social, economic and cultural spheres have been treated as the private spheres of states.

Conceptually, the doctrine of the separation of public and private spheres of life is traced to the western 'liberal tradition'. According to the feminists its continued influence has been the biggest obstacle, as far as the effective international legal protection of the human rights of women is concerned. But in order to appreciate the feminist critique of the public-private distinction, we have to at first consider, though briefly, the roots of this doctrine in the liberal tradition. This would also lay the foundation for analysing the substantive international human rights law, with regard to women.

As mentioned earlier, the liberal ideology is associated with the 'Enlightenment' in Europe. It places central emphasis on individual rights and freedom and considers individuals as rational autonomous beings, capable of striving for their interests under conditions of minimum regulations.[57] According to classical liberalism, there are certain rights that are natural and inalienable to every individual. The rights to life, liberty and property are considered the most important. The State should provide for

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56 Charlesworth, Chinkin and Wright, n. 16 p. 625.

57 For a concise account of liberalism see, International Encyclopedia of the Social Sciences, vol. 9, pp. 276-282.

the protection of these rights through constitutional and legal guarantees. On the other hand, according to this philosophy, there are certain 'private' areas of life of an individual in which there should not be any state intervention. The social, economic, cultural, religious and family spheres are said to fall in this category. Thus, the state is ideally required to perform only negative functions and not take up positive responsibilities.

The relevant point with respect to women's interest as far as the liberal theory is concerned is that, as originally conceived, the liberal theory did not include women as equal citizens.[58] They were thought to belong to the private sphere. Over a period of time this distinction came to be institutionalized in law and policy. It has proven to be detrimental to the interests of women. For institutions of family and religion, to which areas women are thought to belong, have traditionally developed as male dominated institutions and any reform or radical changes in them, which may be needed to protect women's interests, are sought to be precluded by the plea of non-intervention in private life. Also, when this is combined with the limited scope for positive state action in the economic sphere, any mitigation of historical in-equality of women or the fulfillment of their social needs, becomes difficult.[59]

According to analysts the public private distinction is applied not only with

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58 Gayle Binion, "On Women, Marriage: Family and the Traditions of Political Thought", Review Essay, *Law and Society Review*, vol.25, no.2, (1991), pp.445-61.

59 Mary E. Becher, "The Politics of Women's Wrongs and the Bill of Rights: A Bicentennial Perspective", *The University of Chicago Law Review*, vol.50, no.1, (1992), p.456.

respect to the sphere of life, but also with respect to the actors involved i.e., whether governmental or non-governmental. It has become crucial, as would be seen in the next chapter, for international human rights law, given the fact that the so called 'private sphere' remains the site for overwhelming number of human rights violation against women. Such heinous abuses as rape, sexual harassment, battering or such customary practices as female genital mutilation, have not been dealt with effectively by states under the pretext of public-private divide. Wherever they might occur, in family, at work place or in societies at large, they have been either accepted, condoned or overlooked by states and societies both. Even so, as pointed out by scholars these concerns are not limited to international human rights law alone, there are other specialized branches of international law which have to deal with such abuses in one way or the other. Moreover, as this distinction has become institutionalized in international law, it affects the functioning of all its branches.

As mentioned earlier, at the topmost level this distinction operates as the distinction between the domestic sphere of activity of states, as opposed to the international. Infact, according to the feminists, the liberal conception of autonomous, independent individuals, equal to each other, is directly corelated to the realist conception of equal independent nation states. Though, as a result of the theoretical foundation of the private public dichotomy in the liberal theory, the feminists who invoke this distinction are accused of essentialism and ignoring the fact that historically no such distinction existed in many of the other societies of the world. But in response to this it is pointed out that, as far as the particular context of international law is

concerned, the fact is that it was "developed by a very small number of colonial states and therefore operates according to distinctly liberal conceptions about the personhood of the state and the public-private dichotomy".[60]

In light of the above comment it is pointed out that, as the structure of contemporary international relations and international law has developed, even those countries that did not have such a concept indigenously, have used the public-private distinction to escape international scrutiny for many of their domestic policies and existing situations, including the oppression of women. Also, many of the traditional societies, as they are called, especially those which experienced colonial rule, have adopted constitutional and legal mechanisms based on the Western models which imbibe this distinction.[61] Basically it is observed that the distinction in all societies, is used to avoid reform of the existing social structures.

C. - **Self-Determination**

Another fundamental principle of international law whose application the feminists have challenged, is the principle of self-determination. According to them, though the right has been worded in terms of the right of all "peoples" in both the International Covenant on Economic,Social and Cultural Rights and the International Covenant on Civil and Political Rights, Women's voices are usually not sought to be

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60 Mathew, Otto and Walker, n.17, p.4.

61 For instance, after independence in 1947, India adopted a 'secular' state structure and the policy of non-interference in the personal affairs of various communities. These communities are allowed to have their own personal laws.

heard whenever it is invoked.[62] They point out, that traditionally the claims of various national and ethnic groups to self-determination, are not scrutinized adequately as far as the condition of women within these groups is concerned.

The right of self determination has been one of the most controversial provisions of international law. From demands for freedom from colonial rule today the right is being demanded against internationally recognized 'sovereign independent' states. What complicates matters is many a times the involvement of external forces. But whatever the situation, the interests of women according to the feminists, are seldom taken note of as a central issue. For instance, the example of the civil war in Afghanistan and external intervention in it is cited as a reference case. It is pointed out that, though the United States and its allies supported the claims of Afghan Mujahideen and justified their actions against the then Soviet backed socialist regime by invoking the principles of territorial integrity and political independence, they took no account of the fact that, the policies of the Mujahideen with respect to women were oppressive and "patriarchal". This was clear even in the refugee camps in Pakistan in which a strict fundamentalist regime was imposed.[63] It is pointed out that the fact that these policies have continued under the present Taliban regime is clear. According to reports, the position of women has deteriorated considerably as compared to the earlier socialist regime. Women have been made to leave their educational pursuits and jobs that they held earlier, a strict dress code and other religious strictures have been imposed which

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62 Charlesworth, Chinkin, wright, n. 16, p. 643.

63 ibid, p. 642.

are often enforced brutally.[64] The countries that supported the Mujahideen to protect their rights, today do not seem to be bothered too much about the rights of women there, even though they constitute half the population whose interests they were so worried about earlier.

Writing in 1950 i.e., much before the adoption of the two international human rights covenants, about the obligations of member states under the United Nations Charter to respect human rights and fundamental freedoms, without discrimination as to race, sex, language or religion, Hersch Lauterpacht mentions, "...the obligation exists and it must be given effect in good faith...". Specifically taking the example of removal of sex discrimination he wrote; "...although a reasonable interpretation of the Charter does not require that members of the United Nations, should henceforth with one stroke grant full equality to women in all respects, a state would no doubt act contrary to its obligations under the Chanter, if under the impact of an anti-feminist regime it were drastically to curtail the existing rights of women."[65] In light of the feminist critiques it might be said that the same principle is apparently not applied whenever international support to a particular regime is given. The existing situation of women is not taken note of before extending support to particular causes so that, as the changes are affected their situation doesn't become worse. Specifically in situations of

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64 David R. Penna and Patricia J Campbell, "Human Rights and Culture: Beyond Universality and Relativism", *Third World Quarterly*, vol. 19, no. 1, (1998), pp. 7-27.

65 E. Lauterpacht , ed., *International Law Being the Collected Paper of Hersch Lauterpacht*, vol. 3 (The Law of Peace), Part II and VI, (Cambridge, 1977), p. 419.

crisis, an effective monitoring of women's rights is advocated to be undertaken. But as pointed out by feminists, the level of importance given to the rights of women is so low that most of the times they do not become an issue. This would become clearer in the next section.

D. Rules with respect to Specialized Branches other than International Human Rights Law

As mentioned earlier, the post Cold-War period has seen a lot of changes around the world. Some of them coerced, others voluntary. In a seemingly strange mix, the rules of international humanitarian law, refugee law and international economic law have come to be mentioned together, with respect to the same situations. And the gender insensitivity of all three has been an issue, high on the feminist agenda.

Over the last few years, the world has seen a number of large scale refugee crisis. Millions have been uprooted from their homes and countries. According to estimates, seventy five to eighty percent of them are women and children.[66] Not only do they bear the worst brunt of these situations, the inadequacy of the existing rules and procedures compounds their suffering.

Refugee women undergo the most egregious forms of gender specific human rights abuses, from mass rape to torture, to the sale of children, trafficking and forced prostitution. Also they suffer the most due to shortages of food, water and other necessities. Their burden becomes several fold as the result of the responsibility of children. But in addition to all this, they also have to undergo rigorous procedures in

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66 UN Doc., Women at a Glance, DPI/1862/Rev. 1-February, 1997.

order to determine if they can remain in the countries to which they have fled. In such procedures that are used to determine refugee or asylum status, gender specific persecution that many a times may lead women to flee their countries, are not usually recognized. The 1951 Convention relating to the Status of Refugees does not recognise gender as a ground for granting refugee status.[67] As a result, women have to show that they are eligible for refugee status, only through the use of one of the other categories.[68] Here again the public-private distinction comes into play and abuses feared specifically by women such as battering, genital mutilation, ostracism, threats from fundamentalist forces etc., are not seriously taken into consideration, even though given the non-cooperative or hostile regimes within states, women might even be facing a threat to their lives.

The other continuing area of concern for feminist scholars is that of international humanitarian law. After the events during the conflict in Yugoslavia in

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67 According to the 1951 Convention relating to the Status of Refugees, a refugee is defined as a person who, "owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country."

