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# WHAT WOULD GANDHI SAY? RECONCILING UNIVERSALISM, CULTURAL RELATIVISM AND FEMINISM THROUGH WOMEN'S USE OF CEDAW

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This article is a survey of domestic litigation in the Asia Pacific region in which plaintiffs have challenged laws, traditions and cultural practices that they allege to be gender discriminatory. Many of these cases show the various ways in which the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has influenced such domestic litigation strategies and judicial decisions. More importantly, these decisions show how judges in domestic courts have sought to manage the conceptual difficulty of reconciling women's rights with local traditional practices. It discusses the dilemma posed by the question of who should challenge local, traditional cultural practices and which practices should be challenged because they are harmful to women. Should feminists ignore local cultural traditions and practices at the expense of those traditions and practices, or should States uphold the traditions and practices of their populations and such laws which protect these at the expense of gender equality? These difficulties are viewed in terms of the classic problem of effective human rights treaty implementation, involving the question of how treaty obligations are also treated by different domestic legal systems. The article tries to show, however, that the problem is being resolved in practice by women plaintiffs themselves, litigating at the domestic level. Women in the region are using their domestic legal systems to identify the cultural practices and traditions that discriminate against them and to challenge these practices and traditions. Driven by a degree of judicial activism, this has, in turn, led to encouraging judicial responses. The article concludes that women's use of domestic litigation strategies, enhanced by the use of CEDAW and facilitated and supported by the women's movement and N.G.Os, has a crucial role to play in removing the cultural and traditional practices that discriminate against and disadvantage women.

## I. INTRODUCTION

In India, a social worker was the victim of a gang rape. Consequently, women's organisations sued the State of Rajasthan and the Union of India on the victim's behalf arguing that both were obliged by the equality provision in the Indian Constitution to ensure women had a workplace free from sexual harassment. The Supreme Court agreed and then, relying on CEDAW, which requires that a State must take appropriate steps to eliminate discrimination at work, crafted, in the absence of any domestic legislation, extensive guidelines on sexual harassment as an interim measure until legislation was enacted. In Vanuatu, a woman who had left her husband

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was forcibly taken to an island by chiefs and family for reconciliation. In defending charges of abduction and kidnapping, the chiefs and family members argued that custom legitimised their actions. The Court, in finding them guilty, stated that customary law was subject to the fundamental rights of liberty and freedom of movement enshrined in the constitution. In Fiji, a woman was raped by her former boyfriend who claimed it was not rape since they had a prior sexual relationship and he was jealous and drunk then. The Magistrates Court of Levuka, Fiji, in finding him guilty, declared that "men needed to know of the provisions of CEDAW", that the State must ensure CEDAW is respected, and finally, that the Court had a role in ensuring that such respect is given.

Women across the Asia Pacific are challenging laws, traditions and cultural practices they argue detract from their rights to dignity, autonomy and freedom. The opportunity to challenge those practices has arisen in part from the protections provided by international human rights instruments such as the *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW").[1] CEDAW has played an important role in women's domestic litigation strategies in the region by providing them with the opportunity and support to articulate their issues in the courts, transforming them into justiciable issues for which the State and individuals can be held accountable. This article considers the impact of CEDAW in domestic litigation strategies by examining a series of cases brought by women in the Asia Pacific in which they have challenged a range of laws, traditions and cultural practices. An examination of these cases supports the following three main propositions of this article.

First, women's engagement with and their use of domestic litigation strategies has gone far towards resolving a debate that has plagued human rights instruments, including CEDAW, since their inception. The debate has arisen between *universalism*, which proposes that there must be a set of "core" standards that apply to all women regardless of their cultural traditions[2] and *cultural relativism*, which proposes that cultural practices must be preserved in favour of universal norms.[3] Feminist legal theory, which supports cultural difference on the one hand[4] and opposes all harmful practices that oppress women on the other,[5] uncomfortably straddles the two positions. The dilemma posed by the different theoretical positions of *who* should challenge cultural practices and *which* harmful practices should be challenged is resolved by women themselves who are using the legal system to identify the cultural practices that discriminate against them and to challenge them. Second, women's domestic litigation strategies have encouraged judicial activism in the legal systems of many countries in the region, with extraordinary results. Third, litigation can and has prompted positive legislative and constitutional amendments which have brought domestic law in line with the obligations imposed by CEDAW.

Parts II -V provide the reader with the background and context for the analysis of the case studies in Part VI. Part II considers the historical context in which CEDAW emerged, provides an overview of its main provisions and the subsequent drafting of the Optional Protocol to strengthen the enforcement mechanisms of the Convention; Part III considers the

1 GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. A/34/46 [Adopted on 18 December 1979, entered into force on 3 September 1981].

2 K. Brennan, "The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study" (1989) 7 Law and Inequality 367 at 371; S. Desai, "Hearing Afghan Women's Voices: Feminist Theory's Re-Conceptualization of Women's Human Rights" (1999) 16 Ariz.J.Int'l & Comp.L. 805 at 806.

3 See J. Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6(4) Hum.Rts.Q. 400 at 401. K. Miller, "Human Rights of Women in Iran: The Universalist Approach and the Relativist Response" (1996) 10 Emory Int'l L.Rev. 779; see Brennan *supra* note 2 at 370; see Desai *supra* note 2 at 3.

4 C. Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts" (1994) 16 Hum.Rts.Q. 740; T. Higgins, "Anti-Essentialism, Relativism, and Human Rights" (1996) 19 Harv.Women's L.J. 89; see also Desai *supra* note 2 at 809.

5 Desai *supra* note 2 at 808, 810.

limitations that the system of reservations has placed on CEDAW; Part IV considers the legal avenues by which CEDAW can be enforced; Part V considers the debate that has emerged between universalists and cultural relativists in relation to the application of CEDAW. It considers the diverse positions within feminist theory that lend support to both sides of the debate and then attempts to reconcile the different positions. Part VI, the focal point of this article, analyses a series of cases drawn from across the Asia Pacific region. They are presented in three categories corresponding with the three central arguments that this paper makes: that women are using CEDAW to challenge customary practices, traditions and laws in their countries, that women's use of CEDAW in the courts has encouraged judicial activism in the region, and that the legislature has responded with legislative and constitutional changes. Part VII concludes that domestic litigation strategies, utilising CEDAW in the Asia Pacific region, have an important role to play in removing the cultural practices, traditions and laws that discriminate against women in the Asia Pacific region.

## II. CEDAW: Historical Context, Scope and Operation

CEDAW was adopted in 1979 by the United Nations four years after the first call was made for a Convention to specifically protect women.[6] The Convention emerged in the social and political context of the "second" wave of the feminist movement.[7] Whilst that context provided the final impetus and timing of its introduction, CEDAW had its beginnings in the work of the Commission on the Status of Women, which was established by the United Nations in 1946 to address discrimination against women and to promote their advancement.[8] The Commission assisted the United Nations in the drafting of the Convention[9] which entered into force in September 1981, faster than any previous human rights convention.[10] It is, in intent, an international Bill of Rights for women.[11] It obligates countries that either ratify or accede to it, to take "all appropriate measures" to ensure the full development of women in relation to a range of different capacities including their political, educational, employment, health care, economic, social, legal, marriage and family relations.[12] The Convention does not however simply adopt a "formal equality approach" to equality[13] but compels member States to undertake measures designed to achieve substantive equality.[14] It does this by placing obligations upon member States to ensure equality of opportunity, equality of access to those opportunities sometimes in the form of affirmative action measures and, crucially, equality of results.[15] Since the adoption of CEDAW in 1979, the number

6 The call came from the First World Conference on Women in Mexico City in 1975. See F. Isa, "The Optional Protocol for the Convention on the Elimination of all Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights" (2003) 20(2) Ariz.J. Int'l & Comp.L. 291 at 299.

7 See M. Becker, "The Sixties Shift to Formal Equality and the Constitution: An Argument for Pragmatism and Politics" (1998-1999) 40 Wm. & Mary L.Rev. 209 at 210.

8 Isa, *supra* note 6 at 295.

9 R. Piotrowicz & S. Kaye, *Human Rights in International and Australian Law* (Sydney: Butterworths, 2000) at 50.

10 R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990) 30 Va.J.Int'l L. 643 at 643.

11 UN Division for the Advancement of Women, online: <http://www.un.org/womenwatch/daw/cedaw>.

12 *Convention on the Elimination of All Forms of Discrimination Against Women*, 34 UN GAOR Supp. No. 21 A/34/46 UN Doc. A/RES/34/180 (1979) at 193.

