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CEDAW, TAKE IT OR LEAVE IT?

HUMAN RIGHTS AND SPECIFIC IDENTITIES: A LOOK AT WOMEN'S RIGHTS AND THEIR INCLUSION IN HUMAN RIGHTS THROUGH A SPECIALIZED TREATY

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INTRODUCTION

"*All human beings are born free and equal in dignity and rights*" (UN, 1948, emphasis added). This is the first sentence of Article 1 of the Universal Declaration of Human Rights. This paper will start from the premise that this normative idea is not to be questioned. However, what can be debated is if those rights are equally applicable to *all human beings*. Feminists have criticized universal human rights by arguing that their theoretical foundation as well as their practical application reflect inequalities between men and women. This paper will look at the feminist critique of human rights in order to inquire into the place of women's rights in human rights. The paper will not question the idea that women's rights should be included in human rights, it will start from the *assumption* that they ought to be included. However, it will explore the way they are currently included and assess them. The paper will aim to answer the question if a specialized treaty focusing on women, illustrated by the Convention on the Elimination of All Forms of Discrimination against Women[1], is the right way to achieve the normative goal of feminism of equality between all men and all women. In order to do so, the research will be based on a textual analysis of the existing literature on human rights and women's rights and will also rely on the main human rights documents used in the discussion through some discursive analysis. The discussion will be divided into four sections. The first section will look at universal human rights and the feminist critique that claims the exclusion of women's rights from human rights. This will lead to the second section that will introduce the Convention as a specialized treaty aiming to give a place to women's rights on the human rights agenda and will contrast the Convention to the main human rights texts. The third section will argue that the Convention creates a conceptualization of women as a collectivity with

[1] The focus being on this specific Convention due to its character as the main international treaty dealing with the rights of women.

collective legal rights. It will also argue for the existence of collective moral rights based on the interest theory. The last section will look at the three main issues that come from the conceptualization of women's rights in the Convention. These three issues will call into question the capacity for the Convention to create legal rights that can apply to all women equally and that can dispel the doubts exposed by the feminist critiques.

SECTION I: THE FEMINIST CRITIQUE OF UNIVERSAL HUMAN RIGHTS

This first section will introduce the feminist critique of human rights that will lead to the discourse explored in this paper. It will briefly present the idea and development of human rights and how they are considered to be universal. After that, it will present the feminist critique and its main aspects.

Some link the development of contemporary human rights to previous talk of natural rights. Natural rights developed during the Enlightenment period and represented a move away from God-given rights towards a secular grounding of rights. That period saw the advancement of the 'rights of man' more famously in the French Declaration. However, these rights of man quickly became the rights of citizens in most rights declarations throughout the 19th century (Langlois, 2013: 12; Pagden, 2003: 189-90). The Second World War represents a second pinnacle in talks of rights and a revival of the rights of 'man' – that then became the rights of the 'human'. The post-war period also represents the extension of the rights discourse from the philosophical and legal fields to other fields and the appropriation of a language of rights by the political domain and the press amongst others. The 1948 UN Universal Declaration of Human Rights (UDHR) marked the development of the contemporary conception of human

rights and showed the shift from the rights of citizens by offering ground for protection for people everywhere against their governments (Beitz, 2001: 270; Nickel, 2007: 1; Pagden, 2003: 191).

Contemporary human rights discourses then evolved into the representation of a moral vision and moral order with internationalist intent (Bunch, 1990: 486; Peterson, 1990: 304) and started to "embody in everyday language what seems just and morally right" (Grewal, 1999: 337). However, they are mostly considered to stem directly from Western liberal political thought and to represent this ideology, for instance, by finding justification in liberal values such as human dignity, reason, autonomy, or equality (Langlois, 2013: 17-18). There is disagreement as to which value or concept serves as the justification of human rights (Tasioulas, 2015: 45). This paper will not engage with this discourse as it would lead it away from its main discussion. What is important to remember is the liberal aspect of contemporary human rights as it will be explored further in the paper.

Human rights are said to be universal. This has been claimed by many human rights theorists. Their universality is considered as an unquestioned normative claim characterizing them, representing the intentionality of a global scope (Freeman, 2017: 90). To say that human rights are universal also means that people, human beings, are considered to possess those rights in virtue of their humanity alone (Nickel, 2017; Donnelly, 1984: 400; Griffin, 2008: 48; Tasioulas, 2015: 50). Claiming the universality of human rights, for those theorists, does not, however, mean that they represent ideas accepted by everyone everywhere, or that they historically developed universally either in theory or practice, but that they represent ideas that ought to be articulated in terms of these specific rights and that these rights can be claimed by everyone (Beitz, 2001: 274; Langlois, 2013: 16). Yet this universality can be questioned on various

grounds. The foremost critique of the universalism of human rights is the cultural relativist critique (Freeman, 2017: 90). The paper will not engage with this critique in this piece as it lacks relevance for its argument; moreover, the literature on the discourse between universalism and cultural relativism is already extensive and some even argue that the debate has become obsolete (Nickel, 2017). However, there are more recent critiques questioning the universalism of human rights. The rest of the discussion will focus on the feminist critique.

