Gender and democratic citizenship: the impact of CEDAW

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The substantive equality provisions of CEDAW provide theoretical and normative tools to contend with the growing challenges of traditionalist cultural and religious patriarchy and neoliberal exploitation of women. This holds out promise but a large gap exists between normative policy and social practice. The promise of de jure and de facto equality for women cannot be fulfilled by law and philosophy alone. It remains to translate the formulation and commitment into political, economic, and social action, which will secure women’s capacity to participate as equal actors in the public sphere, to have equal opportunity in the economy, and to live in a state of equal autonomy to that of men in the family. This is the meaning of democratic citizenship for women and it is a condition precedent for a viable democracy for men and women alike.

I. Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) established an international bill of rights for women. It introduced a concept of equality for women, which has remained radical even after thirty years, in part as a result of its own language and in part because of its interpretation by the CEDAW Committee. Embracing all aspects of women’s lives—political, public, and diplomatic; economic, employment, and rural; educational; health; marriage and family; and protection against violence, including domestic violence—CEDAW has imposed an obligation on states parties to ensure substantive equality for women. It is notable that the Convention is openly committed to the goal of eliminating discrimination against women and does not assume a guise of gender neutrality. In its preamble, the

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Convention recognizes that “extensive discrimination against women continues to exist [and creates] an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries.” It also expresses awareness of the need for a change in the traditional roles of men and women to achieve full equality between them.

There have been many feminist critiques of international law in general and of CEDAW in particular. The general critiques have claimed, variously, that international law is at best silent on many of the issues important to women and at worst androcentric; that the normative structure of international law, with its retention of state prerogative not to ratify treaties or to make reservations to them, is inadequate to bring about the enforcement of human rights; or that emphasis of international law on rights as such, on the public rather than the private sphere and on political and civil rights in particular does not serve or recognise the interests of women. It is beyond the scope of the present essay to respond to these general critiques of the power and purpose of international human rights law and I set out from the premise that although achieving social change through law as such, including international human rights law, may be a less than secure, it is an essential part of the fabric of social change. It has “the potential to mobilise movements, to influence political debate and, perhaps, to contribute to social change”.

Particular critiques of CEDAW are, however, another matter. The central feminist claim made in criticism of CEDAW is that it is assimilationist and shackles women to the male model as the dominant norm. Much has been written about the problem of a legal agenda which requires women to claim equality with a male comparator, which thus precludes the kind of transformative change which would allow women to participate in social and political institutions on their own terms and in accordance with their own realities. A second and equally important claim is the intersectionality claim, according to which there can be no one expression of feminism which is indistinguishably applicable to women of different ethnicity, cultural or class identity. It is claimed that CEDAW largely treats women as a homogenous group. A post-modernist claim is made that the very retention of the category of womanhood in

1 See for example, Hilary Charlesworth, Christine Chinkin and Shelley Wright, “Feminist Approaches to International Law”, 85 American Journal of International Law 613 at 644 (1991)
2 Ibid, at 633.
6 For a comprehensive analysis of the assimilation model, see: Vanessa Munro, Law and Politics at the Perimeter – Re-evaluating Key Debates in Feminist Theory, (Hart Publishing 2007) 14-40; for the arguments used to show that CEDAW relies fundamentally on a comparison between men and women, see Dianne Otto “Women’s Rights”, in International Human Rights Law, eds., Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, (OUP 2010)345, at 354-5.
8 Dianne Otto, above note 6, at 357.
CEDAW is essentialist and neither accurate nor effective; that it has not achieved the broad transformative equality promised and cannot do so as long as “the harms it addresses focus solely on “women” as a group.”

Though I cannot do any kind of justice to the scope and the seriousness of these critiques in the context of this article, the development of my theme will show that they may be belied both by the language of CEDAW and by institutional interpretation and developments at the international and domestic levels. Indeed many of the writers who have questioned the effectiveness of the international human rights regime as a vehicle for achieving women’s autonomy and their right to self-determination within the international and constitutional framework of states, have nevertheless acknowledged the potential – if challenging - of the international human rights framework and of CEDAW to be the harbingers of transformative equality. The transformative potential of CEDAW Article 5a has been recognized by several feminist writers. As Rosa Brooks concludes her argument, “. . . at a moment when left wing politics, feminism, and liberalism are all floundering, unable any longer to inspire a new generation that worries about wars and jobs and the environment, the discourse of international human rights offers us a new and potentially transformative way to conceptualise the world’s many injustices. As feminist scholars, judges, and lawyers, this is an opportunity we cannot afford to pass up.”