13 Formal equality is the requirement that legal rules should apply in the same way to all members of the community regardless of sex, race, sexuality or any other characteristic. See Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, Part II (1994) at para. 3.8.

14 Substantive equality refers to "actual" equality. See R. Kapur & B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996) at 176.

15 Rea Abuda Chiongson, "Non Discrimination and Gender Equality" (Presentation made at the Regional Consultations on the Interlinkages between Violence Against Women and Women's Right to Adequate Housing

of states that have ratified or acceded to it has increased from 20 in 1981[16] to 180 as of 3 May 2005.[17]

The Convention is worded in broad terms. It consists of a Preamble and comprises of thirty articles which are divided into six parts. In the Preamble, State parties declare that they are "determined to adopt the measures required for the elimination of discrimination in all its forms and manifestations". Part I (Articles 1-6) deals with the basic principles underscoring the Convention. Discrimination against women is explicitly condemned and States are obliged to implement legislative programmes to combat discrimination. Uniquely, since international human rights treaties are usually limited to the conduct of the State or its agencies, the State is obliged by CEDAW to eliminate discrimination against women by any person, organisation or enterprise. Part II (Articles 7-9) provides that women should be free to participate in public life and to have political rights. In particular, women should be given equal opportunities to represent their governments and to participate in the work of international organisations. The rights of women and their children to nationality, and to pass on their nationality, are also identified in this Part. Part III (Articles 10-14) deals with broader social reform particularly access to education, equality in employment, access to health care, access to financial services, and access to social and cultural life. Part IV (Articles 15 and 16) provides for the legal right to own property, the right to contract and equality within marriage and family law.

Part V (Articles 17-22) contains the provisions governing the operation and enforcement of CEDAW. Article 18 imposes a periodical reporting mechanism, requiring all State parties to provide a report every four years to identify the legislative, administrative and other measures taken to comply with their obligations under the Convention. The Committee on the Elimination of Discrimination Against Women ("the Committee") was established under Article 17 to monitor the enforcement process. The Committee consists of twenty-three experts of "high moral standing and competence in the fields covered by the Convention" who are elected by member states.[18] They receive reports from member states and meet every year to consider the reports for "a period of not more than two weeks".[19] Article 21 provides the Committee with the power to "make suggestions and general recommendations based on the examination of reports and information received from the State parties".[20] The purpose of recommendations is to provide clear guidance on the application of the Convention in particular situations.[21] General Recommendation 19, for example, identifies gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.[22] As of January 2004, the Committee had made twenty-five General Recommendations. Part VI (Articles 23-30) allows parties to substitute more effective domestic or international laws for those provided in the Convention. It also states that reservations inconsistent with the Convention are impermissible.

In the years following its introduction, there was considerable criticism of the Convention's weak enforcement mechanisms as contained in Part V.[23] Human rights treaties

in Co-Operation with the UN Special Rapporteur on Adequate Housing, New Delhi, India, 28-31 October 2003).

16 M. Halberstam, "United States Ratification on the Elimination of all Forms of Discrimination Against Women" (1997) 31 Geo.Wash.J.Int'l L. & Econ. 49 at 49.

17 See CEDAW, online: <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

18 Article 17 of CEDAW.

19 Article 20 of CEDAW.

20 Article 21 of CEDAW.

21 A. Byrnes, "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" (1989) 14(1) Yale J.Int'l L. 1 at 43.

22 E. Della Torre, "Women's Business: The Development of an Optional Protocol to the United Nations Women's Convention" (2000) 6(2) Australian Journal of Human Rights 181 at 190.

23 See R. Hoetling, "An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women" (1994) 24(117) Gainsville Journal of International and Comparative Law

typically adopt a variety of mechanisms for their enforcement including periodical reports, individual complaints processes, inter-state complaints processes and inquiry procedures.[24] Upon enactment, the only form of enforcement adopted by CEDAW was the reporting system. Critics argued that the reliance on information provided by State parties,[25] the short meeting time provided for under the Convention[26] and the lack of quasi-judicial power to pronounce a State in violation of the Convention[27] rendered it "the poor cousin of human rights treaty bodies".[28] In response to those criticisms, on 6 October 1999, an Optional Protocol to CEDAW was adopted by the United Nations General Assembly.[29] It entered into force on 22 December 2000. The Optional Protocol strengthens the Convention's enforcement mechanism in several ways. It obliges parties to recognise the competence of the Committee to monitor compliance with the Convention by member States.[30] It creates a procedure that gives the Committee the ability to receive and consider complaints from either individuals or groups who have exhausted local remedies.[31] The Protocol also establishes an inquiry procedure into situations of grave or systematic violations of women's rights.[32] As of 3 May 2005, seventy-one countries have ratified the Protocol.[33]

## III. Reservations to CEDAW

The efficacy of CEDAW has been tempered, some have argued, by the reservations system.[34] In international law, a reservation to a provision of a convention means that, although accepting other provisions of the treaty, the ratifying State will not implement that particular provision, thus limiting its acceptance of the convention.[35] The rationale behind the concept of reservations is to encourage a greater number of parties to ratify so as to maximise "the force and effect of the laws rising out of the treaty".[36] Historically, all member states had to approve any reservation to an international convention proposed by a member State before ratification would be approved.[37] However, in 1980, to ameliorate the rigidity of that system and to encourage more parties to ratify conventions, the Vienna Convention on the Law of Treaties implemented a new regime to govern the reservations system.[38] The Vienna Convention system of reservations is based on the concept that a reservation

137 at 148; S. Cartwright, "Rights and Remedies: The Drafting of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women" (1998) 9(2) Otago L.Rev. 239 at 241; Isa, *supra* note 6 at 303. Note Afsharipour's argument that despite the difficulties of enforcement, the reporting process has provided a powerful empowerment tool for women by allowing local women and N.G.Os to become involved in the enforcement of the Convention in A. Afsharipour, "Empowering Ourselves: The Role of Women's NGO'S in the Enforcement of the Women's Convention" (1999) 99(129) Colum.L.Rev. 129 at 144-145.

24 See the range of mechanisms discussed in Piotrowicz & Kaye *supra* note 9 at 42-57.

25 Hoelting, *supra* note 23 at 149.

26 J. Riddle, "Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process" (2002) 34(3) Geo.Wash.L.Rev. 605 at 629; see also Hoelting, *supra* note 23 at 148 and Isa, *supra* note 6 at 304.

27 See Hoelting, *supra* note 23 at 150 and Riddle, *supra* note 26 at 630.

28 See Byrnes, *supra* note 21 at 57.

29 Optional Protocol to CEDAW, GA Res. A/RES/54/4, UN GAOR, 54th Sess., UN Doc. E/CN.6/1999/WG/L.2 (10 March 1999).

30 Article 1 of Optional Protocol to CEDAW.

31 Article 2 of CEDAW.

32 Article 8 of Optional Protocol to CEDAW.

33 See UNICEF homepage, online: <http://www.unicef.org>.

34 See B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women" (1991) 85 Am.J.Int'l L.281; Riddle, *supra* note 26; Cook, *supra* note 10.

35 Riddle, *supra* note 26 at 605.

36 S*upra* note 10 at 673.

37 Clark, *supra* note 3 at 289.

38 *Ibid.* at 281.

is permissible as long as it is not contrary to the object and purpose of the Convention.[39] CEDAW incorporated the general rule of the Vienna Convention, stating in Article 28(a) that "A reservation incompatible with the object and purpose of the present Convention shall not be permitted".[40] Thus, whilst reservations are permitted, those that are contrary to the object and purpose of CEDAW are not.