Michael Freeman considers the feminist critique of universal human rights to be "one of the most significant shifts in the interpretation of human rights in international politics since the end of the Cold War" (Freeman, 2017: 108). However, there is still a lot of material to analyse and assess within this critique. In order to do so, the paper will rely on feminist theory. Feminism can be argued to represent various and sometimes even contradictory ideas, found within its several waves, subgroups and movements. However, diving into the details of different feminist ideologies will take us away from the more neutral assessment of feminism that will be useful for the following discussion. Feminism can simply be described as "an intellectual commitment and a political movement that seeks justice for women and the end of sexism in all forms" (McAfee, 2018). The analysis in this paper will be essentially feminist and in line with feminist theory and feminist political philosophy. Both aim at a reassessment and a reconceptualisation of theory through the inclusion of feminist concerns and as a reaction to the "male monopoly of the production and reception of knowledges" (Grosz, 1990: 332; McAfee and Howard, 2018). Feminist analysis thus aims at being "*contextual*, *experiential*, and *inductive*" by focusing on specific experiences (Binion, 1995: 512). Within the human rights discourse, feminist analysis examines how human rights are defined and applied (*ibid.*, 513). This analysis then has the potential to lead to a critique of human rights.

The feminist critique states that women experience some violations of their human rights that are intrinsically linked to their gender and that these violations are overlooked within the human rights discourse (Bunch, 1990: 486). Theorists like Charlotte Bunch claim that this is due to the fact that women's rights are often not considered as human rights (*ibid.*). This exclusion stems from the issue with the law which is said to be gendered and privileging male experiences. This issue can be recognized through practical observations of the application of human rights that exclude many violations of women's human rights and through a theoretical standpoint that reflects an understanding of human nature and of the human as based on the male as the norm (Binion, 1995: 510; Peterson, 1990: 305; Charlesworth and Chinkin, 2000: 218, 231). The reliance on the male experience is seen as excluding the specific experiences of women in human rights theory and practice. Only by acknowledging the different experience of women in human rights violations can human rights successfully protect women from these violations (Binion, 1995: 513; Bunch, 1990: 487; Freeman, 2017: 108).

On the more theoretical side, human rights are argued to be based on a conception of the human that relies on the male as the norm. This conception is said to have its roots not just in contemporary human rights theory but in Western liberal political thought. The human[2] in that tradition of thought is seen as having been constructed from the standpoint of men as moral agents[3]. If this has historically been so, then a failure to actively engage critically with this conception leads to the exclusion, of women from it (Peterson, 1990). Yet, as some argue, a certain conception of the human is necessary to Western liberal thought and to human rights theory (Freeman, 2017: 60; Langlois, 2013: 13). For V. Spike Peterson this requires, consequently, a reconceptualisation in less androcentric terms (Peterson, 1990: 306). However,

[2] as moral agent and rightholder.
[3] e.g. by linking rationality or other liberal values to masculinity.

she notes that this failure to engage with that conception, even if it does not present itself in explicitly male terms but pretends to be universal in the context of contemporary human rights, leads to an 'abstract universal human' that falls victim to its passive neutrality (*ibid.*: 313). If this conception of human moral agents was historically based on a male standpoint and has not been reconstructed, it still implicitly represents a male standpoint.

This section has shown how contemporary human rights developed after WWII, most notably with the UDHR, and how they are considered to stem from Western liberal thought. They are said to be universal. However this universality is contested, one of their main recent critique being the feminist one. The feminist critique claims that universal human rights are not truly universal, in practice and in theory, due to their masculine biases. These failures contribute to the exclusion of women's rights from human rights. The next section will show one way this issue has been attempted to be overcome, mainly through a specialised human rights treaty.

SECTION II: THE CEDAW AS A SPECIALIZED TREATY ON WOMEN'S RIGHTS

This section will look at the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as a way to overcome the exclusion of women's rights from human rights through a specialized treaty. It will compare the CEDAW to the traditional human rights texts in their forms and contents and will assess how the CEDAW deals with women's rights in a way previous human rights texts did not.

First and foremost, it is important to make the distinction between moral and legal rights. A *moral right* is a right that "exists within a morality" (Nickel, 2007: 28) and represents "an

entitlement or justified claim" within that morality, independent of legal recognition (Newman, 2004: 128). A *legal right* is a right that "is recognized and implemented within some legal system" (Nickel, 2007: 28). Rights can, and often are, both moral and legal at the same time. Human rights specifically are seen as universal moral rights that are institutionalized into legal rights through human rights declarations and texts (Jovanović, 2012: 177). Their institutionalisation represents the "idea that law can achieve what morality cannot" (Nickel, 2007: 92), namely the implementation of those rights, serving as a tool to that morality. In the context of women's rights the moral rights underlying them could be summarized to the normative goals of feminism, the equality of men and women both formal and substantive. This paper will not take issue with this idea and with the moral rights that are the foundations of women's rights discourse. However, it will look at how those rights are institutionalised legally and question their legal institutionalisation, more specifically through the CEDAW, asking if those legal rights can be successfully instrumentalized to achieve the moral rights they aim to protect.

Contemporary human rights are considered to be a response to the struggle of people everywhere and one of their main moral justifications is the achievement of equal rights and dignity for all (Donnelly, 2013: 99). In that sense, the rights of "disadvantaged or subordinated groups is a longstanding concern" of human rights (Nickel, 2017). However, the limited list of rights presented in the main human rights texts cannot always provide enough ground for the protection of certain groups of people who face specific threats. This is why the United Nations (UN) has started, in the 1960s, to deal with those specific threats of certain groups of people through specialized treaties[4] (Nickel, 2007: 74, 94). The CEDAW thus represents the response of the UN to the specific threats to the human rights of women.

[4] Yet the question remains of how successful this attempt has been.

