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## Using a Rights-Based Approach to Gender Mainstreaming

Policies for gender mainstreaming in the legal and constitutional sector must be developed in the context of respect for women's and men's human rights. Since the human rights discourse did not initially focus on women's human rights, an understanding of the international legal requirements for the guarantee of these rights is an important basis for gender mainstreaming.

Certain rights are foundational. These include equality before the law without distinction based on sex, race, ethnicity, religion or political belief; the independence of the judiciary; freedom of expression and a free press; and procedures for a fair trial. The concentration in this Manual on gender equality does not detract from the importance of the obligation on states to respect and to ensure respect for all human rights and freedoms to all people in their jurisdiction. Gender equality and respect for all human rights, economic and social as well as civil and political, are complementary and interactive.

International human rights offer an important framework that citizens can use to hold their states accountable for the provision of basic needs. A rights-based approach affirms the legitimacy of women's claims, allows progress to be measured against objective standards and upholds the state's international obligations.

### Universal Human Rights

Human rights are 'fundamental principles of justice, whose underlying values are found in elements of many of the world's systems of religion and ethics' (Connors, 1995). Respect for human rights lies at the heart of the United Nations Charter and is one of the accepted goals of the international community, as well as most national governments. Numerous international agreements and conventions (treaties) show the importance of this concept. Some date back to the beginning of the 20th century, for example the measures adopted by governments in 1902 with respect to marriage, divorce and custody of minor children; the League of Nations' work on slavery and trafficking of women; the International Labour Organisation's commitment to equality in the workplace; and the important pioneering work of the Pan American Union. However, the majority come from negotiations that have taken place under the auspices of the United Nations, starting with the UN Charter in 1945.

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights which 'eloquently describes the "inalienable and inviolable rights of all members of the human family" . . . [and] marks a moral milestone in the history of the community of nations' (International Women's Tribune Centre, 1998). This Declaration, together with its two implementing Covenants – the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) – and the Optional Protocols to the ICCPR, constitute what is known as the International Bill of Rights.

These and other international treaties are legally binding on the states that have become party to them and provide standards of conduct for governments to fulfil. States Parties are obliged to take measures to ensure their implementation at the national level. Each of the core human rights treaties has a treaty monitoring body, a Committee of independent experts that monitors its implementation and to which states must submit periodic reports on their compliance. In some cases, the Committee can initiate inquiries into reports of systematic violations. Working groups and special rapporteurs can also be appointed by the UN Commission on Human Rights to report on specific human rights violations. Four human rights conventions allow for individual complaints.

## Women's Rights as Human Rights

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Women's rights have only recently been explicitly articulated as an integral part of international human rights law. Although the UN Charter, International Bill of Rights and every major human rights treaty clearly states that there should be no discrimination on the basis of sex, 'tradition, prejudice and social and economic interests have generally excluded women from prevailing definitions and interpretations of these basic human rights and relegated women to secondary and/or "special interest" status in human rights matters' (Bunch, 1999). The growth of the international women's movement has been a significant factor in the growing acceptance that 'women's rights are human rights'.

Up until the 1970s, the focus was on discrimination, development and the political and economic rights of women. This led to the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) by the UN General Assembly on 18 December 1979. The Convention contains provisions on the rights to political and social equality and the rights to equality in health, education, employment and family life (see below). After its adoption, the women's movement began to concentrate on women's issues in terms of human rights, focusing specifically on violence against women. This had a major success in 1993 at the World Conference on Human Rights, Vienna. The Conference asserted that 'all human rights are indivisible, and interdependent and inter-related', and women's groups from all over the world successfully demanded that the UN General Assembly adopt a Declaration on the Elimination of Violence Against Women and that the UN Human Rights Commission appoint a Special Rapporteur on Violence Against Women, Its Causes and Consequences.