68 In the last one and a half decade some progress has been made in this area, especially in the countries of the North/West. The European community recognised in 1984 that, 'gender specific claims' can be recognized under the category 'particular social group', for the purposes of granting refugee status. It was followed by a similar UNHCR recommendation in 1985 and in 1991, the UNHCR adopted 'Guidelines on the Protection of Refugee Women'. At the level of individual nations the lead was taken by Canada when in 1993, it issued 'guidelines' for ascertaining such claims. Many other countries have followed suit including US, Australia and others yet the efforts remain limited to these countries and have not been adopted at a global scale, wherein most of the women continue to suffer.

the beginning of this decade and later in Rwanda, the subject of violence against women generally has become very important. The "massive, organized and systematic rape used as an instrument of war and as a method of ethnic cleansing,"[69] shook the conscience of the world. Though it has been recognized a war crime since long, it was for the first time that the war crimes tribunals set by the Security Council for Yugoslavia and Rwanda recognized rape as a 'crime against humanity.'

While it has been seen as a significant achievement by some scholars, according to others, too much importance to just two contexts of massive human rights violations and the pronouncement of rape as a crime against humanity, "deflects attention from the ongoing regular incidence of rape"[70] and other violence against women, in all internal or inter state conflicts. In fact as pointed out by Radhika Coomaraswamy, 'the Special Rapporteur on Violence against Women' appointed by the United Nations Human Rights Commission, "violence against women during times of armed conflict has been a widespread and persistent practice over the centuries. There has been an unwritten legacy that violence against women during war is an accepted practice of conquering armies." Many a times, acts like rape are used to terrorize populations either to force them into submission or to make them flee.[71] A large number of these cases either go unreported or investigation, prosecution and punishment are not

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69 Chinkin, n. 1 p. 16.

70 Ibid, p. 11.

71 UN. Doc., Economic and Social Council, Commission on Human Rights, report of the Special Rapporteur on Violence against Women, Its 'Causes Consequences. E/CN.4/1998/54, January 1998, pp. 4-5.

carried out with 'due diligence', pointing to the weaknesses of the present international humanitarian law regime, as premised on the four Geneva Conventions of 1949 and the two Protocols of 1977. Many of their provisions still use obsolete terms to define crimes against women. For example, according to Article 27 of the Geneva Convention Relating to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), "Women shall be especially protected against any attack on their honour, in particular, against rape, enforced prostitution or any form of indecent assault." Thus, describing the crimes in terms of "protection" and "honour" rather than as crimes of violence. Though lately an attempt is being made to recognize crimes like rape as a form of torture, the rate of conviction is not very high.[72]

Also, over the past few decades an effort has been made to import the standards of international human rights law into international humanitarian law so that the basic rights of people can be protected[73] in such situations. Many feminists have been supporting this endeavour to break the barriers between international human rights law, humanitarian law and refugee law.[74] But as yet, not much improvement with respect to dealing with such situations, from the point of view of women's rights, seems to have taken place. Even now most of these crimes are either invisible or not taken care of properly.

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72 Ibid, pp. 4-16.

73 J.G.Starke, *Introduction to International law,* (New Delhi, 1994), ed. 10 p. 372.

74 Mathew, Otto and Walker, n. 17 p. 7.

In fact in order to deal with such problems as humanitarian crisis or refugee exodus in a really meaningful way, we have to take into account their root causes. In looking at some of these causes as have been identified over the years, one can realise that all of them have a gender dimension.

Here, we have to take into account explicitly the disparate effects that various policies and actions have on men and women. For example, it has been pointed out by a number of scholars that the crisis in East-Europe, particularly in Yugoslavia in early 1990s, was contributed to by the structural adjustment policies and austerity measures imposed by the International Monetary Fund and the World Bank. But along with this it has also been pointed out that, whenever or wherever such measures have been adopted, for example, as far back as in 1970s, in a number of countries of the South, they have been generally harmful to women and their condition have as a result, deteriorated [75] As with the shrinking of social benefits, health care etc, and the states' inability to meet the socio-economic needs of its citizens, hardship is imposed on women Yet, women's interests are not taken into account when such policies are framed. Even though looking at the connections it might be observed that if women's interests are kept in the centre while making policies in the first place a number of such crisis might even be averted. But as the feminists point out, the existing patriarchal structures make this difficult to achieve.

Most of the policies adopted or endorsed at the international level are not

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75 Krysti Justice Guest, "Exploitation under Eraser: Economic, Social and Cultural Rights Engage Economic Globalization", *Adelaide Law Review*, vol. 19, no. 1, (1997), pp. 79-82.

analysed adequately from a gender perspective. For example, again referring to Eastern Europe, it has been pointed out that the democratization of these countries over the last few years, has also not affected men and women equally. According to Zalewski, in many of these countries there have actually been adverse effects on women's political participation, accompanied by an increase in their social exploitation through pornography and sexual objectification.[76] Especially at the present juncture in international relations, most of these policies whether of democratization or liberalization are driven by economic imperatives. Thus, it is essential that the international institutions which are at the helm, as far as the economic decision-making is concerned, incorporate women's voices and concerns within their structures. Yet as has been pointed out, both international trade and economic law as well as the international trade and economic institutions, ignore gender issues. As the policies that these institution make have far reaching effects in today's close- knit world, be it with respect to fulfilling people's basic needs or social structures, the absence of women's voices means that, many a times their effects are lopsided. Referring to the present phase of liberalization, feminists point out that the demands for socio-economic justice, which is central to women's welfare, are being subjugated to those of the free-market.[77]

In fact, the importance that gender has been accorded within the International Monetary Fund or the GATT over the years, can be discerned with the help of one

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76 Zalewski, n. 11, p. 21.

77 Guest, n. 75.

example. In 1987 the Commission on the Status of Women was given the mandate to implement the 'Nairobi Forward Looking Strategies' for the Advancement of Women. In order to do this, significant changes were made with respect to its work. "Other agencies of the United Nations also continued to establish and strengthen their co-ordinating or substantive units on the status of women. All of these activities were co-ordinated through a 'System-wide Medium term Plan on Women and Development' (SWMTP-WD) between 1990 and 1995". The plan was considered very important as it provided for the translation of the mandates given in Forward-Looking Strategies to a "consistent and efficient approach to guide the formulation of the planning and programming documents of the organizations of the UN system". However there remained some significant omissions from this plan including, "the departments of the secretariat responsible for political and security matters, the IMF and the GATT".[78]

The above was an over view of the contemporary interntional legal structures, in light of the feminist critiques. According to the feminists, the overall structure as it stands today does not seem to be adequately responsive to the needs and interests of women.

In order to reform the system and to bring appropriate changes in it, the feminists have adopted two different approaches, the liberal and the radical. The more trenchant critiques of the system have been presented by the radical feminists. According to them, the present nation state system itself as it operates perpetuates discrimination against women. Also, as far as the organisational and normative

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78 Steinstra, n. 18 p. 138.

structures of international law try to sustain the present system, they can only be partially successful in answering some of the basic concerns of women.

The continuing lack of women's participation at the organisational or the decision making levels is reflected in the normative structure. This according to the feminists, questions the legitimacy and authority of the structure itself.

Yet, it has also been pointed out that women have been able to benefit by being a part of the present international legal structure to a considerable extent. This it is held, is especially the case as far as the international human rights law is concerned. But how far are these claims valid, can only be ascertained by looking at the substantive norms and implementation mechanisms of the present system of international human rights law.

Thus, the next chapter looks at the historical evolution of women's rights in international human rights law, focussing on the norms contained in the principal instruments and taking into account briefly the enforcement mechanisms. It would also look at the contemporary critiques of the traditional approaches that have shaped the present system.

CHAPTER III

HISTORICAL EVOLUTION OF WOMEN'S RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

INTRODUCTION

Perhaps the one area of international law that seems to be most accessible to individuals and groups within states, is that of international human rights law. And also, the contemporary human rights movement can be said to be the one movement that has descended from top downwards i.e., from the international to the national level. Today human rights have become the central point of legal debate in both the arenas.

Over the years not only the scope of the rights has widened but also, the varied classes of people demanding recognition of their particular concerns as human rights, has gone up This is because of the fact that, the characterization of a demand in terms of human rights grants it an aura of universal validity and legitimacy.[1] Various disadvantaged and deprived sections of societies who do not feel that they are being treated fairly within the existing social structures, use the language of human rights to voice their protest. In particular, if their demands are not being heeded within the domestic set up, they try to get them incorporated into the emerging international human rights regime. In traditional international law it was assumed that a state had the authority to treat its own nationals

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1 Veena Poonacha, *Gender within the Human Rights Discourse* (Bombay, 1995), p.1

as it saw fit[2], i.e. it did not owe any accountability for its actions internationally. This assumption has come to be challenged by the progressive development of modern human rights law. A great number of human rights norms, rules and standards have evolved as state commitments, both as part of international customary law and by way of a range of general and specific legal instruments, bringing the welfare of individuals directly within the preview of international consideration.

Yet, it was not much over half a century ago that the contemporary human rights movement began, with the United Nations Charter giving the first formal and authoritative expression to it.[3] But since then a large number of vastly diverse groups of people with just as varied interests, have tried to seek protection and promotion of their rights under international human rights law. Women have been one such group.

In fact, the advancement of women can be said to be one of the most popular initiatives of the United Nations. Over the years, a large number of international instruments have been adopted towards this end. Alongwith these there have been wide-ranging programmes, policies, training and research directed towards improving women's conditions. Yet the following United Nations statistics make clear the extent of gender discrimination that still persists:

> "of the world's nearly one billion illiterate adults and of the 130 million children not in school, two-thirds are women and girls respectively; 70% of the worlds poor people are women; the majority of women earn on average three-fourths of the pay of males for the same work while in most countries women

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2 Egon Schwelb, "*Human Rights*" *International Encyclopedia of the Social Sciences*, vol. 5-6.

