

CULTURE, RELIGION, AND CEDAW'S ARTICLE 5 (A)

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The clash between culture, religion, and women's equality with men has become a major issue in the global arena. Such conflicts arise in the context of almost all orthodox religions and traditionalist cultures and result in barriers to women's rights that vary in form and severity. My interest in this topic goes back to 1974, when, as a young lecturer, I introduced the first course in feminist studies at the Hebrew University of Jerusalem. I quickly discovered—and at that time there was no general awareness of the fact—that the three monotheisms, Judaism, Christianity, and Islam, whose religious courts have jurisdiction over marriage and divorce in Israel, all impose patriarchal institutions and norms—both religious and secular—on the women of the three communities. I became convinced that, without a transformation of religious patriarchy by decree of the constitutional system, women could not gain full equality. Furthermore, with time, I came to understand that, without the dismantling of patriarchy within the religions, traditionalist women would have no right to equal religious personhood. I was convinced that the importance of religion to a significant section of society and the movement of religious principles into general political discourse would remain a hard core of patriarchal politics so long as this transformation did not take place. In research, teaching, and feminist lobbying and litigation, I have attempted to contribute to this transformation in Israel. From the early 1990s, I represented the Women of the Wall in their petitions before the Supreme Court of Israel, asking for the right to worship in an egalitarian way: to pray from the Torah scroll, draped in prayer shawls, in group prayer in the prayer plaza of the Western Wall—all against violent objections of ultra-Orthodox worshippers.

In 2000, I joined the CEDAW Committee and was energized by the expansion of these issues to a global scale. The energy came from meeting and working with women from different regions, cultures, and religions, all of whom shared a dedication to women's equality. It also came from the women of nongovernmental organizations (NGOs) who, in their "shadow reports" and expert evidence, exposed the barriers to women's equality within their own countries. Some of these women take personal

risks in order to fight for women's equality, especially those from countries whose legal systems include criminal penalties based on patriarchal religious law, as in some Muslim states. The energy also grew from the fact that the CEDAW Convention contains a unique provision requiring States Parties to modify cultural patterns of conduct which prejudice the advancement of women's equality. In this essay, I will examine the solution that is provided by the CEDAW Convention, by other instruments of international law, and by national constitutions, in cases where equality rights clash with cultural practices or religious norms. The cultural clash is expressly cited in CEDAW, which requires modification of "cultural patterns of conduct" in its Article 5 (a) and of "customs" and "customary . . . practices" in Articles 2 (f) and 5 (a) that prejudice women's equality. The religious clash is also referred to in Article 18 (3) of the International Covenant on Civil and Political Rights (ICCPR), which regulates possible conflict between the "[f]reedom to manifest one's religion or beliefs" and "the fundamental rights and freedoms of others," including implicitly the right to gender equality.

CONCEPT OF GENDER

Unlike sexual identity, which results from the differing physiological makeup of women and men, gender identity results from the norms of behavior imposed on women and men by culture and religion. The story of gender in traditionalist cultures and religions is that of the systematic domination of women by men, of women's exclusion from public power, and of their subjection to patriarchal power within the family. This is, of course, not surprising, since it was not until the Enlightenment that the human rights basis for the subsequent recognition of women's right to equal citizenship was established and not until the twentieth century that women's right to equality began gradually to gain momentum; the ethos of traditionalist cultures and the monotheistic religions was, of course, developed long before that. Hence, at the start of the twenty-first century, traditionalist culture and orthodox religion remain bastions of patriarchal values and practices. Claims to protect traditional culture and to practice religious freedom are still employed as means to stem the tide of women's equality.