The Vienna Declaration and Programme of Action, signed by 171 governments, emphasises the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. Despite this, and the fact that the majority of countries are parties to the conventions comprising the International Bill of Rights, debate continues concerning whether human rights are universal and indivisible or represent 'Western' values. Claims are made for cultural and traditional particularity in preference to the values of human rights. Central to this debate has been women's rights in the family (around such issues as polygamy, divorce, free and full consent to and in marriage, honour killings, dowry and child custody) as well as regarding female genital mutilation, property and inheritance rights, and employment rights. 'Cultural relativism is usually asserted when someone is trying to assert the rights of women. Women's rights activists argue that once states sign the United Nations Charter, they are obligated to respect human rights as set out in the Universal Declaration of Human Rights and that they cannot suddenly claim cultural relativism in certain areas' (Coomaraswamy, 2000).

In 1995 the Commonwealth adopted the Commonwealth Plan of Action on Gender



and Development in which governments reaffirmed that women's rights are human rights and urged member governments to adopt legislation and develop national strategies to promote the advancement of women. They also urged governments to ratify and implement other relevant human rights treaties and instruments including CEDAW, and to implement the principles and standards contained in the Declaration on the Elimination of Violence Against Women (1993), the Convention on the Rights of the Child (1990) and the Declaration and Programme for Action of the World Congress on the Commercial and Sexual Exploitation of Children (1996).

## **International Guarantees of Non-discrimination on the Basis of Gender**

At its most simple, the guarantee of women's human rights requires the prohibition of discrimination on the grounds of sex and the positive obligation to ensure equality between women and men. As noted above, the general obligation of non-discrimination on the grounds of sex has been laid down in a number of international instruments, including:

- ◆ The United Nations Charter, Articles 1 (3), 55 and 56;
- ◆ The Universal Declaration of Human Rights, 1948, articles 1 and 2;
- ◆ The International Covenant on Civil and Political Rights (ICCPR), 1966, articles 2, 3 and 26;
- ◆ The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, articles 2 and 3.

The UN Charter, Article 55, states, for example:

*With a view to creating conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . .*

*(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.*

The ICESCR, article 2 (2), states:

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The principle of non-discrimination requires the equal treatment of women and men with respect to the guarantee of rights in the various Conventions. Article 26 of the ICCPR goes further by establishing a free standing right of equality before the law: 'it prohibits discrimination in law or in fact in any field regulated and protected by public authorities' (HRC General Comment no. 18). The Human Rights Committee (the monitoring body of the ICCPR) has drafted another General Comment on that Covenant, article 3 (2000) that provides a comprehensive gender analysis of all its provisions and highlights aspects of particular concern to women. States Parties to the ICCPR and ICESCR should ensure compliance with their non-discrimination provisions.

This consistency in international instruments provides a sound basis for the assertion that the principle of non-discrimination on the ground of sex constitutes customary international law and as such is binding on all states. Even without this assertion, most states are UN members and thus are bound by the provisions of the Charter. In addition many are parties to at least some of the other instruments discussed in this section (see Appendix I).

Mainstreaming women's human rights throughout UN human rights bodies was emphasised by the Vienna World Conference on Human Rights in 1993 and ways of achieving this are being worked on by the Secretary-General and the UN High Commissioner for Human Rights. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights are increasingly asking for information about gender differences with respect to the rights in the Covenants and the steps states have taken to address them. States can anticipate and contribute to this process by co-ordinating their reports to the Human Rights Committee and the Committee on Economic and Social Rights with those to the CEDAW Committee. These reports should be seen as part of an integrated process rather than as distinct.

## **The Convention on the Elimination of All Forms of Discrimination Against Women**

The principle of the elimination of discrimination between women and men and the achievement of women's equality is the explicit objective of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Convention had 166 State Parties at the time of writing, including most members of the Commonwealth (see Appendix I).