The making of reservations by states ratifying CEDAW has been a considerable source of controversy.[41] Amongst the United Nations human rights treaties, CEDAW has received the highest number of reservations.[42] As of November 2002, fifty-five State parties had entered reservations to CEDAW.[43] Most reservations to human rights treaties relate to dispute resolution provisions.[44] Reservations to CEDAW, however, are most often made on the grounds that national law, tradition, religion or culture are incongruent with some of its articles or principles. Thus, most of the reservations lodged relate to Articles 2, 5 or 16. Article 2 identifies the range of measures that State parties should take to eliminate gender discrimination. Article 5 directs State parties to take all appropriate measures to modify social and cultural patterns that lead to the inferiority of women. Article 16 guarantees equality between men and women in marriage and family life. The Committee takes the view that Articles 2 and 16 are core provisions and that reservations to them are incompatible with the objects of the convention.[45] Despite this view of the Committee, many reservations have been made and the process of removing them has been slow. Whilst the Committee continues to urge State parties in their reports to remove reservations, they lack the authority to invalidate reservations.[46]

The number of reservations made to articles which are considered core provisions has led to criticism of the effectiveness of CEDAW and, in turn, its ability to change the position of women.[47] As Clark puts it, "a legislative treaty is necessarily somewhat defeated by any system that allows parties to choose to adhere to some parts of the treaty and not to others".[48] This is affirmed by Thio who argues that the key issues that women face and that require reform—family planning, reproductive rights, marriage and divorce rights, inheritance, succession and maintenance—are contained in the very articles that are most heavily reserved.[49] Clark maintains, however, that the establishment of CEDAW as a major normative treaty, despite the "damaging reservations it has suffered," has set a standard that will in time become established in customary international law.[50] Thus, whilst the number and nature of reservations has tempered the effectiveness of CEDAW, it should be noted that almost *every* United Nations member has ratified the Convention. Consequently, this high number of ratifications increases the potential impact of CEDAW on the domestic legal systems of member states. Further, as international law gains stature and women's rights enjoy increasing visibility, more reservations may be removed. Indeed, some reservations have already been removed by member states.[51] The increasing removal of reservations,

39 Riddle, *supra* note 26 at 611
40 Article 28 of CEDAW.
41 See Riddle, *supra* note 26 at 613-616.
42 *Ibid.* at 606.
43 See UNIFEM homepage, online: <http://www.unifem.org>.
44 Clark, *supra* note 34 at 316
45 A. Bayefsky, "CEDAW: Threat to or Enhancement of Human Rights?" (2000) 94 Am.Soc'y.Int'l L.Proc. 197 at 198.
46 *Supra* note 21 at 6.
47 E. Defeis, "Women's Human Rights: The Twenty-First Century" (1995) 18 Fordham Int'l L.J. 1748 at 1751.
48 Clark, *supra* note 34 at 297.
49 See L. Thio, "The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism and the Transformative Potential of CEDAW" (1997) 1 S.J.I.C.L. 278 at 290.
50 See Clark, *supra* note 34 at 318.
51 *E.g.*, Fiji withdrew its reservation to Article 9 in 1999; Thailand acceded to CEDAW in 1985 with 7 reservations and has since withdrawn its reservations to Articles 7, 9, 10, 15 and 29; New Zealand recently withdrew its reservation to Article 11.

coupled with the high number of ratifications, allows participants in domestic legal systems, including the judiciary, the opportunity to moderate the negative impact of reservations, as will be illustrated below.

## IV. The Legal Avenues for the Implementation of CEDAW

Ratification imposes an obligation on member States to "take appropriate measures" to implement the ratified convention. International law permits each state to determine how it will implement its treaty obligations. The constitutional legal arrangements of some states provide that treaties ratified by the state automatically become the law of that state (self-executing). This approach, also referred to as monism, takes the view that the international law system and the domestic law system constitute a single system of law.[52] The constitutional legal arrangements of other states provide that treaties have no domestic effect without implementing legislation. This approach, also referred to as dualism, is premised on the idea that international law, including the application of treaties, is distinct from domestic law. Still others have hybrid systems, in which some treaties are self-executing while others require implementing legislation.[53]

In countries where CEDAW is self-executing, the courts can interpret the Convention directly, in line with their judicial responsibilities and duties. In those countries where CEDAW is not self-executing, member States are obliged to introduce its principles into their national legal systems either by enacting domestic legislation or by introducing sex equality provisions into their national constitutions.[54] Most member States in the Asia Pacific region have implemented, amended or repealed domestic legislation to incorporate some or all of the provisions and principles of CEDAW. However, to fully satisfy the obligation imposed by CEDAW (that member States seek to achieve substantive equality rather than just formal equality), it is the introduction of anti-discrimination legislation rather than the mere introduction of non-discriminatory gender-neutral provisions into existing law or the repeal of discriminatory provisions, that is required. Australia, for example, recognises its obligations in relation to CEDAW predominantly in the *Sex Discrimination Act (1984)* as well as a number of other domestic Acts, at both federal and state levels, which contain anti-discrimination clauses.[55] Some member States have recognised their obligations in relation to CEDAW by incorporating anti-discrimination clauses into their constitutions, which protect against discrimination on the basis of sex. The incorporation of CEDAW provisions into national constitutions in this manner entrenches these provisions such that they are at less risk than provisions incorporated into domestic legislation which can be removed or modified by the legislature.[56] The entrenched nature of most constitutions affords greater protection to incorporated provisions as they can usually only be amended or removed by referendum.[57] A number of countries in the Asia Pacific region have utilised this avenue for

52 See S. Malone, *International Law*, 2nd ed. (New York: Emanuel Corporation, 1998) at 39.

53 See S. Goonesekere, "Nationality and Women's Human Rights: The Asia Pacific Experience" in A. Byrnes, J. Connors & L. Bik, eds., *Advancing the Human Rights of Women. Using International Human Rights Standards in Domestic Litigation* (London: Commonwealth Secretariat, 1997) 86 at 90.

54 See Halberstam, *supra* note 16 at 63.

55 Other countries to implement entire Acts devoted to the provisions of CEDAW include Japan which implemented *The Basic Law for a Gender Equal Society 1999*, and China which introduced the *Law of the Peoples Republic of China on the Protection of the Rights and the Interests of Women* 1992.

56 E. Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment" (1996) 29 Colum.J.L. & Soc.Probs. 251 at 252.

57 Japan, for example, requires a two-thirds majority of each house for any amendment after which it is then submitted to the people for referendum. See Katz, *supra* note 56 at 257.

the implementation of CEDAW, including India,[58] Korea,[59] Fiji,[60] Nepal,[61] Vietnam,[62] and New Zealand[63] and have introduced anti-discrimination clauses preventing discrimination on the grounds of sex in their national constitutions.

However, even in those member States where CEDAW is not self-executing and where it has not been incorporated into domestic law, there is still capacity for the application of the Convention in the courts. The Bangalore Principles, developed by a group of lawyers and judges from common law jurisdictions within the Commonwealth, place an obligation upon the judiciary to apply international laws domestically, whether in statutory interpretation or common law, and to interpret the national constitution in line with international norms.[64]

## V. Cultural Relativism, Universalism and Feminism: The Debate

The language of universalism contained within human rights instruments, including CEDAW, has led to an (often) polarised debate about the application of human rights. This section provides an overview of *universalism* and *cultural relativism*,[65] which are sometimes regarded as anti-thetical positions, and considers the contrasting viewpoints situated within feminist legal theory, which straddles both sides of the debate.[66] Universalists and cultural relativists see the implications of "universal" rights in the following terms: universalists support the equal application of a set of "core" human rights norms,[67] whilst cultural relativists maintain the view that those "core" human rights should not supercede cultural, religious and traditional differences.[68] However, there is a continuum of positions in this debate. On one end of the spectrum, "strong" cultural relativists would argue that culture is the sole source of the validity of a rule, whilst on the other end, "strong" universalists would argue that culture is irrelevant to the validity of a rule.[69] Between these two extreme positions lie more conciliatory approaches.[70] The entry of feminist legal theory into this debate has caused a further impact. Feminist legal theory, which supports the protection of cultural diversity but opposes cultural practices that harm or oppress women, buttresses aspects of both universalism and cultural relativism.[71]

### A. *Universalism*

The historical and political context in which international human rights instruments emerged, including the aftermath of two world wars, was such that a small select group

58 Article 15 of the Constitution of India.
59 Article 11 of the Constitution of Korea 1948.
60 Section 38 of the Constitution of Fiji 1997.
61 Part 3, Section 11 of the Constitution of the Kingdom of Nepal 1990.
62 Article 36 of the Constitution of Vietnam 1992.
63 Section 3 of the New Zealand Bill of Rights Act 1990, which is one of several written documents that together make up the New Zealand constitution. It is not, however, entrenched.
64 See K. Eastman & A. Bell, *Human Rights in Commercial Practice* (Sydney: The Law Society New South Wales, 2003) at 5-6.
65 See C. Lambert, S. Pickering & C. Alder, *Critical Chatter: Women and Human Rights in South East Asia* (North Carolina: Carolina Academic Press, 2003) at 7-33 for a discussion of this debate.
66 See Desai, *supra* note 2.
67 *Ibid.*
68 *Ibid.* at 809.
69 *Supra* note 3 at 401.
70 N. Kim, "Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism" (1993) 25(1) Colum.H.R.L.Rev. 49; E. Mountis, "Cultural Relativity and Universalism: Re-evaluating Gender Rights in a Multicultural Context" (1996) 15(1) Dick.J.Int'l L. 113; see Desai, *supra* note 2.
71 Desai, *supra* note 2.