The main traditional human rights texts are composed of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, they form the 'International Bill of Human Rights' (Langlois, 2013: 18). The three texts all have non-discrimination clauses that include discrimination based on sex[5] (Charlesworth and Chinkin, 2000: 214; UN, 1948; UN, 1966a; UN, 1966b). They also mention that men and women should have equal rights[6] (UN, 1948; UN, 1966a; UN, 1966b). However, the ICCPR is mainly concerned with the negative duties of the state, individual rights, and formal equality, which according to feminist critiques is not sufficient to deal with the structural conditions that lead to the discrimination faced by women. If the ICESCR concerns itself more with positive duties and is less individualistic in nature, its focus is on class and not sex or gender (Roth, 2002: 190-2). Moreover, as Hilary Charlesworth and Christine Chinkin notice, a textual analysis of the three texts of the International Bill of Human Rights reveals an exclusive use of the masculine pronoun[7] (Charlesworth and Chinkin, 2000: 232; UN, 1948; UN, 1966a; UN, 1966b). The UDHR even uses the word 'man' to refer to all 'humans' in its Preamble (UN, 1948). Finally, outside of the non-discrimination clauses, the only times women are mentioned in the three texts, are in the context of marriage[8] or motherhood[9] (UN, 1948; UN, 1966a; UN, 1966b)[10].

In the previous section, feminist theory was introduced as a reaction to the male monopoly of knowledge, or what can also be called the *androcentrism* of knowledge. In their short article,

[5] Article 2 of each text.
[6] UDHR: Preamble, ICCPR and ICESCR: Article 3.
[7] Considering the universalist intent of these texts, a gender neutral pronoun, or at the very least the use of both masculine and feminine pronouns, would demonstrate an effort to be more inclusive.
[8] UDHR: Article 16, ICCPR: Article 23.
[9] UDHR: Article 25, ICCPR: Article 6 (in the case of penal execution), ICESCR: Article 10.
[10] This might lead to the idea that women only deserve special concern related to marriage or motherhood, both representing relatively patriarchal ideas of the role of women.

Michelle Friedman and Alison Wilks give a concise summary of the multiple ways in which the androcentrism of knowledge can be recognized. Firstly, through the production of knowledge − it is androcentric if men are the ones who dominate the production because this will determine what is considered as important, to be valued, and will most likely create biases. Secondly, through the presentation of that knowledge − the vocabulary used can reflect androcentrism by a use of the word 'man' for instance taken as a universal word to refer to humans. Thirdly, through the content of that knowledge − the content needs to be analysed in terms of absence and presence. Women can be absent from that content through exclusion and gender-biases. They can also be present but in ways that still show androcentrism. For instance, they might only be mentioned in ways relating to their place in the private or domestic sphere. Or they might only be considered for their place in the public sphere, ignoring their experience in the private sphere. Finally, they might be included through women's issues but these run the risk of marginalizing women's studies[11] (Friedman and Wilks, 1987). The analysis of the International Bill of Human Rights shows clear examples of androcentrism through the vocabulary used (masculine pronouns and the word 'man') and the types of rights focused on women (restricted to the private sphere). This, therefore, shows androcentrism through the presentation and the content of knowledge while the production of knowledge can be linked back to the historical masculine bias in Western liberal political thought. In light of this androcentrism, the next paragraphs will show how CEDAW aims at reversing this.

The CEDAW is said, in the introduction to the Convention, to be "the central and most comprehensive document" on the "efforts for the advancement of women" and to constitute an "international bill of rights for women" (UN, 1979). In its Preamble, it highlights the commitment to non-discrimination, including discrimination based on sex, and to the equal

[11] This issue will be explored in Section IV.

rights of men and women in the UDHR and the two Covenants, but that despite those commitments, "extensive discrimination against women continues to exist" (*ibid.*). The CEDAW's fundamental principles and values are mainly based on equal rights and dignity (Holtmaat, 2013: 97), just as the International Bill of Human Rights. However, it departs from more traditional liberal values and from the ICCPR through its commitment to positive liberty and positive duties. Indeed, it focuses on affirmative measures that need to be taken, both politically and socially, to lead not only to the formal equality of women but also and mainly, to substantive or *de facto* equality (Roth, 2002: 189-92; Charlesworth and Chinkin, 2000: 217). This is exemplified by the way most Articles in the Convention start with "*States Parties shall take all appropriate measures*" (UN, 1979), showing the need for the state to engage in positive and transformative change (Roth, 2002: 213). Article 5 of the Convention is seen as the main example of this. Article 5(a) states that

> "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."
>
> (UN, 1979)

This Article recognizes the impact of gender stereotypes in creating social and cultural patterns perpetuating discrimination and thus calls for societal change promoted by the state. Rikki H. M. T. Holtmaat argues that this represents an idea even stronger than *de facto* equality, namely transformative equality - the recognition of the need of society-wide change and the modification of gender stereotypes in order to achieve equality between men and women (Holtmaat, 2013).