### *Substantive provisions*

CEDAW identifies areas where gender-based discrimination is most marked, covering civil and political rights and economic and social rights. It includes provisions on the suppression of prostitution and trafficking in women (article 6); participation of women in the public life of states (articles 7 and 8); equality in nationality laws (article 9); equality in access to, and in all other aspects of, education (article 10); equality in employment (article 11); equality in access to health services (article 12); equality in other areas of economic and social life (article 13); equality before the law (article 15); and equal rights in the family, in particular before, during and after marriage (article 16). Of particular relevance to many Commonwealth states is the attention given to the specific needs of rural women (article 14).

Importantly CEDAW, article 1, defines discrimination against women as:

*... 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.*

This definition has been accepted by the Human Rights Committee as applicable to discrimination under the ICCPR. It encompasses both direct and indirect discrimination. In direct discrimination, the purpose of the 'distinction, exclusion or restriction' is relevant, for example legal prohibitions on women owning or inheriting property, being employed in certain sectors or having access to contraceptive services. Indirect discrimination occurs when 'distinction, exclusion or restriction' is the effect of the provision, for example height requirements for employment or non-provision of benefits for part time workers (the majority of whom are women), or preferential treatment for demobilised soldiers (the majority of whom are men). The definition does not, however, prohibit positive discrimination or temporary special measures. Affirmative or preferential treatment in order to correct conditions that have caused or perpetuated adverse treatment in the past is envisaged under article 4 as a temporary measure to accelerate the achievement of equality of opportunity and treatment.

Unlike the ICCPR and ICESCR, CEDAW is not limited to discrimination in the public sector. Article 2 (d) requires states to ensure that public authorities refrain from



discrimination and 2 (e) requires them to take appropriate measures to eliminate discrimination by any 'person, organisation or enterprise'. Other provisions, notably articles 5 and 16, explicitly relate to discrimination in private arenas, for example the family. Article 2 also sets out the obligations on States Parties, who must condemn discrimination against women in all its forms. This is absolute, allowing for no exceptions or justifications. States agree to pursue a policy of elimination of discrimination 'by all appropriate means and without delay' through:

- ◆ constitutional and legislative inclusion (2 (a));
- ◆ legislative measures, including sanctions (2 (b));
- ◆ competent tribunals to ensure implementation (2 (c));
- ◆ appropriate measures to abolish existing discriminatory laws, regulations, customs and practices (2 (f));
- ◆ repeal of discriminatory penal laws (2 (g)).

In its General Comment No 3 (1990), the Committee on Economic, Social and Cultural Rights considered the content of states' obligations under the ICESCR. Their comments are relevant to CEDAW because economic and social rights are included in it and similar language is used (for example, 'appropriate' means and measures). The Committee dispelled the notion that the ICESCR creates no immediate obligations and that its rights are non-justiciable. It emphasised the immediate, positive obligation to 'take steps' that are 'deliberate', 'targeted' and 'concrete' for the elimination of discrimination. It also found certain rights to be inherently justiciable, including workplace rights and rights of access to education.

## Reservations

Reservations to CEDAW are allowed subject to article 28 (2), which states: 'A reservation incompatible with the object and purpose of the present Convention shall not be permitted'. As well as being the treaty with the second highest number of ratifications (after the Convention on the Rights of the Child), CEDAW also has a large number of substantive reservations, including from a number of Commonwealth States Parties. Some of these are broad and subject the provisions of the Convention to other criteria, including domestic and religious laws. Most frequently, they concern the family – the place where women's rights are most often in need of protection. The existence of such reservations is an obstacle to gender mainstreaming in national legislation, especially where they are framed in terms of refusal to change existing laws.

Under the Vienna Convention on the Law of Treaties, 1969, states may make objections to the reservations of other states that they regard as incompatible with the object and purpose of the Convention. Few Commonwealth states have used this possibility, however, although Canada has done so with respect to the Maldives, which has removed the most extreme aspects of its reservations entered upon ratification of CEDAW. Moreover, no state has indicated that it is not in treaty relations with a reserving state. Failure to object gives tacit acquiescence to such reservations.

