

January 1996

## Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination against Women

Jo Lynn Southard

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### Recommended Citation

Jo Lynn Southard, *Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination against Women*, 8 Pace Int'l L. Rev. 1 (1996)

DOI: <https://doi.org/10.58948/2331-3536.1283>

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**PACE UNIVERSITY  
SCHOOL OF LAW**

**INTERNATIONAL LAW REVIEW**

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Volume VIII

1996

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**ARTICLES**

**PROTECTION OF WOMEN'S HUMAN  
RIGHTS UNDER THE CONVENTION  
ON THE ELIMINATION OF ALL  
FORMS OF DISCRIMINATION  
AGAINST WOMEN**

**Jo Lynn Southard†**

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## I. INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination Against Women<sup>1</sup> represents the universalist<sup>2</sup> response to women's human rights within the world community through a document based in liberal political theory. This article, a feminist interpretation of CEDAW, examines the ability of universalism to protect and promote women's human rights, and it also analyzes the ability of liberal equality to accomplish the realization of women's human rights. Section I contains a brief

<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, 34 U.N. GAOR, Supp. No. 21 (A/34/46), at 193, U.N. Doc. A/RES/34/180, 1249 U.N.T.S. 14 (entered into force 3 Sept. 1981), *reprinted in* 19 I.L.M. 33 (1979) [hereinafter CEDAW].

<sup>2</sup> For an example of the scholarly promotion of the universalist position, see Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985).

discussion of the universalism/relativism<sup>3</sup> debate in international human rights law. It assigns CEDAW to the universalism side of the debate and depicts CEDAW as a document based in liberal political theory. Section I also analyzes the differences between equality and equity as theories for realizing women's human rights, and discusses the various schools of feminist legal theory.

Section II examines the position of women's human rights prior to the implementation of CEDAW. These rights concern the role of women in the family when family relations were treated as private associations which should not involve the legal system. Then, section II discusses CEDAW's place in international law. It examines the role of women as defined by the United Nations, the sponsor of CEDAW. This section situates CEDAW within the realm of international human rights law.

Section III is a feminist analysis of CEDAW. The substantive articles of CEDAW are arranged by general subject areas: political and civil rights; judicial and law enforcement rights; education and health care; non-governmental discrimination; customary discrimination; de-criminalization of gender; full development of women; *de facto*<sup>4</sup> inequality; and systemic inequality. This analysis of CEDAW inquires into who is to decide which steps are necessary for realizing women's human rights, in addition to the standards utilized for those decisions. This section highlights the androcentric foundation of CEDAW.

Section IV calls for a greater inclusion of women in deciding their own fate and an equitable view of women's human rights. Currently, these rights are advanced as equality rights, meaning the rights of women are protected only to the extent that they can be defined in terms of the human rights of men. By

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<sup>3</sup> Universalism is defined as "an ethical theory that the good of all men should take precedence over that of an individual." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2501 (1976). Relativism is "a view that theories of what is right and good are relative in that ethical truths depend upon the individuals and groups holding them so that what is considered right and good by one person or group may be considered wrong and bad by another." *Id.* at 1916.

<sup>4</sup> *De facto* "is used to characterize . . . a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate." BLACK'S LAW DICTIONARY 416 (6th ed. 1990).

viewing human rights on an equitable basis, the differences between men and women can be celebrated without being cause for discrimination. This may serve to protect cultural variations, which are at the heart of the relativist position and the universal right to culture.

#### A. *Universal Human Rights*

Universalism is one position in the debate over the role of culture in the protection and promotion of human rights. In simple terms, universalists believe that human rights do not vary in their application, regardless of the country or culture in which they are applied.<sup>5</sup> Alternatively, relativists believe that the contents of human rights should be understood through the cultural setting in question.<sup>6</sup> An enlightening recent example of this debate can be found in the media coverage of the caning of Michael Fay in Singapore. Fay, an eighteen-year-old American citizen living in Singapore, was sentenced to caning after being convicted of acts of vandalism. The sentence was discussed widely in the United States and all over the world.<sup>7</sup> Ching-Ning Chu, President of Asian Marketing Consultants, expressed the relativist view when she said, "Singaporeans choose the kind of lifestyle that they want . . . . We should respect the Singaporean law. If I want to live in Singapore, I will respect the Singapore law."<sup>8</sup> Representing the universalist position, Nadine Strossen, President of the American Civil Liber-

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<sup>5</sup> Tesón, *supra* note 2, at 890.

<sup>6</sup> Tesón, *supra* note 2, at 870. See generally Adamantia Pollis, *Liberal, Socialist and Third World Perspectives on Human Rights*, in TOWARD A HUMAN RIGHTS FRAMEWORK 1 (Adamantia Pollis et al. eds., 1982).

<sup>7</sup> See, e.g., *American Teenager Appeals on Caning to Singapore President*, AGENCE FRANCE PRESSE, April 20, 1994; Anna Blundy, *American Youth Begs for Mercy from Caning; Flogging Inhumane, Rights Groups Says*, THE OTTAWA CITIZEN, April 21, 1994, at A12; Asad Latif, *Caning Turned Deftly into Issue of Freedom and Basic Rights*, THE STRAITS TIMES (Singapore), April 17, 1994, at 8; Geoffrey Levy, *In Singapore, Any Day Now, This 18-Year-Old Will Be Flogged Unconscious for Vandalizing Cars. Barbarism? Or Effective Justice in a Country Which Has Purged its Streets of Crime? So What Are the Lessons for Britain?*, DAILY MAIL (London), March 24, 1994, at 14; Philip Shenon, *U.S. Youth in Singapore Loses Appeal on Flogging*, N.Y. TIMES, April 1, 1994, at A5.

<sup>8</sup> *Crossfire* (CNN television broadcast, April 15, 1994) (transcript on file with PACE INT'L L. REV.).

ties Union, referred to the Singaporean practice of caning as "barbaric and . . . rejected by civilized society."<sup>9</sup>

The question of whether to privilege culture or to privilege universal human rights has been an on-going debate. Its beginnings can be found in discussions over nationalism<sup>10</sup> versus universalism and nationalism versus self-determination.<sup>11</sup> The debate is complicated by the universal norm of the realization of cultural rights, expressed in article 22 of the Universal Declaration of Human Rights. This guarantees that "[e]veryone . . . is entitled to [the] realization . . . of the . . . cultural rights indispensable for his [sic] dignity and the free development of his [sic] personality."<sup>12</sup> This universal standard places universalists in a position to protect cultural human rights variations so that the universal right to realize one's own culture is protected. Proponents of cultural relativism and proponents of universalism used the United Nations Conference on Human Rights in Vienna in June of 1993 as yet another forum for their on-going debate.<sup>13</sup>

#### B. CEDAW as a Liberal Text

In addition to representing universalism, CEDAW represents the liberal tradition of equality. Liberal political theory is based on the concepts of "[r]ationality, individual choice, equal rights and equal opportunity."<sup>14</sup> In this model, dominated groups strive to be granted the same rights enjoyed by the dominant group.<sup>15</sup> Therefore, rights are defined by the dominant group and the dominated groups must conform their desires to these definitions. In the United States, this philosophical base has led to an attempt to define the medical aspects of pregnancy as being essentially the same as various medical conditions

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<sup>9</sup> *Id.*

<sup>10</sup> Nationalism is defined as the "devotion to the interests of a particular nation." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 874 (1981).

<sup>11</sup> Self-determination is defined as the "[f]reedom of a people or area to determine its own political status." *Id.* at 1176.

<sup>12</sup> Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/80, at 71 (1948).

<sup>13</sup> See, e.g., Lim Teck Ghee, *Human Rights After Vienna: End to Gloom?*, BUS. TIMES, July 31, 1993, at 1.

<sup>14</sup> Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829 (1990).

<sup>15</sup> *Id.* at 831.

faced by men.<sup>16</sup> This comparison is complicated at best and impossible at worst. CEDAW promotes this liberal tradition of equality by defining discrimination against women as the "im-pair[ment] or nullification] of the recognition, enjoyment or exercise by women, . . . on [the] basis of equality of men and women, of human rights."<sup>17</sup>

By 1992, 117 countries<sup>18</sup> were bound by CEDAW. However, many of these countries practice customs that allegedly violate the human rights of women.<sup>19</sup> Therefore, in spite of this widespread commitment to the equality of men and women, cultural practices such as female genital mutilation, veiling of women, dowry, and woman battering continue. The claimed rationale behind these practices is often the biological differences between men and women. As will be seen, however, these practices are based actually on cultural constructs of the differences between the genders. Whether women function openly as the carriers of tradition, as they do in countries practicing female genital mutilation and veiling of women; or whether women are devalued within a society to the extent that practices which harm them are not zealously outlawed, as is the case with dowry in India; or whether a practice is so deeply entrenched within a culture that it is not even recognized as a cultural tradition, as with the case of woman battering in the United States, women and men are clearly not treated equally.<sup>20</sup> Fur-

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<sup>16</sup> See, e.g., Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985).

<sup>17</sup> CEDAW, *supra* note 1, at art. 1 (emphasis added).

<sup>18</sup> KATARINA TOMASEVSKI, WOMEN AND HUMAN RIGHTS 108 (1993).

<sup>19</sup> See, e.g., *Id.* at 117 (signatories to CEDAW include Ghana, Kenya and Egypt; countries in which female genital mutilation is practiced; and Iraq, Jordan and Yemen; countries in which the Islamic tradition of *purdah* is practiced). *Purdah* is defined as the practice of secluding women from men. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1061 (1981). India and the United States have signed but not ratified CEDAW. BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 928 (Burns H. Weston, et al. eds., 1990). This is true even though the practice of dowry leads to the deaths of thousands of women in India and woman battering in the United States is accepted as a cultural norm. See Jo L. Southard, *Gypsies in the Palace: Relativism, Universalism and Women's Human Rights* (1994) (unpublished manuscript, on file with PACE INT'L L. REV.).

<sup>20</sup> See Edward Broadbent, *Getting Rid of Male Bias, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS* 10, 10 (Joanna Kerr ed., 1993). "The truth is that the international community has done precious little to correct these abuses." *Id.*

thermore, liberal equality does not hold much hope for rectifying the disparate treatment of women and men.

### C. *Equality and Equity*

CEDAW, drafted under the auspices of the male-dominated United Nations,<sup>21</sup> calls for States Parties to "ensure to women, on equal terms with men, the right[s]"<sup>22</sup> to vote and be eligible for election; to control their own nationality; to have access to education, employment and health care; to have full legal capacity; to have equality in the context of marriage; and to enjoy other rights "on equal terms with men."<sup>23</sup>

In article 6, CEDAW calls for the elimination of prostitution and the trafficking of women, an international problem peculiar to women.<sup>24</sup> However, nowhere does CEDAW mention rape, woman battering, or other forms of gender-based violence; abortion, forced childbirth or female infanticide; or female genital mutilation, veiling or other forms of abusive cultural or religious practices. Nevertheless, CEDAW does call for the modification of "the social and cultural patterns of conduct of men and women, with a view to[wards] achieving the elimination of prejudices."<sup>25</sup> Even though CEDAW serves an important function in bringing women's human rights center stage in the international human rights arena, it continues the androcentric approach to women's human rights by using a male standard for determining these rights.

The various schools of feminist legal analysis, including liberal feminism,<sup>26</sup> radical feminism,<sup>27</sup> cultural feminism,<sup>28</sup> and

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<sup>21</sup> Barbara Adams, *The UN, World Conferences and Women's Rights*, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 115, 115.

The U[nited] N[at]ions is an arena in which women have raised concerns and influenced agendas, particularly during the U[nited] N[at]ions Decade for Women, through the CEDAW and with the monitoring of the Forward Looking Strategies. Yet, it is a male-dominated system, and this influences processes of decision-making and concepts of participation.

Barbara Adams, *The UN, World Conferences and Women's Rights*, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 115, 115.

<sup>22</sup> CEDAW, *supra* note 1, at art. 7.

<sup>23</sup> CEDAW, *supra* note 1, *passim*.

<sup>24</sup> CEDAW, *supra* note 1, at art. 6.

<sup>25</sup> CEDAW, *supra* note 1, at art. 5.

<sup>26</sup> "Liberal feminism is rooted in the belief that women, as well as men, are rights-bearing, autonomous human beings." Cain, *supra* note 14, at 829.

postmodern feminism,<sup>29</sup> have been grappling with the issues of equality for several years. Liberal feminists assert a theory of equality based on liberal political theory that urges equal opportunity for women.<sup>30</sup> Because the theory of equality is based on the principle that people in similar situations should be treated similarly, liberal feminism has been criticized as unable to deal with situations where men and women are truly not similarly situated.<sup>31</sup> This is true in areas of cultural, societal and biological differences. For instance, issues that arise out of pregnancy do not have a corollary among men.

Radical feminists have responded to liberal feminists by emphasizing women as an oppressed class.<sup>32</sup> When comparing the situations of men and women, radical feminists highlight the differences between the genders. They argue that these differences are constructed in a way that benefits men and allows for the continued oppression of women.<sup>33</sup>

Like radical feminists, cultural feminists focus on the differences between men and women. However, cultural feminists emphasize the value of these differences.<sup>34</sup> They contend that men have defined the qualities of women in a way that devalues these qualities.<sup>35</sup>

Postmodern feminists avoid discussing women as a group. They recognize that women are often situated differently from one another.<sup>36</sup> Therefore, the diversity among women is highlighted in this theory.

Feminist theories contain not only differences but commonalities. It is those commonalities I will focus on to analyze the international community's conception of and response to women's issues via CEDAW. To that end, I will "rest[ ] on the fun-

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<sup>27</sup> "[R]adical Feminis[m] focus[es] on women as a class, typically as a class that is dominated by another class known as men." Cain, *supra* note 14, at 832.

<sup>28</sup> Cultural feminism embraces the characteristic differences between men and women. Cain, *supra* note 14, at 836.

<sup>29</sup> Postmodern feminism supports the gender-based categorizations as being an inherent part of the social construct. Cain, *supra* note 14, at 838.

<sup>30</sup> Cain, *supra* note 14, at 829.

<sup>31</sup> Cain, *supra* note 14, at 830-31.

<sup>32</sup> Cain, *supra* note 14, at 832.

<sup>33</sup> Cain, *supra* note 14, at 832-33.

<sup>34</sup> Cain, *supra* note 14, at 835-36.

<sup>35</sup> Cain, *supra* note 14, at 838.

<sup>36</sup> Cain, *supra* note 14, at 839.

damental notion that [a] wom[a]n's experience is the central starting point of theory: theory flows from experience in the world, and then theory refines and modifies that experience."<sup>37</sup> It seems clear that the inclusion of women's voices in the international arena is the first and essential step to the inclusion of their experiences and concerns. It should be unremarkable that "[p]eople in power should not be privileged to dictate appropriate ways for disempowered people to give voice to their sense of hurt and exclusion."<sup>38</sup> Rather, the oppressed should be allowed and encouraged to give voice to their own oppression and to formulate strategies that are appropriate in overcoming that oppression.

As an expression of women's human rights, CEDAW is most closely aligned with the liberal feminism, or liberal political, school of thought. CEDAW calls for an elimination of discrimination against women so that women may participate "on equal terms with men, in the political, social, economic and cultural life of their countries."<sup>39</sup> This approach continues to entrench the male-dominated view of equality. That is, equality is to be treated like a man. When true differences, biological or cultural, between women and men occur, they must be accounted for in relation to the male standard. Therefore, article 16 calls for measures to "ensure, on a basis of equality of men and women, . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children."<sup>40</sup> Biologically, however, women and men do not have the same experiences with pregnancy and childbirth. A woman cannot deny maternity, she cannot walk away from a pregnancy, and, realistically, she will bear the greatest responsibility in child rearing. CEDAW may attempt to legislate equality in these matters, but it cannot be done. Legislation will not suddenly enable men to get pregnant, nor will it allow women to deny that they are pregnant.

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<sup>37</sup> Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 521 (1992).

<sup>38</sup> Peter M. Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033, 1040 n.14 (1990).

<sup>39</sup> CEDAW, *supra* note 1, at pmb., para. 7.

<sup>40</sup> CEDAW, *supra* note 1, at art. 16(e).

In the area of social or cultural differences, CEDAW calls for education and employment opportunities that are available to men to be available to women.<sup>41</sup> In article 11, CEDAW calls for the "support[ ] [of] social services to enable parents to combine family obligations with work responsibilities."<sup>42</sup> However, the family obligations of women and men are not equal to begin with, since women carry the major responsibility of child rearing.

The problem with CEDAW's view of equality, or any view of equality, is the standard used to measure such equality. Because men have been the standard for many years, women must attempt to fit an androcentrically constructed mold. CEDAW fails to adequately address the systemic changes that are needed to protect the human rights of women. CEDAW is, however, a conventional and customary expression of international law. A change in the way the international community views equality will address many of the shortcomings of CEDAW and will procure the systematic changes necessary to promote the human rights of women.

Canadian law professor Diana Majury argues for equality as a strategy, thereby abandoning the search for a universal meaning to equality.<sup>43</sup> Instead, each situation is analyzed to determine its inherent inequality. The inequality present in each setting will be different depending on its circumstances. In certain situations, men and women are similarly situated, but they are being treated differently. In other situations, men and women, for biological or social reasons, are not similarly situated, and the treatment afforded to women further oppresses them. For example, it further stigmatizes women to say that they cannot engage in a particular career or educational program because they may get pregnant. On the other hand, simply ignoring the fact that women get pregnant is not an adequate response. An equitable accommodation for the pregnant woman must be created to enable her to receive the same opportunities that a man receives.

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<sup>41</sup> CEDAW, *supra* note 1, at arts. 10-11.

<sup>42</sup> CEDAW, *supra* note 1, at art. 11(2)(c).

<sup>43</sup> See Diana Majury, *Strategizing in Equality*, 3 WIS. WOMEN'S L.J. 169 (1987).

Many of the human rights that are found in international law are general in nature. The international community continues to discuss the meaning of torture, intervention, self-determination and many other terms. Equality, as outlined in CEDAW, functions the same way. Each new charge of discrimination against women must be analyzed within its own context, resulting in different solutions and in different methods for achieving those solutions. When equality is viewed as a strategy, the discovery of the true meaning of equality is not part of the process. Therefore, equality as a strategy, framed by CEDAW, has the potential to provide the forum in which female genital mutilation, veiling, dowry, woman battering, and other gender-specific cultural traditions are analyzed as abuses of women's human rights.

An analysis of woman-directed cultural practices shows that women are often situated differently from one another. However, all of these practices serve the same goal, maintaining the oppression of women as a group. Although there are differences among feminist legal theorists, all theories recognize that women's voices are silenced, and that the concept of gender is not a factor in municipal or international decision-making.<sup>44</sup> In this feminist legal analysis, I am not attempting to apply one particular strand of feminist legal theory, nor, am I claiming that there is one "distinctive feminine morality."<sup>45</sup> Instead, feminist theory

signifies an interest (gender as an issue of primary importance); a focus of attention (women as individuals and as members of groups); a political agenda (real social, political, economic and cultural equality regardless of gender); a critical stance (an analysis of "masculinism" and male hierarchical power or "patriarchy"); a means of reinterpreting and reformulating substantive law so that it more adequately reflects the experiences of all people; and an alternative method of practicing, talking about and learning the law.<sup>46</sup>

Cultural practices affecting women can be analyzed under several different universal international human rights stan-

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<sup>44</sup> Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 A.J.I.L. 613, 623 (1991).

<sup>45</sup> *Id.* at 616.

<sup>46</sup> *Id.* at 634.

dards. Female genital mutilation can be identified as torture or inhuman treatment. Veiling can be seen as a violation of the freedom of movement and the freedom of religion. It can be argued that dowry is a violation under any of the treaties that guarantee men and women the equal right to enter marriage. Furthermore, the practices resulting from the dowry system violate any treaty guaranteeing the right to life. Woman battering is a denial of equal treatment before the law and a violation of the right to security. However, since all of these practices deal with the treatment of women in a given culture, CEDAW will be utilized as a template of women's human rights. Nonetheless, the analysis applies to any (androcentric) universal standard that one might use to protect and promote the human rights of women.

## II. PATRIARCHY IS UNIVERSAL

### A. *Women in International Law Before CEDAW*

Although the concept of non-discrimination against women was included in the United Nations Charter,<sup>47</sup> women were considered objects of international law particularly in relation to their roles as wives and mothers.<sup>48</sup> The Universal Declaration of Human Rights called for the equality of men and women to enter into a marriage, to dissolve a marriage, and to be treated as equals during the marriage.<sup>49</sup> In addition, the Universal Declaration held that "motherhood . . . [is] entitled to special care and protection."<sup>50</sup> Even though these areas require special protection, singling them out while ignoring other human rights for women perpetuates the belief that women's human rights revolve around the family.<sup>51</sup> According to the international

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<sup>47</sup> U.N. CHARTER pmbl.

<sup>48</sup> TOMAŠEVSKI, *supra* note 18, at 100.

<sup>49</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 16.

<sup>50</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 25, para. 2.

<sup>51</sup> See, e.g., JANICE WOOD WETZEL, *THE WORLD OF WOMEN: IN PURSUIT OF HUMAN RIGHTS*, 154-55 (1993).

It is believed to be "natural" that women's place is in the home, regardless of whether or not they are employed. It is assumed that the tasks they are expected to perform are universal, based on the biological imperatives of sex. Bearing and rearing children, their most important role, defines their entire lives. Since it is assumed as well that men control families, it is deemed just as "natural" that they are the heads of them. In governmental

community, marriage and child bearing are the paramount roles for women. Therefore, it is understandable that international law would be loathe to interfere with practices that influence a woman's marriageability within her culture.

It is not a coincidence that many of the cultural practices that are required of women, for example, female genital mutilation, *purdah*, dowry, and woman battering relate to marriage and are largely ignored by the international community. They reinforce the idea that a woman's role is to be a "wife." As such, these practices limit a woman's choices. Little girls are mutilated to assure their purity for marriage; young women are veiled to protect their virtue for marriage; families save their whole lives for a dowry substantial enough to assure a good marriage for their daughters; and woman battering must be endured by women in order to stay married. A woman who chooses not to marry is not even considered. Whether she is a lesbian, a bisexual, or a heterosexual who simply prefers not to marry, she is seen as denying the essential role of a woman. Therefore, a woman who is not married is devalued in her society.