CONCEPT OF CULTURE

Culture is a macroconcept, definitive of human society. Anthropologists commonly use the term "culture" to refer to a society or group in which many or all people live and think in the same ways, and it is "[in]

its most general sense . . . simply a way of talking about collective identities” (Kuper 1999, 2). The coexistence of different cultures may be viewed from three different perspectives: ethnicity or religion; institutional subcultures varying at the levels of family, workplace, church, and state; and the developing international or global culture, which includes the human rights culture.¹ Gender equality may be accepted conceptually in some cultures or subcultures, while patriarchy prevails in others. In its regulation of the clash between gender equality and “cultural patterns of conduct,” CEDAW must be understood as referring to traditionalist cultural norms that are at variance with the human rights culture and to the maintenance of patriarchal norms that conflict with and resist gender equality.² These traditionalist cultures accord with a perception of culture as a relatively static and homogenous system, bounded, isolated, and stubbornly resistant (Comaroff and Comaroff 1991; 1997). The contrasting view regards culture as adaptive, in a state of constant change, and rife with internal conflicts and inconsistencies. Where an adaptive culture accepts the human rights demand for gender equality, there will be a process of interactive development rather than a confrontation.³

Many of the practices defended in the name of culture that impinge on human rights are gender specific; they preserve patriarchy at the expense of women’s rights. Such practices include a preference for sons, leading to female infanticide; female genital mutilation (FGM); the sale of daughters in marriage, including giving them in forced marriage as child brides; paying to acquire husbands for daughters through the dowry system; patriarchal inheritance systems in which daughters inherit less than sons; marriage arrangements allowing the husband control over land, finances, and freedom of movement; a husband’s right to obedience and power to discipline or commit acts of violence against his wife, including marital rape; family “honor” killings by the shamed father or brothers of an unmarried girl who has had consensual sexual relations or been raped; witch-hunting; compulsory restrictive dress codes; customary division of food, which produces female malnutrition; and restriction of women to the lives of housewives or mothers, without a balanced view of women as autonomous and productive members of society.⁴ Many of these practices have been the subjects of criticism in the concluding comments by the CEDAW Committee on reports from States Parties as different as Algeria, Cameroon, China, Democratic Republic of Congo, Guinea, India, Indonesia, Jordan, Maldives, and Uganda, to name only a few examples.⁵

Of the harmful cultural practices that have been defended against human rights challenges, some are geoculturally pervasive, if not universal,

and some specific to regions. The most globally pervasive of the harmful cultural practices mentioned above is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunities to participate in public life, whether political or economic.⁶ The continuing prevalence of this stereotypical approach was made evident in the virulent reaction of the Heritage Foundation in the United States to the CEDAW Committee's Reports, which it condemned on the grounds that they were "pushing an agenda that counters traditional moral and social norms regarding the family, marriage, motherhood, and religion" (Fagan 2001). Other patriarchal practices that were widely prevalent in the past have been eliminated in some societies but have survived in others.⁷ Some have always been peculiar to certain areas.⁸

CONCEPT OF RELIGION

Culture and religion are frequently treated as different categories, yet religion is a part of culture in its wider sense. It might even be said that it is an integral part of culture.⁹ What exactly constitutes religion remains a conundrum. One classic work on the subject enumerated forty-eight different definitions (Cohn 1997–1998). Usually such definitions include some transcendental belief in or service to the divine.¹⁰ In practice, most religious claims against gender equality have been made under one of the monotheistic religions—Judaism, Christianity, or Islam, which, taken in conjunction, are the world's most widely observed religions—and I will therefore concentrate on them. The distinctive marks of monotheistic scriptural religions are clear: They have a canonical text with authoritative interpretations and applications, a class of officials to preserve and propagate the faith, a defined legal structure, and ethical norms for the regulation of the daily lives of individuals and communities. Religion is, hence, an institutionalized aspect of culture, with bureaucratic institutions that are focal points for economic and political power within the society. Indeed, religion forms, both theoretically and empirically, the core of cultural resistance to human rights and gender equality. Religions, not cultures, have codified custom into binding source books that predate the whole concept of gender equality and have both the legal and the institutional structures to enforce their principles.¹¹ These characteristics render religion less amenable to adaptive pressures from without. Change must be wrought within the religious hierarchy of the community and must be shown to conform to the religious dogmas of the written sources. Within secular states, religious sects are "often a haven against social and cultural change; they preserve ethnic loyalties, the authority of the family and

act as a barrier against rationalized education and scientific explanation” (Fenn 1978).

The fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine. Monotheistic religion is based on the subjection of the individual and the community to the will of God and on a transcendental morality. Human rights doctrine is human-centric; it is based on the autonomy and rights of the individual (individualism) and systemic-rational principles (rationalism) (Parsons 1963). The doctrine takes as its premise the authority of the state (secularism) (Arieli 1999, 44) and, as its goal, the prevention of abuse of the state’s power over the individual.¹² Within some branches of monotheism, there has been a movement to reform and to close the gap with human rights doctrine, e.g. in Protestantism and Reform Judaism. There are also interpretations of Catholicism and Islam, issued by individual religious leaders, which are more consonant with a human rights approach. However, this hermeneutical endeavor is far from complete, in the best of cases, and is demonstratively absent in those cases where the religious community is asserting a defense against human rights claims.¹³

Religious norms impose patriarchal regimes that disadvantage women. It has often been said that the three monotheistic religions recognized from their inception the full humanity of woman, and that woman was created in *imago dei* (the image of God).¹⁴ However, the argument has been made that attribution of *imago dei* to women resulted from gradual inculturation in Judaism and Christianity and did not occur in Islam at all (Borresen 1995). Furthermore, even if women’s equal personhood were to be regarded as accepted by religion as a spiritual matter, monotheistic religions have promulgated patriarchal gender relations. Women have been excluded from the hierarchies of canonical power and subjected to male domination within the family.¹⁵ In accordance with the source books of the monotheistic religions, women are not entitled to equality in inheritance, guardianship, custody of children, or division of matrimonial property, and they are not eligible for religious office. In some, they are limited in their freedom to participate in public life, whether political or economic.

There has been much variety among different monotheistic religions, and among the branches within each of them, concerning the nature of their patriarchal norms and their adaptation to changes in women’s roles. Judaism originally allowed polygamy (though it was prohibited from the sixth century and formally prohibited from the eleventh century), reserved to the husband absolute power over the woman’s right of divorce, and imposed on women harsher penalties for adultery in the law

of divorce and *mamzerut* (bastardy). However, it also prohibited marital rape and allowed abortion in circumstances where the mother's health was threatened. Christianity, from the outset, established monogamy and a fair measure of symmetry between women and men in regard to chastity and adultery. On the other hand, it abandoned the prohibition on marital rape, and Catholicism adopted and retains a prohibitive attitude toward abortion and contraception (Pope John Paul II 1995). Some branches of Christianity (Lutheran, Episcopal, and Protestant) and Judaism (Reform, Reconstructionist, and Conservative) have shown a readiness to abandon formal patriarchal rules regarding women's eligibility for religious office and have ordained women as religious leaders. Islam has remained more closely attached to its sources, and, in many forms of Islam and in many of the countries that have Islamic regimes, it has retained Sharia law, polygamy, harsh penalties for the offense of adultery by married women (including, in some systems, the possibility of stoning),¹⁶ unequal inheritance rights, and the husband's power of unilateral divorce. The outstanding example of an Islamic country that has prohibited polygamy is Tunisia. Other than that, gender equality as an accepted norm in Islam is still at the level of individual religious leaders, intellectuals, and women's NGOs and has certainly not been accepted at normative institutional levels.

CLASH OF NORMS

The clash with which we are dealing is between those norms of culture or religion that inculcate patriarchal values and demand perpetuation of these patterns of behavior and the norm of gender equality. The conflict with women's rights may arise with regard to a majority culture in a constitutional framework or a cultural or religious subgroup within the constitutional society. Patriarchal claims by cultural or religious subgroups may range from negative demands for privacy and nonintervention to positive demands for autonomous control of their own social institutions and active support by the state.¹⁷ In theocratic regimes, they require state imposition of patriarchal religious norms. Deference to any of these would result in infringement of women's right to equality.