3 Henry J. Steiner & Philip Alston, *International Human Rights in Context: law, Politics, Morals: Text and Materials*, (Oxford, 1996), p.118.

> work approximately twice the unpaid time men do; an estimated 20 million unsafe abortions are performed worldwide and approximately 585,000 women die every year from pregnancy and childbirth related causes and about 20 to 50% of women experience some degree of domestic violence during marriage."[4]

It is evident then that even after purporting to deal with women's rights on a priority basis, the present international regime has not been able to secure some of the very basic human rights of women. Even though in response to this it has been pointed out that, given the deeply entrenched nature of discrimination against women and the general weaknesses of the international legal regime, dramatic changes in the status of women cannot be expected in a relatively short period of time. But then again, it has also been observed that any analysis of the success that the present human rights system has achieved in mitigating the inequality of women, should take into account the relative position of women *vis-a-vis* men at present, as compared to when the regime was first instituted. In this crucial respect a number of studies over the years have shown that not much changes have taken place.[5] As was shown in the last chapter, it is relatively easily that with changes in political regimes the position of women reverts back to some of the most primitive conditions. Infact as pointed out by Stienstra, changes that have taken place in women's situations over time have been more in response to extraneous developments at the national and world stage, rather than being due to the various norms or rules that have been laid to ameliorate their

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4 Un. Doc., *Women At a Glance*, DPI / 1862 / Rev. 1, February 1997.

5 Deborah Stienstra, *Women's Movements and International Organisations* (New York, 1994), pp.145-159.

conditions.[6] This makes it imperative that both the substantive international legal norms as well as the implementation mechanisms dealing with women rights are reviewed in order to locate their short comings.

Thus, in the present chapter as attempt has been made to analyse the evolution of women's rights in international human rights law, focusing specifically an the principal international instruments viz., the Universal Declaration of Human Rights, 1948; the International Covenant on Economic, Social and Cultural Rights, 1966; the International Covenant on Civil and Political Rights, 1966; the Convention on the Elimination of all Forms of Discrimination against Women, 1979 and the Declaration on the Elimination of Violence against Women, 1993.

Infact over a period of time critiques of the international human rights law and structures have been presented which have pointed to its insufficiencies and biases. Particularly with respect to the earlier corpus of instruments i.e., the Declaration and the two Covenants, it has been pointed out that, as they reflect the times and context in which they were created wherein, not only particular conceptions of sex roles in society prevailed but also, the major consideration was the protection of individuals from the abuse of state power, a stereotypical understanding of gender relations, as well as, a neglect of specific gender based abuses seems to be evident in many of their provisions.[7] The assumptions on which these instruments have been based are said to lack requisite sensitivity to some of the basic needs of women, even though their

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6 Ibid.

7 Steiner & Alston, n.3 p.887-967.

fulfillment is a pre-condition for the enjoyment of many of the rights that have been included in them.

It has also been held that, over the years there has been a 'ghettoisation' of women's concerns within the international human rights structures.[8] Their specific problems have been dubbed as 'women's issues', rather than being seen as matters that affect the well being of the entire society. The Universal instruments dealing with the protection and promotion of the human rights of people in general and the mechanism created under them, have evolved in such a way so as to exclude the consideration of women's rights to a large extent. This relegates these rights to a secondary position. It is these observations that make it necessary that the analysis of the norms and procedures takes into account both general and specific instruments, while considering their evolution historically. But as indicated before, the approaches to the problem of sex discrimination have evolved over time. They have been influenced by the prevailing social and material conditions. According to Richard Posner, while dealing with legal provisions of human rights instruments, it is beneficial if these ideological and theoretical approaches that led to their adoption in the first place are kept in mind.[9] This makes it easier to discern their significance and do an objective analysis of their effectiveness.

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8 Ibid.

9 Richard A. Posner, "Legal Reasoning From the Top Down & From the Bottom Up : The question of unenumerated constitutional rights", *The University of Chicago Law Review*, vol. 59, no.1 (1992), p.436.

Traditionally, the three major approaches to human rights that have dominated the international debate have been, the liberal approach, the Marxist-Socialist approach and the 'group rights' approach.[10] The next section would consider them briefly from the standpoint of women's interests, specifically taking into account the gender sensitive critiques that have challanged them. In light of this discussion, the evolution of women's rights in international human rights law will be considered in the last section.

HUMAN RIGHTS : GENDER SENSITIVE CRITIQUES OF THE TRADITIONAL APPROACHES

Though the term human rights was first coined at the inception of the contemporary international human rights movement, the notion of 'rights' has a long historical tradition. As legally recognised interests the ideal of rights can be traced back to the oldest-legal systems of the world.[11] Yet when one refers to human rights, it is not simply in a legal sense but also a moral one. These rights draw their legitimacy from the fact that they are considered to be fundamental for people as human beings, in order for them to lead a secure and happier life. There might be a difference of opinion on how best to achieve the stated goals or which rights are more appropriate, but the ultimate ends that all ideologies and theories strive for, remain essentially the same.

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10 Stanlie M. James, "Challenging Patrianchal Privilege through the Development of International Human Rights, *Women's Studies International Forum*, vol.17, no.6 (1994) pp.564-569.

11 Schwelb n.2 p.540

Still as indicated earlier, for the purposes of law and policy formulation in a particular context, specific theories and ideologies do matter. They dictate as to which interests of the individuals are to be considered so fundamental that they are included within the purview of human rights.

As mentioned in the last chapter, it is the liberal approach that has had the predominant influence on the development of international human rights law. As the individual is the centre of analysis for it and his personal liberty and freedom from state oppression its major concerns, it emphasises civil and political rights. Prominent amongst these being right to vote and participation in government, right to life and security of person, freedom of speech and expression, freedom of thought, conscience and religion, etc. These are combined with demands for as unhindered conditions of market economy as possible and voluntarism in social sphere.[12] Though, as welfare states, liberal states have assumed social and economic obligations, these remain essentially limited.[13]

From the point of view of human rights, the central critique of liberalism is that it places more emphasis on formal abstract rights, rather than taking into account the actual socio-economic conditions prevalent in society. Though the concept of equality is fundamental to it, it ensures only juridical equality, ignoring the fact that, "in so far as people are situated in an unequal social structure with their identities circumscribed

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12 *Liberalism" International Encyclopedia of the social sciences*, Vol. 9, pp. 276-282.

13 Ibid.

by various categories such as class, race and gender, their options remain foreclosed, preventing them from exercising their rights."[14]

From the point of view of women's rights this concept of equality is particularly problematic. As pointed out by the feminist scholars, the standard used to measure equality as far as the liberal theory is concerned has traditionally been the male standard. Thus the needs and interests of men are taken into account more than those of women.[15] When applied in an absolute sense without recognising the difference in the conditions of men and women, it creates crucial problems for the latter. To demonstrate that they match the 'normal' standard women have to show that they are like their male counterparts.[16] This, as far as law and policy are concerned leads to the treatment of their specific interests as 'Special' concerns. This inspite of the fact that women constitute half and in some countries the majority of the population.

Specifically, analysts have observed that the reduction of women's needs to a special category has affected some of their most vital interests. A classic example is the recognition of maternity benefits in various legal instruments as "special protection,"[17] thereby making it sound as if some extra benefits are being accorded

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14 Poonacha, n.1 p.1.

15 Drucilla Cornell, "Sex Discrimination law & Equivalent' Rights" *Dissent*, winter (1991), pp. 400-405.

16 Ibid.

17 Ann C. Scales, "The Emergence of Feminist juris prudence : An Essay ", *The Yale law Journal*, vol.95, no. 7.(1986) pp.1373-1402.

to women, even though pregnancy is a fact of life for majority of women and without provisions for maternity benefits no real equality between the sexes, as far as availing opportunities in different spheres of life is concerned, can exist.

As suggested by a number of critics, any standard of equality should include both men and women, without any stereotypes attached to either category. Infact, according to Katharine Mackinnon, instead of trying to establish a false standard of equality by trying to enumerate real or imaginary differences amongst people, the test that should be applied is that of inequality[18] i.e., one should consider as to which policies and laws or the absence thereof perpetuates inequality between them. Particularly, as far as women are concerned their contributions to society including child bearing and caring roles, should be taken into account[19].

Yet as has been pointed out, the continued application of rights as they have been formulated and interpreted over the year and the non-inclusion of women's particular requirements, has meant that many a times women cannot use the language of these rights to achieve a recognition of some of their most basic interests. This leads to, what Posner identifies as the problem of "unenumerated rights."[20] Many of the rights that have been considered fundamental till now as advocated on neutral assumptions, such as rights to equality, equal protection, privacy etc. have been found to be inadequate when scrutinised from a gender perspective. This has particularly been

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18 Ibid.

19 Ibid.

20 Posner, n.9. p. 436.

the experience with respect to gender specific claims such as, demands for legalised abortion and safer public health facilities, family planning, reproductive freedom, etc.[21]

But even besides the conceptual problems of equality and the public-private discrmination as discussed in the last chapter, the liberal rights approach has generally posed difficulties for the advocates of women's interests. Earlier the debates were between equal rights feminists and social feminists or between equality and difference but since the last decade, the adequacy of rights themselves, as a means to serve women's interests has come to be challenged.[22] Feminists have particularly questioned, as mentioned in the last chapter, whether the acquisition of legal rights advances women's equality. According to them "although the search for formal legal equality through the formulation of rights might have been politically appropriate in the early stages of the feminist movement, continuing to focus an the acquisition of rights, may not be beneficial for women."[23]

In the view of these scholars, as rights denote a claim against the community or individuals they are not the proper means to fulfil the socio-economic needs of women.[24] The fulfillment of these requires positive state action. Though civil and

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21 Ibid. pp. 433-450.