CEDAW distinguishes itself in two more ways. Two of the main successes of CEDAW are considered to be its ability to engage with both first and second generation rights and to reduce the public/private dichotomy (Rosenblum, 2011: 108-9). First generation rights are civil and political rights while second generation rights are social, economic and cultural rights. The focus in the 'West' is traditionally on first generation rights, thus for instance privileging the ICCPR over the ICESCR. However, CEDAW recognizes the importance of second generation rights in fully addressing women's rights and women's issues, through rights to food or work for instance. Women's first generation rights often rely on their access to second generation rights from which they suffer a lack of access in many regions of the world and in disproportionate manners to men (Charlesworth and Chinkin, 2000: 217; Bunch, 1990: 488). The second point concerns the public/private dichotomy. CEDAW recognizes both spheres, public and private, as sites of discrimination against women (Hernández-Truyol, 2011: 213) which is seen as a success because other human rights texts and international law in general usually disregard the private sphere as a site of human rights violations (Binion, 1995: 518; Peterson, 1990: 305). However, discrimination against women often, although not always (e.g. rape as a weapon of war[12]), happens in the private sphere, at the non-governmental level, and thus "outside the purview of human rights law"[13] (Binion, 1995: 519; Freeman, 2017: 107). Yet, even private discrimination is intrinsically linked to governmental and political aspects in that it results from the structural patterns of society based on patriarchal ideas of power, patterns that are condoned by states (Bunch, 1990: 488, 491). The focus then of CEDAW on changing

[12] Rape, when used as a weapon of war against a specific population, can be prosecuted as a war crime. See the OHCHR website on 'rape as a weapon of war' and the UN Resolution 1820 (OHCHR, 2019).

[13] This refers to the focus of international human rights law on the governmental level and the lack of focus on the non-governmental level. This means that it focuses more on human rights violations committed by states or state officials and not individual persons who do not have a governmental position (Binion, 1995). The latter is usually left to the jurisdiction of the state itself and domestic law. However, not all states might have laws protecting women against abuses perpetrated by, for example, their husbands or fathers. Yet women still face significant abuse at the hands of men within the family. This is why it is important for international human rights law, especially in the case of women's rights, to engage more with the 'private sphere' in order to account for these sites of discrimination, particularly to protect women in states where the domestic legal system might fail to do so.

these patterns is an important step towards more recognition of private discrimination and abuse of women as human rights issues.

Specialized treaties are thus a way to deal with the specific threats experienced by certain groups. In the case of women, although the International Bill of Human rights provides non-discrimination clauses, the texts still represent an androcentric bias. The CEDAW then aims at rectifying these issues by dealing entirely with women's rights. The next section will analyse CEDAW further in how it departs from the individualistic conception of rights present especially in the UDHR and the ICCPR.

SECTION III: WOMEN'S RIGHTS AS COLLECTIVE RIGHTS

The CEDAW can be considered to create one more noticeable difference with the International Bill of Human Rights, especially with the UDHR and ICCPR. It can be argued to create a conceptualization of women as a collectivity. This section will explore the concepts of individual, group, collective, and minority rights and will rely on the interest-based theory to argue that women's rights can be collective, based on collective interests, and that women's rights under CEDAW are conceptualized as collective rights.

James W. Nickel gives an account of the increased focus, within the UN and human rights discourse, on minority rights. He identifies three types of minority rights: (1) universal rights applied to minorities (URAMs), (2) minority rights, and (3) group rights. The UN's inclusion of minority rights within the human rights framework started through the use of URAMs, or simply, the acknowledgement that minorities still possessed all the rights in the International

Bill of Human Rights, with a focus on non-discrimination. It then started to give more attention to minority and group rights. URAMs have the advantage to not be differentiated rights while minority rights, although rights of individuals, raise more questions as to whether they can be considered as human rights. Nickel argues that minority rights are human rights when they can be derived from existing human rights. For example, the right to use one's (minority group's) language can be derived from freedom of expression. He shows how even rights that are considered specific to women, e.g. rights related to motherhood and prenatal care, can be derived from universal human rights, e.g. a universal right to medical care (Nickel, 2007: 154-162). Yet, this argument leads all minority rights to be considered as URAMs in order to be seen as human rights since they simply stem from individual universal human rights[14]. The rest of this section will, however, assess the possibility for types (2) and (3), minority and group rights. Although it would be a fallacy to say that women are a minority, the discourse on minority rights can be applied to women's rights in questioning their capacity for a collective conceptualization. For this reason, the rest of the paper will refer to collective rights, understanding them as a version of minority rights for which the collectivity considered need not be a numerical minority.

Traditional conceptions of rights oppose individual rights to group rights. Universal human rights are usually rights of individual persons. Individuals, who possess moral standing, are the rightholders. In the case of group rights, the right is not simply the aggregation of the rights of all the individuals within the group, the group itself is the rightholder and it is argued that for the group to be able to possess rights as an entity in itself, it has to have moral standing of its

[14] The previous section explained that individual rights as seen in the UDHR and the ICCPR might not be enough to protect specific vulnerable populations, hence the creation of specialized treaties. Therefore, if Nickel's argument makes it possible to consider minority rights (as URAMs) as human rights through a derivability test, it leaves unanswered the possibility of considering non-individual minority rights as human rights.

own. The group is then considered to possess rights the same way an individual has rights (Jones, 2016). Yet, this is disputed by those who believe that only individuals can have intrinsic value and possess moral standing and that groups are reducible to the sum of the individuals who make them up and instrumental to those individuals in the sense that they are used to reach common objectives (*ibid.*). However, there is a third conception of rights that is often given less attention and that could be seen as an intermediary between individual and group rights. This is the collective conception. The collective conception of rights does not see the collectivity as having moral standing. The rightholders are all the individuals within the collectivity, not the group itself, but they hold their rights jointly, and they would not hold them individually[15] (*ibid.*). However, the question remains if such a collectivity that has no moral standing can possess moral and legal rights (Freeman, 1995: 27). The next few paragraphs will argue for collective moral rights and then look at women's collective legal rights.

Freeman states that "human rights are rights designed to protect morally valid and fundamental human interests" (Freeman, 2017: 55). This section will thus look at the interest-based theory and how this theory can provide grounds for collective moral rights. The theory states that "the *grounds* of rights are the *interests* of the rights-holders" (Freeman, 1995: 29). Freeman claims that human rights seem to be grounded in the interest theory. For instance, the right to life is based on humans having an interest in being alive (*ibid.*). The rest of the section will thus explore the potential collective aspect of the theory.