Recent developments in international institutions give support to the idea of CEDAW’s transformative potential. The CEDAW Committee has reinforced the concept of transformative equality in its General Recommendation 25 on Temporary Special Measures and General Recommendation 28 on the Core Obligations of States under Article 2. It has taken cognizance of the importance of intersectionality regarding women migrant workers in General Recommendation 26, older women in General Recommendation 27 and on the basis of “factors that affect women such as race, ethnicity, religion or belief, health, status, age, in particular adolescent girls, class, caste, sexual orientation and gender identity” in General Recommendation 28. A further development, in 2011, has been the appointment by the Human Rights Council of a Working Group on Discrimination against Women in Law and Practice. The mandate of the Working Group includes preparation of a compendium of best practices for elimination of laws which discriminate, directly or indirectly, against women; to develop ways and means to eliminate discrimination against women in law and practice; and to make recommendations on reform and implementation of law to promote

9 Darren Rosenblum, Unisex CEDAW or What’s Wrong with Women’s Rights”, 20 Columbia Journal of Law and Gender, 98 at 193.
10 Hilary Charlesworth, Christine Chinkin and Shelley Wright, above note 1, at 644-5; Vanessa Munro, above at note 6, also quoting: S. Mullally, Gender, Culture and Human Rights: Reclaiming Universalism (Oxford, Hart publishing, 2006); Rikki Holtmaat, Towards Different Law and Public Policy – The significance of Article 5a CEDAW for the elimination of structural gender discrimination (Dutch Min of Social Affairs 2004); Dianne Otto, above note 6, at 363.
11 Frances Raday, Culture, Religion and Gender”, 1 I.Con, 663 (2003); Rebbecca Cook and Simone Cussack, Gender Stereotyping – Transnational Legal Perspectives (2010, U of Penn Press)176-80.
12 Rosa brooks, above note 5.
13 A/HRC/Res 15/23
gender equality and the empowerment of women, with reference to the realization of the millennium development goals. The mandate expressly directs the Working Group to work in close coordination with CEDAW and other treaty bodies. This agenda clearly allows for transformative and not merely formal equality.

The overall object and purpose of the Convention is to eliminate all forms of discrimination against women with the view to achieving women’s *de jure* and *de facto* equality with men. Formal equality is achieved if policies are merely gender neutral, while substantive equality is concerned with the effects of equality policies and takes into account the need to correct prevailing inequality. As the Committee points out in General Recommendation 25:

[A] purely formal legal or programmatic approach is not sufficient to achieve women’s *de facto* equality with men, which the Committee interprets as substantive equality. In addition the committee requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results... Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

In this collection of papers, gender and sexuality are examined in the context of democratic citizenship. The relationship between gender equality and democracy requires clarification. Women’s right to equality is a condition-precedent for democracy and not merely a result of democratic recognition. Let me clarify. The primacy of women’s right to equality under CEDAW is not derivative from the right to democratic citizenship. The will of the majority cannot derogate from this right, which flows, as noted in the Introduction to the Convention, from “fundamental human rights and from the dignity and worth of the human person...: among the human rights treaties, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns.” As all fundamental human rights, women’s right to equality provides protection for the individual even against the will of the majority. Thus women are entitled as individuals to equality, whatever the majority’s expressed will to the contrary.

Since the adoption of CEDAW, it has become increasingly clear that there are challenges to implementation of the goal of equality for women, which result from social philosophies which do not endorse the concept of equality for women incorporated in CEDAW. There are current manifestations of dissonance between traditionalist religious edict or cultural practice and neo-liberal ethics, on one hand, and human rights standards, on the other. Both of these social philosophies, traditionalist religion or culture and neoliberalism, challenge CEDAW’s bill of rights for women. However, they do so in different ways.

Traditionalist religious dogma designates women and men as “complements whose duties, though different, are socially comparable.”14 This conceptualization of women’s role is in direct conflict with CEDAW’s requirement of formal and substantive equality for women on the same terms as men and its call for transformative redistribution

of resources and power between women and men. In 2002 the Special Rapporteur on Religion identified the many ways in which religions rationalize and legitimize discrimination against women, remarking that “the longer we postpone tackling it the greater the risk of embedding gender inequalities in the field of human rights.” The reservations to CEDAW, which make it amongst the most heavily reserved of the international human rights treaties, are concentrated in the traditionalist religious arena. The reservations which declare a wide-ranging derogation from CEDAW standards do so in deference to Sharia and occasionally to other religions as well. This deference to traditionalist religion denies women’s entitlement to equality in the family and the public sphere. This poses a current challenge to women’s civil and political rights.

Neoliberal philosophy undermines CEDAW by creating market conditions which make women’s equal opportunity in economic and labor markets in theory axiomatic but in practice unattainable. There is no direct denial of women’s right to equality and, indeed, there is a conceptual requirement of equal opportunity. There is, rather, a refusal to acknowledge differences resulting from gender stereotyping or to accommodate special needs arising from biological aspects of women’s reproductive role. Accordingly, the neoliberal approach opposes creation of conditions which integrate childbearing and family care functions into the economic model. It opposes imposition on the state of the costs of social services which facilitate parental participation in the public sphere and thus enable caregivers (mostly women in current realities) to implement their right to equality of opportunity in public life and in economic and labor markets. This poses a challenge to the realization of women’s social and economic rights.