In addition to viewing women as wives and mothers, international human rights instruments emphasize that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>52</sup> Several international human rights instruments also contain language pro-

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policy and law throughout the world, families are called "female-headed" only when men do not live in them.

*Id.*

<sup>52</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 16(3). Language designating the family as the natural and fundamental group of society appears in other international documents. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316, at art. 10(1) (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6313, at art. 23(1) (1966); African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, at art. 18 (1981), *reprinted in* 21 I.L.M. 59 (1982) ("The family shall be the natural unit and basis of society."); American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II/23 rev.2, at art. 17 (1970), *reprinted in* 9 I.L.M. 673 (1970); European Social Charter, *opened for signature* Oct. 18, 1961, 529 U.N.T.S. 89, at art. 16, Europ. T.S. 35 (entered into force Feb. 26, 1965) ("[T]he family . . . is a fundamental unit of society . . .").

protecting the privacy of the family from state intervention.<sup>53</sup> Although most of these conventions contain provisions that call for the equal treatment of men and women within their marriage, special status and protection to the family reinforces the traditional public/private distinction. This distinction is based on the fact that the private arena of the family is subject to less legal restrictions than the public arena.<sup>54</sup> As the United States Supreme Court has noted, marriage is "a relationship lying within the zone of privacy . . . . Marriage is . . . intimate to the degree of being sacred. It is an association that promotes a way of life . . . ."<sup>55</sup> As in the United States, the international community contends that marriage should be governed from a distance and then governed as little as possible.

The emphasis placed on a woman's role as wife and mother in international conventions and resolutions confines her to the family arena. Therefore, she is excluded from the public arena where she would be judged by her occupation, education and other similar criteria. Moreover, the international community

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<sup>53</sup> See, e.g., Universal Declaration of Human Rights, *supra* note 12, at art. 12 ("No one shall be subjected to arbitrary interference with his [sic] privacy, family, home or correspondence . . . ."); International Covenant on Civil and Political Rights, *id.*, *supra* note 52, art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his [sic] privacy, family, home or correspondence . . . ."); African Charter on Human and Peoples' Rights, *supra* note 52, at art. 18 ("[The family] shall be protected by the State which shall take care of its physical health and moral."); American Convention on Human Rights, *supra* note 52, at art. 11(2) ("No one may be the object of arbitrary or abusive interference with his [sic] private life, his family, his home . . . ."); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, at art. 8(1) & (2), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) ("Everyone has the right to respect for his [sic] private and family life . . . . There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society . . . .").

<sup>54</sup> See, e.g., Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 101 (1993).

At the root of the enshrinement of family in conventional human rights law lies a convergence of narratives which legitimates a hierarchical ordering of intimate relations; this convergence is hidden behind the notion that the family as a social unit is beyond the purview of the state. Love and intimacy become guards on the borders that place the family unit "beyond justice." Thus, beyond justice are the distribution of crucial rights and responsibilities.

*Id.*

<sup>55</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

calls for the special protection of the family, mandating that the state remain outside family issues in all but a few instances. As a result, women's lives, to the extent that they revolve around the family, remain outside the scope of legal protection, whether that protection is international or national.

These twin theses—that women's lives revolve around marriage and child bearing and that families should be shielded from government intervention as much as possible—have allowed the international community to avoid, to some degree, the promotion of women's human rights and, to a greater degree, the enforcement of those rights. Although the Universal Declaration of Human Rights guarantees to everyone the security of person,<sup>56</sup> the "U[nited] N[ations] Commission on Human Rights has never seriously looked at the myriad of forms of violence against women."<sup>57</sup> The division between the public and private world that occurs in individual states has been replicated by the international community. The largest number of reservations to CEDAW are reservations to article 16, which calls for the elimination of discrimination in marriage and the family. Therefore, whether national or international, "[t]he law just does not reach to the private sphere of the family."<sup>58</sup>

Other human rights afforded to women by the international community are based on a male standard.<sup>59</sup> When rights are created based on the standard of any dominant group, certain, often false, assumptions underlie the application of these rights

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<sup>56</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 3.

<sup>57</sup> Edward Broadbent, *Human Rights Conference Challenges Nations to Act at Last*, THE GAZETTE (Montreal), June 11, 1993, at B3.

<sup>58</sup> Rebecca Cook, *Gaining Redress Within a Human Rights Framework*, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 13, 13.

<sup>59</sup> WETZEL, *supra* note 51, at 73.

The organization of society has been developed from the standpoint of men, what interests them, and is relevant to them. Until recently, it has been written by, about, and for men who listened to one another. Women have been systematically excluded, having had no written history, no poetic or artistic tradition, no share in religious ideas, no political philosophy, nor representation of society from their perspective. The means available to women to think about, image, and put into action their experience has been manufactured for them, not by them. [sic] [S]uch power exists for men simply because they are a member of a ruling social category, not necessarily because of any individual characteristic. When they speak, they speak with the authority of the category, never standing alone as each woman in every society must do.

WETZEL, *supra* note 51, at 73.

to the dominated groups. Catherine MacKinnon, a feminist legal scholar, makes this argument in reference to the freedom of speech guaranteed to the citizens of the United States by the First Amendment.<sup>60</sup> She maintains that freedom of speech assumes that there will be "equal social access to the means of expression."<sup>61</sup> Since social inequality exists between men and women in the United States, this presumption is untrue. It is impossible for women to participate in the "free trade [of] ideas"<sup>62</sup> if access to the marketplace is restricted.

In the international context, the "right to life, liberty and security of the person"<sup>63</sup> currently does not include freedom from woman battering or female genital mutilation. This is because the content of this right is androcentric in nature. A non-patriarchal system would recognize that the concept of freedom from "cruel, inhuman, or degrading treatment"<sup>64</sup> would encompass dowry deaths and female genital mutilation.<sup>65</sup> Moreover, in spite of their culture, Middle-Eastern women would have their freedom of religion protected. Instead, in some of its manifestations, the concept of *purdah* includes restricting women from entering mosques.<sup>66</sup> The international protection is provided to the men who use religion as a basis for their inequitable treatment of women.

In recent decades, the international community has begun to look at women's human rights more broadly. The International Women's Year began in 1975. However, it became clear that the problems faced by women required more than a year to be addressed adequately; therefore, the United Nations Decade for Women was proclaimed.<sup>67</sup> The initial conference in Mexico City led to the "World Plan of Action," resulting in 90% of the world's governments instituting some mechanism for promoting

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<sup>60</sup> CATHERINE A. MACKINNON, *Linda's Life and Andrea's Work*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 127, 129 (1987). See U.S. CONST. amend. I.

<sup>61</sup> *Id.*

<sup>62</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>63</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 3.

<sup>64</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 5.

<sup>65</sup> See Edward Broadbent, *Getting Rid of Male Bias*, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 10, 11.

<sup>66</sup> JEAN SASSON, PRINCESS: A TRUE STORY OF LIFE BEHIND THE VEIL IN SAUDI ARABIA 65 (1992).

<sup>67</sup> WETZEL, *supra* note 51, at 2.

women's human rights.<sup>68</sup> In 1979, midway through the United Nations Decade for Women, the United Nations General Assembly adopted CEDAW.<sup>69</sup> In spite of this apparent rise in consciousness, however, it continued to be men who determined how to protect women's human rights. Although women make up 50% of the voters in the world, "they hold less than 8 percent of the seats in national legislatures."<sup>70</sup> Even at the Nairobi Conference that marked the end of the United Nations Decade for Women,

[m]en, though relatively few in number at the conference, sometimes served as spokesmen for their delegations. Men were also often involved in negotiating the wording of paragraphs on political issues and were highly visible as policy advisers to the women . . . . United Nations figures showed that at least fourteen of the delegations were led by men and that the 2,020 delegates included 357 men.<sup>71</sup>

## B. CEDAW's Role in International Law

By 1992, 117 countries ratified CEDAW.<sup>72</sup> Nonetheless, today the status of women worldwide remains inferior to that of men. Although women represent approximately half of the world's population, they receive one-tenth of the world's income and own less than one-hundredth of the property throughout the world.<sup>73</sup> If the unpaid domestic labor of women was included in gross national product figures, it would amount to 4

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<sup>68</sup> WETZEL, *supra* note 51, at 2-3.

<sup>69</sup> CEDAW, *supra* note 1.

<sup>70</sup> Elizabeth Mehren, *International Gender Gap Is Wide Open*, L.A. TIMES, April 12, 1985, at 1.

<sup>71</sup> *U.S. Delegate Protests Conference On Women*, N.Y. TIMES, July 28, 1985, at 1.

1. In addition, [a]n American delegate, Alan L. Keyes, who seemed never more than a few feet from [U.S. Delegation Chairwoman Maureen] Reagan during debates, took a leading role by demanding points of order. Men on the Egyptian, Syrian, and Palestine Liberation Organization delegations dominated the proceedings at times and engaged in most debates. Most of the interpreters were men, as was the official United Nations legal adviser to the conference, who was often called on to aid [Conference Chairwoman Margaret] Kenyatta.

*Id.*

<sup>72</sup> TOMASEVSKI, *supra* note 18, at 108.

<sup>73</sup> Alya Baffoun, *Feminism and Muslim Fundamentalism: The Tunisian and Algerian Cases*, in *IDENTITY POLITICS & WOMEN: CULTURAL REASSERTIONS AND*

trillion dollars.<sup>74</sup> There are over 130 million more illiterate women than men throughout the world, yet there are 80 million more boys than girls in primary and secondary schools.<sup>75</sup> Unfortunately, CEDAW does little to change the status of women.

States Parties retained eighty substantive reservations to CEDAW, more reservations than any other international convention.<sup>76</sup> Among those reservations were: eight substantive reservations to article 2, calling for the end of discrimination against women; six substantive reservations to article 7, calling for the elimination of discrimination against women in public and political life; eleven substantive reservations to article 9, calling for the equal citizenship rights of women; ten substantive reservations to article 15, calling for the full legal capacity of women; and seventeen substantive reservations to article 16, calling for the right of equality in marriage and the family.<sup>77</sup> The practical effect of these reservations "was understood by the objecting [S]tates [Parties] to be that the reserving [S]tates [Parties] would only observe those CEDAW norms which they would have observed anyway, in the absence of [CEDAW]. In other words, treaty participation did not signify a commitment to the provisions of the treaty . . . ."<sup>78</sup> These reservations were allowed in spite of the fact that international law, in the Vienna Convention on the Law of Treaties, says that a State Party "may formulate a reservation [to a treaty] unless . . . the reservation is incompatible with the object and purposes of the treaty."<sup>79</sup>

In June of 1993, the United Nations Conference on Human Rights was held in Vienna.<sup>80</sup> Much to the surprise of many in

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FEMINISMS IN INTERNATIONAL PERSPECTIVE 167, 169 (Valentine M. Moghadam ed., 1994).

<sup>74</sup> Mehren, *supra* note 70, at 1.

<sup>75</sup> Mehren, *supra* note 70, at 1.

<sup>76</sup> Joanna Kerr, *The Context and the Goal*, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 3, 5. See also Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 A.J.I.L. 281 (1991).

<sup>77</sup> TOMÁŠEVSKI, *supra* note 18, at 118.

<sup>78</sup> Clark, *supra* note 76, at 317.

<sup>79</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, at art. 19 (entered into force Jan. 27, 1980).

<sup>80</sup> Joanna Kerr, *UN Rights Conference: Women Take Centre Stage*, THE OTTAWA CITIZEN, June 29, 1993, at A11.

attendance, women were among the most organized and vocal of the groups present.<sup>81</sup> As a result, the Vienna Declaration and Programme of Action contained a clause stating that women's human rights are "an inalienable, integral and indivisible part of universal human rights."<sup>82</sup> Additionally, it called for an end to acts of gender-based violence, "including those resulting from cultural prejudice . . . [and it stated that] [t]he human rights of women should form an integral part of the United Nations human rights activities."<sup>83</sup>

Universalists proclaim that there are advantages to the concept of universal human rights standards, such as those represented by CEDAW and the Vienna Declaration. This is true particularly if they are general standards that can be accepted as universal principles. On the other hand, general standards should not be so vague that they do not provide workable guidelines. Currently, the protection that is available is on a universal or semi-universal regional level.<sup>84</sup> In contrast to relativism, universalism has strong support in the international community, as witnessed by the inclusion in the Vienna Declaration that "[t]he universal nature of these rights and freedoms is beyond question."<sup>85</sup>

CEDAW and the Vienna Declaration are universal statements of women's human rights. The United Nations Confer-

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<sup>81</sup> *Id.*

Amid the pessimism and confusion that have clouded the discussions at the United Nations World Conference on Human Rights in Vienna, there is one success story to be told: the effective performance of the women. Vienna was taken by storm by women's human-rights activists at the conference that ended Friday. After years of preparation, these women managed successfully to show the United Nations and official delegates that their governments have failed to promote and protect the rights of half of humanity. Women from Iran to Malaysia, from Canada to Chile, from South Africa to Tunisia came together to expose the huge gender gap in the recognition and protection of human rights and fundamental freedoms.

*Id.*

<sup>82</sup> Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, at art. I, para. 18(1) (1993), *reprinted in* 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration].

<sup>83</sup> Vienna Declaration, *id.*, at art. I, para. 18(2) & (3). *See also* Colm Boland, *Conference Sends Out Clear Signal on Women's Rights*, IRISH TIMES, June 26, 1993, at 7 ("[T]he major breakthrough in terms of the U[nited] N[ation]'s international declarations was a powerful new section on women's rights.").

<sup>84</sup> *See generally* Southard, *supra* note 19.

<sup>85</sup> Vienna Declaration, *supra* note 82, at art. I, para. 1(1).

ence was “[d]eeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world.”<sup>86</sup> Universalism provides a means of enforcement that can counter-act local patriarchy, but only if the international community recognizes the existence of that patriarchy and its inherent structure in the international realm. If women’s human rights are made truly universal and are promoted to incorporate the needs and desires of women,<sup>87</sup> the theory of universalism will make it more difficult to ignore women’s human rights or to “postpone” them until other goals are achieved.<sup>88</sup>

Of the 117 States Parties to CEDAW, forty-one submitted substantive reservations.<sup>89</sup> Nineteen countries submitted reservations relating to dispute resolution, which is expressly permitted by CEDAW, leaving twenty-two reservations to the substantive policy sections of CEDAW.<sup>90</sup> For example, Iraq filed reservations on article 2 (eliminating discrimination against women), article 9 (granting women equal rights in citizenship) and article 16 (eliminating discrimination against wo-

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<sup>86</sup> Vienna Declaration, *supra* note 82, at pmb., para. 10 (emphasis in original).

<sup>87</sup> See Carolyn Hannan-Andersson, *Integrating, Not Separating, Women in Development*, in OURS BY RIGHT: WOMEN’S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 119, 122.

It is also clear that the concept of human rights is unacceptable because it is based on male norms and does not take into consideration the needs and rights of women. The “add women and stir” concept of integration will not be adequate—there is a need for the transformation to impact on policy and practice in the mainstream, and for changes of attitudes within agencies to accommodate this shift of focus. Even those agencies which have a strong equity focus and a strong focus on human rights have not always recognized or emphasized women’s rights in an integrated manner.

Carolyn Hannan-Andersson, *Integrating, Not Separating, Women in Development*, in OURS BY RIGHT: WOMEN’S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 119, 122.

<sup>88</sup> See CYNTHIA ENLOE, BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS 62 (1989).

Women who have called for more genuine equality between the sexes—in the movement, in the home—have been told now is not the time, the nation is too fragile, the enemy is too near. Women must be patient, they must wait until the nationalist goal is achieved; *then* relations between men and women can be addressed. “Not now, later,” is advice that rings in the ears of many nationalist women.

*Id.* (emphasis in original).

<sup>89</sup> TOMASEVSKI, *supra* note 18, at 117.

<sup>90</sup> See Clark, *supra* note 76, at 282.

men in marriage). Egypt filed reservations on the same three articles. Jordan filed reservations on articles 9 and 16, as well as article 15 (granting women equality before the law and full legal capacity). Malawi and Tunisia have filed reservations to article 2 and Tunisia has filed reservations to articles 9 and 16.<sup>91</sup> With these reservations, the States Parties in question do "not consider as binding upon [themselves] the provisions of articles 2 [and others] as they conflict with Sharia Law based on Holy Quran and Sunna."<sup>92</sup>

These reservations violate the stated purpose of CEDAW "that everyone is entitled to all the rights and freedoms set forth [in the Universal Declaration of Human Rights]."<sup>93</sup> The Vienna Convention on the Law of Treaties states that a State Party may deposit reservations to a treaty it signs, "unless . . . the reservation is incompatible with the object and purpose of the treaty."<sup>94</sup> In the words of the preamble to CEDAW, the object and purpose of the treaty seems to be two-fold: a recognition that, although the principle of gender equality is included in the International Covenants on Human Rights, "extensive discrimination against women continues to exist,"<sup>95</sup> and that "[t]he full and complete development of a country, the welfare of the world, and the cause of peace require the maximum participation of women on equal terms with men in all fields."<sup>96</sup> Although article 28 of CEDAW states that "[a] reservation incompatible with the object and purpose of CEDAW shall not be permitted,"<sup>97</sup> the reservations noted above are incompatible with CEDAW's stated object and purpose.<sup>98</sup>

Regardless of the number of signatories to CEDAW, or the validity of the reservations submitted, CEDAW still represents emerging international customary law. The practice of States Parties support the finding that non-discrimination against wo-

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<sup>91</sup> TOMASEVSKI, *supra* note 18, at 118.

<sup>92</sup> Clark, *supra* note 76, at 299 *quoting* Multilateral Treaties Deposited with the Secretary-General: Status As At 31 December 1989, at 171, U.N. Doc. ST/LEG/SER.E/8 (1990).

<sup>93</sup> CEDAW, *supra* note 1, at pmbl., para. 2.

<sup>94</sup> Vienna Convention on the Law of Treaties, *supra* note 79, at art. 2(c).

<sup>95</sup> CEDAW, *supra* note 1, at pmbl., para. 6.

<sup>96</sup> CEDAW, *supra* note 1, at pmbl., para. 12.

<sup>97</sup> CEDAW, *supra* note 1, at art. 28(2).

<sup>98</sup> Clark, *supra* note 76, at 299.

men is not a norm of international law. However, the so-called psychological component - *opinio juris* - of customary law is fulfilled by CEDAW. The United Nations Charter affirmed the "equal rights of men and women"<sup>99</sup> and CEDAW is seen as an amplification of these rights. Additionally, the 1993 Vienna Declaration, reflecting the consensus of the 170 countries attending the conference, reaffirmed the equality of women and men.<sup>100</sup> It went further than any other treaty or declaration, except CEDAW, in protecting the rights of women. The Vienna Declaration promoted universal human rights "regardless of . . . cultural systems;"<sup>101</sup> protected against "gender-based violence and all forms of sexual harassment and exploitation;"<sup>102</sup> "prevented the systematic rape of women in war situations;"<sup>103</sup> and included several other sections relating directly to women's human rights.<sup>104</sup>

Reservations aside, CEDAW is second only to the International Convention on the Elimination of All Forms of Racial Discrimination<sup>105</sup> in the number of ratifications for an anti-discrimination treaty. The Convention on the Rights of the Child<sup>106</sup> was the only human rights treaty ratified in less time.<sup>107</sup> In spite of the reservations, CEDAW represents a legal and moral commitment by over half of the world's countries to eliminate gender discrimination. If CEDAW is recognized as a codification of more general statements contained in the United Nations Charter and the Vienna Declaration, virtually the entire world is obligated to eliminate discrimination against women.

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<sup>99</sup> UN CHARTER pmb., para. 2.

<sup>100</sup> Vienna Declaration, *supra* note 82, at pmb., para. 6. See also Chai Kim Wah, *UN World Conference on Human Rights: Basic Issues Left Open*, THE STRAITS TIMES (Singapore), July 4, 1993 at 12.

<sup>101</sup> Vienna Declaration, *supra* note 82, at art. I, para. 5.

<sup>102</sup> Vienna Declaration, *supra* note 82, at art. I, para. 18(2).

<sup>103</sup> Vienna Declaration, *supra* note 82, at art. I, para. 28.

<sup>104</sup> Vienna Declaration, *supra* note 82, at art. II(B)(3), paras. 36-44.

<sup>105</sup> Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

<sup>106</sup> Convention on the Rights of the Child, *opened for signature* Jan. 26, 1990, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (1989), with an addendum in 29 I.L.M. 1340 (entered into force Sept. 2, 1990).

<sup>107</sup> TOMAŠEVSKI, *supra* note 18, at 115.

At this time, the principle of non-discrimination against women is not a principle of international customary law. However, CEDAW is the most viable and far-reaching statement of women's human rights that currently exists. Since it has the potential to impact significantly on international law, it is important to analyze the efficacy of the treaty in promoting and protecting women's human rights.

### C. *Women and the United Nations*

CEDAW "spells out the meaning of equality and how it can be achieved. In so doing, the Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights."<sup>108</sup> The United Nations Department of Public Information reprint of CEDAW notes that "[t]he legal status of women receives the broadest attention" in CEDAW.<sup>109</sup> The other two major issues covered in CEDAW are the reproductive rights of women and "the influence of culture and tradition on restricting women's enjoyment of their fundamental rights."<sup>110</sup>

The United Nations Committee on the Elimination of Discrimination against Women [hereinafter the Committee] is charged with monitoring the implementation of CEDAW.<sup>111</sup> However, the Committee does not fare well in the United Nations hierarchy. Article 20 limits the Committee's meeting time to "normally . . . not more than two weeks annually."<sup>112</sup> No other organization charged with overseeing a United Nations human rights convention is limited in such a fashion.<sup>113</sup> Claims by the Committee that its working conditions are substandard compared to other human rights committees have also been reported.<sup>114</sup> It is clear that it is not only a lack of commitment on the part of States Parties to CEDAW, but a lack of commitment

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<sup>108</sup> Convention on the Elimination of All Forms of Discrimination Against Women at 1, U.N. Sales No. DPL/993 (1990).

<sup>109</sup> *Id.* at 1.