[15] In the case of group rights, the group itself, as an entity, is considered as the rightholder, like an individual. For example, only a group can have a right to self-determination, that right is a group right because it is not reducible to the right of all the individuals within the group, an individual cannot have a right to self-determination, at least under this specific conception of self-determination. In the case of collective rights, the rightholders remain all the individual members of the collectivity. This will be explained further in the rest of the section with the help of Newman's argument.

Joseph Raz is seen as the main defender of the interest-based theory (Freeman, 1995: 30). He defines rights this way:

> "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."
>
> (Raz, 1986: 166)

Raz thus grounds his justification of rights as stemming from the interest a person has in this right which is reason enough to create a consequent duty (Raz, 1986: 181). Dwight G. Newman then defines interest as "a relation specifying something (an *object*, being a description of an alteration to the state of the world) that makes someone's life (the *subject's*) go better overall" (Newman, 2004: 129). Therefore, if a person has an interest that is sufficient to create a duty for another person, then the person has a moral right to the object of that interest (Freeman, 1995: 30; Tasioulas, 2015: 50). As Freeman argues, it is consequently possible to rely on the interest conception of rights to defend collective human rights (Freeman, 1995: 28).

Raz claims that collective rights can exist if they fulfill three conditions. The first condition is that the collective right reflects some interest that is sufficient to create a duty that then gives rise to the right. The second condition is that the interest is the interest of the persons forming the collectivity in some public good and the right in that public good thus stems from the interest the persons in the collectivity have in that public good as members of that collectivity. The third condition is that the interest in that public good conceptualized as an individual right of the individuals within the collectivity would not be sufficient to ground a duty (Raz, 1986: 208). If these conditions are met, then Raz's definition of rights can be reformulated into a definition of collective rights:

A collectivity X has a right if and only if X can have rights, and, other things being equal, an aspect of all the members of X's well-being (their collective interest) is a sufficient reason for holding some other person(s) to be under a duty, considering that that interest, conceptualized individually, would not give a sufficient reason for holding some other person(s) to be under such a duty.

The concepts of collective interest and collectivity have not yet been defined. Newman defines a collectivity as "a collection of persons *such that we would still identify it as the same collectivity were some or all of the persons in the collectivity to change* (...) and such that the persons who are in the collectivity identify themselves in some non-trivial way as members of this collectivity" (Newman, 2004: 128, emphasis added). Newman claims that Raz's version of collective interest is actually a version of shared interest. This version, however, poses a problem to the very definition of the collectivity. A shared interest, according to him, is an "interest shared by each and every individual who is a member of a certain collectivity in the sense that each member has an individual interest in the object of the shared interest" (*ibid.*: 131). A shared interest, as he further explains, is a specific sort of aggregate interest. This means that it is an interest that all the members of a collectivity possess individually but have in common. For that interest to be shared by the entire collectivity then, the interest would have to rely on unanimous consent. However, if the collectivity is not homogeneous, the interests of the individuals will vary if the individuals within the collectivity are replaced by other individuals with different interests. Yet, his definition of a collectivity states that the collectivity does not depend on the specific members that constitute it at the time. Shared interests thus depend on the *particular individuals* who constitute the collectivity. If those individuals were to change, their interests would as well and an interest that was previously a shared interest might not be held unanimously anymore. This goes against Newman's definition of a collectivity that is intrinsically *non-particularistic*. Therefore, shared interests cannot be the interests of a collectivity (*ibid.*: 132-4). A collective interest is, instead, a non-

aggregative interest, "something that makes a community thrive and flourish" (*ibid.*: 140) and whose fulfilment can facilitate the pursuit of the interests of individuals within the collectivity (*ibid.*: 141). A collective interest is, therefore, non-particularistic as it does not amount to the unanimously agreed upon interests of all the members but constitutes an interest all the members might have, in a common manner, that will make the collectivity better off overall and that will allow, for the members of the collectivity, the enjoyment of further, more individualistic, interests.

Critiques of collective interests challenge them by claiming that collective interests can clash with individual interests, leading to conflicts of interests. However, individual interests can also clash between them. Recognizing the existence of collective interests does not mean that all collective interests have to be placed prior to individual interests, nor does it mean they always have to be placed as secondary. When collective interests give rise to collective rights, collective rights and individual rights have to be established in terms of priorities based on context and on what the rights aim to protect (Freeman, 1995: 29; Jovanović, 2012: 146-7). The relationship between collective and individual interests goes further in that Newman argues that some individual interests require the existence of some collective interests as collective rights (Newman, 2004: 158). For example, some individual rights might depend on large-scale societal change. However, an individual interest alone might not be reason enough to create a duty for that change, as opposed to a collective one. For instance, in the case of women's rights, women's individual rights might never be fulfilled until some societal change is organized, leading to more equality. The argument would thus go as such, women have a collective interest in sex or gender equality that leads to a collective moral right to equality and non-discrimination that requires a change at the societal level in cultural patterns and in gender-based stereotypes that perpetuate patriarchal practices and discrimination. The individual right

of any singular woman might not be enough to ground such a duty but the collective right of the collectivity 'women' could be said to ground one. The fulfilment of this collective right will then facilitate the further provision of women's individual rights in equal and non-discriminatory ways[16]. Women, as a collectivity, can thus be considered to have collective moral rights.