CEDAW takes an uncompromising stance on the primacy of women’s right to equality which must prevail in the face of traditionalist religious or neoliberal challenges. There are considerable achievements which can be in large part attributed to CEDAW. Achievements include international recognition of women’s rights as human rights, creation of national machinery for the advancement of women, collection of sex-disaggregated data by states parties, promotion of TSMs for women’s political participation, and enactment of specific domestic violence legislation. CEDAW also addresses intersectionality, treating the differing requirements of women in cultural, social, or economic subgroups as requiring special attention and listing, amongst others, women in poverty, women belonging to minorities, women with disabilities, refugees, migrants, stateless women, lesbians, girls, and elderly women.

CEDAW’s tools for addressing cultural, social, and economic intersectional differences between women are offshoots of the core right to equality and are not a vehicle for the fragmentation of it. In this respect, CEDAW is consonant with a core concept of feminism rather than with a subjective and relativist collection of feminisms.

The conceptual clarity of CEDAW is not fully matched by states parties’ record in implementation. It has been observed that as regards de jure discrimination, there has

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been less than full success even in achieving the repeal of discriminatory laws, which represent state-sanctioned and state-condoned discrimination. Further analysis of the discriminatory laws that are still in place reveals that these are concentrated in the area of family law provisions which are based on religious or traditionalist cultural norms. Additionally, the requirement that states parties guarantee women’s right to equality in their constitutions and in legislative and other appropriate measures has not been universally implemented. As regards de facto discrimination, CEDAW is clearly far from achieving its equality goal. Even in the absence of discriminatory laws and even where de jure equality guarantees are in place, the implementation of equality is not assured. In most systems where women’s political and civil rights are secured de jure, women are still grossly under-represented in political and decision-making positions. The influences on women’s right to economic equality in a global surge of neoliberalism are complex and contradictory: while we see the rise of women’s education and workforce participation, we are also aware of women’s continuing high share of poverty, wage, and promotion gaps in employment and increased exploitation and trafficking of women and girls for prostitution. Furthermore, the division of power and responsibility in the family reflects continuing gender hierarchy. In all areas, public and family, violence against women continues unabated.

2. Traditionalist cultural and religious challenges

It may be asked why, in view of the patriarchal character of traditionalist culture in general, the emphasis here should also be on religion. The answer is multilayered. It is the religions themselves which have, in the human rights era, self-identified as the core of resistance to women’s equality, as is clearly evidenced in states’ reservations to CEDAW, which are almost exclusively addressed, in express deference to religion, to the article 16 provision for equality in the family.

The clash between religious and human rights constructs of the family is not merely part of a cultural transition from traditionalism to modernity. Religion is an institutionalized aspect of culture, with focal points for political power within society, which renders religion less amenable to adaptive pressures. Within secular states, religious sects provide “a haven against social and cultural change, . . . defend the eroding authority of the family, sacralize ethnic loyalties, provide barriers against rationalized educational techniques and scientific explanations of nature. . . .” In practice,

most religious claims against gender equality have been made under one of the monotheistic religions: Judaism, Christianity, or Islam, which, taken in conjunction, are the world’s most widely observed religions, and I will concentrate on them with occasional reference to Hinduism. In their texts, it is clear that the monotheisms sacralize the male godhead and the patriarchal family.\(^20\)

The question I pursue here, is what solution is provided under the international regime of women’s human rights, established by CEDAW, under other instruments of international law and under national constitutions, in cases where equality rights clash with cultural practices or religious norms? The cultural clash is expressly cited in CEDAW, which requires modification of “cultural patterns of conduct” or “custom” which prejudice advancement of women’s equality. The religious clash is referred to in the International Covenant on Civil and Political Rights which regulates possible conflict between “the freedom to manifest one’s religion or beliefs” and “the fundamental rights and freedoms of others,”\(^21\) including implicitly the right to gender equality.

Many of the practices, defended in the name of culture, that impinge on human rights violate the rights of women and girls, including: female infanticide; female genital mutilation (FGM); forced marriage and child brides; patriarchal marriage arrangements denying women rights to land, property, or freedom of movement; husband’s right to obedience or commit acts of violence against his wife, including marital rape; family honor killings; witch-hunting; compulsory restrictive dress codes; discriminatory division of food producing female malnutrition; and stereotypical restriction of women to the roles of housewives or mothers, without a balanced view of women as autonomous and productive members of civil society.\(^22\) Many of these practices have been the subject of criticism in the Concluding Comments on Country Reports by the Committee for Elimination of Discrimination against Women.\(^23\)

Some of these cultural practices harmful to women are geo-culturally pervasive, if not universal, and some specific to regions. The most globally pervasive of the harmful


\(^23\) Examples from the CEDAW Committee’s Concluding Comments include: Re Cameroon, 23d session (2000) ¶ 54 (urging “the government to review all aspects of this situation and to adopt Legislation to prohibit discriminatory cultural practices, in particular those relating to female genital mutilation, levirate, inheritance, early and forced marriage and polygamy”); Re Democratic Republic of the Congo, 22d session (2000) ¶¶ 230, 232 (expressing concern “about the situation of rural women. . . . Customs and beliefs are most broadly accepted and followed in rural areas, preventing women from inheriting or gaining ownership of land”; also expressing concern about the “food taboos”); Re India, 22d session (2000) ¶ 68 (expressing concern over “a high incidence of gender-based violence against women, which takes even more extreme forms because of customary practices, such as dowry, sati and the devadasi system”); Re China, 20th session (1999) ¶ 299 (noting “the discriminatory tradition of son preference, especially regarding family planning, [where does the quote end?] and “illegal practices of sex-selective abortions, female infanticide and the non-registration and abandonment of female children”).
cultural practices mentioned above is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunity to participate in public life, whether political or economic.24 Other patriarchal practices, which were widely prevalent in the past, have been eliminated in some societies but have survived in others, such as allowing patriarchal control over land, finances, or freedom of movement; husbands’ rights to mete out physical discipline and to commit marital rape;25 and witch-hunting.26 Some cultural practices that are harmful to women have always been peculiar to certain areas, such as family honor killings;27 FGM;28 and a preference for sons leading to female infanticide.29