of "world" representatives drafted a series of conventions in "universal" terms.[72] The rationale that underscored human rights treaties as they emerged at that time was that there should be a set of "core" principles that governed all member States in order to protect against the kind of destruction caused by the Second World War.[73] Consequently, the Universal Declaration of Human Rights, the cornerstone of the post-war human rights regime, established an internationally recognised set of standards applicable to all persons "without distinction on such grounds as race, sex, religion, language or national origin".[74] This marked a shift towards a universalist conception of human rights and was the first attempt to provide comprehensive protection for all individuals.[75] Similarly, the provisions of CEDAW are intended to apply to women of all cultures and states that are party to the Convention. The provisions of CEDAW are couched in universal terms in that they identify "fundamental rights that all women should enjoy irrespective of the cultures or societies in which they live".[76] Proponents of a universalist approach argue that CEDAW embodies a collective response of "vital human interests" by the international community to the oppression of women.[77] This response, according to universalists, supercedes the culture, tradition and custom in both western and non-western countries that are parties to it.[78] They deny that universal standards are themselves culturally specific and allied to dominant regimes of power.[79] Universalists argue that any "dilution" of universal principles will permit renegade states to discard human rights provisions on the basis that they are contrary to the "cultural practices of the region" and give "the green light to tyrannical governments, torturers, and mutilators of women".[80] Cerna further argues that such a dilution of culture and tradition, or a "strong" cultural relativist position, can provide "a screen behind which authoritarian governments could perpetrate human rights abuses".[81]

### B. *Cultural Relativism*

Cultural relativism, the view that rights and rules about morality only gain meaning within a cultural context, gained prominence during the Cold War when communist countries adopted cultural relativist arguments to contest the democratic movement in the West.[82] Although cultural relativism, as it relates to CEDAW, incorporates a range of positions and arguments, the most common contention is that CEDAW was framed by a select group of women in line with Western norms, reflecting the concerns of Western women and then imposed on other nations.[83] The imposition of "universal" Western norms through the mechanism of international law, cultural relativists argue, is inappropriate for several reasons. First, notions of right and wrong differ throughout the world due to diverse indigenous traditions, political and religious ideologies and institutional structures. The imposition of a universal set of norms ignores and fails to accommodate such diversity and differences.

72 D. Otto, "Rethinking the 'Universality' of Human Rights Law" (1997) 29 Colum.H.R.L.Rev. 1 at 3.
73 Piotrowicz & Kaye, *supra* note 9 at 23.
74 Department of Foreign Affairs and Trade, *Human Rights Manual* (Canberra: National Capital Printing, 1998) at 12.
75 H. Steiner & P. Alston, *International Human Rights in Context: Law Politics Morals* (Oxford: Oxford University Press, 2000) at 143.
76 Desai, *supra* note 2 at 807
77 *Ibid.*
78 Kim, *supra* note 70 at 64.
79 *Supra* note 72.
80 F. Teson, "International Human Rights and Cultural Relativity" (1985) 25(4) Va.J.Int'l L. 869 at 870-871; see also Mountis, *supra* note 70 at 114.
81 See C. Cerna, "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts" (1994) 16 Hum.Rts.Q.740.
82 *Supra* note 72 at 2.
83 Desai, *supra* note 2 at 807.

Indeed, the imposition of universalist norms is likely to result in the erasure of cultural norms.[84] For example, giving women equal inheritance rights over property could erase traditional norms, customs and hierarchies related to succession rights and existing social structures. Second, for many women, tradition is a source of identity. The individual rights of women, particularly in many non-western countries, are secondary to the community's rights as human dignity is preserved not through individual rights but through membership in a community.[85] The imposition of western norms, which favour individual rights, fails to accommodate such difference. Third, there is also the suspicion that the assertions of western universal human rights are pretexts for intervention in the domestic affairs of other countries.[86] Finally, cultural relativists argue that since there are no legitimate cross-cultural standards, outsiders should not judge the moral rules and social institutions of others. Therefore, for cultural relativists, the only valid way to effectuate change in cultural practices is from within the local community, for example, as a result of the impetus of local women.[87]

### C. *Feminist Legal Theory*

Feminist legal theory, while in itself consisting of a wide spectrum of ideologies and theoretical perspectives, brings to this debate alternative perspectives that create possibilities for resolving the impasse.[88] At one end of the spectrum, much of recent feminist legal theorising has focused on the recognition of differences amongst women, particularly cultural difference, and scholars have opposed the practice of "universalising" the category of woman.[89] This approach to legal feminism would appear to accord with the position of cultural relativists, since from this viewpoint, the support of CEDAW would appear to affirm a standard produced by a few which disregards the goal of affirming individual women's voices and differences.[90]

However, feminist legal theorists also challenge many cultural and traditional practices which they argue are harmful to women such as genital "mutilation",[91] sati,[92] child marriage,[93] and polygamy[94] to name a few. Legal feminists also oppose cultural practices that lead to the economic disempowerment of women such as the denial of nationality and

84 *Supra* note 72 at 3. Otto, although not taking a cultural relativist standpoint, argues that it is indisputable that a universal law of human rights has the potential to erase cultural diversity.

85 Kim, *supra* note 70 at 58.

86 S. Hom, "Commentary: Re-Positioning Human Rights Discourse on 'Asian' Perspectives" (1996) 3 Buff.J.Int'l L. 209 at 209.

87 Miller, *supra* note 2 at 789.

88 Desai, *supra* note 2 at 809.

89 T. Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 Berkeley Women's L.J. 16; A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan.L.Rev. 581; A. Parashar, "Essentialism or Pluralism: the Future of Legal Feminism" (1993) 6 C.J.W.L. 328; K. Crenshaw, "Mapping the Margins: Identity Politics, Intersectionality, and Violence Against Women" (1991) 43 Stan.L.Rev. 1241; K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U.Chicago Legal F. 139; M. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rts. L. Rep. 7-10; M. Matsuda, "Pragmatism Modified and the False Consciousness Problem" (1990) 63 S.Cal.L.Rev. 1763.

90 Desai, *supra* note 2 at 5.

91 E. Gifford, "Courage to Blaspheme: Confronting Barriers to Resisting Female Genital Mutilation" (1994) 4 UCLA Women's L.J. 329.

92 *Supra* note 14 at 64.

93 E. Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19(1) Hum.Rts.Q. 136 at 141; R. Coomaraswamy, "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women" (2002) 34(3) Geo.Wash.Int'l L.Rev. 483 at 485, 499, 508.

94 See Brems, *supra* note 93 at 55 and Coomaraswamy *supra* note 93 at 499.

domicile, the right to education, the right to divorce and the right to seek employment.[95] In contrast to the earlier approach, this body of feminist legal theory would appear to accord with the position of universalists. Such contrapositions, in both feminist legal theory and in the debate between cultural relativism and universalism, have led Desai to argue that a path that reconciles the different viewpoints must be sought.[96] The question that should be asked, she suggests, is not *which* perspective of the debate to support but rather *how* to address the legitimate concerns of both.[97] Desai argues that the body of feminist legal theory which focuses on the preservation of cultural diversity, does so because of a desire to value the experiences of different women.[98] Accordingly, she argues that supporting women who oppose certain aspects of their culture is in accord with feminist objectives and those perspectives must be included in defining universal human rights.[99] She calls for the adoption of strategies that "listen to the voices of women" and argues that ignoring the voices of women who advocate for the abolition of cultural practices would amount to a failure to respect cultural diversity. Another approach that attempts to moderate the contrapositions within feminist legal theory is what Coomaraswamy refers to as the "minimum core" rights approach.[100] This approach proposes that only those aspects of customary religious law and practice that preclude women from making important decisions about their lives should be scrutinised by national and international regimes.[101] She argues for autonomy as a test for identifying which aspects of culture and tradition should be scrutinised.[102] Coomaraswamy uses the term "autonomy" to refer to the capacity of women to make decisions about their lives.[103] She likens it to the concept of choice but one which recognises social, economic and political constraints and attempts to empower women within those realities.[104] She argues that customary and religious laws and practices that prevent women from being able to make decisions about their lives should be put aside.

The approaches of Coomaraswamy and Desai provide a framework for considering the case studies in the next section and evaluating the capacity of domestic litigation strategies in the Asia Pacific region to challenge discriminatory practices against women. Their approaches can also be utilised to address the concerns of cultural relativists (that cultural traditions should be protected) and "difference" legal feminists (that cultural diversity should be protected) whilst still drawing on the universal norms of CEDAW. Thus, their approaches have the potential to establish a balance between human rights standards and cultural sensitivities which, in turn, enables universal norms to be negotiated in ways that are more applicable and responsive to the diversity of women's lives.