In practice, these rights are implemented as legal rights through the CEDAW which can be argued to create collective legal rights for women. The literature is relatively scarce on a conceptualization of women's rights as collective rights. Brad R. Roth, however, gives an account of how the CEDAW can be understood as a collective paradigm of women's rights as opposed to an individual one (Roth, 2002: 187). The main example, according to Roth, of the CEDAW's collective conceptualization is through Article 5[17]. Article 5 shows a collective conceptualization of women's rights in two main ways. The first one is through the call for change at the societal level, and not simply through the protection of women's individual rights separately. The second one is through the requirement, for this change, of collective action and governmental interference in areas that are left outside of the state's purview in the liberal tradition, such as the private sphere (*ibid.*: 192-3). Roth's discussion echoes Newman's previous discussion on collective moral rights, also referring to interests, here of women specifically, and how these interests can only be served through societal change and collective

[16] An example could be used by referring to Article 10 of the Convention that relates to equal access to education. All women can be said to have an interest in pursuing an education at the level of their choice. It is a collective interest in that it does not rely simply on the individual interest of every single woman but also serves the collectivity to flourish as if more women attain their desired educational level, women as a collectivity will be more able to advocate for themselves and their rights as well as leading fulfilling lives, independently and together. The collective interest creates a duty at the societal level in ending cultural practices that stop women from getting an education, be it to finish primary school in countries where boys are favoured or to be selected for a PhD in engineering where admission boards might be biased, which then justifies the collective right since the interest of one woman in pursuing a PhD in engineering might not create the same society-wide duty. An equal access to education will then help women further advocate and realize their collective and individual rights.

[17] See page 10.

decision in order to lead to women's flourishing. As he argues, this flourishing is conditioned on a reorganization of 'economic, social and cultural life' remodeled along the lines of women's interests (*ibid.*: 211-6).

Newman's discussion shows how collective moral rights can exist and Roth's discussion shows how women's collective legal rights exist. Although it is true that conceptualizing women as a group would be problematic as groups are usually based on some common tradition or culture (Young, 1994: 718; Grewal, 1999: 341), it is possible to conceptualize women as a collectivity with collective interests that can give rise to collective rights. As Young says, feminism has, for its existence as a movement, to rely on some sort of conceptualization of women as a collectivity (Young, 1994: 719). This conceptualization makes it possible to understand women's "oppression as a systematic, structured, institutional process" (*ibid.*: 718). However, some feminists criticize such a conceptualization on the grounds that it can lead to 'normalizations and exclusions' (*ibid.*: 713). The next section will explore these critiques further.

SECTION IV: THE THREE MAIN ISSUES WITH THE CEDAW'S WOMEN'S RIGHTS

This section will explore the three main issues found in the literature on women's rights as they are institutionalized in CEDAW and conceptualized as collective rights. The first issue is embedded in the nature of the Convention as a specialized treaty and stems from the separate nature of the CEDAW. The second issue is an issue of definition in the Convention that leads to the essentialization of the identity 'woman' in the CEDAW. The third and final issue is

linked to the collective conceptualization of women that induces a lack of concern for intersectionality.

CEDAW as secondary

The first issue is due to the fact that CEDAW creates a distinct and separate human rights document for women's rights. This runs the risk of excluding women's rights from human rights and making women's rights secondary. Moreover, the CEDAW has been shown to face practical limitations due largely to problems linked to states' reservations and non-compliance as well as weak enforcement mechanisms (Bunch, 1990: 495-6; Rosenblum, 2011: 112-7; Charlesworth and Chinkin, 2000: 220). However, a lack of compliance and implementation does not mean that the Convention itself should be completely disregarded. A lot of international treaties could be said to suffer from similar practical limitations. Yet, disregarding them completely would make the very discussion of this paper quite futile. These practical limitations are thus not a reason to disregard the CEDAW as an important human rights treaty.

Yet, the issue at stake here is CEDAW's separate nature. The feminist critique claims that women's rights were excluded from the human rights agenda. However, by creating a human rights treaty exclusively focusing on the rights of women, it pushes women's rights even further away from the universal human rights agenda. It makes it harder for the Convention to be seen as a proper human rights treaty and to be given priority. Instead, it renders it secondary to other treaties, implying that women's rights are secondary to human rights (Bunch, 1990: 495-6; Rosenblum, 2011: 144-5; Charlesworth and Chinkin, 2000: 219). Further than that, it might imply that women's rights are secondary to the rights of men as Bunch said (Bunch, 1990: 492). Indeed, if the CEDAW is supposed to be an international bill of rights for women then

one could wonder if that makes, by default, the International Bill of Human Rights, the 'International Bill of the Rights of Men'. If specialized treaties might be considered as a solution to absences in human rights texts, the separate nature of the CEDAW can create practical issues rendering it secondary and raising further questions as to the place and priority given to women and their rights in human rights discourse.

CEDAW as essentializing

The second issue is a problem of essentialization of the identity 'woman' in the CEDAW. Rosenblum, in his critique of the CEDAW, identifies some of the flaws in the Convention. This section, if it does not support Rosenblum's argument as it will be shown later, will rely on his observations. The main observation he makes, is that although the CEDAW continuously refers to 'women' as its central subject, it never defines the term (Rosenblum, 2011: 100). He further notes that the use of the term 'woman' represents a shift from the UDHR (and the two Covenants) which refer to 'sex' more generally in non-discrimination and equality clauses (*ibid.*: 125), although the Preamble of the Convention reaffirms this commitment to non-discrimination based on sex (UN, 1979).