22 Hilary Charlesworth, Christine Chinkin and Shelley Wright "Feminist approaches to International law" *The American Journal of International law*, Vol.85 (1991) p. 643

23 Ibid.

24 Poonacha, n.1, p.1.

political rights are certainly important for women, given the fact that they have been historically denied to them, women cannot exercise them in any real sense of the term because of their social and economic inequality. Also, it is pointed out that in practice the economic and social dependence of women on men may discourage the invocation of legal rights. Also in addition, there is the problem of competing rights. As the example is given, "the rights of women and children not to be subjected to violence in the home may be balanced against the property rights of men in the home or their right to family life."[25]

Yet as has been pointed out in response to the above thesis, even through rights might not have been able to bring a substantial change in women's situation till now, their value as a tool for women to fight against their continued oppression cannot be underestimated. Thus a restrain is advocated in rejecting them altogether, while accepting the fact that there is a need to rethink the notion, in order for it to correspond to women's experiences and needs.[26]

The second approach to international human rights, has been the Marxist-Socialist approach that arose as a challenge to traditional liberalism. As liberal system of rights and freedoms sustained capitalist development[27] and was found wanting in fulfilling the basic socio-economic needs people it was attacked as being beneficial only for the elite sections of society.

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25 Charlesworth, Chinkin & Wright, n, 22 p. 635.

26 Wendy Kaminer, "On The Devaluation of Rights : A critique within Feminism" *Dissent,* summer (1991), pp. 389-399.

27 James, n. 10, p.565.

For the socialist approach the unit of analysis is the society as a whole and it looks at individuals as members of a social setup interdependent on each other. Also, it emphasises social and economic rights such as right to work, to adequate standard of living, social security education, health etc.

From a traditional Marxist perspective the cause of women's oppression is to be found in the exploitative economic system. This is explained through the inter-connections between the institution of private property patriarchal family and capilatistic accumulation.[28] specifically the patrilineal mode of inheritance and economic devaluation of women's work are cited as the major causes.[29] Also, the general inability of the capitalist system in providing the kind of social and economic rights that women need is reffered to.

But though this approach was able to provide for the mitigation of the class factor in women's oppression, in as much as it failed to deal with gender as a separate variable, it also could not really be successful in ending gender discrimination.[30] At the operational level a relative failure to ensure a functioning democratic policy wherein, women could participate equally in both policy formulation and implementation also proved detrimental to their interests.[31]

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28 Fredrich Engels, *The Origin of the Family Private property & the state* (Moscow, 1948)

29 Ibid.

30 James, n.10. p.565.

31 Connell, n.38 pp.507-544.

The above tries to show that for women an either/or approach to civil-political and socio-economic rights cannot do. A socio-economic system whose central focus is the fulfillment of the basic needs and welfare of people is necessary, but alongside ensuring that these people enjoy their basic civil and political rights is also required.

The third and comparatively less developed approach to human rights at the international level is the 'group rights' approach. Associated mainly with the third world, this approach arose in the aftermath of colonialism and under threats of economic neo-colonialism.[32] As a result of the widening gap between the developed and the developing countries, it has been suggested that the realisation of right such as the right to development and peace, resulting in a more equitable distribution of the world's resources need to be considered as a pre-requisite for the realisation of all other human rights.[33]

From the point of view of women's interest, this particularly brings into focus the debate between 'first and third world feminisms' and the need to assess the impact of such factors as race, class, wealth etc., in determining the needs of women. Infact many scholars from the developing world have criticised the feminists perspectives emanating from the developed world as representing their own particular experiences and concerns. It is pointed out that the women in the developing world are suffering from a 'double oppression,' patriarchal domination at the domestic level and

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32 Ibid., p.566.

33 Ibid.

internationally as a result of the subordination of their domestic economies to richer developed economies.[34]

Referring to the need for transnational justice, in face of global economic and political processes, feminists from the third world urge their counterparts in the affluent countries to be more sensitive to the exploitative relationship that exists between the two parts of the world. They indicate that the application of such explanatory tools as the public / private distinction in international law should also take into account the fact that it is being used by the developed countries to shirk away from their social and economic obligations, towards the well-being of the people in the developing countries.[35] Even though it is their deprivation which has made them rich. Particularly, when we talk of 'feminization of poverty' it is the women in the poorer countries who need the utmost attention. Many of them are forced to live in such 'sub-human' conditions that any talk of human rights for them remains meaningless. In order for there to be any socio-economic justice for them international cooperation is imperative.[36] Especially the realization of international social and economic rights demands it.

Yet the above is only one aspect of the demands for group rights, cultural self-determination is the other. Particularly the third world countries have emphasised their

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34 Rebecca J. Cook, ed. *Human Rights of Women: National and International Perspectives*, (Philadelphia, 1994) p.62.

35 Onora O'Neill, "Justice, Gender and International' Boundaries" *British Journal of Political Science* , vol. 20, 40.4 (1990) pp.349-459.

36 Onora O'Neill, "Justice, Gender & International Boundaries" *British Journal of Political Science*, vol. 20, 40.4 (1990) pp.349-459.

communitarian approach to human rights, with traditional values, moral and ethical principles central to it. Taking a position against the imposition of western cultural norms they demand recognition of cultural pluralism. But this obscures the fact that in many of these countries the subjection of women and denial of individual rights to them, is justified in the name of cultural or religious values.[37] Though invocation of moral norms to deny autonomy and rights to women is not confined only to developing countries, even the so called modern and forward looking countries of the west invoke them. Reproductive rights and family law reform is an example.[38] But as pointed out by Poonacha, in all such cases the fact that is ignored is that, the so called traditional norms and values might not be accepted by all members of the society unquestioningly. There are protests against them, which can be,said to embody the real assertion of human rights.[39] One such protest movement is the women's movement. Thus is emphasised the need to incorporate more and more voices of the groups representing it, in the discussions of international human rights.

The above critiques of the traditional approaches to international human rights law try to make clear that, none of them have proved to be adequate as far as safeguarding and promoting the interests of women are concerned. As pointed out by feminist scholars, as a result of their inherent gender biases or gender blindness they

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37 Charlesworth, Chinkin and Wright n.22, p.637.

38 Ibid. 636.

39 Poonacha, n.1p.4.

can be only partially if at all useful in ameliorating the conditions of women.[40] But as these approaches have influenced the development of the international human rights norms over the years, it is inevitable that they are reflected in them. Thus, the feminists and other critics who have done a gender analysis of the present human rights structures cite a number of shortcomings. How valid these are would be tried to be discerned from the following analysis of the evolution of women's rights in international human rights law.

HISTORICAL EVOLUTION OF WOMEN'S RIGHTS AND THE ENFORCEMENT MECHANISMS: AN ANALYSIS

The early international concerns with women's welfare pre-date the inception of the contemporary human rights movement by a number of years. Though the initial considerations were limited to the field of the 'laws of war,' with special protection being afforded to women and children during the times of conflict, by the beginning of the twentieth century many other areas relating to women's interests were sought to be covered by international legislation. These included conflict of national laws, combating trafficking in women, protection of women's work, maternity and health. Also with the establishment of the league of nations and the International Labour Organisation efforts were made to go beyond these protective considerations. It was the treaty of Versailles, 1919 that called upon the member states of the League to

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40 Jean L. Cohen, "About Women and Rights" *Dissent*, summer (1991) pp. 317-375.

provide equitable and humane working conditions for all workers-men, women and children- and to adopt the principle of equal pay, irrespective of sex for work of equal value.[41]

Yet the first demands for the recognition of equal rights of men and women were voiced only in the mid 1930s. In 1937 the League appointed an "Expert Committee" to undertake a comprehensive study on the legal status of women, though its work was interrupted due to the out break of the world war. [42] It was infact the world war, which marked a turning point with respect to the international concerns for human rights in general and sex based discrimination in particular. In 1944, the ILO's Declaration of Philadelphia proclaimed that, "social justice implied equality of opportunity irrespective of ....sex;"[43] This was followed by the proclamation of the United Nations Charter which reaffirmed faith in "the equal rights of men and women". Achievement of international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex language or religion", was declared as one of the purposes of the organisation.[44] Though these words are not self-enforcing yet, they laid the foundation of the future works of the organisation in the field of human rights.

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41 Anne M. Trebilcock, "Sex Discrimination" *Encyclopedia of Public International law: Human Rights of the Individual*, vol. 8 (1985) pp. 476-477.

42 Stienstra, n.5 p. 76.

43 Trebilcock, n.41 p.477.

44 The Charter of the United Nations.

In the respect the 'UN Commission on Human Rights' was established in 1946. At the time of its establishment it was also felt necessary that the 'Commission' would require "special advice" on problems relating to the status of women. This was the result of concerns that the Commission would be so pre-occupied with carrying out its other mandates that eliminating discrimination against women would not be a priority. Thus was created the 'Sub Commission on the Status of Women'.[45]

At its very first session however, the Sub-Commission in turn recommended that, it be elevated in status to a Commission. Though at the time hailed as an important achievement, this creation of two separate bodies, one dealing with human rights in general and the other specially with women's rights, was to prove crucial later.

Also, the discussions that took place with regard to the establishment of a mandate for the Commission on the Status of Women, laid the foundation for the direction that the organisation took in dealing with women's issues in the subsequent years. It was suggested that the Commission limit its work to the survey of discrimination against women on the basis of their sex alone, thereby pushing the language of equality to the extreme.[46] Thus on the one hand women's concerns were taken to a separate body, and on the other they were sought to be defined narrowly. The basic causes for gender inequality were cited as traditional customs and

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45. Article 1.