## VI. "Women are your Equal":[105] The Case Law. Challenging Customs, Changing Laws and Encouraging Judical Activism

This section analyses the impact of domestic litigation strategies by considering a series of cases, in which women, supported by N.G.Os,[106] have utilised CEDAW and pursued litigation to enforce their legal rights. It should be noted that this article does not propose

95 T. Higgins, "Anti-Essentialism, Relativism and Human Rights" (1996) 19 Harv. Women's L.J. 89 at 95.
96 Desai, *supra* note 2 at 811.
97 *Ibid.* at 811, 818, 830.
98 *Ibid.* at 810.
99 *Ibid.* at 820; see also Higgins, *supra* note 95 at 90.
100 Coomaraswamy, *supra* note 93.
101 *Ibid.* at 509.
102 *Ibid.*
103 *Ibid.*
104 *Ibid.*
105 Stated by Kent J in *John Noel v. Obed Toto* (1995) Supreme Court of Vanuatu, Case No. 18/1994.
106 Women's N.G.Os have played an important part in facilitating and supporting domestic litigation strategies in the Asia Pacific region. N.G.Os have developed their own expertise on CEDAW, facilitated conferences,

that litigation is the primary solution to the oppression of women. Critics of a litigious approach have rightly identified a raft of drawbacks including barriers to access based on limited resources and lack of information, the lengthy and delay-prone process of hearings, the male, middle class composition of the judiciary in all countries, the confronting "masculine nature" of the adversarial system in which women's voices are easily lost and, finally, the reality that even positive decisions may not have much impact upon the lives of the region's poorest women.[107] However this article does contend that domestic litigation strategies have an important role to play as part of a range of community-based initiatives. Individualised litigation has the potential to craft solutions that are sensitive to cultural differences, and since only those who seek those rights will pursue litigation, it is therefore a more precise policy tool than the bluntness of international law.

The case examples are divided into three sections corresponding with the three central tenets of our argument. The first section includes cases in which women have utilised CEDAW to challenge particular cultural practices which they argue interfere with their dignity and autonomy; the second section provides examples of judicial activism whereby judges have utilised CEDAW and gone beyond their traditional role as interpreter of the law to change the law or to provide commentary on a range of issues concerning women; the third group identifies cases subsequent to which the legislature, in line with the obligations imposed by CEDAW, has enacted legislative or constitutional change. The distinctions between the three are, to some extent, artificial since it can be argued that in every case, a traditional or cultural practice is being challenged. Similarly, many of the cases across the three sections present examples of judicial activism.

### A. *"Chaos in the Law"!*[108] *Women Challenging Customary Practices*

This section examines a series of cases in which women, utilising CEDAW, have contested traditions, customary practices and laws that interfere with and diminish their autonomy and dignity. The cases cover such areas as nationality, political rights, employment, marriage and family relations. This section argues that a reading of the cases, using the frameworks of Coomoraswamy and Desai, suggests that the concerns raised by cultural relativists and "difference" legal feminists *are* being addressed by domestic litigation strategies whereby women are choosing to pursue legal action and are themselves identifying the practices and laws they find unacceptable. To achieve their goals, these women are drawing on the universal norms of CEDAW but utilising them within the cultural context in which they are situated. Whilst many of the cases enjoy successful outcomes, some do not. However, even when the decision does not favour the litigant, the courts continue to provide a forum for women to identify the cultural traditions they wish to challenge.

Succession laws and custom have historically favoured male descendants in the Asia Pacific region. Indeed, as the following three cases demonstrate, the issue of succession provides an interesting exposition of the contest between cultural relativism and universalism. In two cases in India, where succession is accommodated within a pluralist system of law,[109] women petitioners challenged, on the basis of sex, the differential impact of the

developed methods of information-sharing and produced "shadow" reports on each member country and its compliance with the obligations imposed by CEDAW. In a number of the cases reviewed in this article, women N.G.Os participated in bringing the matter before the court. See Afsharipour, *supra* note 23 at 43.

107 See K. Mahoney, "Overcoming Gender Bias in the Courts: International Strategies to Implement Equality Rights for Women" (1993) 1 Australian Feminist Law Journal 115 at 128 and Kapur & Cossman, *supra* note 14 at 295.

108 Quoted in *Madhu Kishwar and Others v State of Bihar and Others with Juliana Lakra v State of Bihar* (1996) 5 Supreme Court Cases 125 [Madhu Kishwar].

109 See F. Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999).

rules of succession. In the first case, the petitioners argued that the *Hindu Succession Act* 1956, which has been historically interpreted along patrilineal lines, should be interpreted to provide equal succession rights to both men and women.[110] The Supreme Court agreed. In coming to its decision, the court also held that the reservations to CEDAW that the Indian government had entered on the basis of culture did not prevent a ruling in favour of the petitioners. The Court found that the reservations were negated by other provisions, declarations and the Indian Constitution itself. The Court concluded that "the State should take all appropriate measures including legislation to modify and abolish gender based discrimination in the existing laws, regulations, customs and practices which discriminate against women".[111] The judges declared in support of their decision that "Article 2(e) of CEDAW enjoins the Supreme Court to breathe life into the dry bones of the Constitution".[112] In another case, concerning tribal succession laws that left women landless in some circumstances, the petitioners argued that the patrilineal basis of the tribal succession laws breached the equality provision in the Indian Constitution.[113] Although the Court agreed the Act was discriminatory and provided some concessionary findings that gave women a right to their livelihood, the majority found against the women petitioners. The Court concluded that the interest in preserving cultural traditions prevailed over the arguments put forward by the women. It was "not desirable to declare the customs of tribal people as contrary to the Constitution" as this would result in "chaos" in the law.[114]

The patrilineal nature of succession law in the Asia Pacific was also challenged in a Vanuatu case[115] in which the judge had to consider Article 5, the equality provision of the Vanuatu Constitution which prevents discrimination on the grounds of sex, on one hand and on the other hand, Article 74 which states that rules of custom shall form the basis of ownership and the use of land in Vanuatu. In this case, Obed Toto had been appointed the customary owner of a large tract of land as the representative of his family. He claimed on the basis of customary law "I am the boss of the money. If I don't want to give it, I can keep it all".[116] However, the judge held that it would be inconsistent with the Constitution and the intent of Parliament to rule that some women have less rights with respect to land than men. The judge concluded that all members of the Toto family were equally entitled to income from the land regardless of their sex. Rules of custom must provide the basis for determining ownership, but subject to the limitation that any rule of custom that discriminates against women cannot be applied."[117]

In two cases relating to nationality and citizenship, women challenged laws based on cultural practices. In Bangladesh, a female litigant argued that a law that denied Bangladeshi citizenship to the children of female citizens married to non-nationals was discriminatory.[118] The petitioner relied on the provisions of the Bangladesh Constitution, which prohibits discrimination on the basis of sex, and Article 7 of CEDAW which prohibits discrimination against women in relation to "acquiring, changing or transmitting nationality". The Court held that the prevailing interpretation of nationality law should not be overturned at the expense of cultural tradition. However, in a Nepalese case, a Nepalese woman married to a non-Nepalese man applied to the Court arguing that a regulation that prohibited her

110 *C. Masilamani Mudaliar and Others v. Idol Sri Swaminathaswami Swaminathaswami Thirukoil and Others* (1996) 8 Supreme Court Cases 525 [Masilamani].
111 *Supra* note 110 at 528.
112 *Ibid.* at 536.
113 *Supra* note 108.
114 *Ibid.* at 536.
115 *Supra* note 105.
116 *Ibid.* at 3.
117 *Ibid.* at 11.
118 *Sayeeda Rahman Malkani & Others v. The Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh & Others* (1997) Supreme Court of Bangladesh.

husband from obtaining residency contravened the equality provisions of the Nepalese Constitution on the basis of sex.[119] Although she argued that the law discriminated against her husband, the Court found that the law discriminated against *women* instead and overturned a regulation based on custom that valued men's marriages more than women's.