International conventions and UN declarations protect the human rights to freedom of religion or belief, including its manifestation individually or in community with others, and to enjoy one's culture.¹⁸ The guarantee of freedom of religion is far reaching in its scope, with regard to both the protection of religion in all societal contexts and the protection of all behaviors implicated in the freedom of religion. The Declaration on

the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief details the rights to freedom of thought, conscience, and religion for adults and children, some of which may prove at odds with women's rights (United Nations 1981).¹⁹ For instance, the right "[t]o train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief" (Article 6 [g]) may involve the exclusion of women from religious leadership. In contrast, the right to enjoy one's culture is primarily concerned with the protection of ethnic, religious, and linguistic minorities (ICCPR, Article 27; Convention on the Rights of the Child (CRC), Article 30. The Vienna Declaration adds further protection for the cultural and religious rights of minorities (United Nations 1993b, para. 19).²⁰

Women's right to equality is also expressly protected in international conventions and other instruments, starting from the Universal Declaration of Human Rights, continuing with the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and culminating in CEDAW, which is considered to be the international bill of women's human rights. The clash between culture and gender equality is expressly regulated in CEDAW. Article 5 (a) imposes a positive obligation on States Parties to modify social and cultural practices in the case of a clash: "States Parties shall take all appropriate measures . . . [t]o 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." Additional CEDAW articles can be regarded as supporting a strong application of Article 5 (a). Article 2 (f) imposes an obligation to "modify or abolish . . . customs and practices" that discriminate against women, while all measures required of States Parties under the Convention, including those under Articles 5 (a) and 2 (f) must proceed without delay according to Article 2 (Steiner and Alston 2000, 179).²¹ Custom is the way in which the traditionalist cultural norms are sustained in a society. It is clear, then, that the combination of Article 5 (a) and Article 2 (f) gives superior force to the right to women's equality with men in the case of a clash with cultural practices or customs, including religious norms, thus creating a clear hierarchy of values. Furthermore, Article 5 (b) strikes at what I have described above as the most universal traditionalist cultural norm that disadvantages women, which is the stereotypical assignment of sole or major responsibility for child care to women. It requires States Parties to take all appropriate measures "[t]o 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.”

VIEWS OF TREATY BODIES AND WITHIN THE UN SYSTEM

Culture, as noted above, is a macroconcept, definitive of human society, and the concept of “cultural practices” thus subsumes the religious norms of societies. Interpretation of Article 5 (a) to include religion within its purview is further legitimized and reinforced by ICCPR’s Article 18 (3), which provides that the right “to manifest one’s religion or beliefs may be subject only to such limitations as are . . . necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.” Article 18 (3) thus provides an exception to the right to the freedom to manifest one’s religion, should a confrontation with the fundamental rights and freedoms of others arise, including, by clear implication, the right to gender equality, which is itself protected in Article 3 of the ICCPR. Thus the ICCPR limits the right to manifest religion when this infringes on women’s human rights. While both the ICCPR and CEDAW recognize the need for protecting women’s human rights, the conception of a mandatory hierarchy of values in Article 5 (a) of CEDAW (imposing a positive obligation on States Parties) is not matched by a similar edict in Article 18 (3) of the ICCPR. Article 18 (3) merely provides an exception to a human rights standard and, as such, the Human Rights Committee (HRC) has said it must be strictly interpreted (Human Rights Committee 1993, para. 8). Nevertheless, ICCPR’s Article 18 (3) does legitimize limitations on the right to manifest one’s religion where such manifestation infringes on women’s human rights. Indeed, the Article, in providing an exception for such limitations as may be “necessary” to protect fundamental rights, may be read to imply that there will be an obligation on States Parties to impose them. This seems to be the reading implicit in the HRC’s General Comment on the equality of rights between men and women, which, although not expressly referring to Article 18 (3), holds that the right to religion does not allow any state, group, or person to violate women’s rights to equality (Human Rights Committee 2000, paras. 5 and 32). This reading is also apparent from country reports in which the HRC has called on States Parties to prohibit polygamy, even where it is a religious and not only a cultural practice.²²

Use of the construct of culture in CEDAW as a macroconcept under which religion is included gives the widest possible range of protection to the human rights of women. The use of the term “culture” without express reference to religion, which is a more rigidly defended construct than

culture, appears to have resulted in a readiness by States to accept the hierarchical preference given to women's equality in Article 5 (a). This is clear from an analysis of the reservations of States Parties. There are at least twenty reservations that clearly indicate that a State Party wishes to conserve religious law principles either for its entire population or for minority communities. These reservations are made primarily under Article 16 of the Convention dealing with women's rights to equality within the family,²³ yet only four countries—India, Malaysia, Niger, and the Cook Islands—have entered reservations to Article 5 (a).