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 3. CEDAW, *supra* note 1, at art. 17.

<sup>112</sup> CEDAW, *supra* note 1, at art. 20(1).

<sup>113</sup> Theodor Meron, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 A.J.I.L. 213, 214 (1990).

<sup>114</sup> Charlesworth et al., *supra* note 44, at 624 n.70. The Committee was understaffed, under-funded, and lacked the authority to investigate claims of violations. Therefore, it relied upon information by State Parties to determinate violators.

on the part of its sponsoring agency, the United Nations, which results in CEDAW being unable to improve the status of women internationally.

The United Nations planned to staff 25% of its professional positions with women by 1982. They were unable to achieve that goal by 1986. In 1989, the United Nations Children's Fund had only four women in senior staff positions out of its twenty-nine positions. This is unfortunate since women are primarily responsible for child care throughout the world. In 1989, the Food and Agriculture Organization had fifty-one positions, none of which were held by women. This is true even though women are primarily responsible for food production in many areas of the world. Furthermore, the World Health Organization only has four women on its staff of forty-two.<sup>115</sup>

The Committee is made up of all women members. Besides this representation, women are "vastly underrepresented on U[nited] N[atations] human rights bodies."<sup>116</sup> Nonetheless, the Economic and Social Council has called upon States Parties to nominate both men and women to the Committee.<sup>117</sup> Therefore, while the United Nations is unable to meet its own goals for representation of women within the organization—goals that do not even reflect population realities—there is an attempt to reduce the representation of women on the Committee. This is one area where women need to maintain numerical power since it relates directly to the lives of millions of women.

### III. "WHY CAN'T A WOMAN BE MORE LIKE A MAN?"<sup>118</sup>— CEDAW'S APPROACH TO QUALITY

Assuming the Committee could function in a manner equal to other human rights committees within the United Nations, and assuming States Parties were precluded from making reservations that subvert the purpose of the treaty, would CEDAW be able to function as a vehicle for achieving "the equal rights of

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See Joanna Kerr, *The Context and the Goal*, in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS, *supra* note 20, at 3, 5-6.

<sup>115</sup> Charlesworth et al., *supra* note 44, at 623 n.60.

<sup>116</sup> Charlesworth et al., *supra* note 44, at 624.

<sup>117</sup> Charlesworth et al., *supra* note 44, at 624.

<sup>118</sup> ALAN JAY LERNER & FREDERICK LOWE, *A Hymn to Him My Fair Lady* (1956).

men and women?"<sup>119</sup> In the preamble to CEDAW, reference is made to earlier United Nations resolutions and conventions, noting that "States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights."<sup>120</sup> Furthermore, CEDAW recognizes that discrimination against women is not only detrimental to individual women, but to the development of society as a whole.<sup>121</sup> Poverty, racism, foreign domination and the absence of peace and security negatively impact women more than men.<sup>122</sup> In the preamble, CEDAW mentions the role of women in, and the contribution of women to, the family.<sup>123</sup> Therefore, although CEDAW does not reaffirm the family as the basic unit of society, it does continue the practice of placing great emphasis on the importance of relationships between women and their families. However, CEDAW calls for unspecified changes in the "traditional role of men as well as the role of women . . . in the family."<sup>124</sup>

CEDAW's preamble is a strong statement in support of women's human rights. It calls for changes in the family and in societal structures to bring about true equality for women. CEDAW notes that the accomplishment of other United Nations goals are diminished in their importance if women are not allowed to participate in the realization of these goals. It touches on the traditional roles of women and men and notes that these roles must be open to change. CEDAW addresses underlying societal norms and unquestioned assumptions in regard to women and their status in society. It is, however, the articles following the preamble that constitute the substantive parts of CEDAW, the International Bill of Rights for Women, to which the parties have agreed.

#### A. *Discrimination Against Women—Article 1*

Article 1 of CEDAW states:

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<sup>119</sup> CEDAW, *supra* note 1, at pmb., para. 1.

<sup>120</sup> CEDAW, *supra* note 1, at pmb., para. 3.

<sup>121</sup> CEDAW, *supra* note 1, at pmb., para. 7.

<sup>122</sup> CEDAW, *supra* note 1, at pmb., paras. 8, 10, 11.

<sup>123</sup> CEDAW, *supra* note 1, at pmb., paras. 13 & 14.

<sup>124</sup> CEDAW, *supra* note 1, at pmb., para. 14.

[f]or the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>125</sup>

Article 1 guarantees women equal rights to those of men. However, it is important to ask what standard is used to measure equality. Since women are the oppressed group, it necessarily follows that men are the oppressors. The phrase, "recognition, enjoyment or exercise," indicates that these rights exist for women. However, access to them is denied. The conclusion, therefore, is that women should be allowed access to the rights enjoyed by men with the male standard applying.

Are women allowed the same political rights as men? Are they allowed to vote, to run for public office, to exercise free speech and freedom of assembly, like men? The male standard ignores several essential societal entrenchments. Since women are primarily responsible for childcare,<sup>126</sup> who will watch their children while they vote and run for office? Women are also primarily responsible for feeding their families<sup>127</sup> and doing the household work. Since they are not compensated for these tasks, the international community does not consider them to be work.<sup>128</sup> However, who will take responsibility for these tasks while women run for office and participate in free speech activities? Since women are not compensated for the work that they do, or if compensated, they are compensated at a lower rate than men,<sup>129</sup> how will they be able to afford to start their own newspapers and television stations to enable them to participate in free speech? Who will pay for the traveling that needs to be done in order to start new political organizations or

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<sup>125</sup> CEDAW, *supra* note 1, at art. 1.

<sup>126</sup> TOMASEVSKI, *supra* note 18, at 21.

<sup>127</sup> Barber Conable, President of the World Bank, *quoted in* ELISABETH BUMILLER, MAY YOU BE THE MOTHER OF A HUNDRED SONS: A JOURNEY AMONG THE WOMEN OF INDIA 13 (1990).

<sup>128</sup> TOMASEVSKI, *supra* note 18, at 50.

<sup>129</sup> BUMILLER, *supra* note 127. *See also* TOMASEVSKI, *supra* note 18, at 55.

to participate in existing political organizations under the right to freely assemble?

The obstacles women must overcome to participate in the political arena often result in lower participation by women, thus, "proving" that women are not interested in participating in this arena. However, it is the societal structure which prevents women from participating. Even if women are able to overcome these obstacles, their participation will be based on a male standard. Political parties and elections are usually adversarial in nature, a method of interaction associated more with men than with women.<sup>130</sup> Thus, if a woman attends a political meeting where she disagrees with a speaker, she must leap to her feet and challenge that speaker. If she takes the time to analyze the statement, to consider the ramifications and to think about a response, the meeting has moved on to a new topic. No one kept her from speaking; she had her chance. Why didn't she say something if she disagreed?

In addition to men and women having different methods of communication, women are reared not to disagree with men.<sup>131</sup> Past barriers placed before women kept them from political participation, thereby allowing men to gain experience with political participation. Hence, it takes a tremendous act of courage for women to challenge the views of men since men are familiar with the political process.

Article 1 provides women with equal access to economic areas. However, women's traditional workplace is in the home, therefore, it is neither compensated, nor recognized as work. Even though CEDAW does not allow for States Parties to establish laws which limit the work that women can do, CEDAW does not recognize the significant economic contribution already made by women. A working man whose wife "does not work" is freed up to do his job. His wife is raising his children, cleaning his house, cooking his food and washing his clothes. These are tasks that would take him away from his work. If a man were required to pay for this work, the wages his employer would have to pay him would increase dramatically.

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<sup>130</sup> DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 150 (1990).

<sup>131</sup> *Id.* at 67.

The obstacles to social and cultural activities faced by women may be even more insurmountable. Cultural traditions and social practices that restrict and oppress women have been in place for centuries. It will take more than announcing that these traditions are no longer relevant for both men and women to relinquish them. Attitudes that are so deeply entrenched seem self-evident, particularly by those who are not victimized by them. As a result, the oppression of women, in the name of culture or tradition, continues to the present.

For example, a 1994 report indicates that the number of dowry deaths—young brides murdered by their husband's family when the bride's family cannot meet increasing dowry demands—are on the rise in India.<sup>132</sup> This is in spite of the fact that the payment of dowry was outlawed in India in 1961.<sup>133</sup> Additionally, in May of 1994, a female United States citizen living in Iran was convicted of prostitution. She was publicly flogged and then deported to the United States.<sup>134</sup> Although the Iranian report of the flogging did not contain details, "experts said 80 lashes is not uncommon for such a crime."<sup>135</sup> This incident occurred a month after Michael Fay was sentenced to caning in Singapore with all the publicity that ensued.<sup>136</sup> The International Federation of Obstetricians and Gynecologists issued a report in 1994 which stated that incidents of female genital mutilation are on the rise in many countries, with 2 million new mutilations performed annually.<sup>137</sup> This is true even though women have been mobilized against this practice since the 1970s.<sup>138</sup> Furthermore, in October, 1994, a judge in Maryland sentenced a man to eighteen months in prison for killing his wife after he found her with another man. The man pled guilty to manslaughter for this crime. The judge sympathized

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<sup>132</sup> *'Dowry Deaths' Rising in India*, THE GAZETTE (Montreal), Aug. 25, 1994, at B1.

<sup>133</sup> Elizabeth Newman, *For Richer, For Poorer, 'Til Death Do Us Part: India's Response to Dowry Deaths*, 15 I.L.S.A. J. INT'L L. 109, 115 (1992).

<sup>134</sup> *Iran Publicly Flogs Prostitute From Texas*, THE HOUSTON CHRONICLE, May 6, 1994, at A26.

<sup>135</sup> *Id.*

<sup>136</sup> See *supra* note 7 and accompanying text.

<sup>137</sup> Carolyn Adolph, *Sex Bias Kills, Mutilates Millions of Women: Report*, THE GAZETTE (Montreal) Sept. 27, 1994, at A1.

<sup>138</sup> Myriam Marquez, *A Holy Rite or Brutal Torture?* ST. LOUIS POST-DISPATCH, Aug. 11, 1994 at 7B.

with the defendant, saying, "I seriously wonder how many men married five [or] four years would have [had] the strength to walk away without inflicting some corporal punishment."<sup>139</sup> Since corporal punishment is physical and the purpose of punishment is to correct behavior, the judge's opinion of a husband and wife relationship is clear: a husband has the right to use physical means to correct his wife's behavior. As indicated by the incidents of dowry death and woman battering, it is hard to counteract cultural traditions even where these acts are illegal. Since the beginning of time, men have been the norm for all cultures. Therefore, it is simply not possible to grant women equal access to social and cultural fields without vast, systemic alterations in those fields.

Nonetheless, article 1 is quite progressive in its definition of discrimination against women. It is essentially a two-part definition. The first part of the definition addresses "any distinction, exclusion or restriction made on the basis of sex."<sup>140</sup> The second part of the definition addresses "which has the effect or purpose of impairing or nullifying"<sup>141</sup> a woman's access to her human rights.<sup>142</sup>

Part one addresses a variety of situations. It addresses distinctions; such as adultery being a crime for women but not for men; exclusions, for instance, exclusively male schools; and restrictions, such as so-called protective employment legislation. This part of the definition represents the concerns of the liberals towards equality. The second part of the definition looks at the effect or purpose of each distinction, exclusion or restriction. It satisfies concerns about true gender differences and equality. First, a woman is discriminated against only if the policy has the effect or purpose of *impairing* the exercise of her rights. This allows policies to be made that are based on distinctions between men and women. These policies are allowed if they are made in order to overcome or to compensate for past discrimination or if they are made because of biological differences between men and women. Second, they must not negatively

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<sup>139</sup> *Punishment Is 18 Months For Killing Cheating Wife*, N.Y. TIMES, Oct. 19, 1994, at A20.

<sup>140</sup> CEDAW, *supra* note 1, at art. 1.

<sup>141</sup> CEDAW, *supra* note 1, at art. 1.

<sup>142</sup> CEDAW, *supra* note 1, at art. 1.

impact women's human rights. Therefore, affirmative action programs and pregnancy related policies are allowed as long as they are not pretextual.

However, the rights guaranteed to women are still rights that are formulated and implemented with an androcentric viewpoint. For example, slavery and the slave trade have long been outlawed in the international community, but only recently has forced prostitution become an issue. Forced prostitution is viewed as a different issue even though it has all the earmarks of the slave trade.

Torture perpetrated by a government actor or "with the consent or acquiescence of a public official"<sup>143</sup> is universally outlawed. Since the international community declares that woman battering does not fit into this definition, it is not considered torture. This is true even though woman battering is done for the purpose of "intimidating and coercing"<sup>144</sup> a woman. When the government turns a blind eye to the illegality of such an assault, the government has "acquiesced" to that behavior.<sup>145</sup> Moreover:

Although the killing of student demonstrators in Tiananmen Square in Beijing in 1989 produced cries of outrage and calls for diplomatic isolation, the drowning of girl babies in China does not. The horrors of apartheid were cause for worldwide condemnation and costly economic sanctions, but the fact that a woman is raped every minute and a half in South Africa is not.<sup>146</sup>

If the contents of human rights are not changed or expanded, the extent of the benefits a woman will receive is questionable when she is given equal access to human rights. Once again, this illustrates CEDAW's greatest failing. CEDAW only works to guarantee women equal access to human rights as defined by men. However, this may not have any real meaning to a woman in her daily life.

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<sup>143</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/708, Annex, art. 1., (1984) *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention].

<sup>144</sup> *Id.*

<sup>145</sup> See Broadbent, *supra* note 57, at B3.

<sup>146</sup> Anne Reifenberg, *Violence Against Women*, CALGARY HERALD, May 30, 1993, at B3.

### B. *General and Specific Undertakings—Articles 2-16*

Articles 2, 3 and 4 of CEDAW outline the “general undertakings”<sup>147</sup> to which States Parties will be held under CEDAW. Articles 5 through 16 provide for “specific undertakings”<sup>148</sup> and should be understood “in the context of”<sup>149</sup> article 2. Article 2 of CEDAW, as modified by the more specific provisions of articles 5 through 16, will be analyzed in this section. Although they amplify article 2, articles 3, 4 and 14 also stand alone, and will be analyzed as creating specific rights for women.

Article 2 of CEDAW outlines the steps that States Parties must take in order to implement a “policy of eliminating discrimination against women.”<sup>150</sup> A list of seven legislative/constitutive steps follow, including: changing national constitutions, if necessary;<sup>151</sup> adopting legislative measures, including sanctions, to prohibit discrimination against women;<sup>152</sup> ensuring that national tribunals and other institutions protect the legal rights of women;<sup>153</sup> eliminating official government discrimination;<sup>154</sup> eliminating discrimination practiced by any “person, organization or enterprise,”<sup>155</sup> modifying or abolishing “laws, regulations, customs and practices”<sup>156</sup> that discriminate against women;<sup>157</sup> and repealing any penal provision that discriminates by gender.<sup>158</sup> The major problem facing article 2, however, is the large number of reservations submitted by States Parties to CEDAW. These reservations were second only to the number of reservations submitted to article 16 which calls for the elimination of discrimination in the family.<sup>159</sup>

In spite of its detail, article 2 does not address the root cause of discrimination against women, the patriarchal system.

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<sup>147</sup> Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 158 (1994).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> CEDAW, *supra* note 1, at art. 2.

<sup>151</sup> CEDAW, *supra* note 1, at art. 2(a).

<sup>152</sup> CEDAW, *supra* note 1, at art. 2(b).

<sup>153</sup> CEDAW, *supra* note 1, at art. 2(c).

<sup>154</sup> CEDAW, *supra* note 1, at art. 2(d).

<sup>155</sup> CEDAW, *supra* note 1, at art. 2(e).

<sup>156</sup> CEDAW, *supra* note 1, at art. 2(f).

<sup>157</sup> CEDAW, *supra* note 1, at art. 2(f).

<sup>158</sup> CEDAW, *supra* note 1, at art. 2(g).

<sup>159</sup> CEDAW, *supra* note 1, at art. 16.

Except for Section (f), which calls for the modification of customs and practices, article 2 calls for the changing of laws and constitutions that discriminate against women without calling for the investigation into why these laws were promulgated initially. Article 2, as is the case with many human rights conventions,<sup>160</sup> is worded in very abstract terms. In addition to lacking the necessary guidelines for investigating the root cause of gender discrimination, article 2 does not use language more powerful than "all appropriate measures"<sup>161</sup> in outlining how a State Party should make the necessary changes for eliminating gender discrimination. Therefore, it is necessary to rely on articles 5 through 16 substantively when addressing article 2.

In addition, article 2 does not mandate that women be involved in formulating these changes, even though the importance of the decision-maker is paramount. "Gender discrimination is so firmly imbedded in the history of humanity that it is often not perceived as discrimination,"<sup>162</sup> especially by men. In most societies, the men in power, who may or may not have been directly involved in the initial promulgation of sexist constitutions and legislation, are charged with changing these official enactments to make them non-discriminatory.

It is significant that section (a) calls for an awareness of the "practical realization"<sup>163</sup> of the equality of women and men; however, it does not address who will determine this practical realization. Section (b), which calls for the implementation of sanctions, fails for the same reason. Ensuring the involvement of women in the decision-making process is imperative. Without their involvement, women will only be granted equality with men as it is defined by men. Male "privilege always gives

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<sup>160</sup> TOMAŠEVSKI, *supra* note 18, at 120.

<sup>161</sup> CEDAW, *supra* note 1, at art. 2. Rebecca J. Cook contends that States Parties are required to "develop appropriate means with due diligence and apply them without delay." Cook, *supra* note 149, at 163. She notes that "appropriate" allows States Parties to be "sensitive to national legal, political, and social environments, but criteria of appropriateness are not within the [S]tates [Parties]' exclusive control." Cook, *supra* note 147, at 161. As noted throughout this analysis, the author is concerned with CEDAW's lack of guidelines for States Parties to arrive at appropriate measures, especially when CEDAW does not insist that women be included in this determination.

<sup>162</sup> TOMAŠEVSKI, *supra* note 18, at 44.

<sup>163</sup> CEDAW, *supra* note 1, at art. 2(a).

[men] permission to frame [their] perceptions as the [t]ruth."<sup>164</sup> The involvement of women, however, would foster the "empower[ment of] women on [their] own terms . . . . [Women] seek not only to be valued as who [they] are, but to have access to the process of the definition of value itself. In this way, [their] demand for access becomes also a demand for change."<sup>165</sup> At best, the changes will allow women to access the rights and freedoms enjoyed by men, even though their applicability to a woman's daily life is limited.

Section (a) calls for States "[t]o embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle."<sup>166</sup> Section (b) calls on States "[t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women."<sup>167</sup> Sections (a) and (b) are modified by articles 6, 7, 8, 9 and 15, which call on States Parties to adopt legislation to deal with the relationship between women and government.

# 1. *Political and Civil Rights—Articles 2(a), 2(b), 7, 8, 9 & 15*

Article 7 deals with the civil and political rights of women. States Parties are to take "all appropriate measures to eliminate discrimination against women in the political and public life of the country."<sup>168</sup> The subsections of article 7 direct countries to ensure a woman's right to vote and hold office,<sup>169</sup> to hold appointed positions within the government as well as participating in the development and implementation of governmental policy,<sup>170</sup> and "to participate in non-governmental organizations

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<sup>164</sup> Terrence Crowley, *The Life of Entitlement*, in TRANSFORMING A RAPE CULTURE 341, 346 (Emilie Buchwald, et al. eds., 1993).

<sup>165</sup> CATHERINE A. MACKINNON, *Not By Law Alone: From a Debate With Phyllis Schlafly*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 60, at 21, 22.

<sup>166</sup> CEDAW, *supra* note 1, at art. 2(a).

<sup>167</sup> CEDAW, *supra* note 1, at art. 2(b).

<sup>168</sup> CEDAW, *supra* note 1, at art. 7.

<sup>169</sup> CEDAW, *supra* note 1, at art. 7(a).

<sup>170</sup> CEDAW, *supra* note 1, at art. 7(b).

and associations concerned with the public and political life of the country."<sup>171</sup>

These guarantees are the familiar formal, public and individual rights that are associated with liberalism and are conceived to be the same as the human rights of men.<sup>172</sup> However, as with the more general provisions of article 2, article 7 fails to address the systemic, underlying cause of a woman's lack of participation in the political system.<sup>173</sup> In the same way that cultural traditions are based on an androcentric view of society,<sup>174</sup> liberal democratic structures were created from a male standard. This precludes a woman's participation in the political system. That is, "[e]nfranchisement has not . . . led to substantial formal political participation by women because the gendered form of liberal democracy was left intact."<sup>175</sup>

In relatively long established democracies, women only occupy from 2% to 10% of elected or appointed positions on the national level.<sup>176</sup> In Eastern Europe, prior to recent "democratic reforms," quota systems assured women a percentage of national positions. Since the quota systems were removed, the current number of women in these positions has dropped dramatically.<sup>177</sup> This trend indicates that enfranchisement does not assure the representation of women in the decision-making process that impacts their lives.

Article 7 subsections (b) and (c) call for the inclusion of women in government policy-making and implementation. They also call for the participation of women in non-governmental organizations that impact policy decisions.<sup>178</sup> Article 8 calls for the inclusion of women as representatives of their governments in international organizations.<sup>179</sup> The subsections to article 7,

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<sup>171</sup> CEDAW, *supra* note 1, at art. 7(c).

<sup>172</sup> Dianne Otto, *Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 371, 381 (1993).

<sup>173</sup> *Id.*

<sup>174</sup> See generally Southard, *supra* note 19.

<sup>175</sup> Otto, *supra* note 172, at 388.

<sup>176</sup> Otto, *supra* note 172, at 388.

<sup>177</sup> Otto, *supra* note 172, at 388 n.84. "Generally, the percentage of women elected in national elections has fallen by over half, dropping 80% in Hungary and 90% in Romania." Otto, *supra* note 172, at 388.

<sup>178</sup> CEDAW, *supra* note 1, at art. 7(b) & (c).

<sup>179</sup> CEDAW, *supra* note 1, at art. 8.

together with article 8, almost assure that women will participate in the decisions that effect them. However, these general provisions do not mandate systemic changes, which are needed to foster the participation of women.