It has been remarked that the three monotheistic religions recognized from their inception the full humanity of woman and that woman was created in imago dei (bezelem). However, the argument has also been made that attribution of imago dei to women resulted only from gradual inculturation in Judaism and Christianity and did not occur in Islam at all.30 Furthermore, even if women’s equal personhood is regarded as accepted by religion as a spiritual matter, monotheistic religions have, at least in their orthodox streams, promulgated patriarchal gender relations. Women have been excluded from the hierarchies of canonical power and subjected to male domination within the family. In accordance with prevalent interpretations of the source books of the monotheistic religions, women are not entitled to equality in marriage, inheritance, guardianship, or division of matrimonial property and they are not eligible for religious office. This said, there is a lack of homogeneity among religions, as well as amongst the different branches within them, with reform movements in both Judaism and Christianity occurring at the time of the Enlightenment in Europe. Nevertheless, these reform movements, too, have to contend with patriarchal passages and images in their original texts and in the chain of memory of their communities.

The conflict of those norms of culture or religion that inculcate patriarchal values with gender equality rights may arise with regard to a majority culture in a constitutional framework or a cultural or religious subgroup within the constitutional society. Patriarchal claims by cultural or religious subgroups may range from negative demands for privacy and nonintervention to positive demands for autonomous control of their own social institutions and active support by the state.31 In theocratic regimes, they require state imposition of patriarchal religious norms.

24 See Re Georgia, 21st session (1999) ¶ 30 (“the prevalence of stereotyped roles of women in government policies, in the family, in public life based on patterns of behaviour and attitudes that over emphasise the role of women as mothers”).
26 Coomaraswamy, supra note 9, at 45–48.
27 Id. at 9: “Honour killings are carried out by husbands, fathers, brothers or uncles, sometimes on behalf of tribal councils. . . . They are then treated as heroes.” She lists some of the countries in which family honor killings are reported: Egypt, Iran, Jordan, Lebanon, Morocco, Syria, Turkey, and Yemen.
28 Id. at 14.
CEDAW provides a strong normative basis for overcoming the ideological barrier of traditionalist culture and religion to women’s equality in all these contexts, predicking a hierarchy of values in which women’s right to equality prevails over discriminatory traditionalist rules or practices. This is a unique contribution to the international law regulation. Other international conventions do not establish a clear hierarchy of norms. Indeed, the UN Declaration on Intolerance and Discrimination Based on Religion or Belief details the right “to train, appoint, elect or designate by succession, appropriate leaders called for by the requirements and standards of any religion or belief” thus implicitly allowing exclusion of women from religious leadership.\(^3\)

The clash between culture and gender equality is expressly regulated in article 5(a) of CEDAW:

> The Parties shall take all appropriate measures . . . 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 of either of the sexes or on stereotyped roles for men and women.

Additional CEDAW articles can be regarded as supporting a strong application of Article 5(a). Article 2(f) imposes an obligation, without delay, to “modify or abolish . . . customs and practices” that discriminate against women. Custom is the way in which the traditionalist cultural norms are sustained in a society. It is clear, then, that the combination of articles 5(a) and 2(f) gives superior force to the right to gender equality in the case of a clash with cultural practices or customs, including religious norms, thus creating a clear hierarchy of values.

Use of the construct of culture in CEDAW, as a macro-concept under which religion is included, gives the widest possible range of protection to the substantive equality of women. The use of the term “culture” without express reference to religion, which is a more rigidly defended construct than culture, appears to have resulted in a readiness by states to accept the hierarchical preference given to women’s equality in article 5(a). This is clear from analysis of the reservations of states parties; there are at least twenty reservations that clearly indicate that the state party wishes to conserve religious-law principles for either its entire population or for minority communities. These reservations are made primarily under article 16 of the convention dealing with women’s rights to equality within the family, while only four countries have entered reservations to article 5(a).