In international forums, cultural practices have been taken to include religious norms. The interwoven nature of culture and religion, insofar as they affect women's rights, has resulted in a merging of the two within the UN system as well as bodies involved with the application and enforcement of the human rights treaties.²⁴ It is in this spirit that the committees of experts, charged with monitoring compliance by the States Parties to the two treaties, have applied Article 5 (a) and Article 18 (3) (Bayefsky 2001). Where the CEDAW Committee has, in its concluding comments, recommended that States Parties enact laws making cultural practices discriminatory against women illegal or enforce existing laws aimed at ending such practices, it has included religious practices that are prejudicial to women (e.g. Jordan, CEDAW Report 2000, 19, para. 167; Guinea, CEDAW Report 2001, 58, paras. 122–23; Singapore, CEDAW Report 2001, 53–54, para. 74). The Committee has not only held purely cultural practices, such as the practice of FGM, to be in violation of the Convention in its General Recommendation No. 14. It has also consistently expressed its concern about the continuing authorization of polygamy, whether or not based on religious belief, and has asked governments—including those of Egypt, Indonesia, and Jordan—to take measures to prevent its practice (CEDAW Report 2001, 37, paras. 354–55; CEDAW Report 2000, 19, paras. 174–75; CEDAW Report 1998, 26, para. 284 [a]). The HRC has also stated its policy on the relationship between culture, religion, and gender in the General Comment on the equality of rights between men and women mentioned above:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. . . . States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. . . .

The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. (Human Rights Committee 2000, paras. 5 and 32)

NATIONAL AND INTERNATIONAL CASE LAW

This overview clearly shows that practices injurious to women are regarded as outlawed under the UN human rights system, whether or not they are claimed to be justified by cultural or religious considerations. The cultural defense and the right to religious freedom have, as noted, been raised in opposition to women's claims to gender equality both in constitutional courts and in quasi-judicial and judicial procedures of various bodies.

I have, elsewhere, analyzed the rhetoric and the outcome of constitutional judgments in different countries as they relate to the hierarchy of values between culture, religion, and gender (Raday 2003). This analysis may also shed some light on the possible interpretations and application of the CEDAW Convention. However, such analyses of the decisions in different constitutional cases must be tentative, both because of the limited number of cases and because key variables not considered, such as the constitutional framework for the court's jurisdiction, may have been crucial to the outcome. Nonetheless, a few indicators, intended to promote further inquiry, are in order. Certain variables, for example, prove inconclusive as guides to the hierarchy of values adopted by constitutional courts. First, the constitutional courts examined do not seem to be more consistently deferential to claims of religious freedom than to cultural defense claims. Second, constitutional courts in different countries having apparently similar religious or cultural rules have sometimes ruled in contrary ways. Third, there does not seem to be a clear and consistent distinction in the ways constitutional courts treat majority vis-à-vis minority claims to a cultural or religious defense. In contrast, the secular or nonsecular nature of the State seems to be a constantly relevant factor; in secular States, the courts cite the national secular character of the state as justifying the insistence on the right of women to equality, while religious law is a barrier to intervention.²⁵ One other theme appears to be constant. Decisions in which constitutional courts have ruled against the popular sentiment of a religious majority or large minority, without the backing of the government, are rare. But when they do occur, they are usually ineffectual. It seems that, although constitutional courts may

have been no more circumspect on religious than cultural issues, their decisions have been more vulnerable to popular opposition aroused about religion. In such circumstances, without strong governmental support, the constitutional courts have generally not prevailed in their championing of gender equality. At the level of international quasi-judicial and judicial bodies, there have been very few cases and therefore they cannot be used to produce a principle. Anecdotally, however, it is worthy of note that in all such cases, human rights and women's equality were preferred in the result, and the religious and cultural defenses were rejected. A number of examples follow.