CEDAW mandates a system of equality that continues to judge women by a male standard. Article 7 calls on States Parties to assure women on equal terms with men participation in policy-making.<sup>180</sup> This results in the continuation of "the commitment to male, hierarchical structures in all legal and political organizations."<sup>181</sup> Women are allowed to become government ministers and judges, but only if they can function in the same fashion as men. That is, women can be employed in these positions if they do not have primary child-care responsibilities, if they have managed to receive the necessary education and if they can act like men. CEDAW would be more effective in furthering women's rights if it called for a change in the structure of government so that it was possible for women to participate effectively.

Mandating that women be equal to men results in women being judged by a male standard. Ending women's oppression, however, "can be achieved only through rules that take account of the different needs and characteristics of women."<sup>182</sup> For example, article 8 requires that women be involved in the foreign service of a country. This highlights how systemic male standards of performance cannot work to assure women's participation in the current androcentric government structure. In the United States, the entrance test for the foreign service was found to be biased against female applicants.<sup>183</sup> In addition, the "diplomatic life-style" is premised on a male officer whose wife is willing to "accompany her husband on his far-flung postings and missions, and is willing to act as his hostess for a variety of diplomatic functions."<sup>184</sup> Therefore, the number of postings available to women diplomats are limited. Not only is this limitation based on the lack of availability of a woman's husband to play the hostess role, but also on the cultures of var-

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<sup>180</sup> CEDAW, *supra* note 1, at art. 7.

<sup>181</sup> Charlesworth et al., *supra* note 44, at 634.

<sup>182</sup> Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293, 304 & n.41 (1993).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 304-05.

ious countries, which are less willing to accept women diplomats.<sup>185</sup> At best, CEDAW requires that States Parties place a woman in a diplomatic posting but only if she can manage to pass an androcentric test.

In order to fulfill these diplomatic roles, women must travel. In societies where freedom to travel is only offered to men, women are further restricted from diplomatic positions. Furthermore, women, especially when travelling alone, must contend with woman-directed violence. In most patriarchal societies, women are particularly vulnerable to acts of violence, especially when alone or in unfamiliar places. A petition that was presented to the Vienna Human Rights Conference recognized the existence of "gender violence, a universal phenomenon which takes many forms across culture, race and class."<sup>186</sup> Simply extending to women the androcentric right of freedom to travel, without addressing issues of woman-directed violence, is only a partial solution at best.

The fact that some women have become successful in the civil and political arena does not negate this discussion. The small number of women who emerge as political leaders are the exception to the rule. Since the successful political woman is still an anomaly, she stands out from the crowd.<sup>187</sup> The question still remains, however, why there are few women in political and civil leadership roles?

Article 9 calls on States Parties to "grant women equal rights with men to acquire, change or retain their nationality."<sup>188</sup> This article exemplifies why "equality" must be viewed as a fluid concept. In the area of nationality, laws which discriminate against women are often explicit, the "exclusion" variety. An example of this type of law is found in the laws of Gabon: if a woman in Gabon marries a foreigner, she must renounce her citizenship while a man is not held to this same requirement.<sup>189</sup> A liberal view of equality would correct this particular inequality. Legislation is required to eliminate gen-

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<sup>185</sup> *Id.* at 305.

<sup>186</sup> Reifenberg, *supra* note 146, at B3.

<sup>187</sup> The author contends, for example, that many people are familiar with the name Margaret Thatcher while fewer people are familiar with the name John Major.

<sup>188</sup> CEDAW, *supra* note 1, at art. 9.

<sup>189</sup> TOMASEVSKI, *supra* note 18, at 33-34.

der and marital status from the determination of citizenship. Unfortunately, there exists a lack of commitment on the part of the international community in this area. For example, although subsumed by CEDAW and the Convention on the Rights of the Child, the Convention on the Nationality of Married Women<sup>190</sup> was ratified by less than one-third of the world's states.<sup>191</sup>

Article 15 requires States Parties to "accord to women equality with men before the law."<sup>192</sup> This refers to identical legal capacity between men and women in civil matters and in the freedom of movement. It declares null and void any private contractual agreement that "restrict[s] the legal capacity of women."<sup>193</sup> These changes are clearly necessary since "[e]quality before the law is a bad joke in many countries where the word of a man is automatically accorded more value than that of a woman in a court of law."<sup>194</sup> Rights accorded to men need to be afforded to women to provide equality. In order to do this, the "social preconditions [and] the presumptions that underlie"<sup>195</sup> the principle of equality before the law must be examined.

Article 15 mentions equality of legal capacity, particularly in reference to contracts, to the administration of property and to court procedure. Equality of access to these precepts assumes an underlying economic, educational and social equality between men and women. This does not exist and it cannot be rectified by legislation granting women "legal capacity identical to that of men."<sup>196</sup> Economically, women are disadvantaged in their ability to enter contracts, to own and transfer property and to access the courts. Women "earn only one-tenth of the world's income and own less than 1% of the world's property."<sup>197</sup> As a result, a woman will be the "weaker party" in a contractual relationship. Not only will women be at a disadvantage as the "weaker party" to a contract, but they will participate in con-

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<sup>190</sup> Convention on the Nationality of Married Women, 309 U.N.T.S. 65 (1957).

<sup>191</sup> TOMASEVSKI, *supra* note 18, at 33.

<sup>192</sup> CEDAW, *supra* note 1, at art. 15(1).

<sup>193</sup> CEDAW, *supra* note 1, at art. 15.

<sup>194</sup> Broadbent, *supra* note 57, at B3.

<sup>195</sup> MACKINNON, *Linda's Life and Andrea's Work*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra* note 60, at 127, 129.

<sup>196</sup> CEDAW, *supra* note 1, at art. 15(2).

<sup>197</sup> BUMILLER, *supra* note 127, at 13.

sumer contracts, not business contracts. Without a concomitant change in the economic position of women, they will only be afforded the opportunity to become parties to adhesion contracts.<sup>198</sup>

Levels of education impact upon a woman's ability to bargain and to enter contracts. Currently, "there are more than 130 million more adult women than men in the world who cannot read and write."<sup>199</sup> Besides affecting a woman's ability to enter a contract, lower levels of education raise questions about contract enforcement. This is true where women suddenly are legislated "equal rights to conclude contracts."<sup>200</sup> Should women with less education be held to the same standards of accountability in contract enforcement as men? If not, who is to determine the different levels of accountability—women who have experienced discrimination or men who can only imagine what these experiences are like? As has been discussed throughout this analysis, there is great danger when one group makes decisions affecting another group. Women in the United States have found that rules designated to protect women in the workplace have "protected" them right out of their jobs.<sup>201</sup> Therefore, an inequitable standard for women in the legal interpretation of contractual obligations may result in merchants being less willing to enter into contracts with female consumers.

The right of women to administer property equally with men, as contained in article 15, includes transactions involving one's own property, the ability to inherit property and the management of a minor's inheritance. Furthermore, article 13(b) calls for the equal access to "bank loans, mortgages and other forms of financial credit"<sup>202</sup> for women. However, discussing a woman's right to conduct transactions involving her own property seems ludicrous when women "own less than 1% of the

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<sup>198</sup> An adhesion contract is defined as a consumer contract in which the "weaker party has no realistic choice as to its terms." BLACK'S LAW DICTIONARY 40 (6th ed. 1990).

<sup>199</sup> Mehren, *supra* note 70, at 1. In addition, the gap between educated women and men is widening. "In 1950, there were 27 million more boys than girls enrolled in primary and secondary levels of education around the world. Currently there are 80 million more boys than girls enrolled." Merhen, *supra* note 70, at 1.

<sup>200</sup> CEDAW, *supra* note 1, at art. 15(2).

<sup>201</sup> See, e.g., HERMA HILL KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 8 (3d ed. 1988).

<sup>202</sup> CEDAW, *supra* note 1, at art. 13(b).

world's property."<sup>203</sup> Yet, "[p]roperty is fundamental to economic identity."<sup>204</sup> Lack of property ownership not only impacts the ability to be involved in property transactions, but it denies one an "economic identity." In article 15, CEDAW provides an inadequate response to women's economic problems. Revisions are needed in the concepts of property acquisition and ownership. Property could be viewed, for example, as owned by entire families or other groups, rather than by (usually male) heads of households. Women have had great success in organizing cooperatives for the ownership of property.

Article 2(a) calls on States Parties to "embody the principle of the equality of men and women"<sup>205</sup> in national constitutions and legislation, but it is vague as to method and measurement of success. Women are judged by a male standard; hence, the more a woman acts like a man, the more she will be treated "equally". The level of change necessary in a country must be "appropriate" to reach the "equality of men and women."<sup>206</sup> The lack of specificity of the language used in article 2, however, encourages a system whereby women strive for equality based upon men, rather than the equitable treatment of all persons, regardless of gender.

## 2. *Solely on the Basis of Sex — Article 6*

Article 2(b) calls on States Parties "[t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women."<sup>207</sup> According to article 1,

discrimination against women [is] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental free-

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<sup>203</sup> Barber Conable, President of the World Bank, *quoted in* BUMILLER, *supra* note 127, at 13.

<sup>204</sup> Marsha A. Freeman, *Women, Development and Justice: Using the International Convention on Women's Rights*, in *OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS*, *supra* note 20 at 93, 99.

<sup>205</sup> CEDAW, *supra* note 1, at art. 2(a).

<sup>206</sup> CEDAW, *supra* note 1, at art. 2(a).

<sup>207</sup> CEDAW, *supra* note 1, at art. 2(b).

doms in the political, economic, social, cultural, civil or any other field.<sup>208</sup>

This definition of discrimination embodies the principle of eliminating "distinction . . . on the basis of sex." Therefore, the analysis of article 2(a) applies to subsection (b). These two subsections are then modified by the succeeding articles. For example, an analysis of equality "in all stages of procedure in courts and tribunals" shows that in some legal systems a man's word is accorded more weight than a woman's.<sup>209</sup> This disparity reflects the inequality between men and women and the blatant discrimination against women.

Article 6, however, presents an example of the impairment of a woman's "human rights and fundamental freedom [that is based solely] on . . . sex."<sup>210</sup> The abolishment of slavery and slave trade is among the oldest of the universally recognized civil rights.<sup>211</sup> Additionally, trafficking in women has long been discussed in the human rights community. The topic "was among the principle issues of the anti-slavery action from the very beginning."<sup>212</sup> Article 6 calls on States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."<sup>213</sup> Even though "international standards of performance"<sup>214</sup> are available to governments to incorporate into their legislation to suppress trafficking of women and forced prostitution, these activities continue to be a world-wide industry.<sup>215</sup>

The multi-national sex-industry is based on a patriarchal system that objectifies a woman's body, while demanding that a "good" woman only have sex with one man. If a man abandons a woman, she often has few options but to use her body, which is now "considered worthless, . . . [as an] instrument[ ] to earn a living."<sup>216</sup> It is the economic aspect of the sex-industry that is

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<sup>208</sup> CEDAW, *supra* note 1, at art. 1.

<sup>209</sup> See Broadbent, *supra* note 57, at B3.

<sup>210</sup> CEDAW, *supra* note 1, at art. 1.

<sup>211</sup> See, e.g., Universal Declaration of Human Rights, *supra* note 12, at art. 4; TOMASEVSKI, *supra* note 18, at 13-15.

<sup>212</sup> TOMASEVSKI, *supra* note 18, at 13.

<sup>213</sup> CEDAW, *supra* note 1, at art. 6.

<sup>214</sup> Cook, *supra* note 147, at 161.

<sup>215</sup> WETZEL, *supra* note 51, at 45.

<sup>216</sup> WETZEL, *supra* note 51, at 44.

often overlooked. Prostitution is one of the most financially lucrative jobs available to women. When women the world over earn only one-third to two-thirds of a man's income,<sup>217</sup> the sex-industry jobs can provide women with greater financial stability. Therefore, in addition to outlawing trafficking in women, States Parties must deal with the patriarchal view of a woman's sexuality and the economic issues that contribute to the sex-industry.

A frequent liberal response to outlawing prostitution and trafficking of women is that women will be robbed of their choice to participate in these activities. Since the sex-industry is based on a patriarchal objectification of a woman's body and her sexuality, women participate in this industry within the male construct of a woman. This construct, which displays a woman's sexuality as forbidden, mysterious and immoral, leads to an economic valuation of women. This perpetuates the view that a woman's sexuality is a commodity that is available to men.

Other manifestations of this objectification include: women mutilated in ways that men are not; women segregated from society in ways that men are not; women sold into marriage in ways that men are not; and women as the victims of intimate violence in ways that men are not. These activities are based on the male construct of a women, which is seen as the norm. It is because a woman's sexuality is forbidden that a market exists in which a woman can sell her sexuality. Under the male construct, a women never actually makes a free choice to participate in prostitution.

The phrase, "all appropriate measures," in article 6 confers on States Parties an "obligation to act in accordance with international standards of performance."<sup>218</sup> On the issues of forced prostitution and trafficking of women, the international community has a legal framework in place to judge the performance of States Parties. In addition to article 6 of CEDAW, the Convention for the Suppression of the Traffic in Persons and of the

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<sup>217</sup> United Nations Development Programme, HUMAN DEVELOPMENT REPORT 21-22 (1992).

<sup>218</sup> Cook, *supra* note 147, at 161.

Exploitation of the Prostitution of Others<sup>219</sup> and the Convention on the Rights of the Child have addressed these issues.<sup>220</sup> However, more is needed to address the underlying economic and gender oppression of the sex-industry. Education is necessary and must be aimed not only at the procurers and consumers of the sex-industry, but at the general public and the women who participate in this industry.

The sex-industry of some countries is a selling point for business-tourists from more developed countries. These business-tourists and others who use the sex-industry encourage its continuation. Therefore, they should be penalized for their participation. Furthermore, States Parties should be vigilant to the practice of importing women via bogus marriage or employment offers.<sup>221</sup> Ultimately, participation in the sex-industry will continue if women are still valued based on their bodies. This is especially true where the economic structure does not provide women with the opportunity to support themselves.

### 3. *Judicial and Law Enforcement Rights — Article 2(c)*

Article 2(c) addresses the special legal relationship between women and the courts. It calls on State Parties "[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."<sup>222</sup> In this way, section (c) mandates that States Parties actively and effectively protect the rights of women via law enforcement and the courts.

The role of the judiciary exemplifies what happens when women are not involved in the decisions to eliminate gender discrimination. If a society gives to plaintiffs and defendants the right to be represented by an attorney, but women have not had access to attorneys, changing the law to guarantee women access to attorneys appears, on its face, to remedy the discrimination. It ignores, however, the fact that in such a society, women probably do not have the financial means to hire an attorney.

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<sup>219</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 272 (1950).

<sup>220</sup> Convention on the Rights of the Child, *supra* note 106.

<sup>221</sup> TOMASEVSKI, *supra* note 18, at 16.

<sup>222</sup> CEDAW, *supra* note 1, at art. 2(c).

Furthermore, the barrier of a woman talking to a "strange" man may be too difficult for some women to overcome. Therefore, training female attorneys, providing for government-paid attorneys and other systemic changes are not only desirable, but absolutely necessary.

In addition, the input of women into changes in the judicial system will reveal that all segments of the system must work together. It is not enough to require judges to impose mandatory sentences for crimes against women if prosecutors do not prosecute. It does not help to require prosecutors to bring charges if police do not arrest.<sup>223</sup> Women, particularly those who are or have been victims of woman battering, understand that the system must work in concert to address not only violence against women but the causes of such violence.

An example from the United States experience with woman battering points out inherent problems when the underlying causes of violence against women are not explored in the judicial context. In the last few decades, mediation has been popular in the United States Court system as an alternative method for settling legal claims, particularly in the family law arena.<sup>224</sup> The validity of mediation is based on its conception as a discussion between equals. Its purpose is to arrive at a mutual decision without assessing blame. Even ignoring the fact that a patriarchy itself results in an unequal distribution of power between spouses, the battering of one spouse by the other certainly skews the balance. It is impossible to solve the problem of violence in this context and impossible for the victim of violence and the perpetrator to be participants with equal bargaining power. Yet, mediation in marital issues continues, usually without consideration of the presence or absence of violence.

Moreover, article 2(c) protects women from discrimination through "public institutions" other than the courts. Dealing with woman battering in the United States highlights the reality of discrimination against women, where women are not "effectively protect[ed]," even when existing laws appear to apply. The Model Penal Code provides definitions for simple assault (a

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<sup>223</sup> See, Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. 217, 221 (1992).

<sup>224</sup> Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U.L. REV 717, 719 (1993).

misdeemeanor) and aggravated assault (a second- or third-degree felony).<sup>225</sup> The major differences between misdemeanor and felony assault are that to be a felony, the perpetrator must "manifest extreme indifference to the value of human life"<sup>226</sup> or use a "deadly weapon."<sup>227</sup> Despite the fact that many assaults in the domestic setting either disregard "the value of human life" or involve a weapon, "most police charge domestic violence offenses only as misdemeanors."<sup>228</sup> Furthermore, police usually cannot arrest on a misdemeanor without actually witnessing the assault, thus in the past, arrests were rarely made at all. In response, feminists demanded mandatory arrest laws that require police to arrest batterers. Notwithstanding that laws specifically directed at woman battering and domestic violence were sorely needed, it is a sad commentary that they were needed at all. Although laws which could have protected women were on the books, female victims did not receive "effective protection" from the police. The relationship of the victim to the perpetrator should never be an issue, since causing bodily harm to another individual is always assault.

#### 4. *Education and Health Care — Articles 2(d), 7, 10 & 12*

Section (d) of article 2 requires States Parties "[t]o refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation."<sup>229</sup> Therefore, in addition to section (c) protection of women's rights, section (d) prohibits the "public authorities and institutions" of the States Parties from engaging in any discrimination themselves. This section is modified by articles 7, 10 and 12, to the extent that articles 10 and 12 relate to government sponsored education and health services. However, once again, CEDAW calls on States Parties to implement laws and regulations, define injuries and impose sanctions, from a standpoint that has no guarantee of including women's views. The ability "[t]o make a deep change in something that, once it exists, apparently has never

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<sup>225</sup> MODEL PENAL CODE § 211.1 (1962).

<sup>226</sup> *Id.* at (2)(a).

<sup>227</sup> *Id.* at (2)(b).

<sup>228</sup> Joan Zorza, *Criminal Law: the Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. 46, 61 (1992).

<sup>229</sup> CEDAW, *supra* note 1, at art. 2(d).

not existed — and sex inequality has changed little if sex equality is your standard — requires a new way of thinking, not just thinking about new things.”<sup>230</sup> In addition, it requires the thinking of previously excluded groups. However, like other Sections of CEDAW, article 2(d) merely requires “thinking about new things” by the same decision makers.

Article 7 directs States Parties to eliminate discrimination against women in public life and deals with voting and office holding issues. Article 7 also modifies section (a). Section (a) relates to changes in the written law and (d) relates to changes in the actions of the government and other public institutions. However, articles 10 and 12 relate to specific services provided through public institutions and, together with article 2(d), address how these institutions should treat women.

Article 10 is aimed at eliminating discrimination in education. It is a highly detailed article, addressing guidance counseling; access to, and achievement in educational institutions at all levels; stereotyping of women and men in educational materials; scholarships and grants; and continuing education. This article addresses the drop-out rates of women and girls, availability of sports and physical education and “[a]ccess to specific educational information to help ensure the health and well-being of families, including information and advice on family planning.”<sup>231</sup> Section (h), relating to family planning and health and section (c), calling for the elimination of gender stereotyping in education, make this article a less androcentric approach to equality. Still, article 10 only touches on the systemic patriarchy in education and, therefore, will benefit mainly the women who are able to live up to a male standard.

As Tomaševski has noted, education for women must have as its main goal the empowerment of women as individuals and as a group. “For women, the process of empowerment entails breaking away from the cycle of learned and taught submission to discrimination, . . .”<sup>232</sup> Yet, sections (a), (b), (d), (e) and (g) of article 10 offer women the *same* conditions and the *same* curricula and the *same* opportunities as those offered to men. Con-

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<sup>230</sup> CATHERINE A. MACKINNON, *The Art of the Impossible*, in, FEMINISM UNMODIFIED, *supra* note 60, at 1, 9.

<sup>231</sup> CEDAW, *supra* note 1, at art. 10(a)-(h).

<sup>232</sup> TOMAŠEVSKI, *supra* note 18, at 24.

versely, sections (c), (f) and (h) address educational issues directly relating to women. Section (c) mandates,

[t]he elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods."<sup>233</sup>

This section would be strengthened by a call for more women teachers to act as role models for both girls and boys. Nonetheless, elimination of stereotypes is vital to the realization of women's human rights. What becomes important, as with other issues facing women, is who decides what is a stereotype and how to eliminate it.

Marger defines stereotypes as "overly simplistic and exaggerated beliefs about a group, generally acquired second hand and resistant to change."<sup>234</sup> Stereotyping masks how "the dominant group, through the process of the self-fulfilling prophecy, may contribute to the very creation of these unfavorable traits."<sup>235</sup> Marger was referring to stereotypes imputed to ethnic groups and parts of the definition may not seem to apply to women. For example, to the men holding the stereotypes, the traits in question may not be obviously "unfavorable." Therefore, while stereotypes labeling ethnic or religious groups as "greedy," "lazy" or "violent" are clearly unfavorable, the characteristics attributed to women may seem favorable. Women are "nurturing," "gentle" and "intuitive,"<sup>236</sup> traits that may be considered complimentary. If members of the dominant group are charged with eliminating the stereotypical views of women presented in educational materials, the damage of this type of

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<sup>233</sup> CEDAW, *supra* note 1, at art. 10(c).

<sup>234</sup> MARTIN N. MARGER, *RACE AND ETHNIC RELATIONS: AMERICAN AND GLOBAL PERSPECTIVES* 47 (1985).

<sup>235</sup> *Id.*

<sup>236</sup> Certainly, some stereotypes of women are clearly unfavorable, such as women are "manipulative" or are "gossips." And, some stereotypes are less clearly either favorable or unfavorable, such as women are "(physically) weak" or "soft." Many of the traits stereotypically applied to women, however, are superficially complimentary. Most people would prefer to be considered gentle rather than mean, for example.

stereotyping may not be obvious and the stereotypes may be overlooked.