46 Stienstra, n. 5pp. 81-86. She quotes the views expressed by the 'British delegation' in leading up to the establishment of the mandate of the Commission. These proved, according to her to be crucial in the decision that the Commission should have a narrow focus rather than a broad one.

practices and the Commission was urged to take cognizance of their legal manifestation.[47] This was in contrast to the views that urged a broader approach to discern the causes for gender discrimination. But in the end the narrower view's prevailed.[48] As a result the Comission for the next twenty years concerned itself majorly with formal legal equality; framing a number of instruments in the area of civil and political rights.

The first major international human rights instrument adopted by the General Assembly in 1948, was the Universal Declaration of Human Rights. Though non-binding it is still perhaps the most influential in terms of moral authority. Proclaimed "as a common standard of achievement for all peoples and all nations "it laid the basic principles regarding international obligations with respect to human rights. The various instruments adopted later were influenced greatly by it and further elaborated its provisions.

Broadly speaking, the evolution of women's rights in international human rights law, since the adoption of the Universal Declaration, can be divided into two distinct phases: the first phase till 1966, in which as mentioned above, the emphasis was on legal equality in the various civil, political, social, economic, and cultural fields; the second phase from 1967 to the present wherein the emphasis has been not only on the legal recognition of the equality between the sexes but also, on the *'de facto'* realisation of this equality.

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47 Ibid.

48 Ibid.

THE INTERNATIONAL BILL OF RIGHTS

The circumstances that led to the emergence of the contemporary international human rights movement, had a strong influence in shaping the initial concerns in the field. The large scale inhuman atrocities perpetrated during the war shook the conscience of mankind and the immediate concern was to ensure that such gross violations did not take place again. The major focus was understandably on violations perpetrated by states, mostly in the name of race, colour, language, religion or such other group identities. Intra-group socio-cultural relations at this stage were largely considered off-limits for international scrutiny.[49] Also, though as a result of a compromise between the East and the West both civil and political as well as. Socio economic cultural rights were recognised at the international level and included in the Universal Declaration, it was the former that pre-dominated.

In 1966, the two International Covenants, the International Covenant on Civil and Political Rights and the Intranational Covenant on Economic, Social and Cultural Rights, hereinafter referred to as the ICCPR and the ICESCR respectively, were adopted. Coming into force in 1976, both are legally binding treaties. They, alongwith the Universal Declaration form the central component of the International Bill of Rights. They are the over-arching comprehensive instruments applicable to all persons as individuals and as members of groups. This makes it imperative that they are analysed from a gender perspective, in order to see if their provisions as they are applicable today, reflect any gender biases or if they affect men and women in the

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49 Ibid.

same manner, representing their interests equally. This is essential more so in light of the fact that, over the years a discernable change in gender roles has taken place, aided in no small measure by the improvements in biotechnology.

First and foremost, the Universal Declaration focuses on equality as an integral component. Though, it is pointed out that it is clearly the natural law conception of equality central to liberal theory, that is reflected in article 1. It says "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." Criticising the formulation of the article as advancing a particular conception of rights, Kelsen holds that the article ignores the fact that in reality, human beings are "neither free nor equal." Infact Article 3 of both ICCPR and ICESCR that refers specifically to the equal rights of men and women, obligates the states parties "to ensure" these rights to the enjoyment of all civil, political, economic, social and cultural rights set forth in the Covenants.[50]

Further, Article 2 of the Declaration reiterates the charter pledge of non distinction on the basis of sex. It reads: "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as ...sex...." This is repeated in the two Covenants. Infact the ICESCR specifically uses the term 'discrimination'.[51] But though as pointed out by legal analysts, non-discrimination

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50 "The International Covenant on Social Economic & Cultural Rights & The International Covenant on Civil & political Rights" *The international Bill of Human Rights*, UN, (NY, 1993)

51 Ibid.

on the basis of sex might seem to have become one of the fundamental principles of international law with the adoption of these instruments, none of them actually define it. They only lay down the grounds on which discrimination is forbidden. This is crucial from the point of view of women's interests as traditionally, the demands to recognize their rights have focused on the eradication of gender discrimination. As pointed out by Tomasevski, "human rights do not lay down separate sets of rights for men & women". It is the basic principle of non-discrimination which is relevant from the point of view of women's interest.

Again, as identified by Vierdag, both the Covenant embody a formal-legal right to non-discrimination[52] i.e., if there is any discrimination on grounds and with respect to the rights included in the Covenants, the right to non-discrimination can be invoked as a justiciable right. But as mentioned earlier, given the nature of gender discrimination this is an insufficient provision. As the feminists have held, it is the standards themselves that are many a times discriminatory and lead to a perpetuation of the unequal status of women. It is these that have to be changed. In other words, discrimination need not be explicit, it is implicit in the so called 'neutral norms'. For example, in light of the discussion regarding maternity benefits if the Covenants are examined, the relevant provision in the ICESCR is again worded as a 'special

52 E.W. Vierdag, *The concept of Discrimination In international law with special reference to Human Rights, (The Hauge, 1973)* pp.3.

protection' measure.[53] Also since it is included in the ICESCR it can only be realized progressively "in accordance with the available resources of the states."[54]

Infact as indicated in the last section, given the crucial necessity of socio economic rights for women, the very policies that have ensured divergent nature of obligations and enforcement mechanisms under the two Covenants can, as pointed out by many feminists, be termed as gender insensitive. The civil and Political rights are immediately applicable and enforceable. Not only is a stronger reporting system under the Human Rights Committee attached to the Covenant but also, a complaints procedure is there. Enabling not only state parties to bring complaints against each other but also, individuals to bring complaints against states if they feel that the rights guaranteed to them under the Covenant have been violated. Under the ICESCR only a perodic reporting system is there. Though over the years the indivisibility of both these types of rights and their interdependence has come to be recognised, it is the civil and political rights which take priority, as for as implementation is concerned.

Again, the inclusion of various grounds on which discrmination is prohibited, signifies not only a resolve to deal with discrimination in the future but also, acknowledge the fact that, historically discrimination has existed on these grounds. Thus according to Vierdag, any just policy of non-discrimination should take into account the gap that is already existing among people as far as real material equality is concerned. Under such situations, according to him, provisions for non-discrimination might actually

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53 Article 10 (2), International Covenant on Economic Social & Cultural Rights, *The International and Bill of Right*, UN, (NY, 1993)

54 Ibid. Article. 2(1).

be discriminatory to those deprived,[55] including women. What is actually required in such circumstances accordingly, is reverse discrimination i.e., extra benefits and incentives should be given to those who have been historically discriminated against.

Yet, it is not only with regard to positive state action that the provisions of the instruments, their interpretation and implementation are lacking, but also as indicated by a number of scholars, in particular the feminists, some of the basic human rights of women such as right to life, liberty and security of person, right to be free from torture or cruel, inhuman or degrading treatment or punishment, have not been effectively protected as far as the regime established under the Covenants is concerned. According to them this is the result of both the prevailing public-private distinction, as well as, the separation of women's rights from human rights.[56] As Laura Reanda observes, "the main human rights organs like the UN Commission on Human Rights and the ICCPR Human Rights Committee do no appear to deal specifically with violations of the human rights of women, except in a marginal way or within the frame work of other human rights issues."[57] Though these comments were made as early as 1981, as pointed out by a number of other scholars, the 'ghettoisation' of women's concerns has continued over the years. Their issues are treated as marginal issues rather than mainstream issues. This is significant in view of the fact that the powers and

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55 Vierdag, n.52 pp7-18.

56 Julie Peters & Andrea Wolper, ed., Women's Rights, Human Rights; International Feminist Perspectives, (NY, 1995) pp.1-8.

57 Laura Reanda, "Human Rights & Women's Rights": The UN Approach, *Human Rights Quarterly*, Vol.II, no.2 (1981)

resources committed to the general human rights structures are much more than those of the structures dealing with specific issues.[58]

As far as the ICCPR and the violations of women's rights are concerned, there are two different comments that have been made. Firstly, as analysts have observed, even where the Covenant has provisions that can be invoked in order to deal with gender specific abuses, they have not been interpreted over the years to include these abuses. For example, it has been remarked that rape within the 'private' sphere at the hands of private actors or such abusive customary practices as female genital mutilation, can be said to be covered by article 5 of the Covenant which reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,". Yet, traditionally, the article has not been interpreted to include them.[59] Infact, the definition of torture that has been included under the 'Convention against Torture', defines torture as a 'pain or suffering' whether physical or mental, "...inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity,"[60] thus accepting the public private distinction explicitly. Though as would be discussed later, with the adoption of the Declaration on the Elimination of Violence against Women this distinction is sought to be bridged, yet the practice that has been established over the year has been greatly influenced by the distinction. The second related comment that has been made is that, since gender

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58 Ibid.

59 Ibid.

60 Charlesworth, Chinkin & Wright, n.22p. 628.

specific abuses are not specifically defined in the Covenant they tend to be neglected.[61]

Though, women suffer such violations of their rights as political repression, violence perpetrated by state officals and other such abuses within the public sphere alongwith men, their participation in this sphere is limited and the overwhelming number of violations suffered by them are still in the private sphere. Mostly these are at the hands of people known or closely related within the family. The overlooking or condoning of these violations in the private sphere, be it marital rape or other forms of domestic violence, sexual harassment at work place or in the society at large, suffering inflicted as a result of such practices as dowry demands or bride price, have infact engaged debates about 'state responsibility' in international law.

It has been pointed out by a number of feminist scholars that, the life of individuals in both the public and the private spheres exists in a continuum. In as much as the existing socio-economic structure is legitimised by states either through Commission or omission, they cannot absolve themselves of responsibilities to protect the interests of their citizens by resorting to the public-private distinction. For instance, it has been remarked that, as long as the states recognise and enforce the personal laws of various communities with regard to marriage, divorce, custody, adoption, inheritance etc, it cannot take the plea of non-interference in the private sphere of family or religion[62] in order to avoid reform of these institutions.