In international forums, cultural practices have been taken to include religious norms. The interwoven nature of culture and religion, insofar as they affect women’s rights, has resulted in a merging of the two by agencies or bodies involved with the

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\(^3\) See article 6(g) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. Res. 36/55. 36 U.N. GAOR, Supp. No. 51. U.N. Doc. A/36/684, at 171 (1981). Although not a treaty, the declaration may be seen as stating rules of customary international law. See also Lerner, above note 35, at 123.
application and enforcement of the human rights treaties. The CEDAW Committee has, in its concluding comments, recommended that states parties enact laws making illegal cultural practices discriminatory against women or enforce existing laws aimed at ending such practices it has included religious practices that are prejudicial to women, such as polygamy, whether or not based on religious belief. The Human Rights Committee has also stated its policy on the relationship between culture, religion, and gender in its General Comment on the Equality of Rights between Men and Women:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights. The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

This overview clearly shows that practices injurious to women are regarded as outlawed under the UN human rights system, whether or not they are claimed to be justified by cultural or religious considerations. Both the cultural defense and the right to religious freedom have been raised in opposition to women’s claims to gender


The form and concept of the family can vary from State to State. Whatever form it takes and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice.

See also Beijing Declaration and the Platform for Action, September 15, 1995, A/CONF 177/20 ¶ 9, 24 (1995): “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms,” including women’s human rights, and that, “while religion may contribute to filling women’s and men’s moral, ethical and spiritual needs, any form of extremism may have a negative impact on women and can lead to violence and discrimination.” See also Mary Robinson, U.N. High Comm’r for Human Rights:

Mention must also be made of the significance of national, cultural, religious and historical considerations which influence programmes and policies in individual States. I am only too well aware that justifications which lie in such terminology impact mainly against the human rights of women. I would cite as examples of particular concern the fact that certain States still refuse to recognise marital rape, do not condemn so called honour killings, and that domestic violence remains one of the greatest barriers to women’s equality. Violations of such an egregious nature cannot, under any circumstance be accepted. (available at www.unhchr.ch/huricane/huricane.nsf/1viewO1/DB6643258A4CC97F802568FD005B08A?opendocument).


equality in judicial human rights litigation, both in constitutional courts and in international tribunals.

At the level of international tribunals, there have been very few cases and therefore they cannot be said to produce a body of precedent. Anecdotally, however, it is worthy of note that in all the international tribunal cases, human rights and gender equality were preferred in the result, and religious and cultural defenses were rejected.

In 1977, Sandra Lovelace submitted a communication to the UN Human Rights Committee contesting the decision by the Canadian Supreme Court to reject her petition to cancel the Indian Act’s provisions, which authorized her loss of Indian status as the result of marrying a non-Indian. The Human Rights Committee held the Indian Act unreasonably deprived Sandra Lovelace of her right to belong to the Indian minority and to live on the Indian reserve. This was an unjustifiable denial of her right to enjoy her culture under article 27 of the ICCPR. It is notable that, in contrast with the high courts of Canada and the U.S. which had upheld tribal autonomy, the Human Rights Committee was very clear that minority tribal discrimination against women was an unjustifiable denial of women’s right to equality.

In 1981, a challenge to the Mauritius immigration law, which provided that if a Mauritian woman married a man from another country, the husband must apply for residence and permission may be refused, while, if a Mauritian man married a foreign woman, the foreign woman was automatically entitled to residence. The Human Rights Committee found discrimination against women in violation of the ICCPR.

In 1993, the European Commission of Human Rights upheld the decisions of the Turkish courts regarding the prohibition of the wearing of Muslim head scarves on university campuses. The Commission took the view that by choosing to pursue her higher education in a secular university a student submits to those university rules which may make the freedom of students to manifest religion subject to restrictions as to place and manner, intended to ensure harmonious coexistence between students of different beliefs.

In 2004, the issue of women’s right to equality was material to the decision: in Sahin v. Turkey, the European Court of Human Rights upheld the Turkish ban on Muslim headscarves on university campuses. The Court held unanimously that there was interference in the right of Muslims to manifest their religion but the majority of the

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39 Id. at 108.
Court also held that the interference was prescribed by law and pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. It also held, however, that the principle was the paramount consideration underlying the ban on the wearing of religious symbols in universities and that, in such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn. Thus, the ban, being based on the principles of secularism and equality of men and women, was legitimate. In her dissenting opinion, Justice Tulkens said:

I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them.

The dissent thus differed on the application of the principle of gender equality to the facts of the case, rather than rejecting the proposition that women’s right to equality was a democratic necessity, allowing diversion from the right to manifest one’s religion.

In conclusion, under CEDAW and other international law instruments, where there is a clash between cultural practices or religious norms and the right to gender equality, it is the right to gender equality that must have normative hegemony. At the international level, this hierarchy of values has been adopted in international treaties and in decisions of international treaty bodies and tribunals. This said, the implementation of the CEDAW in so far as it requires that equality for women take primacy over traditionalist cultural and religious discriminatory norms is problematic. The success in repealing discriminatory laws in this area has been limited.41 Personal law systems have been entrenched through reservations rather than reformed in accordance with the right to equality. Constitutional courts in different countries as they relate to the hierarchy of values between culture, religion, and gender have not been effective in restricting religious freedoms where these have resulted in gender inequalities. A theme that appears to be constant is that decisions in which constitutional courts have ruled against the popular sentiment of a religious majority or large minority, without the backing of the government, are rare and, when they do occur, are usually ineffectual. In circumstances of popular opposition aroused on a religious basis, without strong governmental support, the constitutional courts have generally not prevailed in their championing of gender equality.42