The stereotypes of women are also particularly pernicious because they appear to be "based on the biological imperatives of sex."<sup>237</sup> Children must be born by women and therefore, "bearing and rearing children, their most important role, defines their entire lives."<sup>238</sup> Even women who have no children or are beyond their child bearing and rearing time are considered to be praised when the characteristics associated with idealized motherhood are ascribed to them. Since these characteristics are associated with biological characteristics, they are not recognized, often even by women, as stereotypes that carry with them the damage and restrictions that all stereotypes do. Men sometimes cannot understand how a woman could be offended at being called nurturing. Being recognized as nurturing is not a problem. Being *stereotyped* as nurturing is a problem.

Section (c) calls for the elimination of "any stereotyped concept of the roles of men and women."<sup>239</sup> It will be more difficult for the dominant group to recognize the stereotypes of men presented in educational material. For instance, a school text that depicts all women as mothers, with perhaps a few female teachers and nurses, may be changed to include some women as school administrators and doctors, but it should also be changed to depict men as teachers and nurses and fathers.

The stereotyping of women causes damage by restricting women, and men, in their respective life choices. Alleged male characteristics of competitiveness and objectivity become associated with particular "male" fields of study, while a woman, stereotyped as less competitive and more empathetic, is considered to lack the necessary characteristics for a particular field. Thus, characteristics are viewed as belonging to the endeavor itself and not as male conceptions of the endeavor. Therefore, individual women will not be encouraged to enter traditionally male fields and will be encouraged to remain in traditionally female fields. Conversely, males, viewed as inherently objective and action-oriented, will not be encouraged to train for a job

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<sup>237</sup> WETZEL, *supra* note 51, at 154.

<sup>238</sup> WETZEL, *supra* note 51, at 155.

<sup>239</sup> CEDAW, *supra* note 1, at art. 10(c).

that requires patience and connection. Both genders lose.<sup>240</sup> The alleged biological connections of these gender stereotypes make them appear to be real and natural, not characteristics that are "overly simplistic and exaggerated beliefs."<sup>241</sup>

The female biological ability to bear children also contributes to the benefits that the dominant male group receives from stereotyping women into a few limited roles and range of activities. The bearing of children is necessary in any culture in order for society to survive. In some nationalistic movements it is imperative, and a woman is patriotic only when she has a large number of children.<sup>242</sup> Women are defined, classified, and understood as producers of the next generation of citizens.<sup>243</sup> When women are stereotyped into domestic and child-rearing roles, men benefit by having domestic workers to care for their homes and children, freeing them to participate in the public world.

Section (c) of article 10 is impressive in its notice and call for the elimination of stereotyping of women, even in spite of its lack of an understanding that women must contribute to this change. However, unfortunately, section (h) contributes to the continuation of the maternal stereotyping of women. Article 12, which addresses family planning and maternal care, also contributes to the perpetuation of this stereotype.<sup>244</sup> It is difficult to deny that "educational information to help to ensure the health and well-being of families, including information and advice on family planning"<sup>245</sup> is imperative for the well-being of women, as well as men. However, its inclusion in a Convention relating to women's human rights perpetuates the beliefs that a

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<sup>240</sup> WETZEL, *supra* note 51, at 33 ("It is not that all men are aggressive and all women servile, but rather that the universal system of patriarchy does not allow men to behave in a gentle, caring manner and women to reject the stereotype of compliance without being ostracized.").

<sup>241</sup> MARGER, *supra* note 234.

<sup>242</sup> It is interesting that in China, overpopulation is such a significant problem that women, unlike in other countries, are patriotic when they have only one child. It is still system that defines and controls women based on their child bearing activities.

<sup>243</sup> *E.g.*, Seny Diagne, *Defending Women's Rights — Facts and Challenges in Francophone Africa*, in, OURS BY RIGHT, *supra* note 20, at 43, 47 ("Women [in Africa] are considered child-bearers before being considered women.").

<sup>244</sup> CEDAW, *supra* note 1, at art. 12.

<sup>245</sup> CEDAW, *supra* note 1, at art. 10(h).

woman's major role in life to take care of her family and that women are primarily responsible for family planning.<sup>246</sup> Denial of family planning information is devastating for the health and well-being of women, but, "[r]educing the discussion of family planning to women may indeed contribute to the tolerance of irresponsible fatherhood. . . ."<sup>247</sup> CEDAW does not require that family planning information and information on the health and well-being of families should only be imparted to women. However, addressing it in a convention intended to deal with women's human rights issues does entrench family issues even more firmly in the world of women. This is a stereotype that was apparently not recognized by the drafters of the Convention.

Article 12 adds the responsibility of States Parties to provide "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."<sup>248</sup> It is clear that "maternal mortality is the single most neglected health problem in the third world,"<sup>249</sup> and, "[e]ven in relatively well off countries like the United States, health conditions are shocking."<sup>250</sup> The reality is that women die because of their biological disposition to child bearing. They die from bad abortions, the unavailability of abortions, from having too many children too close together, from lack of pre-natal care and unattended childbirth.<sup>251</sup> The drafters of CEDAW would have been remiss had they not addressed these issues. However, as part of the major human rights convention relating to women, these articles continue the belief that family planning is exclusively the province of women. Although men in power in governments and religion feel free to dictate the policies on abortion and birth control that women should follow, ultimate responsibility for family planning falls on the woman. Although no woman ever managed to get pregnant all by herself, the male role in family planning, or the lack of it, is seldom recognized.

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<sup>246</sup> See *supra* notes 50-55 and accompanying text.

<sup>247</sup> TOMAŠEVSKI, *supra* note 18, at 17.

<sup>248</sup> CEDAW, *supra* note 1, at art. 12(2).

<sup>249</sup> WETZEL, *supra* note 51, at 110.

<sup>250</sup> WETZEL, *supra* note 51, at 108.

<sup>251</sup> WETZEL, *supra* note 51, at 110.

In addition, these articles perpetuate the belief that having children, whether responsibly or not, is a woman's primary role in life. This belief limits the life choices of women who choose not to give birth. When the birth of children is tied closely to the institution of marriage, as is true universally, this impacts women who would otherwise choose not to marry, whether they have children or not. Ultimately, the patriarchal pattern is reinforced. A feminist vision of the human rights of women in this area includes the responsibility of men for the children they father and for the role they play in family planning. Although CEDAW does not mandate that family planning information be given only to women, it does not discuss the role of men in the issue of reproduction.

Conversely, section (f) of article 10 singles women out from men in a positive fashion. It addresses the needs of "girls and women who have left school prematurely."<sup>252</sup> Girls and women who have dropped out of school may have often done so due to problems they face because they are female. From teenage marriage and pregnancy to the decision that a daughter's education is less important than a son's, girls and women frequently do not complete as many years of education as boys and men do. "Currently there are 80 million more boys than girls enrolled [in primary and secondary levels of education around the world]."<sup>253</sup> Section (f) urges States Parties to work to lower the female drop-out rate and to provide "programmes for girls and women who have left school prematurely."<sup>254</sup> A stronger section would call for States Parties to provide female drop-outs with the opportunity to form their own programs and self-help groups, in the same way that article 14(e) does for rural women.<sup>255</sup>

It is necessary to pay special attention to the reasons why there is generally a higher rate of female drop-outs than male. These high rates can be attributed to factors such as teenage pregnancy and marriage, forced participation by young women in sex trades, and the general devaluing of girl children com-

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<sup>252</sup> CEDAW, *supra* note 1, at art. 10(f).

<sup>253</sup> Mehren, *supra* note 70, at 1.

<sup>254</sup> CEDAW, *supra* note 1, at art. 10(f).

<sup>255</sup> CEDAW, *supra* note 1, at art. 14(e). Mandates the right of rural women "[t]o organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment." *Id.*

pared to boy children. The stereotyping of women that primarily relegates them to the role of mother conveys the idea that the ability to be a mother is instinctive. Even though women are responsible for the education of their children, it is often thought that women do not need an education in order to be good mothers.

5. *Non-Governmental Discrimination — Articles 2(e), 11 & 13*

Section (e) of article 2 requires States Parties “[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>256</sup> To the extent that education and health care are provided privately rather than by the government, articles 10 and 12 modify this section, as they modify section (d). In addition, section (e) is modified by articles 11 and 13. Article 11 calls on States Parties to “take all appropriate measures to eliminate discrimination against women in the field of employment,”<sup>257</sup> and article 13 mandates the elimination of discrimination in “other areas of economic and social life.”<sup>258</sup>

As noted, the CEDAW definition of discrimination includes the element of “a basis of equality of men and women.”<sup>259</sup> Therefore, article 11(1) offers women access to outside-the-home employment on an equal basis with men. Women gain the right to “the same employment opportunities” and to have “the same criteria for selection in matters of employment” as men.<sup>260</sup> This again creates a situation where the women who can best emulate the men will be rewarded with equal treatment at work. Article 11 does not include any discussion of the possible systemic barriers women face in attaining employment. First among those barriers is that work outside the home is largely structured by and for men.

The drawback of this omission is illustrated by the movements in the United States for equal employment opportunity for women. Laws were passed which prevented women from be-

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<sup>256</sup> CEDAW, *supra* note 1, at art. 2(e).

<sup>257</sup> CEDAW, *supra* note 1, at art. 11(1).

<sup>258</sup> CEDAW, *supra* note 1, at art. 13.

<sup>259</sup> CEDAW, *supra* note 1, at art. 1.

<sup>260</sup> CEDAW, *supra* note 1, at art. 11(b).

ing denied employment based solely on their sex, but issues of pregnancy and childcare were left unaddressed (until recently). Women were afforded the right to compete in a man's employment world where male employees find it easier than their female counterparts. For example, it is easier for men to work overtime and travel in their jobs because other people (their wives) are primarily responsible for child care. Men usually have no problem working until 5:00 p.m. or beyond, although their children may get out of school much earlier, because their wives pick up and care for their children. On the whole, women do not have the same luxury. Nonetheless, flexible hours of work have not been discussed in the context of employment discrimination (at least by the decision makers). This kind of flexibility would allow women to work and care for their children, as well as, hopefully, allow men to participate in the care of their children. A change in the regime of the outside-the-home work world is necessary in order to provide women equality in the employment field.

Furthermore, article 11 does not address the fact that "[t]he majority of women in the world work, but a minority are recognized as workers."<sup>261</sup> A majority of the world's women perform activities that are vital, and yet are not considered work. They raise children, maintain households, run the family farm, yet they are not counted among the world's work force. The services women provide without remuneration allow those who are counted as workers (largely men) to be free to pursue an outside-the-home career, because men are relieved from doing the household and childcare duties. Bumiller tells the story of an Indian couple which illustrates this inequity. This example demonstrates that the support women provide men allows them to pursue their work while that same support and its provider are devalued by society.

In the government census, a man like Phula's husband [a farmer who employed up to 15 people a day] would be listed as the head of the household, which he was, but a wife like Phula would be considered a nonworking dependent. And yet consider what she did all day: 'Yesterday I got up at five in the morning'. . . . After rising, Phula walked half an hour into the fields, because the family had no latrine, then half an hour back. When she returned,

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<sup>261</sup> TOMAŠEVSKI, *supra* note 18, at 50.

she cleaned the pots used for the meal the night before. Soap was a luxury, so she used mud and water, scraping with her bare hands. She swept the floor of the house, squatting over a short-handled broom, then walked back to the fields to collect tall grasses for her cows to eat. This took several hours because she had to remove all the thorns. She fed the animals, then went into the house to make lunch for herself and her husband — the lentil stew called dal, and chapaties and rice. She rested during the heat of the afternoon, then got up to wash the pots before dinner. A dozen times during the day she had to fetch water from the well outside her house; she also had to make cow-dung cakes for fuel. And this was a leisurely time of year. In a few weeks, when the wheat was ready for harvesting, she would have to spend most of her time in the fields, managing her household chores in between.<sup>262</sup>

Phula is representative of women worldwide, women who work more hours than men, and whose work include a greater variety of chores.<sup>263</sup> Phula and millions of women around the world are considered non-working dependents of their husbands. Consider the difficulty Phula's husband would have in doing his "real" work if Phula was not providing the necessary support services.

Article 11 addresses the problem of devaluation of the kind of work done by women, even when it is paid work. Although "women perform two-thirds of the work in the world . . . [they] receive one-tenth of the income . . . ."<sup>264</sup> The difference in the income earned by women and men who do the same or similar tasks reflects the fact that women's work is unpaid. It reflects blatant practices of underpaying women who do the same jobs as men and it reflects the devaluation of jobs that are predominantly held by women.<sup>265</sup> CEDAW addresses this issue in article 11(d), calling for "equal remuneration, including benefits,

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<sup>262</sup> BUMILLER, *supra* note 127, at 88.

<sup>263</sup> WETZEL, *supra* note 51, at 88.

<sup>264</sup> Ayla Baffoun, *Feminism and Muslim Fundamentalism: The Tunisian and Algerian Cases*, in *IDENTITY POLITICS & WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE* 167, 169 (Valentine M. Moghadam ed., 1994).

<sup>265</sup> MICHAEL E. GOLD, *A DIALOGUE ON COMPARABLE WORTH* 7 (1983) (In the United States, for example, "[a] study based on 1970 census data showed that each additional percentage point of women in an occupation resulted in a drop in median compensation for that occupation of forty-two dollars a year.").

and . . . equal treatment in respect of work of equal value . . . .”<sup>266</sup> Section (d) also mandates the “equality of treatment in the evaluation of the quality of work.”<sup>267</sup> Evaluation of the quality of work is the method by which jobs are measured to determine their value and this evaluation leads to the determination of the amount of pay that workers receive for jobs that are of equal value.<sup>268</sup>

This visionary section is imperative to raising the standard of living of women and to assuring true equality between women and men. “The treatment of women as inferior or of secondary importance is widely perceived by governments to be justified because women’s contributions are considered to be marginal or subsidiary.”<sup>269</sup> Unfortunately, merely changing the perceptions and treatment of women’s outside-the-home work will not in itself serve to improve the perceptions and treatment of women in society as a whole. For instance, the belief that married women have the right to work outside the home without their husbands’ permission is not universal.<sup>270</sup> In addition, the contribution made by women who work inside the home, and who are usually uncompensated, must be evaluated in a fashion that recognizes its economic worth.<sup>271</sup> The majority of the work done by women is in the private sphere of the home. Because “[t]raditionally, . . . greater significance is attached to the public, male world than to the private, female one, . . . [a] universal pattern of identifying women’s activities as private, and thus of lesser value, can be detected.”<sup>272</sup> While comparable worth programs in the public sector are extremely important in the fight to recognize women’s human rights, as well as in the battle against a patriarchal structure, massive systemic changes are needed to eliminate the perception that the work done by women is work of low value.

Section (f) of article 11 guarantees women equality in “[t]he right to protection of health and safety in working conditions,

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<sup>266</sup> CEDAW, *supra* note 1, at art. 11(d).

<sup>267</sup> CEDAW, *supra* note 1, at art. 11(d).

<sup>268</sup> GOLD, *supra* note 265, at 41 (Gold discusses the practical problems of job evaluation) in *Id.* at 40-54.

<sup>269</sup> WETZEL, *supra* note 51, at 91.

<sup>270</sup> TOMASEVSKI, *supra* note 18, at 24-25.

<sup>271</sup> TOMASEVSKI, *supra* note 18, at 25. *See also*, WETZEL, *supra* note 51, at 91.

<sup>272</sup> Charlesworth et al., *supra* note 44, at 626.

including the safeguarding of the function of reproduction.”<sup>273</sup> The second clause of this section refers to what is commonly known as “protective legislation.” Protective legislation encompasses rules which provide special protections for women workers because of their biological reproductive capabilities. These rules often represent the kind of discrimination against women that is easily overlooked, particularly because the affected group (that is, women workers in certain job categories) are not consulted during the formulation of the rules. As section 2(a)-(d) of article 11 notes, women workers need protection from arbitrary dismissal, lack of maternity leave and lack of childcare services, in order to effectively work outside the home. However, this form of protective legislation is too often applied in a paternalistic and discriminatory fashion resulting in more harm than good.<sup>274</sup> Therefore, section 3 of article 11, correctly calls on States Parties to periodically review protective legislation in view of advancing technology.

Unfortunately, this type of review is insufficient to protect women from legislation that has a discriminatory effect. If review of this type is conducted without the input of women workers, the protections required for “safeguarding the function of reproduction” may be determined by male managers’ ideas about the protection necessary for pregnant women and for women of child-bearing age. This may lead to discriminatory treatment, particularly of women who are not pregnant, but merely of childbearing age. Fed by the myth that a woman’s major function is the bearing of children, she may be denied a job or advancement based on her *potential* to bear children, with no regard for her *intentions*. If a woman can prove her inability to have children, she may be exempt from protective rules; women have even chosen sterilization over losing their job.<sup>275</sup> On the other hand, ignoring the potential for reproductive damage in certain work settings, and failing to provide women workers the choice to opt out of such jobs, places women in a dilemma in which they must choose between having a child

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<sup>273</sup> CEDAW, *supra* note 1, at art. 11(f).

<sup>274</sup> See, e.g., KAY, *supra* note 201, at 8.

<sup>275</sup> This was the choice of one of the original plaintiffs in *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991).

and having a job.<sup>276</sup> Protective legislation often denies women the autonomy men have over their lives.

Finally, protective legislation serves to perpetuate stereotypes about women and their ability to function in certain settings. In the United States, for example, women have been "protected" from participating in society as lawyers,<sup>277</sup> as employees working more than ten hours a day,<sup>278</sup> and as bartenders (although they could hold the less lucrative job of waitress).<sup>279</sup> Although these cases are no longer law in the United States, they highlight the insidious discrimination that may lie in protective legislation. What is the difference between the presence of a woman waitress in a tavern and a woman bartender?<sup>280</sup> The real difference between the two jobs was that the bartender was paid better and the men wanted to keep the bartender jobs part of the male preserve. As demonstrated previously, male dominated jobs traditionally pay better than female dominated jobs.<sup>281</sup> Protective legislation that prohibits women from certain professions must always be examined with the pay differential as the background.

Concerns about the discrimination often lurking in "protective legislation" should not serve to deny women protection when they do choose to bear and rear children. It is not outmoded stereotypes and assumptions that result in the fact that only women can get pregnant and bear children. It is biological reality. The major difference between protective legislation aimed at women and protective legislation related to child bearing issues is that the latter is aimed at *people* engaged in child-bearing and child-rearing.<sup>282</sup> Article 11(2) protects pregnant, child-rearing and married women (who may be discriminated against because employers assume they will become pregnant)

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<sup>276</sup> *Id.* at 206.

<sup>277</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130.

<sup>278</sup> *Muller v. Oregon*, 208 U.S. 412 (1908). Only women were denied this type of employment, in spite of the fact that the U.S. Supreme Court had held three years previously that the states had no business dictating employees' hours of work. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

<sup>279</sup> *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948).

<sup>280</sup> Indeed, the daughters and wives of tavern owners were exempt from the prohibition. *Id.* at 465.

<sup>281</sup> *Supra* note 264 and accompanying text.

<sup>282</sup> TOMAŠEVSKI, *supra* note 18, at 20.

from dismissal,<sup>283</sup> denial of maternity leave with guarantees of return to work<sup>284</sup> and protection from work that is harmful during pregnancy.<sup>285</sup> It also "encourage[s] . . . the establishment and development of a network of child-care facilities."<sup>286</sup>

Protection for pregnant workers is vital. However, until policy recognizes that "child-bearing is biologically determined, while child-rearing is not,"<sup>287</sup> legislation only aimed at women raising children will help ensure that women remain primarily responsible for child rearing. Stereotypes regarding women and their relationship to children will remain and will continue to appear reflective of "nature," rather than imposed preferences. As long as women are primarily responsible for the raising of children, it is necessary to include provisions regarding child care in a woman's convention. It is unfortunate that its very inclusion, however, perpetuates as natural and based on biology the notion that the raising of children causes an interruption in the outside-the-home work of women, but no interruption in the work lives of men.

Article 13 relates, in sections (a) and (b) to issues having to do with female heads of households and the autonomy of women and their finances. Section (c) mandates the elimination of discrimination against women in "recreational activities, sports and all aspects of cultural life."<sup>288</sup> Section (c) has largely been dealt with in the discussions of other cultural issues. Section (a) calls on States Parties to "take all appropriate measures to eliminate discrimination against women . . . [and] to ensure, on a basis of equality of men and women, the same rights, in particular . . . the right to family benefits."<sup>289</sup> As noted in the discussion on rural women and development aid,<sup>290</sup> government benefits are often distributed based on out-moded notions of "families" and who heads them. In reality, "[w]omen are the main providers for one-third of all families in the world, and

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<sup>283</sup> CEDAW, *supra* note 1, at art. 11(2)(a).

<sup>284</sup> CEDAW, *supra* note 1, at art. 11(2)(b).

<sup>285</sup> CEDAW, *supra* note 1, at art. 11(2)(d).

<sup>286</sup> CEDAW, *supra* note 1, at art. 11(2)(c).

<sup>287</sup> TOMAŠEVSKI, *supra* note 18, at 21.

<sup>288</sup> CEDAW, *supra* note 1, at art. 13.

<sup>289</sup> CEDAW, *supra* note 1, at art. 13(a).

<sup>290</sup> See *infra*, notes 391-405 and accompanying text.

two-thirds of the poorest.”<sup>291</sup> Inclusion of women’s access to family benefits is extremely important in a world where “families are called ‘female-headed’ only when men do not live in them.”<sup>292</sup> This section would be even stronger if it included a new and flexible definition of family, one that made it clear that not every family is made of father, mother and children.

Section (b) relates to women’s access to “bank loans, mortgages and other forms of financial credit.”<sup>293</sup> CEDAW ignores, however, the inequitable distribution of capital, land ownership and income between women and men. These are the prerequisites on which credit is based. Wetzel maintains that credit should be considered in itself a human right. She notes, “[t]he logic behind the notion that the poor should not have access to credit has always been considered infallible. It is argued that because they cannot provide collateral, there is no basis for making loans to them.”<sup>294</sup> Added to this belief is the fact that “[t]he feminization of poverty has reached global proportions,”<sup>295</sup> resulting in women having minimal access to credit. CEDAW only mandates that States Parties assure women access “on a basis of equality”<sup>296</sup> with men to financial credit. It is once again the women who are best able to emulate men, in that they own land or have other resources that most women do not, who will be able to take advantage of this Section. A bank can no longer deny a woman credit simply because of her gender, but this section does not address the issues underlying women’s ability to receive credit.