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61 Steiner & Alston, n.3, p.904.

62 Ibid.

Over the last few years, it has been the movement to combat violence against women particularly in the family, which has questioned the traditional concept of state responsibility that focused primarly on state action i.e., the actions of state agents in the violation of human rights. It has especially been pointed out by the feminists that, not only the domestic laws in a large number of states do not provide requisite guarantees against abuses suffered by women and children in the family but also, "international law in turn, has protected states by imposing a strong obligation of non-inter-vention".[63]

Here Articles 17 and 18 of the ICCPR are relevant. As a number of feminst scholars have pointed out, these articles canot be said to have the same effect on men and women. Article 17 talks of a right to privacy, but it does not included only an individuals's right to privacy, the right instead is extended "to arbitrary or unlawful interference with *his* (emphasis added)...family...." This according to the feminists reflects the fact that "the family is legally treated as a semi-closed unit."They observe that, in the family the absuses are suffered mostly by women and children and because of the reason that modern governments are slow in intervening in family affairs, if at all, it makes states, in different degrees accomplices in this injustice.[64]

Again, article 18 deals with "the right to freedom of thought, conscience and religion" This right also, according to the feminists, can have a differing impact on women and men. They point out that freedom to exercise all aspects of religious belief

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63 Fernando R. Teson, "Feminism & Internatonal law: A Reply," *Virginia Journal of International Law*, Vol.33.

64 Ibid.

does not always benefit women because many accepted religious practices entail reduced social positions and status for women.[65] The right extends to "...freedom...in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." But in many such cases the individual's i.e. the women's right to have a religion or belief of their choice, is subsumed by the community rights. Even when individual women have explicitly come out in protest against some of the prevailing religious or cultural practices, their freedom of choice is sought to be curtailed. Many a times they have been victimised for voicing it. The 'Shah Bano case' in India is an example of this, where a Muslim women sued for maintenance under the criminal law of the land using a provision against destintution. This created such a furore that under pressure, the then Prime Minister had to bring in a legislation to overturn a favourable decision by the Court.[66]

In response to demands for religious freedom and cultural pluralism, Coomaraswamy holds that they have to be tested against the notion of choice and scrutinsed to see as to if, those said to be enjoying cultural diversity are doing so voluntarily. This is particularly important in view of the fact that many a times, the weaker and vulnerable positions of women and the resultant inability to make a visible

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65 Charlesworth, Chinkin and Wright, n.22 p.635.

66 Radhika Coomaraswarny, "Reinventing International law: Women's Rights as Human Rights in the Intenational Community" *Bulletin of Concerned Asian Scholars*, vol. 28, no.2 (1996) p.24

political protest, lead to an assumption that they are happy with their given situation, thus perpetuating what is called the "myth of the contented woman"[67]

Further, from the point of view of reflecting a clear gender bias and a stereotypical understanding of the family unit, which can prove deterimental to the interests of women, Articles 16 and 23 of the Universal Declaration and the ICCPR respectivily are cited by the feminists to be crucial. According to Article 23 of the ICCPR, "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state". This is followed by clause 2 of the Article which states, "the right of men and women of marriaggeable age to marry, and to found a family shall be recognised". These provisious have been interpreted as reflecting encoded assumptions about ideal gender relationship and are said to be referring clearly to the western model of the nuclear family. Noting the widely divergent definitions of the family in different cultures, Helen Holmes asserts that in view of the ongoing conflicts over the advantages and disadvantages of different types of families, the wisdom and fairness of institutionalizing a particular vision of the family is questionable.[68]

Again doubts are raised about what is meant by 'protection by society and the state', for "whenever supporting laws are enacted to protect the family there is the added risk of totalitarian control over the life of individual members of the household." According to Poonacha, in built into this clause is the assumption that families always

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67 Myres S. McDougal, Harold D. Lasswell and Lung Chu Chen, *Human Rights & World Public Order*, (New Haven & London, 1980)

68 Cited in steiner & Alston, n.3, p.904.

co-exist in harmony, ignoring the fact that there exist power relatinships within the families which can prove harmful for women if perpetuated through state or societal protection.[69]

From the above analysis it is clear that, according to critics, not only does the human rights regime established under the International Bill of Rights, favour men more than it does women generally, but also it includes in many instances provisions that reflect a stereotypical understanding of gender roles in society, which is harmful for women. As far as the crucial aspect of removal of discrimination against women is concerned, neither of the instruments place any positive obligations on the states parties. The provisious refer only to passive legal measures, which given the *'de facto'* inequality of woman cannot go very far in mitigating gender discrimination. Though as identified by a UN study, progress was made as far as the codification of equal rights of women under these instruments was concerned, these largely remained as laws on statute books. Thus towards the mid-sixties it was realised that, efforts were needed to ensure that women could actually exercise these rights.[70]

THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979

The 1960s and 1970s were a time of profound change within the United Nations, with the increase in membership of the newly independent developing

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69 Poonacha, n.1 pp.98-99.

70 UN Doc. *The United Nations and the Advancement of Women*, 1945-1996, p.26.

countries, the focus of the organisation shifted to developmental or socio-economic issues. There was also a growing recognition that the central role of women in the over all economic and social progress of the society had been vastly under estimated. Evidence was accumulated which showed that women were affected dispropotionately by poverty, and that inequality with men perpetuated their low status in many regions. Such issues as women's needs in community and rural development, agricultural work, family planning, the impact of scientific and technological adavancement on women became increasingly prominent.[71] Need for affirmative action to remove discrimination against women so that they could participate on the basis of equality in the social and development processes of the society, had gradually been realised.

In 1963 proposals were made to solidify the earlier gains by consolidating in one document, all of the standards on women's rights that had been developed since 1945. Thus in 1967 was adopted the 'Declaration on the Elimination of Discrimination against Women,' containing the basic framework for combating sex based discrimination, laying the foundation for the Convention on the same subject that was to be adopted in 1979.

Between the adoption of the Declaration and the Convention on the Elimination of all Forms of Discrimination against Women, important developments took place. In 1968 the Tehran Conference on Human Rights called for a unified long term UN programme for the advancement of women. A system of periodic reporting was instituted by which a monitoring of actions taken by states to fulfill the principles of

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71 Ibid. p.27.

the Declaration could be undertaken. Also, as disscussed in the last chapter, this was the time of the second wave of the feminist movement. Demands were increasingly being made to bridge the public-private distinction in law and in fact alongwith a questioning of traditional gender roles and the systems that sustained them. Also in 1975 the International Women's year was celebrated and the UN Decade for Women was called for with Equality, Development and Peace projected as the central themes.[72] These developments leading up to the adotpion of the Convention had a significant impact on its formulation.

The Convention itself was drafted on the initiative of the Commission on the Status of Women."It was felt that many existing instruments relating to women's rights were outdated and that the rights set out in the Declaration would be better protected if codified into a binding treaty." But the fact that the issue was complex and involved reforms of such areas as traditional social and customary practices,was reflected in the protracted discussions that led to the adoption of the Convention. On many issues specially related to culture, marriage, family and equal rights of men and women, different parties had extremely different if not opposing views. Inevitabily, "the final text is a result of compromise and an effort to take into account the possibility of implementation in all parts of the world"[73]

The 'Women's Convention' as the 1979 Convention is popularly called brings together in a comprehensive legally binding form, internationally accepted principles

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72 ibid. p.33.

73 Commentary" *The Canadian Year Book of International law*, Vol.20, (1982), p.349.

on the rights of women and makes clear that they are applicable to women in all the societies. Also the Convention makes clear that the passage of laws is not enough, women should actually be able to exercise there rights.

The Convention, as compared to the instruments in the international Bill of Rights, clearly defines discrimination against women. According to 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."[74]

Though the Convention targets discrimination, in view of its comprehensive treatment of the subject which is evident from the above definition, according to some scholars, it is in actuality an 'equality' Convention. While condemning discrimination against women it calls upon state parties to pursue "a policy of eliminating discrimination against women. Thus while non-discrimination is the means equality is the end."[75]

As Steiner and Alston have commented, the Convention recognizes "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". The definition

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74 UN Doc. *Convention on the Elimination of all Forms of Discrimination against Women*. Article 1.

75 Commentary, n. 73 p. 350.

of discrimination according to them has three vital characteristics; firstly, it refers to effect as well as purpose of discrimination thus directing attention to the consequences of the actions and not only the intention behind them. Secondly, the definition is not limited to discrimination through state action only and thirdly, the definition's range is further expanded by the phrase 'or any other field'. The last two signify that the definition extends to both private actors and private life.[76]

The Convention places wide obligations on the states parties. It urges the states, to take constitutional, legislative and other measures to promote equality amongst men and women and to ensure through competent national tribunals and other public institutions,the effective protection of women against any act of discrimination. It not only obligates the states to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women but also,to take all appropriate measures to achieve the elimination of prejudices and customary practices based on stereotyped roles of men and women. Also they must ensure to women on equal terms with men,the rights to fully participate in public life, to acquire, retain and change nationality, and other civil and political equalities. Women should be treated on an equal basis with men in the fields of education, employment, health and social security. They must be accorded full legal capacity and equality of rights in marriage and with respect to property. In addition,not only should women be accorded "the same rights to decided freely and responsibly on number and spacing of children" but also state parties shall ensure to

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76 Steiner and Alston, n.3p, p.402.

women appropriate services in connection with pregnancy, confinement and the post-natal period. Though the convention again terms these as 'special measures'. This, and the assertion in article 1 that human rights are to be enjoyed on the basis of equality of men and women, according to the ferminist, again shows the dominance of the male standard. Even a convention specifically aimed at eliminating discrimination against women doesn't escape it.