In 1977, Sandra Lovelace submitted a communication to the HRC contesting the decision by the Canadian Supreme Court to reject her petition to cancel the Indian Act's provisions, which authorized her loss of Indian status as the result of marrying a non-Indian. The HRC held that the Indian Act unreasonably deprived Sandra Lovelace of her right to belong to the Indian minority and to live on the Indian reserve (*Sandra Lovelace v. Canada* 1980). This was an unjustifiable denial of her right to enjoy her culture under Article 27 of the ICCPR. It is notable that, in contrast with the high courts of Canada and the United States, which had upheld tribal autonomy, the HRC was very clear that minority tribal discrimination against women was an unjustifiable denial of women's right to equality.

In 1981, the HRC considered a communication in which a number of Mauritian women alleged that Mauritius immigration law discriminated against women in violation of Articles 2 (1) and 3 of the ICCPR (*Aumeeruddy-Cziffra et al. v. Mauritius* 1981). The Government of Mauritius had adopted an immigration law providing that, if a Mauritian woman married a man from another country, the husband must apply for residence and permission might be refused. If, however, a Mauritian man married a foreign woman, the foreign woman was automatically entitled to residence. The HRC held that Mauritius had violated the Covenant by discriminating between women and men without adequate justification (1981).

In 1983, the European Commission on Human Rights considered the complaint of a devout member of the Jewish faith that an order of the French Court of Appeals infringed his freedom of conscience and religion under Article 9 of the European Convention of Human Rights.²⁶ The court had ordered the complainant to pay damages to his former wife for his refusal, subsequent to their civil divorce, to provide a letter of repudiation of the marriage (*ghet*), as required under Jewish law to complete

the religious divorce allowing the spouses to remarry. The Commission held that there was no infringement of Article 9. The argument used by the Commission was that the refusal to hand over the letter of repudiation was not a manifestation of religious observance or practice. In so deciding, the Commission accepted the holding of the French Court of Appeals that “under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife” (*D. v. France* 1983).

In 1993, the European Commission on Human Rights upheld the decisions of the Turkish courts regarding the prohibition of the wearing of Muslim head scarves on university campuses: “The Commission takes the view that by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestations of observance and symbols of that religion without restriction as to place and manner may constitute pressure on students who do not practice that religion or those who adhere to another religion” (*Senay Karaduman v. Turkey* 1993). Although no direct reference was made to the issue of women’s equality, this issue has been seen as intrinsic to questions of women’s dress and modesty.

In 2004, however, the issue of women’s right to equality *was* material to the decision: In *Leyla Sabin v. Turkey*, the European Court of Human Rights (ECHR) upheld the Turkish ban on Muslim head scarves on university campuses. The Court held unanimously that there was interference in the right of Muslims to manifest their religion, but the interference was prescribed by law and, being based on the principles of secularism and equality of women and men, was legitimate (2004 and 2005).

In 2001, the ECHR rejected a petition to strike down a ruling of Turkey’s Constitutional Court disqualifying the political party Refah from participating in the elections. The Constitutional Court had held that Refah had become a “centre of activities contrary to the principle of secularism, encouraging the wearing of Islamic headscarves in public and educational establishments.” It had held that manifesting one’s religion in such a manner amounted to exerting pressure on persons who did not follow that practice and created discrimination on the grounds of religion or beliefs. The European Court of Human Rights held: “It is difficult to

declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts." Expressing concern about use of "divine rules in order to define the political regime" and Sharia's compatibility "with the democratic ideal," the ECHR held by four votes to three that, because the limitation imposed on the freedom was justified, there was no violation of Article 11 of the Convention, which guarantees freedom of association (*Refah Partisi [Welfare Party] and Others v. Turkey* 2003).