In addition, it has been proven that traditional conceptions of credit are not the only conceptions that make sense. The Bangladeshi’s Grameen Bank has demonstrated remarkable success in making loans to their customers, largely poor rural women.<sup>297</sup> The bank recommends these guidelines for providing credit, guidelines that do not depend on the traditional belief that only those who have capital can borrow capital:

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<sup>291</sup> WETZEL, *supra* note 51, at 88.

<sup>292</sup> WETZEL, *supra* note 51, at 154.

<sup>293</sup> CEDAW, *supra* note 1, at art. 13(b).

<sup>294</sup> WETZEL, *supra* note 51, at 92.

<sup>295</sup> WETZEL, *supra* note 51, at 88.

<sup>296</sup> CEDAW, *supra* note 1, at art. 13.

<sup>297</sup> WETZEL, *supra* note 51, at 92.

(1) provision of collateral-free loans; (2) formation of small homogenous groups for group guarantee of loans and supervision of loan utilization; (3) taking credit services to women; (4) participation of bank staffs in social development activities for the borrowers; (5) recovery of loans in small regular installments; (6) developing institutions for collective savings for the mutual benefit of the borrowers in times of distress; (7) providing intensive practical training for developing a well-motivated dedicated cadre of workers and organizers who would deliver credit to women.<sup>298</sup>

These guidelines would benefit men in poverty, as well as women generally. Yet, CEDAW makes no such far-sighted mandate. Instead, article 13(b) continues in the tradition of assuring that banks, while they presumably cannot deny credit solely on the basis of gender, will tender credit only to those women who are able to live up to an androcentric definition of financial success.

#### 6. *Customary Discrimination — Articles 2(f), 5, 10, 11 & 16*

Section (f) of article 2 directs States Parties to go beyond laws and regulations in combatting gender discrimination. This Section directs governments "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>299</sup> The absolute necessity of altering customs and practices is clear when one considers traditions such as female genital mutilation, the veiling of women, dowry and dowry deaths and woman battering which contribute significantly to the oppression of women.<sup>300</sup>

Of concern in section (f), indeed throughout CEDAW, is the phrase "all appropriate measures." Rebecca Cook contends the phrase establishes "an obligation to act in accordance with international standards of performance."<sup>301</sup> However, it also allows "[t]he determination . . . [to] be sensitive to national legal, political and social environments, . . ."<sup>302</sup> "All appropriate

<sup>298</sup> WETZEL, *supra* note 51, at 93.

<sup>299</sup> CEDAW, *supra* note 1, at art. 2(f).

<sup>300</sup> Southard, *supra* note 19, *passim*.

<sup>301</sup> Cook, *State Responsibility of Violations of Women's Human Rights*, *supra* note 147, at 161.

<sup>302</sup> Cook, *State Responsibility of Violations of Women's Human Rights*, *supra* note 147, at 161.

measures" is problematic because of the absence of women, which may be inherent in the decision making process. A decision maker must be able to recognize that an existing custom or practice is detrimental to women's human rights. However, even this step may be difficult for a member of the dominant group to comprehend.

One noted human rights scholar presents arguments for "preserv[ing] the tension between, and the insights of, both relativism and universalism."<sup>303</sup> While noting that "appeals to traditional practices and values all too often are a mere cloak for self interest or arbitrary rule,"<sup>304</sup> he asserts that if a cultural practice has an "underlying cultural vision of human nature or society [that] is both morally defensible and incompatible with the implementation of the 'universal' human right in question,"<sup>305</sup> then it may be perfectly acceptable under international human rights law. To a strict universalist, it might appear to be in violation. As an example, this article includes a brief analysis of brideprice.<sup>306</sup> Although this analysis of dowry is very brief, it concludes that the "underlying cultural vision" of the practice of dowry payments is "morally defensible" and incompatible with universal norms. The analysis of dowry begins with article 16 of the Universal Declaration<sup>307</sup> which guarantees women and men the right to enter into marriage only with their "free and full consent."<sup>308</sup> The author contends that this right is more open to interpretation than other rights, because it "reflects a specific cultural interpretation of marriage . . . that is of relatively recent origin and by no means universal today. . . ."<sup>309</sup> His analysis does not reflect an underlying international concern for the rights of women, but rather views article

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<sup>303</sup> Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 400 (1984).

<sup>304</sup> *Id.* at 412.

<sup>305</sup> *Id.* at 417.

<sup>306</sup> Donnelly's use of the word "brideprice" is unclear. Traditionally, brideprice was an amount of money paid by the groom's family to the bride's. Since this practice has died out virtually everywhere and since many authors seem to use the words "dowry" and "brideprice" interchangeably, I am assuming that Donnelly is referring to the payment of dowry, i.e., an amount paid by the bride's family to the groom's. See, e.g., MAKHAN JHA, *DIMENSIONS OF INDIAN CIVILIZATION* 83 (1979).

<sup>307</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 16.

<sup>308</sup> Universal Declaration of Human Rights, *supra* note 12, at art. 16(2).

<sup>309</sup> Donnelly, *supra* note 303, at 418.

16 as an attempt to standardize marriage traditions. It also ignores the fact that "specific cultural interpretation[s]" are exactly the means usually used to oppress women in a given society. In addition, rights that are of recent origin and not universal are not usually, for those reasons, considered less worthy of international promotion.<sup>310</sup>

The article goes on to contend that "some traditional customs, such as brideprice, provide alternative protections for women . . . that address at least some of the underlying concerns of article 16(2)."<sup>311</sup> This seems to acknowledge that issues of women's human rights underlie article 16, although the author characterizes them as protection for women, not equality of men and women. However, if women need protection in the decision to marry (and currently, they often do), they need protection from the dowry system itself. Women are dying when their families cannot provide adequate dowries.<sup>312</sup> Yet, dowry helps maintain a system whereby marriage is the only viable alternative for a woman.<sup>313</sup> In addition, the stated human rights goal of CEDAW is to enable women to achieve equality with men, not to merely be protected from the abuses of a patriarchal system, while allowing the gender hierarchy to continue.

This analysis would allow decision-makers within a society to maintain the dowry system, because it is "sensitive to national legal, political and social environments."<sup>314</sup> However, the analysis is flawed because of where the author stands while he views the issue of dowry. The ingrained beliefs of society lead most of us to accept, without questioning or even particularly

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<sup>310</sup> See, e.g., Elaine Sciolino, *In Nairobi, Consensus*, N.Y. TIMES, July 29, 1985 at A6. ("Ten years ago the idea that women should be singled out as an interest group with a separate collection of issues baffled much of the world.") In addition, marriage has been dealt with by the universal human rights community since the beginning of the modern human rights era; it is questionable, therefore, how "recent" these views are. See, *supra* notes 49-51 and accompanying text. Donnelly himself is relying on the Universal Declaration of Human Rights which is, next to the U.N. Charter itself, one of the oldest of the modern human rights documents.

<sup>311</sup> Donnelly, *supra* note 303, at 418.

<sup>312</sup> *'Dowry Deaths' Rising in India*, *supra* note 132 ("The number of "dowry deaths" rose to 5,582 last year from 4,836 in 1990, [the Indian government] said in a written reply to a parliamentary question.").

<sup>313</sup> Vijayendra Rao, *How Family Planning Came to Bangladesh; India's Dowry Problem*, N.Y. TIMES, Jan. 16, 1994, § 4 at 16.

<sup>314</sup> Cook, *State Responsibility for Violations of Women's Human Rights*, *supra* note 147, at 161.

thinking about it, that a woman needs and desires the institution of marriage; that it is a "natural" state. However, dowry, rather than providing protection for women, has come to represent the worst possible marriage situation for a woman. Her value is measured by the wealth of her family, by how much she can contribute to increasing the wealth of her husband and his family. In the dowry system, women are little more than investment opportunities that are evaluated based on their potential returns. In addition, women and girls are devalued by their own families because of the financial drain they cause. "If we don't give birth to girl children, we wouldn't have these problems. What flows out of our eyes is not just tears, but blood."<sup>315</sup>

This analysis demonstrates the problem when those high in the gender hierarchy are charged with abolishing or revamping current customs and practices to implement policies of equality of women and men. Even for those lower down in the hierarchy and more directly impacted by the detrimental aspects of a practice it is difficult to envision a world without a practice that has been around for generations. "The impact of culture on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness."<sup>316</sup> For those who are not harmed and may even benefit from the practice, it is almost impossible. "Major parts of our lives are dominated by assumptions that are based on tradition and the notions of bygone eras which no longer hold within them the ring of truth."<sup>317</sup> When viewing the position of women in a society, as seen by both women and men, it may be even more difficult to separate nature from imposed belief than it is with other groups. "[D]iscrimination against women is somehow regarded as more 'natural' and acceptable than, for example, racial discrimination."<sup>318</sup> Without the participation of

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<sup>315</sup> Murti, an Indian father, *quoted in*, Edward A. Gargan, *Bangalore Journal; For Many Brides in India, a Dowry Buys Death*, N.Y. TIMES, Dec. 30, 1993, at A4.

<sup>316</sup> Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 19, 23 (Abdullahi Ahmed An-Na'im ed., 1992).

<sup>317</sup> WETZEL, *supra* note 51, at 152.

<sup>318</sup> Charlesworth et al., *supra* note 44, at 69 (A conclusion based on a comparison of the number and content of reservations to CEDAW and reservations to the Convention on the Elimination of All Forms of Racial Discrimination.).

the oppressed in reassessing cultural practices, customs will continue to seem natural, continue to be unquestioned, and continue to be actively practiced and excused on the grounds of culture.

Article 2(f) is modified by articles 5, 10, 11, and 16. Articles 10 and 11, dealing with education and employment, are considered elsewhere. Article 5(a) calls on State Parties to

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>319</sup>

Throughout this analysis, stereotyping has been discussed in detail as have some cultural practices that are based on "stereotyped roles for men and women." Recognizing customs and practices that are based on beliefs of the inferiority of one gender to another is more difficult. That many of these customs are based on beliefs about the roles of men and women, beliefs that may now be outdated, is relatively clear. As noted,<sup>320</sup> many of the stereotyped traits of women are often seen as highly valued characteristics. Yet, stereotyping, coupled with a gender hierarchy, nearly always leads to beliefs that male characteristics are superior to female ones. Over time, this leads to the view that not only are stereotyped female characteristics inferior, females themselves are inferior. Therefore, female genital mutilation, the veiling of women, the dowry system and woman battering, among other things, are based on beliefs about inferiority or superiority. "The representation of sexes is always ranked, asymmetrical."<sup>321</sup>

In Africa, women's groups are working to eradicate female genital mutilation, but few laws are passed, and governments do little to protect women from this practice.<sup>322</sup> Female genital mutilation is aimed at suppressing female sexuality, due to the

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<sup>319</sup> CEDAW, *supra* note 1, at art. 5(a).

<sup>320</sup> See, *supra* note 236 and accompanying text.

<sup>321</sup> Cherifa Bouatta & Doria Cherifati-Merabtine, *The Social Representation of Women in Algeria's Islamist Movement*, in *IDENTITY POLITICS & WOMEN*, *supra* note 73, at 183, 199.

<sup>322</sup> A.M. Rosenthal, *On My Mind; The Torture Continues*, *NY TIMES*, July 27, 1993 at A13.

belief that female sexuality is dangerous to society.<sup>323</sup> In addition, the ability to control female sexuality gives men a greater control over women and places women in the category of property.<sup>324</sup> It keeps women "tied to [their] husband[s]' wishes"<sup>325</sup> and maintains a patriarchal hierarchy<sup>326</sup> which benefits most the group that has the power to change it. Since this hierarchy is based on gender, control of sexuality is of paramount importance to the powerful group. "The power of men as a class depends on keeping men sexually inviolate and women sexually used by men."<sup>327</sup>

Sexuality is such a defining force in all our lives that the women who are victims of sexual oppression internalize the dominant beliefs and acquiesce in order to survive. This produces a lack of self-respect that makes resistance almost impossible.<sup>328</sup> However, if women's stories are excluded from the discussion totally, change becomes even more impossible. In addition, female genital mutilation, for example, as a practice is structured so that women, that is, mothers and grandmothers, are often its strongest proponents. This is accomplished by shrouding the dangers of the practice in silence<sup>329</sup> and by the power bestowed on women who continue the practice. In a song sung by mothers to their daughters on the day of the daughters' mutilation, the mothers proclaim, "[w]e used to be friends, but today I am the master, for I am a man. Look, I have the knife in my hand, and I will operate on you."<sup>330</sup> The ritual mutilation provides a rare opportunity for a woman to be powerful.

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<sup>323</sup> LEILA AHMED, *WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE* 35 (1992) (Women were "perceived as innately more implicated in physicality and sexuality than men. The shamefulness of sex was focused most intensely on the shamefulness of the female body. . .").

<sup>324</sup> Blaine Harden, *Africans Keep Rite of Girls' Circumcision; Practice Causes Pain, Infection, But Seen as Badge of Chastity*, WASH. POST, July 13, 1985, at A12.

<sup>325</sup> *Women's Wound—Whose Will?*, MONEYCLIPS, July 8, 1993.

<sup>326</sup> *Id.*

<sup>327</sup> Andrea Dworkin, *I Want a Twenty-Four-Hour Truce*, in, *TRANSFORMING A RAPE CULTURE*, *supra* note 164, at 13, 17.

<sup>328</sup> CATHARINE A. MACKINNON, *Desire and Power*, in *FEMINISM UNMODIFIED*, *supra* note 60, at 46, 61.

<sup>329</sup> Alice Walker, *Speech at Radcliffe College*, (June 5, 1992), in, *WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN*, 20, 24-25 (Alice Walker and Pratibha Parmar eds., 1993).

<sup>330</sup> *Ritual song sung at circumcision*, from, A.M.I. Vergiat, *MOEURS ET COU-TUMES DES MANJAS* (1937), *reprinted in*, WALKER & PARMAR, *id.* at 178.

Female genital mutilation continues, in spite of laws against it, supported by three powerful forces: a gender hierarchy so ingrained it is difficult to recognize, a male (often unconscious) desire to maintain the gender hierarchy, and the support of the victims who are granted at least occasional feelings of power by the performance of the mutilation. Yet, in the language of CEDAW, female genital mutilation clearly is a "distinction . . . made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition . . . by women of human rights and fundamental freedoms."<sup>331</sup> The practice itself is a violation of a woman's right to be free from "cruel, inhuman or degrading treatment."<sup>332</sup> But eradication of a cultural practice is much more complicated than simply changing discriminatory laws. In addition to legislation, education is vital to the process. Effective implementation of CEDAW necessitates an understanding that "all appropriate measures" be interpreted broadly. It should not allow for slow change because of the difficulty in changing custom, but require intensive education programs to facilitate change, as well as aggressive enforcement of new laws that are enacted to outlaw these customary practices.

The problem of woman battering in the United States points to the necessity for action that includes legislation, but goes significantly beyond it as well, to include measures that get at the structural basis for violence against women. When a woman is battered, it represents not an isolated, aberrant incident, but an activity that is "pervasive and structural."<sup>333</sup>

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<sup>331</sup> CEDAW, *supra* note 1, at art. 1.

<sup>332</sup> Torture Convention, *supra* note 143. The Convention does not define "cruel, inhuman or degrading treatment" distinct from torture. International law, however, seems to consider cruel, inhuman and degrading treatment as a lesser form of torture. See, *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (Ser. A) (1978). The definition of torture includes the component of "instigation. . . or . . . consent or acquiescence of a public official or other person acting in an official capacity." Torture Convention, *id* at art. 1. Often, the lack of an official actor is cited as the reason international law does not become involved in customary practices. However, since CEDAW requires governments to change cultural practices, failure on the part of government officials to intervene is a violation of law under CEDAW; therefore, inaction is at least "acquiescence of a public official." So, if a practice fits the rest of the definition of torture, a government that refuses to intervene is in violation of CEDAW and, therefore, the Torture Convention.

<sup>333</sup> Cook, *Gaining Redress Within a Human Rights Framework*, in *OURS BY RIGHT* *supra* note 20, at 13, 13.

Violence against women is not a series of actions committed by maladjusted individuals, but "stems, in large measure, from [women's] inferior position."<sup>334</sup> Although all of the individual States in the United States have laws outlawing domestic violence,<sup>335</sup> other kinds of actions aimed at the problem may do more toward re-affirming the "inferior position" of women than changing the attitudes and structure of society to eliminate the motivation to continue the practice.<sup>336</sup> For example, among the techniques for combatting violence against women have been programs to teach women self-defense and other precautions for avoiding violent situations. Yet, these tactics ultimately result in controlling the actions of women and therefore continue the pattern of male control over women.<sup>337</sup> Whether one avoids certain situations because of fear of actual attack or because it is safer not to be there is merely a question of semantics; either way, the reality of male violence against women restricts the movement and activities of women and results in women being effectively controlled. The situation of woman battering is very much one where men are the actors and women are acted upon. Education to change attitudes must be directed at the actors.

The United States experience with woman battering also points out how legislation alone, or that which is not extensive enough, may have little impact on a given problem. The cooperation of police is vitally necessary in combatting domestic violence and enforcing the laws that a legislature passes. Yet, traditionally in the United States, police departments have left enforcement of domestic violence laws in the hands of victims.

Police officers need not have someone swear out a warrant to arrest two people in a fight. Two men standing on a corner in a fist fight; a police officer can arrest them both, regardless of whether either one swears out a complaint. In the vast majority of cases where a woman is bleeding from an orifice and a man is

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<sup>334</sup> WETZEL, *supra* note 51, at 161.

<sup>335</sup> Lauren L. McFarlane, *Domestic Violence Victims v. Municipalities: Who Pays When Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 931 (1991).

<sup>336</sup> Gloria Steinem, *Erotica Vs. Pornography*, in TRANSFORMING A RAPE CULTURE *supra* note 164, at 33, 33 ("[I]t takes violence or the threat of it to maintain the dominance of any group of human beings over another. Moreover, the threat must be the most persuasive wherever men and women come together intimately and are most in danger of recognizing each other's humanity.").

<sup>337</sup> WETZEL, *supra* note 51, at 163.

standing over her and the police are called, they turn to the woman and say, "Do you wish to swear out a warrant?" And when she stands there at 110 pounds looking at a 230 pound man, knowing that if she says yes, then once he gets out on bail, he may beat the living hell out of her again, they demand of her, before they'll arrest, . . . in most cases — to swear out a warrant. They don't do that with men.<sup>338</sup>

In addition to not arresting abusers, a police officer notes, "For a long time I think police officers would respond to domestic violence calls and have the attitude of apathy, if you will, disdain, contempt for the victim."<sup>339</sup> Nonetheless, only twenty-seven states have laws mandating arrest for domestic violence.<sup>340</sup>

Once the laws are enacted by the legislature and the police begin to enforce them, prosecutors must follow through, without relying on the victim to direct the prosecution.

Victims of domestic violence should never be asked if they want to press charges or if they want to prosecute — never. If you create a policy that says that you might as well draw a target on the victim's chest, because you've just told the batterer that now the victim has control over what happens. And if he can manipulate her, if he can intimidate her, if he can threaten her, the case will go away.<sup>341</sup>

Nonetheless, woman battering is viewed as a crime in which the victim is responsible, responsible for her attack and responsible for arresting and prosecuting her attacker. The policy of requiring the victim to press charges and follow through on the prosecution of her batterer is "an age-old legal tenet,"<sup>342</sup> albeit one

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<sup>338</sup> *Confirmation of Ruth Bader Ginsburg as Supreme Court Justice, 1993: Hearings before the Senate Judiciary Committee*, 103rd Cong., 1st Sess. 194 (1993) (statement of Senator Joseph Biden); *see also*, Joint Resolution Designating October 1991 as "National Domestic Violence Awareness Month"; "Whereas some individuals in our law enforcement and judicial systems continue to think of spousal abuse as a "private" matter and are hesitant to intervene and treat domestic assault as a crime. . . ." S.J. Res. 73, 102d Cong., 1st Sess., 105 Stat. 579 (1991).

<sup>339</sup> *San Diego Successfully Battles Domestic Violence* (CNN television broadcast, June 28, 1994).

<sup>340</sup> *Turning Point: Police in 27 States Can Now Make Arrests in Cases of Domestic Abuse Even if the Victim Doesn't Want to Prosecute* (ABC television broadcast, July 20, 1994).

<sup>341</sup> *Supra* note 339.

<sup>342</sup> Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse; Violence: New Legal Techniques Tested. But Critics Say Attacks on Women are Still not Taken Seriously Enough*, L.A. TIMES, July 11, 1994,

that is slowly changing.<sup>343</sup> Imagine the scenario of the police responding to an alarm at a bank, nabbing the robber as he flees out the door, then turning to the bank president and asking, "Do you want to press charges? Do you want to prosecute?"

Even if the police arrest and the district, county and city attorneys prosecute, the judges who hear the cases must treat them like the crimes that they are. Some states have begun to require that judges receive specialized training in domestic violence issues.<sup>344</sup> Such training is sorely needed. For example, in 1989, a battered woman appeared before a judge in Massachusetts, requesting protection from the man who had bragged, even in front of police, that he was going to kill her. The judge responded, "This court has a lot more serious matters to contend with."<sup>345</sup> This woman is now dead.<sup>346</sup> A woman in Georgia faced a judge who "mocked" her and "led the courtroom in laughter as the woman left" when she asked for protection from the husband who had repeatedly threatened to kill her. Her husband appeared before this judge before, and this time, just like the previous times, the charges were dismissed. This woman is now dead.<sup>347</sup> Included in the numerous reports of O.J. Simpson's history as a woman batterer that have surfaced since his arrest in the murders of Nicole Simpson and Ronald Goldman is the report that, in 1989, when Simpson pleaded *Nolo Contendere* to spouse abuse, he was sentenced to "[a] small

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at A1. Sonoma County (CA) Dist. Atty. Gene Tunney expressed his office's policy this way: "No matter how much time you spend with these ladies, many will still not prosecute." *Id.* Lynda Gorov, *Battering Case Fits Pattern, Some Say; Woman Apparently Caught in Bind*, BOSTON GLOBE, Aug. 25, 1993, at 22 ("Too often, [domestic violence advocates] say, women caught in the cycle of domestic violence not only remain with their abusers, they also *refuse to prosecute* them.") (emphasis added). See also, Jane Hansen, *Decision to Prosecute Batterer is the State's*, ATLANTA JOURNAL AND CONSTITUTION, Apr. 28, 1992, at D1. (The file of a battered woman in Atlanta, described by police as "beaten to a pulp," contains the notation, "[h]owever, the subject failed to prosecute.") Even domestic violence advocates can fall into the legal/semantic trap.