The Committee on the Elimination of Discrimination Against Women has called on states to narrow the terms of reservations, to consider whether they are needed and to withdraw them where possible. The CEDAW Committee has subjected states to close questioning on their reservations during the presentation of their reports. Some states have withdrawn or modified reservations (for example, UK, Canada, Malaysia and the Maldives). The Human Rights Committee in its General Comment No. 24 has asserted that it will sever reservations that it regards as incompatible with the ICCPR, a view that has been strongly challenged by some states, including the UK, as contrary to the exclusive power of states to object to reservations. The CEDAW Committee has not indicated whether it will take the same line.

## Monitoring and enforcement

All the committees of experts created by the UN Human Rights treaties provide for initial and periodic reporting by states. CEDAW article 17 establishes a Committee of independent experts (the CEDAW Committee) to which states must report within a year of becoming a party to the Convention and subsequently at four-yearly intervals or whenever the Committee requests a report. States should make every effort to keep to this reporting schedule. Late or outdated reports reduce the usefulness of the process to states, as well as to the Committee. Increased meeting time for the Committee is reducing a backlog that had developed and allowing more timely consideration of reports. The General Assembly has adopted an amendment to article 20 of the Convention formalising this ad hoc arrangement. States should ratify this amendment to ensure that the greater effectiveness achieved through more meeting time is maintained. The Committee also agreed at its 23rd session (June 2000) to allow 'on an exceptional and as a temporary measure, that States Parties with overdue reports should be invited to combine these into a single document' (General Assembly A/55/38).

State reporting provides an assessment of compliance with the Convention. To gain maximum advantage from the process, states should follow the reporting guidelines set out in the Commonwealth Secretariat/UNDAW/IWRAW publication, *Assessing the Status of Women: A Guide to Reporting Under the Convention on the Elimination of All Forms of Discrimination Against Women* (2000), and respond fully to the Committee's questioning. The CEDAW Committee recently introduced new procedures whereby states are presented with questions in advance of their oral presentation, based on their periodic report. This allows states to give more complete consideration to points of concern to the Committee and to exchange in a fuller dialogue with Committee members, including about ways of overcoming obstacles to effective implementation. This in turn enhances the opportunity to benefit from the Committee's expertise and experience gained from their dialogues with other states. States' reports and the Committee's Concluding Comments provide a public and readily available resource on the approaches of other states to gender equality.

The CEDAW Committee has developed its Concluding Comments to improve their usefulness by making them more precise and specific. States should study and respond to these comments, and use them as a starting point for the next report. They are available on the web site of the UN Division for the Advancement of Women (<http://www.un.org/womenwatch/daw>). Concluding Comments should also be given media coverage and forwarded to national NGOs. The reporting system is a valuable mechanism for linkage between the state and NGOs and states should use this opportunity to consult with civil society, especially women's NGOs, and to respond to their concerns. 'Shadow' reports, which are being produced by NGOs in some countries to provide the CEDAW Committee with additional information and an alternative viewpoint, should be used in such consultations. Consultations should continue after the reporting process to inform NGOs of the dialogue with the Committee and to consider in partnership ways of implementing the recommendations.

Gender mainstreaming throughout the UN Human Rights system has encouraged the other Human Rights Committees increasingly to address gender issues. States should therefore include in their reports gender aspects of their obligations under these treaties and be prepared to engage in dialogue about them.

CEDAW has recently been strengthened by an Optional Protocol (adopted by the General Assembly, 6 October 1999; entered into force 22 December 2000) that allows individuals and groups claiming violations of the Convention to bring petitions before the CEDAW Committee. NGOs and groups can represent individuals with the consent of the individuals but the Committee can conclude that consent is not



necessary if the author can justify acting without it. The Committee can make recommendations to the government concerned but cannot make a binding decision. The new Optional Protocol also gives the Committee investigative powers if it receives reliable evidence of grave or systematic violations.