41 Banda, supra note 4.
3. Neoliberalism

Neoliberalism is a throwback to liberalism before the era of welfare economics. We can identify liberalism as having been the source of commitment to individual autonomy and liberty. In its historical evolution, liberalism introduced a new concept of equality, which in the course of time established one of the sources for women’s right to formal equality. Implicit in the move from status to contract was the recognition of the contractual autonomy of each of the sides of the new bargaining system for determining rights. The resulting message was formal equality. Members of groups previously deprived of legal capacity were to be permitted to become arbiters of their own fate. Even though, in its origins, liberalism contained the seed of women’s equality, it did not lay the foundation for their social and economic welfare. On the contrary, it left women as the weaker members of the market economy exposed to considerable economic and social hardship. The policy of the welfare state was to correct the bargaining weakness of members of socioeconomically disadvantaged groups: employees, members of racial minorities, women, protected tenants and consumers. Teubner denoted this, historically, as the stage of social constitutionalization which followed on the previous stages of legal and political constitutionalization. 43 In the era of managed capitalism, social and economic rights were introduced in the Universal Declaration of Human Rights alongside political and civil rights and the two were elaborated in the twin treaties of 1966. However, in spite of the prevalent welfare philosophy in post-WWII Europe and post-New Deal U.S., social and economic rights were downgraded as being merely a concession to the Socialist Eastern blocks 44 and neglected in mainstream human rights discourse until the last quarter of the twentieth century, regarded as second generation rights.

The resurgent ideological challenge of neoliberalism at the end of the twentieth century is relevant primarily in the context of social and economic rights. Neoliberalism, as did liberalism, promotes the political and civil right to liberty. It also promotes formal equality, which constitutes both a condition precedent for efficiency and competition and, in the area of employment, increases the pool of available labor and thus reduces the wages and labor costs. Neoliberalism does not, in contrast, support the redistributive character of social and economic rights, in general, or the transformative char-

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43 Teubner, above note 67, at 11:

In the first thrust of legal constitutionalization the system of civil law was so coordinated with the exercise of power that the principle of legality of administration could be interpreted in terms of the “rule of law.” In a further thrust the democratization of the constitutionalized power of the state was introduced by law. Universal and equal franchise and freedom of organization for political associations and parties legalized the political process. The last thrust of juridification that which occurred in the social state, is of crucial importance to our subject. There, the juridification of the modern world of industry and labor, the line of freedom-guaranteeing juridification was continued.

acter of substantive equality for women, in particular. It is fundamentally opposed to redistributive social and economic rights. The gender perspective is not taken into consideration and, in the neoliberal era, the adverse consequences for women of development projects too often remain invisible.

CEDAW imposes a state obligation to ensure women’s right to equality in political, social, and economic spheres. It imposes an obligation on states parties to ensure the full development and advancement of women in all fields, particularly the political, social, economic, and cultural fields (article 3). By explicitly guaranteeing the exercise and enjoyment of human rights and fundamental freedoms as the purpose of the full development and advancement of women, this locates women as rights-holders, not just as objects or prospective beneficiaries of development policy. CEDAW also specifically requires the taking of all appropriate measures to ensure that women have rights on the same or equal terms with men in public life (article 7), acquisition of nationality (article 9), education (article 10), employment (article 11), health care (article 12), credit (article 13), and in the rural sector (article 14). State obligation extends to the private sphere as well as the public sphere: states must take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise (article 2(e)). This obligation is an obligation on the state party to exercise due diligence to prevent discrimination against women by non-state bodies.

CEDAW protection of women’s equality in social and economic rights elaborates on the article 3 equality provision of the CESCR, which applies “in particular” to “political, social, economic and cultural fields.” Economic and social rights are directed at ensuring women’s economic independence and free choices within society.

The CEDAW Committee has observed that there is an “urgent need to ensure that globalisation, policies and plans of action that facilitate international trade and the transition to market economic policies are gender-sensitive and improve the quality of life of women”; and that “[i]f sustainable development is to realise economic, social and environmental goals, women’s needs and concerns must be given equal priority with those of men.” Similarly the World Bank has said that “ignoring gender disparities comes at great cost to people’s well-being and to countries’ abilities to grow sustainably, to govern effectively, and thus to reduce poverty.” The CESCR Committee has clarified that the equal right of men and women to the enjoyment of economic, social and cultural rights is “a mandatory and immediate obligation of states parties.” This

47  montreal principles on women’s economic, social and cultural rights, 26 hum. rts. q. 760, 762 (2004). see also leilani farha, women claiming economic, social and cultural rights—the cedaw potential, in social rights jurisprudence emerging: trends in international and comparative law 553 (malcolm langford ed., 2008); henry j. steiner, social rights and economic development: converging discourses, 4 buffalo hum. rts. l. rev. 25 (1998).
48  cedaw, gender and sustainable development, u.n. doc. a/57/38 (part i) ¶¶ 424, 426 (2002).
49  world bank policy research report. engendering development: through gender equality in rights, resources and voice (january 2001).
50  committee on economic, social and cultural rights. general recommendation 28, ¶ 29 [hereinafter cescr]; henry j. steiner & philip alston, international human rights in context, at 179 (2d ed. 2000).
is in itself a major breakthrough as it is acknowledged that the right of women to social and economic equality is not a qualified right, dependent on the ability of the state according to its resources, but rather an absolute right which requires the equitable distribution of existing resources.