In a Japanese case relating to marriage laws, the plaintiff argued that a requirement in the Civil Code that prohibits women from remarrying within 180 days after divorce was in breach of the equality provision in the Japanese Constitution and CEDAW.[120] Although the respondents argued that the purpose of the provision was to avoid any paternity confusion, the plaintiff argued it rested on "Confucian moral views and paternalism which oppose the remarriage of women". The Court did not find in favour of the plaintiff on the basis that its role was to examine only domestic law and not international treaties. In spite of this the judge stated that:

> this case can be utilized to raise public awareness and matters like pregnancy and reproduction should belong to the shared responsibilities of men and women. By invoking human rights law the plaintiff's arguments gained legitimacy which appeal stronger to public opinion. Invoking CEDAW in future cases in these fields will contribute to accelerating the social trend towards more equality in marital and family relationships.[121]

In the Philippines, challenging a traditional understanding of domicile in which a wife automatically gains a husband's domicile upon marriage, Imelda Marcos argued that such an understanding discriminates against women on the ground of sex.[122] Imelda Marcos was seeking candidature in an election in her place of birth but where she had not resided since her marriage. She had resided with her husband in different provinces of the Phillipines. The Court held that a husband can and should fix a wife's abode but this does not remove a woman's right to choose her domicile. The majority relied on the newly enacted Family Code which provides a joint right to a man and woman to choose their domicile, which had been enacted to accord with the principles of CEDAW. Puno J stated "To rule that a married woman is eternally tethered to the domicile dictated by her dead husband is to preserve the anachronistic and anomalous balance of advantage of a husband over his wife…The Family Code buried this gender discrimination against married women and we should not excavate what has been entombed. More importantly the Constitution forbids it".[123] Romero J stated "It can hardly be doubted that the common law imposition on a married woman of her dead husband's domicile even beyond his grave is patently discriminatory to women. It is a gender based discrimination and is not rationally related to promoting family solidarity. It cannot survive a constitutional challenge".[124]

Apart from female protagonists, the State has also played a role in challenging certain gender-discriminatory traditions and practices such as in the area of the criminal law. In Vanuatu, a woman who left her husband was forcibly taken to an outer island by chiefs and family, with the assistance of the police, to engage in a process of reconciliation.[125] The State brought charges of abduction and kidnapping against the chiefs and family members.

[119] *Meera Gurung v. Her Majesty's Government Department of Central Immigration, Ministry of Home Affairs* (1994) Supreme Court of Nepal.

[120] *X1 and X2 v Government of Japan* (1991) Supreme Court of Japan [X1 and X2].

[121] *Ibid.*

[122] *Imelda Romualdez-Marcos v. Commission on Elections and Cirolo Roy Montejo* (1995) Supreme Court of the Philippines.

[123] *Ibid.* at 17.

[124] *Ibid.* at 21.

[125] *Public Prosecutor v. Walter Kota, Chief Jimmy Kawai, Chief Cyril Wis Menusa, Chief Andrew Koau, Chief Ringimanu, Joseph Nayo, Charles Narun Kauiata, Thomas Nasup Taura, Babara Tehu Mathias, Marie Salome Morrison, Mathias Teku* (1993) 2 VLR 661.

Defending the charges, the chiefs and family members argued that customary practice legitimised their acts. Justice Downing found it "astonishing and abhorrent that the Vanuatu police had anything to do with this matter"[126] and in finding the accused guilty, concluded:

> there is a conflict between the Constitution and the Statutory Law of Vanuatu on the one hand, and Custom…Article 5 of the Constitution makes it quite clear that men are to be treated the same as women and women are to be treated the same as men. All people in Vanuatu are equal and whilst the Custom may have been that women were to be treated or could be treated as property and could be directed to do those things by men, whether those men be their husbands or chiefs they cannot be discriminated against under the Constitution.[127]

A reading of the cases above, using the frameworks provided by Desai and Coomaraswamy, suggests a strategic middle ground between universalism (and the concern that discrimination against women will continue in favour of preserving cultural traditions) and cultural relativism (and the concern that the application of CEDAW's "universal" norms will result in the erasure of cultural norms). Coomaraswamy argues that the "principle of autonomy" (which she defines as women themselves making choices based on their cultural and social context) should be the measure of determining which cultural practices are retained and which are not.[128] Similarly, Desai argues that the way to resolve the tension between universalism, cultural relativism and feminism is to "listen to the voices of local women". The cases above provide a means of "listening to women's voices" and demonstrate that women litigants themselves are identifying and challenging cultural and traditional practices that harm or oppress them. Although their voices cannot be taken to be representative of all women, the cases do illustrate that universal standards can be applied in different cultural contexts without erasing difference. Thus, for example, in the Indian case of *Masilamani*, Hindu women petitioners who were denied equal succession rights under the *Hindu Succession Act* mounted a legal challenge against a law which they perceived as interfering with their dignity and autonomy. A criticism that is often made of international norms by cultural relativists is that they will result in the breakdown of cultural difference by replacing traditional practices with homogenous western norms. However, the cases reveal that the plaintiffs are not challenging cultural practices as a whole but rather, particular practices which they view as hindering their access to full and satisfying lives. For example, in the Japanese case of *X1 and X2*, the petitioner challenged an aspect of family law that prevented women (but not men) from remarrying within 180 days of a divorce. The petitioner, therefore, was not challenging all cultural traditions relating to marriage in Japan but only a discriminatory component of the law. Finally, cultural relativists and some "difference" feminists have suggested that the rights gained by women litigants will be imposed on *all* women. However, this criticism does not bear scrutiny since successful litigation facilitates access to legal rights but does not require the exercise of such legal rights by those who are unwilling.

As evident in some of these cases, judicial decisions do not always favour the women plaintiffs. However, even when the outcome is unsuccessful, the process of litigation itself has other benefits. It can provide a focal point for the mobilisation of the local community as "women come together, form coalitions, articulate their political demands and participate in contests over meaning".[129] The courts provide a forum to raise public awareness of the issues of concern to women[130] and the cases provide a symbolic contribution to the

[126] *Ibid.* at 20.
[127] *Ibid.* at 664.
[128] Coomaraswamy, *supra* note 93 at 509.
[129] Kapur & Cossman, *supra* note 14 at 294.
[130] *Ibid.* at 324.

articulation of new social values and norms, sowing the seeds of change.[131] As discussed more fully in the following two sections, the litigation process also provides the opportunity for other players such as the State or the judiciary to respond to the issues raised, either with legislative change or by setting new precedent.[132] It can also provide the judiciary with the opportunity to positively comment on women's issues, which in turn can alter social values.[133]

### B. *"Breathing Life into Dry Bones":*[134] *Encouraging Judicial Activism in the Courts*

Women's use of CEDAW in domestic litigation strategies has facilitated and encouraged judicial activism in the courts of countries across the Asia Pacific region. The use of such strategies has provided judges with the opportunity to make findings that extend the law and, at the same time, to make a range of statements about the position of women in society. This activism has been encouraged and supported by a series of judicial colloquia which has produced documents such as the Bangalore Principles, referred to earlier, which obliges the judiciary to interpret domestic laws in line with international norms.

In three extraordinary Indian cases, the Supreme Court displayed innovative judicial activism to find favourably for the women litigants. In the first case, a Bangladeshi woman, while waiting for a train, was lured to a hostel by railway employees and was brutally gang-raped.[135] A practising women's advocate subsequently filed a petition under the Indian Constitution claiming compensation for the victim from the Railway Board and the Union of India. The outcome is notable for three reasons. First, the Court awarded compensation under the Constitution, a remedy traditionally only available in private law and not in public law proceedings. Second, it held that a government instrumentality could and should be liable to pay compensation for the criminal acts of its employees. Third, the Court recognised the expansion of locus standi under Indian constitutional jurisprudence to include public-spirited persons acting in matters of public interest. Therefore, when women are not in a position to bring cases themselves, an advocate may act on their behalf. In another case, a social worker campaigning against child marriage in Rajasthan was the victim of a gang rape during her work hours.[136] Consequently, women's organisations brought a class petition against the State of Rajasthan and the Union of India arguing they were obliged by the Indian Constitution[137] to ensure the right of working women to a safe working environment free from sexual harassment and abuse. The Court agreed and, in a remarkable piece of judicial activism, crafted a set of sexual harassment guidelines to protect women in the workplace and to fill the legislative void until Parliament took steps to enact domestic legislation. The obligations imposed by CEDAW and the Constitution, the Court argued, empowered them to take this unusual step. In another case two years later, a female plaintiff was sexually harassed by a fellow employee.[138] The male employee was initially dismissed but was later reinstated on the basis that there was no physical molestation. The Supreme Court of India reinstated the dismissal and in the process broadened the meaning of sexual harassment from actual physical molestation to include circumstances such as requests for sexual favours or other direct or implicit verbal and physical conduct with sexual overtones. The Court