The fact that the CEDAW refers to sex once and then keeps on referring to women without defining the identity runs the risk of essentializing this identity. CEDAW's preference of the term 'sex' over 'gender' might simply reflect the image of its time, a time where talks about gender were not as prominent as they are now (Hernández-Truyol, 2011: 216-7; Rosenblum, 2011: 100-1). However, it raises some issues within the modern understandings of sex and gender. The reliance of the term 'women' without a specific definition might reveal the universalist intent of the application of the Convention to all women. In reality, a reference to

sex and then to women might enshrine the identity 'woman' into an essentialized form. Essentialism, in this context, is defined as "the attribution of a fixed essence to women" (Grosz, 1990: 334) through certain characteristics, most often biological characteristics fitting the definition of the female sex. Although, these characteristics can also be social characteristics fitting a certain definition of the feminine gender (Charlesworth and Chinkin, 2000: 52; Grosz, 1990: 334; Young, 1994: 733). Essentialism based on sex reduces women to biological attributes and essentialism based on gender reduces women to a certain social definition of homogeneous experience (Young, 1994: 733). However, there is both biological and social diversity in the expression of the identity 'woman'. The focus on 'women' and 'sex' in the Convention without further specification as to how these terms are to be understood can lead to the exclusion of women whose identities are already contested by some people and governments in the world. These women who might be excluded are, for instance, transgender women who might not fit the biological characteristics (Rosenblum, 2011: 175). It also leaves intersex women and women with other biological traits in a difficult position as to the subjectivity of their place in the law. The recently highly publicized case of South African runner, Caster Semenya, that Rosenblum was already mentioning in 2011 (*ibid.*: 176) proves that society and officials have the dangerous power to debate what makes a woman 'woman enough'. Women cannot therefore be defined solely in terms of sexual characteristics. As to the risk of essentialization based on social characteristics, the third issue explored in the section will look at the problems this might bring.

Rosenblum, therefore, argues that the CEDAW should be 'unsexed'. He claims that by focusing on women the CEDAW takes an identitarian approach that fixes the identity and creates issues of essentialization as argued before. According to him, the CEDAW should rely not on an identity (women) but on a category (sex or gender) in order to overcome the definition

issue and instead, to recognize the system of oppression and discrimination that is sex or gender based (*ibid.*). He argues that men can also suffer from sex or gender discrimination through ideals of heteronormativity or hegemonic masculinity and that the CEDAW's aim to change social and cultural patterns of oppression and discrimination should thus include all sexes and genders (*ibid.*).

If Rosenblum's statement that men can also suffer from these patterns is true, women still suffer from them in a disproportionate manner as Berta E. Hernández-Truyol states, which justifies CEDAW's focus on women (Hernández-Truyol, 2011). She adds that instead of 'unsexing' CEDAW, it should be 'super-sexed'. By that, she means that a protocol should add more sexual and gender identities. She specifies that these identities "should not be considered to be binary, dichotomous, monolithic, or essentialized" (*ibid.*: 220). However, neither 'unsexing' or 'super-sexing' CEDAW actually solves the issue of essentialization. Holtmaat criticizes Rosenblum's 'unsexing' argument by saying that although Rosenblum claims that sex can be inclusive of other sexes, it is often only seen as binary between male and female, and that it then runs the risk of being appropriated by men (Holtmaat, 2013: 101). Rosenblum's 'unsexing' of CEDAW would not distance it from its essentializing issue then as long as sex and gender are seen, by those who are responsible for implementing the Convention, as binary identities. Meanwhile, Hernández-Truyol's 'super-sexing' of CEDAW would encounter other issues. Her argument is to add more identities to the Convention in order to reflect the multitude of sexual and gender identities within the identity 'woman'. However, the problem would be to draw the line as to which identities are then to be included. Indeed, gender and sexual identities are extremely diverse and while some only recognize two of them, some others recognize dozens of them. The issue of essentialization, therefore, does not reside in taking a less or more identitarian approach. As long as there is not a universally acknowledged definition of what it means to be

a woman, both biologically and socially, that can encompass women who do not fit traditional or conservative meanings of it, then it might be impossible for the CEDAW to avoid essentializing identities, making its application difficult to all women equally.

Intersectionality

The third issue is the lack of concern for the diversity of women's experiences and the intersectionality of their discriminations, which is to be linked to the conceptualization of women as a collectivity. The previous section established women's collective moral rights based on their collective interests in normative feminist goals such as non-discrimination and equality. However, this implies some form of collective homogeneous experience faced by all women in the privation of these and the collective conceptualization implies some sort of universal category of women. This section will explore the issue stemming from this homogenisation.

Hernández-Truyol states that the realities women face in terms of oppression and inequalities with men "are global and cut across religion, race, class, and nation" (Hernández-Truyol, 2011: 212). She argues that this justifies a focus on women as a category and specifies that this category (actually an identity as seen above) should thus be considered in a non-essentialized, non-monolithic way since it represents the experience of all women (*ibid.*). However, the fact that all women may experience oppression, discrimination or inequalities does not mean that all women experience those issues in the same way. For example, a heterosexual woman and a lesbian woman might both experience discrimination as women. However, while the heterosexual woman might experience discrimination solely based on her identity as a woman, the lesbian woman might experience not only discrimination as a woman but also as a non-

heterosexual woman. Her experience of discrimination based on her gender identity cannot be separated from her experience of discrimination based on her sexual orientation. She cannot be said to experience discrimination as a woman and as a lesbian, but as a lesbian woman. A focus only on women does not make it possible to acknowledge the different realities women are victims of as a result of their other identities, be it sexual orientation, class, or race for instance.