The CEDAW Committee has adopted a number of important general recommendations on the interpretation and application of the Convention. These provide guidelines to states on measures to be taken to comply with the Convention. Among the most important are:

- ◆ General Recommendation 18, 1991: Disabled Women
- ◆ General Recommendation 19, 1992: Violence Against Women
- ◆ General Recommendation 21, 1994: Equality in Marriage and Family Relations
- ◆ General Recommendation 23, 1997: Political and Public Life
- ◆ General Recommendation 24, 1999: Women and Health

### Other international conventions

Other international treaties contain provisions that address matters of particular concern to women, although these are not always presented in human rights terms. Where they are not already bound by such treaties, states should examine their ability to become so.

The Constitution of the International Labour Organisation (ILO), 1919, Article 41 asserts the 'special and urgent importance' of the principle of equal remuneration for work of equal value for men and women. ILO Conventions are particularly valuable as there are procedures for their implementation. Relevant ILO Conventions include:

- ◆ No. 3 on Maternity Protection, 1919; No. 103 on Maternity Protection, 1952
- ◆ No. 100 on Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951
- ◆ No. 111 on Discrimination with Respect to Employment and Occupation, 1958
- ◆ No. 156 on Equal Opportunities and Equal Treatment for Men and Women Workers, Workers with Family Responsibilities, 1981
- ◆ No. 175 on Part-time Work, 1994
- ◆ No. 177 on Home Work, 1996 (supplemented by Recommendation No. 184)
- ◆ No. 183 Maternity Protection Convention, 2000 (supplemented by Recommendation)

Other international conventions of importance for women include:

- ◆ Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1951
- ◆ Convention Relating to the Status of Refugees, 1951 (and 1967 Protocol)
- ◆ Convention on the Political Rights of Women, 1954
- ◆ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1957
- ◆ Convention on the Nationality of Married Women, 1957
- ◆ UNESCO Convention on Discrimination in Education, 1960
- ◆ Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1964
- ◆ International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- ◆ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- ◆ International Convention on the Rights of the Child, 1989
- ◆ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158 (1990) (not yet in force).

## The International Criminal Court

The International Criminal Court (ICC) will be a global judicial institution that will investigate and bring to justice individuals, but not states or corporations, who commit the most serious crimes of concern to the international community. Its particular importance for women lies in the affirmation that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence constitute war crimes and, in defined circumstances, crimes against humanity. As of January 2001, the Rome Statute setting up the ICC had been signed by 139 countries and ratified by 27, including Botswana, Canada, Ghana, New Zealand, South Africa and Trinidad and Tobago. Other countries are encouraged to ratify the Statute; 60 ratifications or accessions are necessary for it to enter into force.

## Regional human rights treaties that prohibit discrimination

Regional human rights treaties include:

- ♦ the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (to which the United Kingdom became a party in 1953, and which it incorporated into national law with the Human Rights Act of 1998, Cyprus became a party to in 1962 and Malta in 1967);
- ♦ the American Convention on Human Rights, 1969 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 1994 (to which states in the Americas are party);
- ♦ the African Charter on Human and Peoples' Rights, 1981 (to which African states are party).

All these treaties prohibit discrimination on the grounds of sex. Protocol No. 12 to the European Convention, which was adopted on 4 November 2000, reaffirms the principle of non-discrimination in a free-standing prohibition of discrimination. It requires acceptance from states to come into force. The African Charter, Article 18(3) states that:

*The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.*

This provision appears to assert that incorporation of the Africa Charter into national law carries with it incorporation of the CEDAW Convention and other relevant human rights instruments. In addition, Article 25 of the Charter imposes a duty on States Parties to promote the rights contained in the Charter through education and publication and to ensure understanding of both the rights and obligations.

There is a considerable body of case law on the interpretation and application of both the European Convention and the Inter-American Convention.

## Other international instruments

In addition to the treaties mentioned above, other UN human rights instruments are also relevant in determining what responsibility states have in ensuring and protecting the rights of women. While they do not have the force of law, these agreements set a moral standard and provide a framework for international and national actions, monitoring and accountability. In them, governments agreed to take action on a broad range of social and economic issues so that women can realise their rights (Elson, 2000).