Yet there are certain outstanding achievements of the convention. For example, it allows for temporary special measures aimed at accelarating *de facto* equality between men and women and also, article 14 for the first time recognises the special needs of women in the rural areas.

Though the 'Women's Convention' is one of the most widely ratified Conventions, and targets discrimination against women in a comprehensive manner, yet it is saddled with a number of weaknesses. Firstly, as pointed out by Wadstein, though the Convention places extensive obligations on states to eliminate discrimination against women - both in law and in fact, it does not place any time limit for the achievement of this goal. According to article 2 of the Convention, "States Parties...agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...." According to her, the convention, barring the provision on nationality in Article 9, does not contain any provision "meaning that upon ratification a state must already have reached a certain level of development towards equality." This, she says, means that the Convention can be ratified by states no matter what level of development has been reached, which is perhaps one of the

reasons for the large number of ratifications. No time limit is set as to when the goal should be met. It can only be said that "each state is compared with itself and competes with itself".[77]

The second major problem with the Convention is the number of reservations against its provisions. Though, Article 28(2) of the Convention says, "a reservation in compatible with the object and purpose of the present Convention shall not be permitted" yet, a number of reservations have been made against some of the most crucial substantive provisions of the Convention. Many of these undermine the very purpose of the Convention, As of 15th March 1996, out of 152 Member-states Parties to the Convention, more than 40 states have accompanied their ratifications of the treaty with formal reservations, involving eleven different articles. The longest number of substantive ones concern the provisions on the elimination of discrimination in marriage and in the family.[78] Most of these are on religious or cultural grounds. As pointed out by a UN document, though the Convention leads other human rights Conventions in respect to the number of states parties that have withdrawn their reservations, a significant number of governments are still not fully committed to some of its most basic principles. Efforts have been made to persuade the states to withdraw the reservations that are contrary to the object and purpose of the Convention or are otherwise incompatible with international treaty law. Yet a number of them remain. Thirdly, attention has been given to the Convention's weaker enforcement mechanisms.

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77 Margareta Wadstein, "Implementation of the UN Convention on the Elimination of all forms of Discrimination against Women", *SIM News letter*, No. 4. (1988)

78 *The UN and the Advancement of Women*. n.70, p.42.

Article 17 of the Convention establishes a Committee of independent experts to oversee compliance with it. Its main task is to consider reports submitted by governments concerning "legislative, judicial, administrative or other measures which they have adopted " to comply with the Convention and to submit reports that "may indicate factors and difficulties affecting the degree of fulfillment of obligations". But as has been pointed out, compared to some other treaty bodies, especially the Human Rights Committee, the powers and position of the Committee On the Elimination of Discrimination against Women (CEDAW) are weaker. Attention has been given to its shorter meeting time and lack of an Optional Protocol, on line with the first Optional Protocol to the ICCPR, allowing for individual and group complaints to be made to the committee. Though, with respect to these some changes have taken place. The General Assembly has approved by a resolution, an amendment seeking to increase the meeting time of the committee to two three week periods in a year from two weeks a year. Also, a draft Optional Protocol allowing for individual and group complaints is on the agenda of the Commission on the Status of Women. Yet significant problems remain.

A major cause for worry has been the non submission of reports and the backlog that is already there. Also the standard of reporting in many of the reports is not upto the mark, with many of them not providing information in a satisfactory manner[79].

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79 Rebecca Wallace, *International Human Rights : Text and Materials* (London, 1997), p. 30.

According to Laura Donner, the weaker provision made for the implementation of human rights of women, show the lesser concern and priority that the international community has for women's concerns as compared to those of other groups. Comparing it to the 1965 'Racial Convention' she holds that, the 'Women's Convention' has failed to achieve comparable acceptance and respect. Specifically pointing at the reservations regime under the convention she holds that, the reservations provision of the 'Women's Convention' do not lay down any standard for determining incompatibility, while the 'Racial Convention' explicitly mentions that the reservations will be incompatible if at least two thirds of the state parties to the convention object to it. Secondly, she observes that the women's convention suffers from a lack of information from non-governmental organisation (NGOs). "Although many NGOs attend the public meetings to observe, the convention does not have any formal role for NGOs to provide information to the Committee. This is crucial, as without detailed information from other sources, 'CEDAW' must rely on the reports of the state parties which often exaggerate or provide only selective information about the states' accomplishments.[80]

Yet the overall problem that has affected the implementation of women's rights in the period after the adoption of the convention is the fact that, it has been used by some human rights bodies to justify ignoring the needs of women. They assure

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80 Laura A. Donner, "Gender Bias In Drafting International Discrimination conventions : The 1979 Women's Convention Compared with the 1965 Racial Convention" *California Western International Law Journal*, vol. 24, (1993-94), pp. 241-254.

themselves that because the issue of eliminating discrimination against women is already addressed in a Convention and by a treaty body there is less of a need to focus on it by them. But as identified in the last chapter, according to critics, women's issues cannot be dealt with in a separate isolated manner. Whatever decisions, in whatever bodies take place, affect the interests of women. Thus over the years a need to mainstream women's rights as human rights has been felt. In particular demands have been mode that the Human Rights Committee (CCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) give effect to their mandate to deal with the human rights of women. As stamatopoulou remarks again, neither of these committees has paid particular attention to women's rights. Though certain developments that might benefit women have taken place. For example, in 1989 the CCPR adopted a general comment on Article 2 of the ICCPR regarding the principle of non-discrimination and pointed out that, "states parties should if necessary take affirmative action in order to diminish or eliminate conditions that cause or help perpetuate discrimination prohibited by the Covenant.[81] Yet as far as actual implementation is concerned a lot is still left to be desired.

Infact since its coming into force in 1981 the Women's Convention has faced a number of challenges. Concerns that the Convention has not explicitly addressed have been sought to be included within its preview. Through interpretation and by way of suggestions and general recommendations made by CEDAW specific gender

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81 E. Stamatopaulov "Women's Rights and the UN" in Julie Peters and A. Wolper ed. *Women's Rights, Human Rights* (London, 1995) p. 43.

discriminations have been sought to addressed. One issue that has come into focus most prominently over the years, is that of violence against women. In the Convention, an explicit prohibition regarding it is singularly absent. Except for prohibitions against trafficking and prostitution, there is no mention of the subject. Though as pointed out by feminists and many other women's rights activists,gender based violence is one of the major manifestations of discrimination against women,be it in the public or the private sphere.

Infact it was by late eighties that violence against women emerged as a major focus of debate regarding the human rights of women. It was suggested that it be included in the reporting under the 'Women's Convention', that a special rapporteur on violence against women be appointed and that a Declaration on the subject be drafted. As a consequence, in 1992 the CEDAW committee issued General Recommendation No. 19, which states that gender -based violence is an issue of gender - discrimination and that states should comment on it in their reports to the committee.[82]

Specifically, the recommendation lays emphasis on the fact that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." It defines gender based violence as, "violence that is directed against a women because she is a women or that affects

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82 R. Coomaraswamy, "Reinventing International Law" : Women's Rights as Human Rights in the International Community". *Bull. of Concerned As. Scholars* vol. 28, no. 9 (1996) p. 18.

women disproportionately. It includes acts that inflict physical, mental as sexual harm suffering, threats of such acts,coercion and other deprivations of liberty."[83]

As mentioned earlier,violence within the family and the private sphere generally has been at the centre of the contemporary debate on gender - based violence. It has led to a challenge to the traditional concept of state responsibility within international law. It has been pointed out that, states may be held responsible for not preventing prosecuting and punishing individuals and communities that violate the rights of women. Infact the forerunners of this theme were certain cases on disappearances in Latin America. The most important amongst these was the 'Velasques Rodriguez vs Honduras'. In that case the Inter-American Court of Human Rights held that "Honduras was responsible for politically motivated disappearances even if they were not carried out by government officials. The state has an affirmative duty to protect human rights against such violations to the extent and within the means suggested by a 'due diligence' standard. It has a duty to organize the government apparatus to ensure the full and free exercise of all rights". Thus making the state indirectly responsible for violence in the community perpetrated by non-state actors.[84]

Taking encouragement from the above pronouncements,many women's NGOs made representations in order to achieve recognition of gender based violence as a matter of state responsibility. The major turning point however was the UN Conference on Human Rights in Vienna, in 1993. The conference explicity recognised women's

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83 CEDAW Committee, General Rec. no. 19, 11th Sess. no. 1, 1992. UN DOC. A [47] 38.

84 Coomaraswamy, n. 83 p. 22.

rights as human rights and the eradication of gender discrimination as an international priority. Emphasis was laid on mainstreaming the concerns of women within the entire United Nations system. Also the conference called for the appointment of a special rapporteur on violence against women and the adoption of the Declaration on the Elimination of violence against women[85].