This is why the CEDAW is said to omit concerns for intersectionality (Rosenblum, 2011: 166-7). It is difficult to establish a definite and concise articulation of what intersectionality is in the sense that it is not a fixed concept rooted in only one discipline. This paper will understand intersectionality, broadly, and inspired by D. W. Carbado *et al.*'s article, as the way experiences, marginalizations, and identities interact in an embedded manner, creating structures of power and domination (Carbado *et al.*, 2013). Charlesworth and Chinkin claim that while it is important to recognize the differences in the experiences of women, "employing the category 'women' can be a valuable method of highlighting the commonality of the marginalisation of all women in the international legal system" (Charlesworth and Chinkin, 2000: 2). That makes it possible to focus on issues women face regardless of their backgrounds or other identities (*ibid.*: 54). However, this leads to the universalisation of their experiences and this might mean that their experiences are only accounted for in terms of a minimal common denominator in order to construct women as a collectivity with a collective experience. This minimal common denominator runs the risk of only reflecting the experience of the 'least discriminated' women, who could be said to be white middle class heterosexual cisgender abled women. Such women would construct the norms of gender discrimination as they would be considered to only experience discrimination based on their gender (Grewal, 1999: 341-2; Spelman in Young, 1994: 715). Yet, women cannot be identified by their gender only. Elizabeth V. Spelman, whose idea is summarised by Iris M. Young, says that it would be

absurd to ask a woman to "distinguish the "woman part" of herself from the "white part" or the "Jewish part"" (Young, 1994: 714). Women's identities are constructed, by their sense of self and by the way they are treated in society, through the multiplicity of the identities that form them. This is why conceptualizing women as a single collectivity in order to assign them a homogeneous experience of oppression or discrimination would be counterproductive, if not harmful, as it would not allow for the recognition of the diverse and intersectional ways women experience these sorts of oppression or discrimination.

There are, therefore, three main issues with the CEDAW that are worth considering in the analysis of women's rights through the Convention. The first one was an issue linked to the fact that the CEDAW is a specialized treaty. By creating a treaty, outside of the International Bill of Human Rights, that specializes on women, the issue arises that this treaty will be considered as secondary to these other main human rights texts. The feminist critique aimed at replacing women's rights within the human rights framework. As this section showed, the separate nature of the CEDAW might actually fail to do this by placing women's rights further away from the main human rights agenda. The second issue was with the definition of the identity 'woman' in the Convention, or rather the lack thereof. The absence of a definition might lead to subjective understandings and application, especially for women whose identities are contested by some who attack them as not women enough, based on their sexual characteristics for instance. The last issue was directly linked to the collective conception established in the previous section. Considering women as a collectivity risks to homogenize their experiences and universalize them by overlooking the specific experiences of women of colour, LGBTQ+ women, or working class women for instance. Peterson argued that a search for universalisation in universal human rights without specification of the subject of these rights and their experiences, led to a model of 'abstract universal human'. Universalisation in the

CEDAW by the absence of a definition of its subject (women) and the absence of focus on intersectional experiences of discrimination reproduces the same issue by leading to a model of 'abstract universal woman'. This paper will not pretend to have the solutions to these issues as this would require much more research. However, the presentation of those problems that face women's rights as they are institutionalized in the CEDAW shows the incapacity of the CEDAW to institutionalize legal rights that can be instrumentalized to realize women's moral rights, as well as appeasing the feminist critique of human rights.

CONCLUSION

This paper has given an account of the inclusion of women's rights in the human rights framework. It aimed at assessing whether CEDAW, a specialized treaty focused on women, could successfully institutionalize women's rights into human rights as to answer the concerns of the feminist critique and achieve the normative goal of feminism, which is equality. The paper first established, through the feminist critique, that universal human rights were not truly universal both in theory and practice. The two main critiques that put their universalism into question are the exclusion of the specific experiences of women and their human rights abuse from the human rights agenda and the androcentrism of the conception of the human that is the foundation of Western liberal political thought and human rights theory. The CEDAW was then presented as the main human rights document focusing on women's rights, a way thus to potentially rectify the exclusion of women's rights from the main human rights texts. Moreover, it argued to create a conceptualization of women as a collectivity with collective legal rights justified through the existence of collective moral rights based on collective interests. This collective conceptualization makes it possible to justify large scale society-wide

changes on the grounds of collective rights that can then allow women to enjoy their individual rights in equal, non-discriminatory ways. However, the paper then identified the three main issues with the CEDAW. Overall then, the CEDAW as it has been argued to be conceptualized encounters issues that still exclude the experience of all or some women from the human rights discourse. While the first issue directly puts into question the effectiveness of specialized treaties in placing the rights of specific people on the human rights agenda, the second and third issues echo problems that were already raised against universal human rights. Indeed, attempts at universalisation in both cases lead to the exclusion of the specific experiences of some people, specifically people who are more marginalized. Meanwhile, lacks of definition in both cases render the identity abstract and thus subject to a lack of specification on the inclusion of some people whose inclusion, both in theory and practice, have been historically contested. This thus shows the accuracy of Peterson's 'abstract universal human' issue as the issues presented above also reflect the risk for CEDAW to rely on an 'abstract universal woman'. The CEDAW, as it is conceptualized, thus seems to fail to institutionalize women's rights as human rights in a way that can serve the feminist normative goal of equality for *all* women. This is not to say that the CEDAW has not been a way to still promote the advancement of women's rights both normatively and in practice. However, further research could establish which direction women's rights and human rights more generally have to take in order to become more inclusive of all identities.

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