<sup>343</sup> Boxall & Muir, *id.*

<sup>344</sup> Bob Hohler, *State Judges Lag in Training on Domestic Violence Cases*, BOSTON GLOBE, Nov. 5, 1993, at 1.

<sup>345</sup> Karen Tumulty & Stephanie Chavez, *Domestic Abuse Laws; Victims Find Little Safety in System*, LA TIMES, Sept. 4, 1989, at 1.

<sup>346</sup> Tumulty & Chavez, *id.*

<sup>347</sup> Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence In the Americas*, 34 HARV. INT'L L.J. 507, 521 n.64 (1993).

fine, two years' probation, counseling by phone, and 120 hours of community service,"<sup>348</sup> even though police had been called by Nicole Simpson eight times before.<sup>349</sup> Nicole Simpson is now dead.<sup>350</sup>

The legal system is not alone in needing reform in order to respond to human rights abuses impacting women. As many as a third of women visiting hospital emergency rooms are there because of injuries resulting from woman battering. The American Medical Association calls domestic violence an epidemic.<sup>351</sup> The medical profession is beginning to implement programs to recognize and treat victims of domestic violence. The Joint Commission on Accreditation of Healthcare Organizations has recommended its members develop and implement policies, procedures and educational programs identifying and treating battered patients.<sup>352</sup> A family doctor, or emergency room doctor, is often a battered woman's primary contact with the outside world. Nonetheless, one survey showed that only 14% of doctors polled felt "very capable" of identifying and treating battered women.<sup>353</sup> In addition to the professionals a battered woman may encounter, she must also deal with the treatment and attitudes of family, friends, employers and co-workers.

Modifying the "customs and practices which constitute discrimination against women"<sup>354</sup> is a large undertaking. It is unfortunate that the international community, via CEDAW, provides no guidance as to who the decision makers should be and how the decisions should be made, nor as to the kinds of "measures" that are "appropriate." This discussion of female genital mutilation and woman battering demonstrates that attitudes toward these practices run much deeper than the legal system. When decision makers have inherited traditions, legal

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<sup>348</sup> *Judge's Leniency Kept Simpson out of Jail* (CNN television broadcast, June 21, 1994).

<sup>349</sup> *Id.*

<sup>350</sup> On October 3, 1995, O.J. Simpson was found not guilty of the murder of Nicole Simpson.

<sup>351</sup> Laura Fraser, *A Hidden Epidemic; As Many as 12 Million Women a Year are at Risk of Being Battered*, ST. LOUIS POST-DISPATCH, Feb. 27, 1993, at 1D.

<sup>352</sup> E. McLoughlin et al, *Emergency Department Response to Domestic Violence — California, 1992*, 270 JAMA 1296 (Sept. 15, 1993).

<sup>353</sup> Michele Lesie, *Doctors Told to Look for Abuse*, CLEVELAND PLAIN DEALER, Oct. 29, 1993, at 9C.

<sup>354</sup> CEDAW *supra* note 1, at art. 2(f).

or societal, that are so firmly entrenched as to seem natural, re-education must begin at the highest levels of society and must include all levels of society. The only possibility for success in overcoming these discriminations against women is a society that will not tolerate activities that restructure or restrict women's sexuality or autonomy in any way. The phrase "all appropriate measures" is simply too ambiguous to encompass the kinds of radical, structural changes a society must experience in order to combat these kinds of discriminations against women. "All the resources of a country must be channeled into making equality a fact as well as a law."<sup>355</sup>

Article 5(b) has the potential either to encourage enormous changes in any patriarchal society or to entrench motherhood in the national mentality in a manner that will set back women's rights by decades. This clause mandates that:

States Parties shall take all appropriate measures . . . to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.<sup>356</sup>

It is possible to deconstruct the language of this article so that it either promotes women's rights or more deeply ingrains patriarchal assumptions about women and their role as mothers.

The most problematic phrase in this section is "proper understanding." This language, depending on who is interpreting it, could lead to an increase in the belief and practice that motherhood is the only proper role for women, and that women who do not bear children are not "real" women or "patriotic" women. In many nationalist movements, it is through the bearing of children — the provision of more citizens — that women receive status. Not only does this limit women's choices by locking them into particular, prescribed, "appropriate" roles, "[i]t is precisely because . . . reproduction, and child-rearing acquire such strategic importance with the rise of nationalism that many nationalist men become newly aware of their need to exert control

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<sup>355</sup> Luke T. Lee, *Law and the Status of Women*; 8 COLUMBIA HUMAN RIGHTS LAW REVIEW 3 (1976).

<sup>356</sup> CEDAW, *supra* note 1, at art. 5(b).

over the women.”<sup>357</sup> Therefore, controlling women becomes synonymous with directing the fate of the nation. Most often this control is exerted with talk of patriotism and tradition. On occasion, it becomes much more blatant.

In 1990, the rate of natural population growth in Croatia was .07 percent. It was expected that by the end of the civil war, the population would experience an actual decline. To combat this trend, the Croatian government passed a series of laws that were aimed at increasing the birth rate.<sup>358</sup> These provisions included a call to draft legislation “which will ensure that the highest profession in the Republic will be that of the mother as educator of children.”<sup>359</sup> Like CEDAW’s article 5(b), this language could work to improve women’s situation, recognizing the bearing and rearing of children to be deserving of respect equal to the respect given to people who choose other professions. Conversely, this provision could ensure that women are only respected when they function as reproducers, not “merely” as producers. Subsequent provisions clarify that the Republic of Croatia intended to follow the latter route.

Other sections of the legislation called for the “remov[al of] working mothers with children from factories and other places of heavy work which are unsuitable for them.”<sup>360</sup> This provision would guarantee not only that “women—mothers”<sup>361</sup> would be freed from such work, but that “thousands of workplaces in Croatia would become vacant.”<sup>362</sup> It is questionable which is the primary motivation. In addition, the legislature enacted legislation aimed at “[f]ighting [n]on-womanhood.”<sup>363</sup> This provision calls for tax structures that “will not support” couples who have only “one child or even no child at all”; rather, taxes will favor “the family and couples with children.”<sup>364</sup> Noted to be particularly “evil” in this context are “late marriages between the ages

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<sup>357</sup> CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* 238-39 (1993).

<sup>358</sup> *Id.* at 241.

<sup>359</sup> *Id.* at 242.

<sup>360</sup> *Id.* at 242.

<sup>361</sup> *Id.* at 242.

<sup>362</sup> CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* 242 (1993).

<sup>363</sup> *Id.* at 242.

<sup>364</sup> *Id.* at 242.

of 35 and 50 . . . .” Many women have found that the only possibility for them to acquire an adequate education or establish a meaningful career is to delay marriage. Not only does the official policy of Croatia define the choice to have few or no children as an “evil,” this policy devalues women who have passed child bearing age immeasurably.

It is assumed that this type of categorizing and devaluing of women is not what the drafters of CEDAW intended; it is unfortunate they did not expand on the meaning of the “proper understanding of maternity as a social function.” Although “proper” is not defined, referring to maternity as a social function indicates the intention of the drafters was that this function, which only women can perform, should be recognized for the value it contributes to a society and not denigrated precisely because only women can perform it. Reports from the general debate at the Nairobi Conference on the United Nations Decade for Women buttress this interpretation. Although the issue appears to have been addressed only sparsely in Nairobi, “[a] number of representatives stated that in their countries motherhood was recognized as an important social function.”<sup>365</sup> The representatives addressing this issue discussed their countries’ policies regarding maternity leave from work, day care, health care and government assistance to mothers and children.<sup>366</sup>

The difference between the Croatian government’s view of the social function of maternity and that expressed by representatives to the Nairobi Conference may best be explained by speculating about who was involved in the process that resulted in the decisions about how a particular government was going to understand the social function of motherhood. The Croatian government’s policy supports a patriarchal conception of the State;<sup>367</sup> women’s role is to produce children and stay home to

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<sup>365</sup> *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, Nairobi, Kenya Conference at 118, U.N. Doc. A/CONF.116/28/Rev.1 (1985).

<sup>366</sup> *Id.*

<sup>367</sup> Valentine M. Moghadam, *Introduction: Women and Identity Politics in Theoretical and Comparative Perspective*, in, *IDENTITY POLITICS AND WOMEN*, *supra* note 73, at 3, 16. “Crisis and transition seem to bring about an exaggerated reliance on the home and family as refuge for the assaulted identity.” ENLOE, note 88, at 53, 64 (“[A] nationalist movement informed by masculinist pride and holding a patriarchal vision of the new nation-state is likely to produce just one more actor in the [patriarchal] international arena.”).

educate them to be future citizens of the State. Furthermore, by staying home, women are no longer in competition with men for factory and other jobs involving "heavy work." The result is not only an increase in the population, but a decrease in unemployment, two indicators of the success of the government. At the Nairobi Conference, the discussion centered on the women who have or will have children. The policies are designed to allow mothers who also identify themselves as outside-the-home workers to maintain both parts of their identity. Further, when motherhood is respected as a career choice, women who do not participate in outside-the-home employment are also respected for what they (re)produce. It is fairly clear that this conception of maternity is in the nature of what was intended by the CEDAW drafters. Unfortunately, their choice of language does not clarify this issue.

Article 16 outlines in greater detail the human rights of women in the context of marriage; several of the issues have been discussed in other contexts.<sup>368</sup> In addition to the equal rights to enter and dissolve a marriage, article 16 discusses issues that CEDAW deals with in other sections: equal rights and responsibilities as parents,<sup>369</sup> which are discussed in articles 5(b), 10(h), 11(2)(b), (c) and (d), and 12, and equal personal rights,<sup>370</sup> which are discussed in articles 9, 11(1)(c), 13, 14(2)(g) and 15. The greatest impact of article 16 may be to serve as a reminder that women do not become the property of or mere extensions of the men they marry. Previously, marriage and child-bearing were often the only contexts in which the international community addressed the rights of women.<sup>371</sup> This emphasis, however, ignored that "protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children."<sup>372</sup> Article 16 is designed to recognize the oppression of women that may be integral to marriage; oppression that varies among cultures.

All of the cultural practices discussed throughout this article relate in some way to the institution of marriage in a partic-

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<sup>368</sup> See, e.g., *supra* notes 47 - 51 and 312 - 314 and accompanying text.

<sup>369</sup> CEDAW, *supra* note 1, at art. 16(d), (e) and (f).

<sup>370</sup> CEDAW, *supra* note 1, at art. 16(g) and (h).

<sup>371</sup> See, *supra* notes 47 - 51 and accompanying text.

<sup>372</sup> Charlesworth et al., *supra* note 44, at 623.

ular culture and to the belief that women are somehow a commodity in their relationship to their husbands (or future husbands). Dowry murders provide perhaps the most salient example of this manifestation. However, both the veiling of women and female genital mutilation are designed to ensure women are virgins at the time of marriage and remain monogamous after marriage. Woman battering is a particularly virulent manifestation of the principle that a "man's home is his castle." As a recognition that marriage (and the prospect of marriage) presents women with particular forms of oppression, article 16 is grounded in feminist theory.

In the context of the universalism/relativism debate,<sup>373</sup> article 16 superficially represents doctrine that may be seen as a resolution of that debate. Section (a), for example, mandates that men and women should have "[t]he same right to enter into marriage."<sup>374</sup> Assuming that a given culture does not violate international law standards as to age and right to choose one's partner, section (a) can serve to protect a variety of cultural marriage traditions (the relativist side of the debate) while requiring a universal standard of equality.

At the same time, however, article 16's detailed discussion of marriage points out an omission in CEDAW. Nowhere does CEDAW discuss specifically the rights of women who are not married. This does a disservice, not only to heterosexual women who generally fit into a culture's dominant race or class but simply choose not to marry, but most especially to lesbian and bisexual women, for whom not marrying is more than a simple lifestyle choice. The omission of unmarried women of all sexual orientations highlights, again, the paternalism of both cultural and universal standards. While it is imperative that CEDAW functions to assure the rights of married women, doing so at the expense of discussing marriage as one lifestyle option among many marginalizes women who do not marry. Article 16 highlights the liberal bent of CEDAW, and therefore the androcentric viewpoint of the document.

CEDAW begins with the assumption that the institutions and procedures currently practiced in given societies are basically appropriate modes of behavior. All that is missing is that

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<sup>373</sup> See, *supra* notes 1 - 13 and accompanying text.

<sup>374</sup> CEDAW, *supra* note 1, at art. 16(1).

women are often denied access, or meaningful access, to these institutions and procedures. Article 16 points up the necessity of viewing various cultures from a new location; a location that begins by asking "what do women and men (*all* women and men) want, need and desire and how can individual governments and international law assure that people will have their needs fulfilled?"

### 7. *De-Criminalizing Gender — Articles 2(g), 15 & 16*

Section (g) of article 2 calls for States Parties "[t]o repeal all national penal provisions which constitute discrimination against women."<sup>375</sup> This article is modified by articles 15 and 16, which have been analyzed previously. Penal provisions are those which are punishable by the State law enforcement mechanism.<sup>376</sup> This section is targeted at criminal provisions aimed directly at women, provisions relating to women's mode of dress,<sup>377</sup> or provisions providing for different standards for women and men (for example when adultery is a crime for women but not for men). Section (g) relates also to laws that appear to be neutral, but in reality "constitute discrimination against women." It is important to note that laws that appear to be neutral, may not be. When laws are initially enacted in a setting of gender hierarchy, but that hierarchy is ignored by an official policy of neutrality, the gender difference seems natural and the "harm that has been done will not be perceptible as harm."<sup>378</sup>

While dowry, female genital mutilation and woman battering are all, to greater and lesser degrees, outlawed or at least discussed as to the possibility of being outlawed, the veil and all it represents in Middle-Eastern cultures<sup>379</sup> is part of the crimi-

<sup>375</sup> CEDAW, *supra* note 1, at art. 2(g).

<sup>376</sup> BLACK'S LAW DICTIONARY 1019 (5th ed. 1979).

<sup>377</sup> *Hearings Before the Subcommittee on International Security, International Organizations, and Human Rights of the House Foreign Affairs Committee*, Sept. 29, 1993 (Statement of John Shattuck, Assistant Secretary for Human Rights and Humanitarian Affairs) *reprinted in*, *Violations of Women's Human Rights*, 1993 U.S. Dept. of State Dispatch, Oct. 11, 1993, Vol. 4 No. 41.

<sup>378</sup> Catherine MacKinnon, *Francis Biddle's Sister*, in *FEMINISM UNMODIFIED*, *supra* note 60, at 166.

<sup>379</sup> The veiling of women is justified by *Sharia*, or Muslim personal law, and is defended by its proponents as a religious imperative. However, feminist Muslim scholars argue that the veiling of women is a cultural imperative. *See, e.g.*, Pamela Bone, *Jordan: An Islamic Princess Defends Her Faith*, *THE AGE* (Melbourne), June

nal and personal law of many countries.<sup>380</sup> National laws based on *Sharia* impact women in different countries in different ways. "[T]he specific content of the laws derivable from the Quran depends greatly on the interpretation that legists chose to bring to it and the elements of its complex utterances that they chose to give weight to."<sup>381</sup> For example, in Iran, Saudi Arabia and the Sudan, women who fail to cover themselves face criminal prosecution. In addition, in the Sudan and Saudi Arabia, a woman cannot travel without the permission, in writing, of her male guardian. If a woman in Iran is caught alone with a man who is not a member of her family, she can be arrested. In Kuwait, women cannot vote.<sup>382</sup> In Pakistan, a woman who is raped must provide four adult male witnesses to the attack. If a woman has the misfortune to be raped without the necessary witnesses present, she may be jailed for having "impermissible sex."<sup>383</sup> It is not necessarily unusual for countries, at least in the recent past, to treat women and men differently under the laws that pertain to sexual conduct.<sup>384</sup> What is unique about *Sharia* is the extent to which it intrudes on women's lives as well as the extent it is supposedly based on religion, rather than simply culture. Religion serves both to give meaning to the everyday way things are and to "proclaim what ought to be."<sup>385</sup> Although *Sharia* helps fulfill important religious roles, it is im-

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25, 1993. ("It has been argued that. . . Islam restricts the rights of women. Islam does no such thing. In most cases the practices are relics of culture unrelated to Islam.") See, also, Elaine Sciolino, *Islam: Feminists vs. Fundamentalists*, N.Y. TIMES, July 25, 1985 at C1. Because of this disagreement, I prefer to analyze veiling as a cultural tradition; therefore, while it is true that Muslim fundamentalists outside of the Middle East require women to be veiled, I will refer to the practice as a Middle-Eastern custom. Muslim author Fatima Mernissi says, "Being Muslim is a civil matter, a national identity, a passport, a family code of laws, a code of public rights." FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE* 20 (Mary Jo Lakeland, trans., 1991) (1987).

<sup>380</sup> Deborah Scroggins, *The Women of Fundamentalist Islam: Back to a World Ruled by Men*, THE OTTAWA CITIZEN, July 11, 1992 at B2.

<sup>381</sup> AHMED, *supra* note 316, at 88.

<sup>382</sup> Scroggins, *supra* note 380.

<sup>383</sup> Michele Landsberg, *Human Rights Must Include Woman's Right to Escape Abuse*, TORONTO STAR, Sept. 12, 1992 at G1.

<sup>384</sup> Shahnaz Sadjadi & Marianne Hedin-Pourghasemi, *Law and the Status of Women in Iran*, in, LAW AND THE STATUS OF WOMEN, *supra* note 355 at 141, 154.

<sup>385</sup> Joan H. Timmerman, *Religion and Violence: The Persistence of Ambivalence*, in TRANSFORMING A RAPE CULTURE, *supra* note 164 at 201, 203.

portant to remember that "[i]n many countries, what is considered Islamic is muddled with local customs and traditions."<sup>386</sup>

The underlying basis of these laws, although there is variety among Middle-Eastern countries, is that women are the targets of regulation.<sup>387</sup> The veil is representative of the treatment of women in Middle-Eastern cultures — it also serves a representative function drawing a line between "Muslim" and the outside world.<sup>388</sup> Most of all, however, compulsory veiling represents a lack of choice of identity for Muslim women. Identity as "woman" is defined and imposed by the state in the form of the veil.<sup>389</sup> A veiled woman is a woman who functions as one man's daughter, one man's wife and some men's mother. The veil functions as notice to men of the availability of a woman for sexual purposes.<sup>390</sup> And, no other choice of identity is considered.

As availability and sexuality are considered the defining characteristics of woman, men exert tremendous control over women. Autonomy for women is nonexistent.<sup>391</sup> Men control women's movements and demeanor completely because this is necessary in order for men to retain control over women's sexuality. Moreover, the laws that impose this control on women are not mere vestiges of ancient legislation. A change in the law in Algeria in 1984 deprived women of their freedom to choose a marriage partner. Now they must depend on the counsel of a male "matrimonial tutor."<sup>392</sup> Also taken away recently was a woman's right to divorce or to have custody of her children. The next year, legislation in India abolished a Muslim woman's right to alimony, in accordance with *Sharia*.<sup>393</sup> In 1990, Ira-

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<sup>386</sup> Sciolino, *supra* note 379.

<sup>387</sup> See, e.g., AHMED, *supra* note 316, at 6; Margot Badran, *Gender Activism: Feminists and Islamist in Egypt*, in IDENTITY POLITICS & WOMEN, *supra* note 73, at 208; Bouatta & Cherifati-Merabtine, *supra* note 298, at 199; Binnaz Toprak, *Women and Fundamentalism: The Case of Turkey*, in IDENTITY POLITICS & WOMEN *supra* note 73, at 293, 293; Louise Crosby, *Islamic Apartheid: Conference Told Rise of Fundamentalism Forces More Women to Obey Restrictive Codes*, THE OTTAWA CITIZEN, Sept. 4, 1992, at A6.

<sup>388</sup> Moghadam, *supra* note 367, at 14.

<sup>389</sup> Moghadam, *supra* note 367, at 14.

<sup>390</sup> AHMED, *supra* note 316, at 15.

<sup>391</sup> AHMED, *supra* note 316, at 62.

<sup>392</sup> See, Crosby, *supra* note 387.

<sup>393</sup> See, Crosby, *supra* note 387.

nian men gained the right to kill women family members suspected of adultery.<sup>394</sup> Recently, a progressive family law enacted in Egypt in 1979 was overturned by Muslim fundamentalists on procedural grounds: polygamy is once again legal, a man may once again legally prevent his wife from working or travelling and it is once again easier for a man to obtain a divorce than for a woman.<sup>395</sup>

The Koran is being used by fundamentalists to deny the rights of women. Many argue that these restrictions are not required by the Koran.<sup>396</sup> The motivation is not religious, but patriarchal. These restrictions ensure the domination of women by men, cloaked in a religious cover so that even women believe in the religious imperative of the laws. "Men play upon the religious sentiment of the people, and the people believe it is Islam when it's a custom or a tradition."<sup>397</sup>

Anti-woman laws based on *Sharia* are relatively easy for anyone to recognize. As with other issues pertaining to CEDAW, however, other penal provisions that discriminate against women may be more difficult to spot, particularly if women are not included in the discussions of how to reform penal provisions. An example is found in the domestic violence laws of the United States. In the United States, criminal law relating to woman battering is largely a function of state law,<sup>398</sup> so there is some variety among the laws.<sup>399</sup> Domestic violence was

<sup>394</sup> See, Crosby, *supra* note 387.

<sup>395</sup> See, Sciolino, *supra* note 379.

<sup>396</sup> See, Scroggins, *supra* note 380.

<sup>397</sup> Sciolino, *supra* note 379.