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### *The Vienna Declaration and Programme of Action (1993)*

The Vienna Declaration for the first time recognises violence against women as a human rights abuse, and states that:

*The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in the political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex, are priority objectives of the international community.*

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### *The Declaration on the Elimination of All Forms of Violence Against Women (1993)*

The Declaration defines violence against women as:

*. . . any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.*

It asserts that states should 'exercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. In addition, states 'should not invoke any custom, tradition or religious consideration to avoid their obligations' with respect to violence against women.

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### *The Cairo Programme of Action (1994)*

The International Conference on Population and Development agreed on a Programme of Action which, in Principle 4, declares that advancing gender equality and equity and the empowerment of women, the elimination of all kinds of violence against women and ensuring women's ability to control their own fertility are cornerstones of population and development-related programmes. It also asserts that states should act to empower women and to eliminate inequalities between women and men.

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### *The Beijing Declaration and Platform for Action (1995)*

The Platform for Action (PFA), the major policy document produced by the Fourth UN World Conference on Women, reaffirms that all human rights – civil, cultural, political and social, including the right to development – are universal, indivisible, interdependent and interrelated, and that the human rights of women and the girl-child are an inalienable, integral and indivisible part of human rights. The PFA sets out strategic objectives, and actions to be taken by states to achieve those objectives, in each of twelve areas of critical concern: poverty, education, health, violence, armed conflict, economy, power and decision-making, institutional mechanisms, human rights, media, environment and the girl child. It therefore provides an action plan for states.

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### *The Beijing+5 Outcome Document (2000)*

Five years after Beijing, governments met in New York at a Special Session of the General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-first Century' (popularly known as Beijing+5). The Ad Hoc Committee of the Whole produced a Political Declaration and Outcome Document, *Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action*. This recognises that:

*the full realisation of all human rights and fundamental freedoms is essential for the empowerment of women. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.* (para. 3)

## The Persistence of Discrimination

It is increasingly recognised that, despite the vision of universal human rights and the mechanisms noted above which exist to concretise this vision, gender discrimination has persisted world-wide. Some examples of the obstacles faced by women include:

- ◆ Violence or the threat of violence, which restricts the range of choices open to them in almost every sphere of life. The type of violence varies depending on cultural context and includes dowry deaths, 'honour' killings, rape and other sexual assault, domestic violence, sexual harassment and genital mutilation.
- ◆ Their invisibility in formal political institutions. For example, world-wide, women hold only 10 percent of parliamentary seats.
- ◆ Their unequal status as enshrined explicitly or implicitly in the legal system and the injustice they continue to face because of their gender. Legal and regulatory provisions that discriminate against women perpetuate gender inequalities and restrict women's ability to participate fully in social and economic development.
- ◆ The continuation of harmful traditional practices, rooted in cultural assumptions and/or religious practices.
- ◆ The growth of religious and cultural extremism and fundamentalism which narrowly define women's choices and restrict their movement.
- ◆ The multiple roles women have to perform in productive and reproductive labour, paid and unpaid, that are not reflected in official measures of economic activity.
- ◆ The increasing burden of unpaid care work, caused by cuts in public expenditure in pursuance of structural adjustment programmes, which falls on women who have primary responsibility for family healthcare and provision of services.
- ◆ The effects of globalisation, including the migration of women for employment but creating vulnerability to violence and exploitation.
- ◆ The effects of armed conflict, including increased incidents of violence against women, further economic hardship and demands of caring for those injured and traumatised by war.

These obstacles to women's equality ensure that women remain excluded from the vision of universal human rights. Expanding the understanding of state responsibility and accountability is therefore an important component in implementing, enforcing and asserting human rights instruments from a women's rights perspective (Clarke, 1996).