131 *Ibid.* at 313.
132 *Ibid.*
133 *Ibid.*
134 Quoted in Masilamani, *supra* note 110.
135 *Chairman, Railway Board and Appellants v. Mrs Chandrima Das and Others* (2000) AIR 988.
136 *Vishaka v. State of Rajasthan* (1997) 6 SCCC 241.
137 Article 14, the fundamental right to equality; Article 15, which prohibits discrimination on the grounds of sex; Article 19, the right to life and liberty; Article 21, the right to practice any profession or carry out any occupation, trade or business.
138 *Apparel Export Promotion Council v. A.K. Chopra* (1999) AIR 625.

referred to its previous findings in *Vishaka,* the Constitution and to CEDAW and concluded that "sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations".[139]

In Fiji, the defendant of a rape charge claimed that he was not guilty of rape because he had had a sexual relationship with the victim before and that he had been jealous and drunk at the time.[140] In finding him guilty, the Court took the extra step of stating that "men should be aware of the provisions of CEDAW" and that courts should be a "watchdog" (ensuring CEDAW is respected). Further, "[t]he old school of thought that women were inferior to men, or part of your personal property, that can be discarded at will, is now obsolete and no longer accepted by our society".[141] In Pakistan, a plaintiff who had married of her own volition was forced by her family into an arranged second marriage.[142] She ran away with her husband of choice and was subsequently chastised by her family. Both she and her husband were also beaten by the police. She argued that the second marriage was not valid as she had not consented whilst her family argued that the first marriage was not valid as she had broken religious Hudood law. The Court held that the first marriage to be valid and the second marriage to be invalid. The Court stated that culture was behind the views of the family and the police and that culture:

> needs to be tamed by law and an objective understanding of Islamic values. Let us do a little self accountability and a little soul searching both individually and collectively. Male chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values.[143]

The Court also held that the actions of the police were in breach of CEDAW, and in admonishing their involvement, stated that "the police are the guardians of the lives, liberties and the honour of citizens. They owe their place in society to the taxes which are paid by the citizens. If these guards become pouchers then no society and no State can ever have the semblance of human rights and the rule of law".[144] In a Bangladeshi case, the plaintiff was forced from her husband's home as he wanted to remarry.[145] Her husband refused to pay her maintenance. The judges not only ordered that maintenance be paid in full but took the opportunity to put forward their views on the issue of polygamy. The Court stated that since Islamic law holds that a husband must deal "justly" with his wives, polygamy could not be supported as it was impossible for a husband to deal justly with more than one wife. The Court recommended that polygamy should no longer be permitted by domestic law because it is contrary to Islamic law and ordered that "… a copy of this judgment be sent to the Ministry of Law".[146]

The cases lend weight to the argument that the use of domestic litigation strategies by women has created the forum and the opportunity for judicial activism that can benefit women. Confronted with the call by women for equality, dignity and autonomy, judges have responded not only with some positive decisions but have also used the opportunity to challenge cultural practices and traditions in some extraordinary examples of judicial activism. These decisions and statements, whilst not a panacea in themselves (indeed, it should be noted that judicial activism can also prompt unfavourable developments in the law), potentially have the following benefits. First, it demonstrates that some judges are

[139] *Ibid.* at 634.
[140] *State v. Filipe Bechu* (1999) Magistrates Court Levuka, Case No 79/94.
[141] *Ibid.* at 12.
[142] *Humaira Mehmood v. The State and Others* (1999) Pakistan Current Criminal Rulings 542.
[143] *Ibid.* at 566.
[144] *Ibid.* at 564.
[145] *Jesmin Sultana v. Mohammad Elias* (1997) 17 BLD 4.
[146] *Ibid.* at 6.

willing to move, and have moved, beyond their traditional role of interpreting the law to make new law (*E.g.*, in the case of *Vishaka* where the Court stepped in to create new sexual harassment law) or significantly broaden the scope of existing law (*E.g.*, in the case of *Chandrima Das* where the Court awarded a private law remedy to a public law claim). Second, regardless of the outcomes, judges have given consideration to a range of issues beyond their responsibilities (*E.g.*, in *Jesmin Sultana,* where the judge put forward his views on polygamy and ordered a copy of those views to be sent to the Ministry of Law) and these obiter statements can have a possible impact on women's lives in the following ways. Statements made in obiter can have considerable persuasive weight in future cases concerning similar issues. Such judicial pronouncements may also raise further awareness within the community of the issues that concern women. Additionally, in making statements on issues that require reform, judges can impose a symbolic and elevated standard which advocates can utilise to challenge discriminatory practices or laws. In particular, judicial statements on the importance of adhering to international norms strengthen and affirm the status and relevance of international conventions and may provide the impetus for other judges to follow suit. Judicial activism may also prompt more women and women N.G.Os to make use of the legal system. Finally, the statements made by judges may prompt the legislature to make changes to both domestic and constitutional law.

### C. *"Let a Copy of this Judgment Be Sent to the Ministry of Law":*[147] *Promoting Legislative and Constitutional Change*

The pursuit of domestic litigation strategies coupled with the external influence of CEDAW has, in some instances, led to the removal of discriminatory domestic laws and the introduction of beneficial laws for women. Spurred on in part by judicial activism or in some instances by the lack of judicial activism, the legislature has sometimes, after a case or series of cases, moved to amend both domestic laws and constitutions to accord with the rights enshrined in CEDAW. This section provides an overview of those cases in the Asia Pacific region which were followed by positive legislative or constitutional change. Although the potential for negative legislative or constitutional changes is always present, these examples illustrate the potential for positive change. In many of the following cases, the plaintiffs were unsuccessful. However, despite the findings of the court, legislatures have subsequently amended laws and set standards which accord with the demands of the women litigants and which comply with the principles of anti-discrimination and CEDAW.

In a Bangladeshi case, a woman was raped by a group of men.[148] However, due to the victim's delay in filing an information report and her failure to describe the actual rape in her statement to a male police officer, the accused were found not guilty of rape, but guilty of the lesser charge of "outraging the modesty". The Appeal Court upheld the Trial Court's finding but made a number of critical statements in relation to the rules and procedures surrounding rape trials in Bangladesh. The problems surrounding the rules and procedures of rape trials can be summarised as follows: the shame and secrecy that continue to surround sexual violence discourages women from contacting authorities;[149] the

[147] Stated by Jilani J in *Jesmin Sultana v. Mohammad Elias, ibid.*

[148] *Al-Amin v. State* (1999) 51 DLR 172.

[149] See F. Agnes, "The Domestic Applications of International Human Rights Norms Relevant to Women's Human Rights: Strategies of Law Reform in the Indian Context" in A. Byrnes, J. Connors & L. Bik, eds., *Advancing the Human Rights of Women* (London: The Commonwealth Secretariat, 1996) 101 at 103; J. Stubbs, "Shame, Defiance and Violence Against Women: A Critical Analysis of 'Communitarian' Conferencing" in S. Cook & J. Bessant, eds., *Women's Encounters With Violence: Australian Experiences* (London: Sage, 1997) 109 at 122; J. Stubbs, "Sexual Assault, Criminal Justice and Law and Order" (Paper presented to Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, 12-14 February 2003) 1-14, online: <http://www.agd.nsw.gov.au.cpd.nsf/pages/stubbs>.

admissibility of evidence is strictly controlled in the interests of a fair trial to the defendant rather than grounded in any concern for the dignity, privacy or interests of the victim;[150] the defence of consent makes convictions hard to secure since an honest belief is sufficient for the defendant to establish the defence;[151] the application of the criminal standard of proof "beyond reasonable doubt" can be problematic for victims of sexual assault because of the lack of witnesses particularly when claims are lodged years after the occurrence of the actual events[152] and finally, the intimidating and public nature of the criminal process makes rape trials traumatic for victims.[153] The Appeal Court responded to some of these historical problems and made a number of suggestions for reform. The Court stated that the defence of consent should be amended to ensure that it is real and given out of free choice; a victim of rape should be protected from publicity; investigations should be conducted by women officers; medical examinations should be conducted by women doctors; trials should be held in closed courts and video cameras should be used for the victim's testimony; women judges should be engaged where possible; the process of cross-examination by the defence should be tightly controlled to prevent the harassment and humiliation of the victim; and finally, victims of sexual assault should be compensated for their injuries. In 2000, in direct response to the comments of the judges and to campaigns for reform, the *Suppression of Violence Against Women and Children Act* (2000) was enacted in Bangladesh, providing greater protection for victims of sexual assault and other gender-based violence. This case illustrates a positive response by the judiciary and subsequently the legislature to the issue of sexual violence.