The Committee has considered the relationship between gender and economic development: seeking information and expressing concern about the impact on women of economic crisis, structural adjustment programmes, observing that economic growth and development may not benefit women as much as men. It has requested states to ensure that all poverty alleviation programs fully benefit women to enhance “monitoring of the impact of economic development and changes on women and to take proactive and corrective measures, including increasing social spending, so that women can fully and equally benefit from growth and poverty reduction.” The Committee has also welcomed the introduction of microcredit or microenterprise schemes that facilitate women’s independence through enhancement of their economic self-sufficiency. It has expressed concern about women’s poverty and social exclusion, which have been exacerbated by the global downturn from 2008. The Committee has linked sustainable development with “people-centered human development, based on equality and equity, participation of government and civil society, transparency and accountability in governance.”

The Convention requires accommodation of women’s biological differences, requiring special measures to protect maternity, including provision of maternity leave with pay and encouragement of provision childcare facilities. Furthermore, CEDAW goes beyond the conventional limits of equal opportunity in economic and employment markets by requiring that equal opportunity begin at home. In article 5(b), CEDAW requires states parties to ensure that family education includes the recognition of the common responsibility of men and women in the upbringing and development of their children. The Scandinavian model, which provides separate and independently subsidized childcare leave for fathers, has been cited in Concluding Observations as best practice by the CEDAW committee and the CESCR Committee has postulated that the equal right to social security requires states to guarantee

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54 CEDAW, Concluding Observation: China, supra note 39.
58 CEDAW, Gender and sustainable development, supra note 35, at ¶ 424.
59 The Committee has explicitly addressed women’s development in the context of family relations, for example recognizing family responsibilities as inhibiting personal development. See CEDAW, General Recommendation 21, supra note 20, at ¶ 21.
Gender and democratic citizenship: the impact of CEDAW

The requirement of shared responsibility for childcare hits at the roots of the ongoing undermining of women’s capabilities outside the home, in the political and economic spheres.

CEDAW in its entirety addresses the need to ensure women’s capabilities. The capabilities approach recognizes the need to guarantee those functions particularly crucial to women as dignified free beings who shape their own lives in cooperation and reciprocity with others. A list of central capabilities includes: the right to hold property or seek employment on an equal basis with others; to participate effectively in political choices; to move freely from place to place; to have one’s bodily boundaries treated as sovereign; to be secure against sexual abuse; to have the social bases of self-respect and non-humiliation; and to be treated as a dignified being whose worth is equal to that of others, which “entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.”

CEDAW’s article 4 introduces the concept of special measures into CEDAW, in the first paragraph temporary special measures (TSMs) to accelerate de facto equality for women and, in the second, special measures to protect maternity, which are not of a temporary nature.

The “special measures referred to in the two sections serve divergent purposes and differ in their conceptual basis: article 4(1) TSMs are promotional measures of assistance, compensation and correction to ensure women equal opportunities in all fields of life, while article 4(2) focuses on legitimizing protective measures for women’s needs associated with maternity. Article 4 addresses both of the major barriers to women’s social and economic de facto equality. First, achievement of de facto equality for women is constrained by gender stereotyping and ongoing discriminatory practices. Second, women’s participation in social, political, and economic fields is hampered by failure to integrate maternity and parenthood roles into social and economic structures. These result in a wide gap between the right to equality and its translation into living law and social practice. Article 4 provides the tools to close this gap.

The concept of substantive equality is hence in place, but can the international recognition of the right to substantive equality contend with the problems of inequality produced for women by neo-liberalism? Derrida has commented on “the euphoria of liberal-democratic capitalism . . . and increasingly glaring hypocrisy in its formal or juridistic rhetoric of human rights.” Neoliberal policy has exacerbated inequality globally, between countries and within countries. These extreme inequalities are often borne disproportionately by women. Women suffer from increased poverty and unemployment, deteriorating working conditions and social insecurity, while relatively few

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women enjoy the benefits of global neoliberalism in high skilled jobs in employment, trade and investment market. Women have found themselves struggling under an increased work burden and also constitute a majority of workers employed in highly exploitative export processing zones, which are a creation of global capitalism. Many women are in part-time, flexible, and informal sector work, which typically lacks health, pension, and other work-related benefits. The shift away from state-regulated trade and investment to market-led development has swept away the protections of state employment and necessitates the formulation of new policies to influence or regulate the private sector, in particular in regard to income and employment opportunities for women. However, only a very few governments have introduced concrete incentives, such as subsidies for businesses that establish childcare facilities, or special equality allowances as part of national income policy agreements. The privatization and reduction of public services also has a disparate impact on women. It is women who do the major part of the caregiving to children and sick or disabled family members. When services are reduced or commercialized, women not only lose the benefit of the service themselves but also frequently replace the lost service for dependent family members.