## Limitations of the Prohibition of Discrimination

The principle of non-discrimination requires the equal treatment of women and men with respect to the guarantee of rights in the various Conventions. This development at the international level has been mirrored at the national level as many constitutions now prohibit discrimination on the basis of sex. However, prohibiting discrimination is not of itself enough to ensure that women have the same opportunities for advancement and full enjoyment of their rights as men. Full equality of access to opportunity, supported by social policies and programmes, is also required. Such substantive equality requires that all groups are able to enjoy equal human dignity and to participate fully in society. It accordingly allows for different treatment where needed to achieve that goal. CEDAW specifically notes that 'temporary special measures aimed at accelerating de facto



equality between men and women shall not be considered discrimination' (article 4). The traditional human rights framework is, however, limited in its ability to achieve such equality of opportunity. Human rights discourse has tended to concentrate on the relationship between the state and the individual as it is played out in the public arena. While the standard of equality is important, it most benefits women where their circumstances are comparable to those of men, for example in paid work, in public life or in facing criminal charges. In such situations women's legal right to equal treatment, at least in theory, provides them with the same guarantees as men. However, the sexual division of labour restricts the employment opportunities for many women to occupations deemed 'suitable' for women, typically in the 'caring' professions, social services, working with children and the elderly, cleaning and domestic service. Some forms of employment exploit women's sexual desirability and may suggest availability, for example jobs in the tourist industry, itself often seen as vital to the state's economic development and therefore involving government complicity. Other forms of employment focus on women's assumed passivity and manual dexterity (small fingers/delicate tasks), for example factory working, especially in clothing and light assembly work. What all such forms of employment typically have in common is low pay, lack of unionisation and the lack of similar male occupations that can be used as a comparison to determine equality of treatment. It is often assumed that men are the primary source of paid income (without reference to statistics on female-headed households) and there is no basis on which to compare conditions of leave from paid employment for child birth and infant care.

The impact of globalisation has been mixed. Corporate investment and increased transborder mobility have allowed many women to enter the paid workforce who previously had been unable to do so. A level of economic independence furthers the empowerment of women. However, the Special Rapporteur on Human Rights of Migrants, the Special Rapporteur on Violence Against Women and the UN Secretary-General have reported on the linkages between exploitation, migrant women and violence.

While there has been an emphasis on standards of equality and on the public arena, there has been an unwillingness to assume responsibility for the elimination of violations that occur in the private arena, where many abuses against women take place. For example, the majority of women who experience 'severe physical or mental pain or suffering' do so at the hands of male members of their own families, although such an act committed by a public official would fall under the definition of torture. This victimisation is frequently facilitated by the maintenance of a social, cultural or legal framework by the state that tolerates, condones or, in some cases, encourages such activity (Connors, 1995). State failure to expose and attempt to redress such abuses make them a matter of public, rather than private, import. States have to accept that gender equality goes beyond ensuring women the same rights as men with respect to the processes of law. It requires positive action to guarantee the means for the enjoyment of rights and for ensuring participation in society on equal terms with men.

A specialist group of the Council of Europe decided that:

*Gender equality means an equal visibility, empowerment and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference, and aims to promote the full participation of women and men in society.*

*As well as recognising women's rights as human rights, other important elements of gender equality are: the development and improvement of representative and participatory democracy; women's economic independence; education; and women's and men's common acknowledgement of the need to remove imbalances in society and their shared responsibility in doing so.*

A good illustration of what such a positive response to human rights guarantees might require is the decision of the European Court of Human Rights in *Airey v. Ireland*. Irish law allowed a wife to seek judicial separation from a violent spouse but she could not afford legal assistance. The Court held that respect for family life requires the state to provide legal aid for an impoverished wife to make good this right. Formal equality in the law with respect to separation was not sufficient for its practical achievement. Another example is *X and Y v. the Netherlands*, where the state had failed to provide any legal remedy for a 16-year-old mentally retarded child who had been sexually abused by a private individual. The state's failure to provide for this situation within its criminal law constituted a violation of the Convention. These cases go beyond equality and show the state's responsibility to ensure respect for family life for all people in its jurisdiction. They also demonstrate how gender mainstreaming has benefits for all citizens in that analysis showing the obstacles to actual enjoyment of formal human rights is applicable to both women and men.