Thus, in December 1993 the UN General Assembly adopted the Declaration and in 1995 appointed the Special Rapporteur on Violence against Women under the UN Human Rights Commission, which brings women's rights into the network of investigatory and reporting powers of the system of special rapporteurs.[86]

THE DECLARATION ON THE ELIMINATON OF VIOLENCE AGAINST WOMEN, 1993

While adopting the resolution on the above declaration the General Assembly significantly declared that, violence against women "is a manifestation of historical unequal power relations between men and women and a social mechanism whereby women are forced into a subordinate position compared with men", in public and private areas. The definition of violence included in the declaration is more or less a repeat of the one included in the CEDAW General recommendation no. 19. According to the Declaration "violence includes but is not limited to physical, sexual, and psychological violence in the family such as battering, sexual abuse of female children in the house hold, dowry-related violence, marital rape, female genital mutilation and

85 Ibid. p. 18-19

86 Chinkin, n. 79 p. 16.

other traditional practices harmful to women". It also prohibits violence against women in the general community by rape, sexual abuse, sexual harassment and intimidation, whether at work, in educational institutions, or elsewhere.[87]

As mentioned by Coomaraswamy, the fact that under the declaration states may be held responsible for their failure to meet international obligations even when the violence occurs within the family i.e., a space considered hitherto as sacred and distinctly private, is an extremely significant development for International law.[88]

But though with the adoption of the 1993 Declaration the Public private distinction is said to have received a major blow, atleast in law if not in practice, from the point of view of women's overall well being it is pointed out that, it is not sufficient to focus on violence as the only manifestation of gender discrimination. As Julie Mertus and Pamela Goldberg point out, violence no doubt attracts more attention and the decision to focus on violence against women as the principle human rights concern was a result of painstaking efforts by many women throughout the world. Yet, like any other strategy it has both its benefits and limitations. While a focus on violence especially in the family opens up that space for international scrutiny, the importance of realising the basic social, cultural and economic rights of women, the denial of which leads to such violence in the first place, should not be lost sight of. Specifically according to them, by focusing narrowly on acts of violence, other issues of grave concern to women including poverty, gender segregation, discriminatory

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87 Coomaraswamy, n. 83. p. 22

88 Coomaraswamy, n. 83p.22.

divorce, citizenship laws etc. are many a times ignored. In effect what is required is looking at the causes and consequences of violence and dealing with them, rather than taking account of the acts at violence alone.[89]

Again, according to Sullivan analysis that rely on the failure to criminalize, investigate and prosecute domestic violence as the principle means for establishing state responsibility should be further examined and the appropriateness of criminal penalties should be assessed in the context of particular social and political systems. Moreover, any analysis of the use of criminal penalties as a response to violence must consider whether effective restraints on the exercise of police power are in place. "This becomes necessary as human rights organisations have reported patterns of rape and other sexual abuse by law enforcement officials in a number of countries."[90]

In addition to the above, it has been suggested that in order to deal with women's oppression effectively, international law should realise and provide for the fact that ultimately such oppression is not based on gender alone. In actuality women experience complex and interwoven violations. Many of them may be inflicted on them because they are members of a racial, national, ethnic, religious or linguistic group,

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89 J. Mertus and P. Goldberg, "A Prespective on Women and International Human Rights after the Vienna Declaration", *Ny Univ. Jr. of Law and Politics*, vol. 26, (1994) no. 2. pp. 201-234.

90 D.Sullivan, "The Public Private Distinction in International Law" In Julie Peteir and Andrea Wolper, n.82 p. 132.

that as whole faces discrimination. Thus, the law should be able take into account all these different situations and provide remedies for them[91]

The above analysis makes clear that women's rights have evolved a long way in international human rights law. Beginning with a focus an civil and political equality in the early years, emphasis in the later stages shifted to social, economic and cultural issues. But again, it was realised that locating women's concerns mainly in the social-economic-cultural realm led to a situation where the violations of some of their basic human rights were getting ignored as social and cultural manifestations. Thus, in the 1990s the focus has again shifted to individual rights of women with violence being on the top of the agenda. Yet real progress can only be discerned if these rights, civil, political, social, economic or cultural are implemented effectively. From this stand point a lot of progress is still to be made. As the critics have pointed out the 'ghettoisation' of women's rights as a separate category has meant that their implementation has received secondary importance. Though recommendations to mainstream women's concerns within the whole human rights system have been made, the analysis of the situation upto the present shows there is still a long way to go.

On the one hand the specialised bodies viz., the Committee on Elimination of Violence against Women (CEDAW) and the Commission on the Status of Women have lesser resources and weaker implementation powers, on the other, the segregation of women's rights from the general human rights corpus especially the working of the

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91 Mertus and Goldberg, n.90.

ICCPR Human Rights Committee and the UN Commission on human rights has led to a comparatively less effective enforcement of women's right.

Finally, in order to make the requisite changes in the present structure of international human rights law it has to be said that, the critiques of the traditional approaches to human rights need to be taken into account. In particular the observations of the feminist scholars should be given due consideration. This would help in incorporating those reforms that are needed to answer some of the most critical needs of women.

CHAPTER - IV

CONCLUSIONS

As mentioned in the introduction, the purpose of the overview of contemporary international legal structure in general and international human rights law in particular, was to examine both of them from the stand point of women's interests. The study focused specifically on the gender sensitive critiques of these systems that have emerged in the past few years. This chapter attempts to summarise the conclusions of the study.

First and foremost, the study stresses that the human rights of women are affected not only by the operation of the prevailing international human rights norms and procedures but also by the rules of international law in all other fields. According to feminist scholars the effects of these rules are disparate on men and women. In many an instance these rules reflect the fact of long entrenched discrimination against women and may even work towards perpetuating that discrimination. That far reaching changes have not been effected within the system over the years may be attributed to the fact of continued lack of equal participation by women at various levels of rule making and rule implementation. This has ensured not only a predominance of the male perspective but also serving of the male needs and interests, ignoring those of women.

Secondly, it has been suggested that the dominance of confrontational politics - conflict, war - at the international level sustains the patriarchal structures at the state

level contributing to the continued oppression of women. Rather than working towards the fulfillment of the basic socio-economic needs of the people through international co-operation,which is more beneficial for women,such a system highlights the conflict of interests between various groups. The over whelming influence of the realist concepts of power and abstractly defined "national interest" has been to emphasise conflict over cooperation. This has had negative implications for the interests of women. Gender relations, though integral part of the existing structures,do not seem to get the requisite attention. This perpetuates the stereo typical understanding of sex-roles in society. The lack of visibility of women at the international stage means that their contribution to society are either ignored or undervalued thus leading to a situation where cognizance is not taken of their interests while making various laws and policies.

Specifically, some of the principal norms on which the present international legal system is based seem to work in a gender partial manner. The very first such norm is perhaps the principle of sovereign equality of states. On the one hand the principle seems to be losing its relevance in view of the fact of growing international integration and the transnational scale of the emerging problems, but on the other it is continually involved in order to resist international pressure to reform domestic socio-cultural systems. This is crucial for women in view of their historical inequality and continued domination under discriminatory social systems. This in turn is aided by the continued existence of the public-private distinction in international law. It infact has been identified by feminists as the biggest obstacle in achieving effective international

protection for the human rights of women. Traditionally women have been associated with the private spheres of family, religion and culture. As state intervention is sought to be precluded from these spheres, any changes in order to improve the situation of women are difficult to achieve. Small wonder that the private sphere is the site for the maximum number of gender based human rights abuses, particularly gender based violence. Another related norm is the principle of self determination. The feminists have argued that though this principle has been invoked a number of times over the years, its invocation is not subjected to a sensitive scrutiny in order to see if women in the groups demanding self determination are given an equal opportunity to voice their own opinions, or whether such demands might lead to a situation of further deterioration of women's position.

On the whole it has been suggested that women's concerns have been marginalised in the entire structure of contemporary international law. Issues affecting them are dealt with as issues of a separate or 'special' category, which in turn relegates them to a secondary position, rather than as issues of general human concern. Also the fact that their cognizance is not taken on a priority basis means that many a times laws are framed and policies instituted which aggravate these issues rather them mitigating them. The present efforts at economic liberalisation accompanied by curtailing of the socio-economic responsibilities of states, are cited as an example of such detrimental policies.

But it is infact with respect to the rules and structure of the present system of international human rights law that the marginalisation of women and their interests

is most acutely felt. This is perhaps because of their reason that human rights directly purport to safeguard and protect the interests of individuals against oppression and exploitation. Moreover, as the study indicates, the protection and promotion of the rights of women has been at the fore-front of the human rights agenda of the United Nations. Yet, large scale violations of the basic human rights of women continue in almost all parts of the world bringing both the substantive norms and their implementation mechanisms in to question.

A major reason for the shortcomings of the present system of international human rights law to provide adequate guarantees for the protection of women's interests is held to be the gender-biased or gender blind focus of the traditional approaches to international human rights. None of these approaches focus directly on gender discrimination and are thus said to be only partially, if at all capable in safeguarding and promoting the rights of women. The result of their deficient perspectives towards women's issues is said to have been reflected in the present structure of rules and procedures.

Though women can be said to have benefited from getting their rights recognised within the present corpus of rules, it is the realisation of these rights in actual effect which is the crucial issue. Not only the socio-economic and cultural rights, which are of utmost importance in view of the historical deprivation and specific needs of women, receive less importance within the whole system but also some of their basic civil and political rights are not protected on the basis of equality. The primary focus on human rights violations by states has been shown to be a major cause for this.

Gender specific violations have not received adequate attention.

Though initially the separation of women's rights from the general human rights concerns might have served the purpose of paying special attention to them but over the years this separation of both the substantive norms as well as their enforcement mechanism, has led to a 'ghettoisation' of women's issues. The "general" bodies endowed with more effective powers and resources have largely been ignoring issues of gender discrimination, while the specialized bodies be it the, 'Committee on Elimination of Discrimination Against Women' (CEDAW) or the Commission on the Status of Women (CSW) have been provided with weaker mechanisms.

Again, even though, over the years the varied rights have indeed shown progress as far as their recognition in law is concerned, covering the entire gamut of issues, their implementation requires serious efforts. And to be really successful at it, it is the structural factors leading to gender discrimination that have to be targeted. Last but not the least, women's concerns have to be integrated or 'mainstreamed' within the entire structure of international law. Though this might call for a re-look at the basic principles on which the system is based, it is the only long term strategy towards ending gender discrimination and establishing equality between men and women.

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