<sup>398</sup> The Violence Against Women Act has been introduced in the last several Congresses; recently its passage was spearheaded by Senator Joseph Biden. It includes provisions allowing civil rights causes of action for hate crimes based on gender, makes crossing state lines to inflict spousal abuse a federal offense and encourages all states and localities to adopt a mandatory arrest policy. The Act passed as part of the Crime Bill passed by the Senate on August 25, 1994, currently awaiting President Clinton's signature. *Abused Women are Crime-Bill Winners*, DES MOINES REGISTER, Aug 27, 1994 at 1.

<sup>399</sup> Pennsylvania passed the first domestic violence law in 1976. Now, all states have specific domestic violence provisions. *Renewed Concern Sparks Awareness of Domestic Violence*, (National Public Radio Morning Edition broadcast, June 23, 1994); examples of the variety among state laws includes: 15 states have mandatory arrest laws, *World News Tonight: State Domestic Violence Laws* (ABC Television Broadcast, June 20, 1994); several state court systems treat domestic violence as a civil, not a criminal matter, Lynne Gold-Bikin, *Larry King Live: Bob Costas on the O.J. Simpson Tragedy* (CNN Television Broadcast, June 20, 1994); in

first criminalized by a state in 1976.<sup>400</sup> Prior to that time, woman battering was routinely ignored by law enforcement.<sup>401</sup> What is astounding is that separate legislation was necessary at all. When a person "causes bodily injury to another,"<sup>402</sup> it was assault then as it is now. If the victim was not related to the perpetrator and the assault happened anywhere but the home, chances were the perpetrator would be arrested. If the victim was the perpetrator's wife or girlfriend, it would be suggested to the perpetrator that he walk around the block and calm down. If the police even spoke to the woman (assuming she was not "hysterical"), it was to give her advice on how to keep from making her husband angry so she could avoid further injury. Absolutely the only difference in the two assaults was the relationship of the victim to the perpetrator.

It was therefore necessary to legislate against spousal abuse, since it was not being treated like any other assault. However, once the legislation was in place, the police, the prosecutors and the judges did not change their behavior at all. The pre-protective legislation days represent how women are discriminated against by unequal application of the laws. Current legislation has not solved the problems of arrest and enforcement, proving a change in legislation may not be enough. Women are discriminated against if there are no laws aimed directly at spousal abuse because, in that situation, an assault is not an assault. And, the discrimination continues when protective legislation is enacted. Unfortunately, CEDAW only calls for a repeal of discriminatory provisions; there is no specific call to enact penal laws that may be necessary to protect women's rights.

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over half the U.S. states, a man is immune from prosecution, in some situations, for raping his wife; in seven states, interspousal immunity prevents a woman from suing her husband to pay the medical bills from injuries he inflicted, *Civil & Constitutional Rights: Violence Motivated by Gender, 1993: Hearings on H.R. 1133 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103rd. Cong., 1st. Sess. (1993)* (Testimony of Sally Goldfarb Senior Staff Attorney Legal Defense & Educational Fund).

<sup>400</sup> *Renewed Concern Sparks Awareness of Domestic Violence* (National Public Radio Broadcast, June 23, 1994).

<sup>401</sup> See, e.g., Michele Ingrassia & Melinda Beck, *Patterns of Abuse*, NEWSWEEK July 4, 1994 at 26, 31-32.

<sup>402</sup> MODEL PENAL CODE § 211.1 (1962).

8. *The Full Development and Advancement of Women — Article 3*

Articles 3, 4 and 14 of CEDAW, although they amplify parts of article 2, also stand alone in creating specific guarantees for women. Article 3 of CEDAW requires States Parties to

take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>403</sup>

On one level, this provision is very broad. "Political" encompasses activities from voting and holding office to freedom of speech and assembly. "Economic" ranges from salary issues to aid and development issues. "Cultural" issues have been discussed throughout and are wide-ranging indeed. And "social" may be the broadest of all. Social interactions are interactions "of or having to do with human beings living together as a group in a situation requiring that they have dealings with one another."<sup>404</sup> These four fields encompass virtually all forms of human interaction.

Article 3 is limited, however, by its purpose, which is to assure women "the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."<sup>405</sup> The first limitation this creates is in the determination of which rights and freedoms are fundamental. The international community is not necessarily in accord on the question of the extent and definition, indeed even the inclusion of certain rights, of fundamental rights and freedoms.<sup>406</sup> In addition, article 3 calls for women's access to human rights and fundamental freedoms to be on "a basis of equality with men." This, once again, creates a situation where the needs and desires of women must be defined in a manner that will fit into an androcentric definition of human rights. To a battered woman, her beatings constitute torture, an "act by which severe pain or suffering, whether

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<sup>403</sup> CEDAW, *supra* note 1, at art. 3.

<sup>404</sup> WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1722 (2d ed. 1983).

<sup>405</sup> CEDAW, *supra* note 1, at art. 3.

<sup>406</sup> See, e.g., Burns H. Weston, *Human Rights*, ENCYCLOPAEDIA BRITANNICA 714 (15th ed., 1988).

physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him [sic] or a third person . . . when such pain or suffering is inflicted . . . with the consent or acquiescence of a public official."<sup>407</sup> She suffers physical or emotional pain or suffering that is inflicted intentionally for the purpose of coercing her into behaving the way the batterer wants her to behave. In addition, when police, prosecutors and judges refuse to arrest and prosecute or treat the assault as a lesser crime because they devalue the victim, the assault takes place with the consent of the government.<sup>408</sup> Yet, we continue to "condemn states which torture political prisoners without condemning those who condone domestic violence by failing to prosecute offenders."<sup>409</sup> Article 3 does not recognize that "human rights and fundamental freedoms on a basis of equality with men" may not provide women meaningful equality. It does not consider that these rights are based on an androcentric view of what is fundamental.

#### 9. *De Facto Equality — Article 4*

Article 4 allows States Parties to implement "special measures aimed at accelerating *de facto* equality between men and women."<sup>410</sup> Commonly known as affirmative action, these measures are "fundamental to overcoming the barriers that have closed off women throughout the world from full participation in society."<sup>411</sup> Throughout CEDAW, States Parties are called on to eliminate discrimination against women via "all appropriate measures, including legislation." Although affirmative action programs may be mandated by legislation, they are also a different kind of "appropriate measure" that serves an educational function. The more one sees, for example, women police officers, the less unthinkable it becomes, the less obvious

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<sup>407</sup> Torture Convention, *supra* note 143, at art. 1.

<sup>408</sup> ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 88 (1994). (A counseling program in Boston for men who batter, defines spousal abuse as: 'any act that causes the victim to do something she does not want to do, prevents her from doing something she wants to do, or causes her to be afraid.' In addition, 'violence need not involve physical contact with the victim', as psychological abuse and intimidating acts can accomplish the same coercion.) *See also*, Culleton, *supra* note 347, *passim*.

<sup>409</sup> Broadbent, *Getting Rid of Male Bias*, *supra* note 65, at 11.

<sup>410</sup> CEDAW, *supra* note 1, at art. 4(1).

<sup>411</sup> WETZEL, *supra* note 51, at 22.

it is that law enforcers are policemen. After some time, women become commonplace in positions that were previously open only to men. Society, employers, educators, women and men find that options become greater. And, if affirmative action is sincerely implemented, as article 4(1) recognizes, after awhile it is no longer necessary.<sup>412</sup>

In spite of the importance of affirmative action, article 4 limits the possibilities for the implementation of meaningful affirmative action by noting that it "shall in no way entail as a consequence the maintenance of unequal or separate standards."<sup>413</sup> As this analysis has shown, not only have women been the victims of separate standards throughout history, but the standards present in virtually any given situation are standards conceived by men for men. In addition, in some situations, biology dictates some difference in the standards to be applied to men and women. Article 4(2) addresses this issue by mandating that "special measures aimed at protecting maternity shall not be considered discriminatory."<sup>414</sup> This does not allow, however, for special measures that level the playing field between men and women, when the women are, for example, mothers primarily responsible for child care.

It is absolutely imperative that a State committed to the principles of equality and equity of women and men engage in a wide range of programs to overcome systemic discrimination. As analysis of the various substantive provisions of CEDAW shows, women suffer oppression as a result of patriarchal governments and social orders. It is not enough for a woman to be treated in a non-discriminatory fashion by the public institutions with which she comes in contact, but the men in her personal life must also be educated about the oppressions they visit upon the women with whom they interact. A society committed to removing the oppression of women will not tolerate the father who denies his daughter the education he provides for his son or

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<sup>412</sup> Two or three decades ago, I am told, when women were barely visible in U.S. law schools, law professors used to hold "Ladies Day" — the day when the professor called on the women students. Now that women make up almost half of the students in most U.S. law schools (due to affirmative action programs) such demeaning attention to the needs of women students would probably not be tolerated.

<sup>413</sup> CEDAW, *supra* note 1, at art. 4(1).

<sup>414</sup> CEDAW, *supra* note 1, at art. 4(2).

a daughter that is undernourished because her brother receives preference when scarce food is distributed. A country striving to overcome the oppression of women will not only listen to women when they speak, but will ask women what they want and need and will take the answers to heart. The equality of women needs to be included in every item on every agenda in every country to assure that equality is not "delayed" in favor of other demands on government resources. Every program that every government enacts has the potential to impact women. The rights of women must be viewed as both a separate issue and as integral to every decision a government makes. Failure to act in this fashion will serve to perpetuate *de facto* discrimination.

#### 10. *Addressing Systemic Inequality — Article 14*

Unlike the preceding substantive articles of CEDAW, article 14, aimed at the "particular problems faced by rural women,"<sup>415</sup> provides an example of the type of visionary approach needed in addressing the systemic inequities facing women. "This article is unique as a statement of human rights because it emphasizes the rights of a particular sub-group to which special attention should be paid."<sup>416</sup> Currently, rural women who do not own property are often denied development aid, whether from foreign or domestic sources. Development programs are most often aimed at those who own land (usually men) and, in addition, are based on stereotypes about land ownership; for example that a family farm is owned by, and the family headed by, the husband.<sup>417</sup> Often, production activities that are performed by women are addressed in aid programs aimed at men, because of the assumption that the man is the true owner of the family's land or at least has control over the land.<sup>418</sup> A lack of

<sup>415</sup> CEDAW, *supra* note 1, at art. 14(1).

<sup>416</sup> Freeman, *supra* note 204, at 98.

<sup>417</sup> Freeman, *supra* note 204, at 98.

<sup>418</sup> Ann Whitehead & Helen Bloom, *Agriculture, in, GENDER AND DEVELOPMENT: A PRACTICAL GUIDE* 41, 53 (Lise Ostergaard ed., 1992) ("For example, an attempt to introduce irrigated rice production in The Gambia made an initial assumption that the men were the traditional rice growers and had full control over the resources required for it. In reality women grew the rice for household consumption and exchange. . . . Backed by project officials, the men established exclusive rights to the women's rice fields and pushed the female rice farmers out to inferior scattered plots to continue cultivating traditional rice varieties. The levels of improved rice production were disappointingly low, . . .").

access to aid in a developing country will further disadvantage women in the economic arena.

This article calls on States Parties to assure that women “participate in and benefit from rural development.”<sup>419</sup> This participation is vital to the effective use of development aid. Including women both as participants and beneficiaries, this article comes closest to addressing many of the short-comings inherent in other sections of CEDAW, by embracing both method and outcome. Women are not only to specifically benefit from development aid, but are to be involved in making determinations about aid expenditures and distributions. In addition, the subsections of section 14(2) are more extensive and explicit than similar sections of CEDAW. These subsections call for the involvement of women in “elaboration and implementation of development planning at all levels.”<sup>420</sup> They also mandate access to “health care facilities, including information, counselling and services in family planning.”<sup>421</sup> Women are to “benefit from social security programmes,”<sup>422</sup> and to receive education and training aimed at increasing their “technical proficiency.” This is to include formal and informal training with an aim to assuring women will benefit from “all community and extension services,” as well as addressing functional illiteracy.<sup>423</sup> Article 14 ensures rural women the right “to organize self-help groups and co-operatives,”<sup>424</sup> to “participate in all community activities,”<sup>425</sup> to “have access” to credit and loan programs, to “marketing facilities,” and to receive “equal treatment in land and agrarian reform . . . [and] resettlement schemes.”<sup>426</sup> Article 14 also addresses women’s needs in the area of “adequate living conditions,” especially “housing, sanitation, electricity and water supply, transport and communication.”<sup>427</sup> Finally, article 14 mandates a recognition of “non-monetized

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<sup>419</sup> CEDAW, *supra* note 1, at art. 14(2).

<sup>420</sup> CEDAW, *supra* note 1, at art. 14(2)(a).

<sup>421</sup> CEDAW, *supra* note 1, at art. 14(2)(b).

<sup>422</sup> CEDAW, *supra* note 1, at art. 14(2)(c).

<sup>423</sup> CEDAW, *supra* note 1, at art. 14(2)(d).

<sup>424</sup> CEDAW, *supra* note 1, at art. 14(2)(e).

<sup>425</sup> CEDAW, *supra* note 1, at art. 14(2)(f).

<sup>426</sup> CEDAW, *supra* note 1, at art. 14(2)(g).

<sup>427</sup> CEDAW, *supra* note 1, at art. 14(2)(h).

sectors of the economy,"<sup>428</sup> the sectors where a majority of women's labor is performed.

This attention to detail when it comes to rural women is long overdue, as well as impressive. Other articles of CEDAW would have benefitted by the same extensive analysis. For example, article 15(2) which "give[s] women equal rights . . . to administer property"<sup>429</sup> could have include details about women's right to inherit property, to act as administrators for the property left to their children and to dispose of their property in any manner they see fit. It could have mandated government social programs aimed at helping women acquire property and assured them equity in obtaining mortgages. It could have encouraged and assisted women in forming co-operatives for the purpose of owning and administering land, and offered educational programs and training to give women the skills necessary to effectively administer their land. In addition to guaranteeing women equal treatment "in all stages of procedure in courts and tribunals,"<sup>430</sup> article 15 could have provided for training for women in accessing and using the legal system, as well as training for members of the legal profession in the special issues relating to women and (in this example) land administration. In addition, article 15 could (and should) have mandated the inclusion of women at all levels of this decision-making process; in determining the areas in which women (and others) need training, in implementing the programs, in determining the kinds of governmental aid women need to facilitate effective administration of their property and so on. A government whose policy incorporates this attention to the rights of an oppressed group in all areas of life would go far in ending the systemic discrimination against women. This government would recognize that policies made by the power elite do not impact only people "like" those elite decision-makers. Every policy considered by this hypothetical egalitarian government would be analyzed in a manner that includes the input of all groups in the society, so that a realistic assessment of the impact of the policy can be made. In this way, the power elite itself begins to look different, as over time it becomes more reflective of the make-up of the society.

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<sup>428</sup> CEDAW, *supra* note 1, at art. 14(1).

<sup>429</sup> CEDAW, *supra* note 1, at art. 15(2).

<sup>430</sup> CEDAW, *supra* note 1, at art. 15 (2).

## IV. APPRAISAL AND RECOMMENDATION

This analysis of the Convention on the Elimination of All Forms of Discrimination Against Women calls into question the ability of both universalism and liberalism to respond adequately to alleged violations of women's human rights. Currently, universalism provides an androcentric conception of human rights that often does not encompass the real-life experiences of women. This study has shown that current understandings of human rights norms spring from male experiences and male understandings of the world. Women experiencing female genital mutilation, the *purdah* represented by the veil, the inequities of the dowry system, and violence in their intimate relationships understand that human rights must be expanded to encompass the parts of the world that are traditionally seen to be private and beyond the reach of the legal system.

Historically, international human rights law, in the liberal tradition, perpetuated a split between the public and the private, with law reaching only minimally into the realm of the private. In addition, the public/private split included a socialization of women and men that assigned women's lives to the private area. The result was that legal systems have been ineffective in promoting and protecting women's rights. This split was replicated in the international human rights regime, with its protection of the family from legal intervention and its continued assignment of women to the realm of child-bearing and child-rearing. The United Nations continues in an androcentric fashion, unable to meet its own goals for the inclusion of women in decision-making positions. Nonetheless, the U.N. promulgated CEDAW and ensured its position as *opinio juris* in customary international law.

A feminist analysis of CEDAW uncovers its androcentric base. For the most part, CEDAW does not address the content of human rights norms, but guarantees women the same rights that are available to men, although the social positions of women mandate new ways of viewing human rights. In addition, CEDAW calls for women and men to have equal access to these rights, although the reality of women's lives is significantly different than men's. Finally, with few exceptions, CEDAW does not address the issue of who is to be involved in the decision-

making process in defining rights and assuring access to the rights.

This section-by-section analysis of CEDAW is somewhat misleading, in that treaties should be interpreted "in accordance with the ordinary meaning . . . [of] the terms of the treaty in their context and in the light of its object and purpose."<sup>431</sup> While some of the foregoing analysis would change when the terms are taken in context and with an understanding of the overall purpose of the Convention, the analysis nonetheless highlights the underlying androcentrism on which CEDAW rests.

Changes in the laws and other public and private institutions are vitally necessary in achieving protection of women's human rights. When women's issues are ignored by the law, their "absence devalues women and their functions: women simply are not sufficiently important to merit legal regulation."<sup>432</sup> Indeed, "[l]imitations on the rights of women cannot be adequately challenged without due process and equality of access and resources . . . . But laws that are not founded on reality are more likely to be abusive."<sup>433</sup> In many cases, reality may be more serious than simply the fact that women's viewpoints are not heard and considered. "It is worrying when those charged with the protection of rights of others are themselves the violators of those rights."<sup>434</sup> With no mandate to include women in the process of implementing CEDAW, the decision-makers in the States Parties to CEDAW will most likely continue to think about women in the same old ways. Change will definitely not be effective if women are not included in the formulation of change and if patriarchy is not understood and considered as the basis for anti-woman practices. "The only way for the truth to surface is if less false visions come to the forefront of common-sense knowledge."<sup>435</sup>

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<sup>431</sup> Vienna Convention on the Law of Treaties, *supra* note 79, at art. 31(1).

<sup>432</sup> Nadine Taub and Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 9, 13 (D. Kelly Weisberg ed., 1993).

<sup>433</sup> WETZEL, *supra* note 51, at 152.

<sup>434</sup> *Africa — Women: Up in Arms over Gender Violence*, INTER PRESS SERVICE, Nov. 25, 1993.

<sup>435</sup> CHRISTINE SYLVESTER, *FEMINIST THEORY AND INTERNATIONAL RELATIONS IN A POSTMODERN ERA* 46 (1994). Sylvester goes on to note, "[feminist standpoint]

This feminist analysis of CEDAW indicates that universalism, as practiced, is not able to protect women's fundamental rights. It also points to the failings of liberalism in promoting and protecting women's human rights. However, it is important to note that this analysis focuses on universalism more *as practiced* and less as theory. It is largely because of the intersection of universalism and liberalism that universalism fails to protect women's human rights. Liberalism, and, therefore, universalism, promotes access for women to androcentric human rights that are incapable of addressing patriarchal oppression.

However, it is possible to pay attention to the needs and desires of all segments of a given society, even when universal principles are applied. Ann Scales calls this "concrete universality."<sup>436</sup> This concrete universality eliminates the "two legal choices" available in the past; that is, "law could either ignore differences [universalism], thereby risking needless conformity, or it could freeze differences [relativism], thereby creating a menu of justifications for inequality."<sup>437</sup> But there is a third choice, whereby we discuss, understand and celebrate the differences that make up our societies. The legal questions then become occasions of "discern[ing] between occasions of respect and occasions of oppression."<sup>438</sup> This would be accomplished most effectively when the oppressed become the decision-makers and implementors of the changes necessary in overcoming their oppression.

Feminist thinking adds a vital element to the process of drawing lines between respect and oppression. And that is

the belief that women initially, strategically, and perhaps permanently need space to define oppression for themselves and to formulate emancipatory strategies in solidarity with other women (and perhaps with other oppressed peoples). This politics counters the solidarity of oppressors, who inscribe women's bodies as places of male control and who script women's assignments in ways that rehearse gender relations of inequality, with a collec-

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draws attention to the incompleteness and failure of objectivity in any project that purports to be generalizable while giving voice and agency only to a privileged few. . . ." *Id.* at 48.

<sup>436</sup> Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay in FEMINIST LEGAL THEORY* *supra* note 432, at 40, 46 (1993).

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

tive effort to seek out and root up the core of transgressions on woman that goes by the name of patriarchy.<sup>439</sup>

This method of recognizing respect and recognizing oppression is applicable to any oppressed group. Understanding that every group has a viewpoint based on their position in society, it is highly problematic to assume that those at the top looking down are able to view the landscape in the same way as it is seen from lower positions. Oppression appears different to those who are experiencing it than it does to those who are looking through the filter of their own privilege. Indeed, the damage done by denial of participation in decision making is clearly so pervasive and easily masked as to raise questions about participation itself as a fundamental right.

Exclusion from the rights-forming process is itself a denial of human rights, and is at best likely to produce unsatisfactory substantive results. The observation here is structural; to the extent that the international law of human rights is an exclusive result of the states system, it cannot hope to take account of the values and needs of peoples that are not adequately represented in that system or even constituted to qualify for membership.<sup>440</sup>

Women in all cultures need to have their voices heard and their views of their cultures recognized and taken seriously. In this way, universal standards can be made truly universal by being defined in a way that encompasses all the members of society. When women choose, for example, to dress in a particular way that reflects their cultural and national heritage, while at the same time having complete and autonomous access to all aspects of their society, cultural differences are celebrated while fundamental rights are protected. In short, it is not the wearing of the veil that makes a Middle-Eastern woman oppressed, it is her lack of choice as to career, education, and marriage; her inability to move about freely; the denial of her right to practice her religion that causes her oppression. When all segments of society are included in the decision-making process, especially when the decision impacts them directly, universal standards

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<sup>439</sup> SYLVESTER, *supra* note 435, at 50.

<sup>440</sup> Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES, *supra* note 316, at 44, 48.

can be promoted, while at the same time protecting cultural differences. When differences are promoted with the purpose of celebrating diversity rather than maintaining oppression, universal standards can be protected in a respectful and non-oppressive fashion.