The negative aspects of globalization do not apply only to workers in the Western world, but also to women in the developing world. Analyzing the Women’s World Studies Conference in Korea 2005, from forty-nine abstracts listed under the topic of globalization, I found, almost exclusively, accounts of the negative aspects of globalization for women in the developing world. The abstracts talked about marginalization and poverty, about sex tourism, about women’s migration and their downward mobility as migrants around the world, about trafficking (the sex industry, as it is called), the “infamilization” as women are being pushed into the informal work sector without regulated rights, the backlash of traditionalist cultures which negate women’s right to full personhood, the race to the bottom economically, the precarious labor into which women are forced and the state’s retreat from social responsibility and from the welfare state. One paper alleged that global population control is producing cheap labor in the developing world, where women are freed from motherhood for participation in the workforce. Others discussed the negative impact on women of the democratic deficit of global institutions, and particularly financial global institutions, and the adverse impact of globalization on free speech. The Commission on the Status of Women has concluded:

The challenge posed by the multifaceted impact of globalization, the reorganization of world economic relations, new structures of economic decision-making and international finance that transcend national borders, and resulting financial crises, have seriously challenged the ability of Governments, particularly those in the least developed countries, to direct financial and human resources to the implementation of Platform for Action commitments.\(^65\)

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CEDAW’s requirement of social and economic equality for women has clearly not been implemented on a global basis. Liberal economic globalization may have created new employment opportunities for women in the formal economy, enhancing their opportunities for economic independence. However, it has not dislodged the gender division of labor, which traps women in low-paid, unregulated work. The Millennium Development Goals 2009 Report notes that job opportunities for women are opening up and women have more income-earning possibilities than ever before, occupying overall 40% of non-agricultural jobs as compared to 35% in 1990, however, they remain trapped in insecure, low paid positions. Women constitute a high proportion of workers in export processing zones, of trafficking victims, of the unofficial labor force and of unpaid family workers. Two thirds of women in the developing world work in vulnerable jobs as own-account and unpaid family workers and in Southern Asia and Africa, this type of work accounts for more than eighty percent of all jobs for women.

4. Conclusion

The provisions of CEDAW and their interpretation by the CEDAW Committee clearly belie the claims that CEDAW is assimilationist, homogenous or essentialist. CEDAW provides the basis for transformative equality and indeed mandates it. It takes into account a wide range of intersectional needs. As regards its essentialism, CEDAW responds to discrimination in law and practice based on the identity of women and hence it is somewhat ingenuous to categorise its formulation as essentialist. CEDAW corrects the historic silencing of women’s voices documented and analysed in feminist literature for many decades, since Simone de Beauvoir’s observation of women as the other in the Second Sex. The Convention provides for intersectionality while not losing the core of feminist theory applicable to all women - it can be regarded as nourishing the tree of feminism with its branches of feminisms. Without the concentration of CEDAW on discrimination against women, there is a strong likelihood that women’s voices would be marginalised even in the human rights setting. The concentration on the need to eliminate discrimination against women and to empower them is essential both as a focal point and as a way of stimulating and indeed insisting on mainstreaming of women’s issues in all other human rights frameworks. CEDAW has produced the understanding that “women’s rights are human rights” but it should also be regarded as guaranteeing a fundamental concept of human rights as men’s and women’s rights, on a shared and mutual basis.

The Human Rights Council Working Group on Discrimination against Women in Law and Practice has the task of contributing to the realisation of the potential of

CEDAW. It has at its disposal the tools of women’s human rights discourse, which provides a conceptual basis most empathetic to women’s perspectives. This discourse mandates women’s equal entitlement both to experience and to form the human social realities in which we live, and to participate with men in engineering a transformative mutuality and framework in which both can flourish. Alternative discourses which have growing influence in democratic societies are the traditionalist religious and the neo-liberal discourse, neither of which has an agenda for women’s transformative equality and both of which indeed challenge the rights mandated in CEDAW. The traditionalist religious agenda challenges women’s civil and political rights in the public sphere and their right to equality in the family; the neo-liberal agenda challenges state interventionist policy to advance women’s economic and social rights. The HRC Working Group has identified the thematic scope of discrimination against women in law and practice and the areas of life in which women must be empowered to take their full and equal place in the fabric of societal existence under five thematic themes: public and political, economic and social, family and cultural, health and safety, with violence as a cross-cutting issue for all these aspects of women’s lives.

The substantive equality provisions of CEDAW provide theoretical and normative tools to contend with the growing challenges of traditionalist cultural and religious patriarchy and neoliberal exploitation of women. This holds out promise but a large gap exists between normative policy and social practice. The promise of de jure and de facto equality for women cannot be fulfilled by law and philosophy alone. The necessary formulations and commitments to the goal of substantive equality have been made under the auspices of CEDAW. It remains to translate the formulation and commitment into political, economic, and social action, which will secure women’s capacity to participate as equal actors in the public sphere, to have equal opportunity in the economy, and to live in a state of equal autonomy to that of men in the family. This is the meaning of democratic citizenship for women and it is a condition precedent for a viable democracy for men and women alike.