In a Korean case, a university employee was sexually harassed by her supervisor and after complaining, was dismissed.[154] She sued her supervisor, her employer (National University of Seoul) and the Republic of Korea arguing that she was protected from sexual harassment by the Korean Constitution, in particular by section 10 which protects personal rights. She was awarded damages against her supervisor, but failed in her suit against her employer and the Republic of Korea. Soon after the case, however, changes to domestic legislation were enacted in relation to sexual harassment. The *Gender Equal Employment Law* was amended in 1999 to provide protection from sexual harassment and sexual harassment provisions were also inserted into the *Law on the Prohibition and Relief of Gender Discrimination.* In another Korean case, the female plaintiff argued that the mandatory retirement age for telephone operators of 53, when the retirement age for other positions in the company was 58, was in breach of the equality provision of the *Gender Equal Employment Law* since most telephone operators were women. Although the Court held it was reasonable to discriminate, the Act was amended shortly afterwards with more specific wording which would have led to a different finding.

In another employment-related case in Japan, the plaintiff argued that the provision of different wages to male and female workers was in breach of domestic legislation and the Japanese Constitution.[155] The Court agreed and held that it was discriminatory. Japan ratified CEDAW after this judgment, and passed the *Basic Law for a Gender Equal Society*.

[150] See Agnes, *supra* note 149 at 103; R. Kaspiew, "Rape Lore: Legal Narrative and Sexual Violence" (1995) 20 Melbourne U.L.Rev. 350-382 at 356; K. Mack, "You Should Scrutinise Her Evidence With Great Care: Corroboration of Women's Testimony About Sexual Assault" in P. Easteal, ed., *Balancing the Scales. Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998) 59; T. Hennig & S. Bronnitt, "Rape Victim on Trial: Regulating the Use and Abuse of Sexual History Evidence" in P. Easteal, ed., *Balancing the Scales. Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998) 59.

[151] B. McSherry, "Constructing Lack of Consent" in P. Easteal, ed., *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998) 26 at 29.

[152] Agnes, *supra* note 149 at 103.

[153] *Ibid.*

[154] *Woo v. Shin, Kim and The Republic of Korea* (1998) SC Seoul Decision 95Da39533.

[155] *Iwate Bank Case* (1992) The Hanreijihou No. 1410.

In Nepal, an unsuccessful succession law case led to significant legislative changes.[156] Two women petitioners argued that domestic legislation that allowed sons to inherit without conditions while conditions were imposed on daughters was contrary to both the equality provision in the Nepal Constitution and to CEDAW. The Court, however, found in favour of the respondents who argued that the Constitution did incorporate the principles of CEDAW in relation to equality and property rights and was consistent with international standards. The Court held that the right to equality guaranteed in the Constitution was not a right to full equality in all circumstances. The Court stated that the equality provisions should be interpreted to take into account the different social situations of men and women. To find otherwise, the Court held, would cause "disruption of the whole structure of the traditional society like ours".[157] The legal and strategic movement for equal property rights propelled the Supreme Court to issue a direction to the Parliament in 1995 to introduce an appropriate Bill within a year for the consideration of family laws relating to property. As a result, on 26 September 2002, the laws were changed in the form of the *11th Amendment to the Country Code 1963*, giving equal inheritance and property rights to women.

It should be remembered, however, that a positive judicial decision can have an obverse effect and result in parliaments legislating to remove legal rights as evidenced in a recent Australian High Court case.[158] A doctor argued that provisions of the *Victorian Infertility Treatment Act 1995*, which restrict access to fertility treatments to women who are married or in a heterosexual relationship, discriminated against women on the basis of their marital status and were therefore in breach of the *Sex Discrimination Act 1984*. The High Court agreed with Dr. McBain and declared the relevant provisions illegal. The Australian government responded immediately to negate the effects of the decision by announcing its intention to amend the *Sex Discrimination Act 1984*. The amendments proposed would exempt state laws so that they can restrict access to in-vitro fertilisation (I.V.F.) procedures and fertility treatment.[159]

Domestic litigation strategies, utilising CEDAW, have brought womens' issues before the courts. This has given the judiciary, as discussed in the previous section, the opportunity to change or interpret the law in line with CEDAW. This process has also created opportunities for the legislature to respond with statutory amendments. Indeed, in response to the outcomes of the cases, the statements made by the judiciary and the broader women's movement for social change, the legislatures in a number of countries across the Asia Pacific *have* introduced amendments to domestic laws and even constitutional provisions to achieve conformity with CEDAW. These changes have created a state-sanctioned set of acceptable standards and accord with the views of those who argue that the most effective way to enforce CEDAW is to ensure its presence in the domestic legal system.[160] The legislative changes reinforce a culture of justiciable rights. The success of past cases and corrective legislation enable more women, with the support of women's organisations and an active judiciary, to continue to advance the human rights of women and to uphold human rights norms.

156 *Meera Kumari and Mira Khanal v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs, Secretariat of the Council of Ministers, House of Representatives, National Assembly* (1995) Supreme Court of Nepal.

157 *Ibid.* at 10.

158 *McBain v. State of Victoria* (2000) FCA 1009.

159 K. Del Villar, "*McBain v State of Victoria*: Implications Beyond IVF" (2000) 4 *Law and Bills Digest Group*, *archived at* the Parliament of Australia Parliamentary Library, online: <http://www.aph.gov.au/library/pubs/rn/2000-01/01RN04.htm>.

160 See H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 113.

## VII. "Let Us Do a Little Soul Searching":[161] Concluding Comments

A reading of the cases considered in this article, drawn from across the Asia Pacific region, has provided a means of resolving some of the dilemmas posed by the different positions of universalism, cultural relativism and feminism. Whilst universalists argue that a core set of principles should apply to all regardless of cultural differences, cultural relativists argue that cultural differences should be preserved regardless of their impact on women whereas "difference" legal feminists oppose the practice of universalising the category of woman. The case examples, however, have revealed that local women in the Asia Pacific region, supported by the work of women's N.G.Os, are themselves choosing to legally challenge traditions and customs that they argue interfere with their rights to dignity, autonomy and freedom. They have drawn on the provisions of CEDAW, utilised available legal avenues and argued for the abolition of customary laws relating to succession, immigration, marriage and guardianship. They have argued for equal working conditions, safe working environments, and freedom from sexual harassment and sexual violence. In this way, the women themselves are responding to the concerns of "difference" legal feminists and cultural relativists as the cultural practices opposed and sometimes eradicated as a result of litigation, are those that the women themselves have targeted for challenge.

The case examples also illustrate that, in many instances, the courts are willing to respond to the claims brought by local women and hold the particular practice or tradition under challenge to be contrary to domestic law, state constitutions and sometimes CEDAW. In some instances, the courts have responded with creative and far-reaching decisions and obiter discussion that exceed either the claims before them or their judicial responsibilities. In other cases, when the court did not find favourably for the women plaintiffs, the legislature stepped in and enacted changes to either the domestic or the constitutional laws of the particular country. The combination of the domestic litigation strategies of women and positive responses by the judiciary and the legislature has resulted in the transformation of the universal principles of CEDAW into domestic laws that incorporate and reflect the concerns of local women. In this way, the process does not reflect "strong" universalism. Instead, it is more closely aligned to the strategic middle ground approaches, advocated by authors such as Desai and Coomaraswamy, in which universal norms are combined with the concerns and realities of local women's lives to reach solutions that are sensitive to cultural differences.

The dilemmas that we are faced with in this debate are similar to those that Gandhi faced when dealing with the issue of the caste system and its treatment of Dalits. How then did Gandhi deal with this issue and *what did Gandhi say*? In an approach not dissimilar to those of Coomoraswamy and Desai, he found that the personal dignity of human beings and the rights of both individuals and communities to enjoy that dignity prevailed over the cultural practices and traditions that prevented them from attaining dignity.[162] Although Gandhi denounced law courts and lawyers, Kapur and Cossman argue that "legal strategies cannot and should not be abandoned in women's struggles".[163] Likewise, this article concludes that women's use of domestic litigation strategies, enhanced by the use of CEDAW and both facilitated and supported by the women's movement and N.G.Os, has a crucial role to play in removing the cultural practices that discriminate against women. In doing so, such strategies have a strong potential to advance the human rights of women in the Asia Pacific region.

[161] Quoted in *Humaira Mehmood v. The State and Others, supra* note 142.

[162] G.K. Karanth, "Caste in Contemporary Rural India" in M. Srinivas, ed., *Caste: Its Twentieth Century Avatar* (New Delhi: Penguin, 1997) 87 at 107.

[163] See Kapur & Cossman, *supra* note 14 at 292.