CONCLUSION

In conclusion, the intersection between traditionalist culture, religious norms, and gender clearly does not support women's human rights. The communitarian arguments of multiculturalist ethics and social consensus, used to justify a "defense" against women's equality, marginalize and silence women's voices in the process of deferring to community norms. Only when individual women choose to consent to live under patriarchal norms must their autonomy be respected, since only at the individual level can the systemic impact of patriarchal authority in the community be avoided. But consent cannot be taken to validate any practice that denies women the most basic of their human rights and that undermines their very personhood and their capability for dissent; such practices are repugnant and invalid. As for lesser infringements of their human right to equality, women's autonomy must be respected but women's individual consent to inequality in a strongly patriarchal environment is suspect. Constitutional authorities cannot remain indifferent to the quality of women's consent, and it is incumbent on them to establish the conditions for genuine, free, and informed consent. This entails putting into place a spectrum of measures to create an educational and economic infrastructure that will augment women's autonomy; indeed, that will offer autonomy as an alternative. Furthermore, women who do dissent must have access to constitutionally guaranteed social equality. This might be achieved, in some cases, by allowing women a right of exit into a civil framework that provides them with the option of an egalitarian position in life or, where possible, by enforcing their rights to equal personhood within their own traditional communities.

Thus, where there is a clash between cultural practices or religious norms and the right to gender equality, it is the right to gender equal-

ity that must have normative hegemony. At the international level, this hierarchy of values has been adopted in international treaties, in case law of international courts, and in views of international treaty bodies and commissions, thereby establishing state obligations. At the constitutional level, this principle is only patchily applied, whether as regards majority or minority cultures or religions. The application depends on political will. Some constitutional courts have attempted to implement gender equality in the face of religious resistance, but such efforts have usually been transient or ineffectual where the government has not supported them. The courts in municipal systems cannot be left with the sole burden of securing the human rights of women. It is the duty of legislatures and governments to implement the gender equality obligations that States Parties have undertaken in ratifying CEDAW. In order to further assist legislatures, governments, and courts to implement the gender equality obligations that States Parties have undertaken in ratifying CEDAW's Article 5, it would certainly be helpful if the CEDAW Committee were to formulate a new general recommendation on this issue.²⁷

NOTES

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1. The human rights culture has been called "a particular cultural system . . . rooted in a secular transnational modernity" (Merry 2003). This global culture is, on the one hand, generated by States and, on the other, is increasingly determinative of the limits of state power and of States' constitutional culture.

2. A wider definition of culture would clearly not be helpful as it would include the gender equality norms themselves.

3. The cultural defense is often asserted at a rather abstract level. Thus, it has been argued that the imposition of universal human rights regimes is a Western concept, undermining African or Asian culture (Pannikar 1982), often in the context of postcolonialism (Ibhawoh 2001), or as antithetical to the claims of indigenous peoples (Sjørsløv 2001). An anthropological perspective is often used to base claims for nondiscrimination against subcultures and for the protection of cultural identity as expressed in language, dress, or communal institutions. This view is unproblematic. The problem arises when anthropologists, as ethical relativists (Hatch 1998, 8), insist on a cultural defense that demands the preservation of practices infringing human rights (Nussbaum 1999, 35–39).

4. For a fuller description of these cultural practices see Cerna and Wallace 1999, 630–40; also United Nations 2002b, 70–81 (preference for sons), 12–20 (FGM), 55–64 (marriage), 45–48 (witch-hunting), 38–44 (the pledging of girls for economic and cultural appeasement), 21–37 ("honor" killings), 89–95 (practices that violate women's reproductive rights), and 85–88 (restrictive practices).

5. Algeria still contains many discriminatory provisions denying women their basic rights, such as free consent to marriage, equal rights with husbands in parenting, the right to dignity and self-respect and, above all, the elimination of polygamy (CEDAW Report 1999, 14–15, paras. 68–92); Cameroon still allows discriminating cultural practices relating to FGM, levirate, inheritance, early and forced marriage, and polygamy (CEDAW Report 2000, 55, para. 54); China still permits “illegal practices of sex-selective abortions, female infanticide, and the nonregistration and abandonment of female children” (CEDAW Report 1999, 31, para. 299); in the rural parts of the Democratic Republic of Congo women are prevented from inheriting or gaining ownership of land and from certain foods because of “food taboos” (CEDAW 2000, 24, paras. 230 and 232); Guinea widely accepts and lacks sanctions for practices such as FGM, polygamy, and forced marriage (including levirate and sororate) (CEDAW Report 2001, 59, paras. 134); India’s customary practices include dowry, *sati*, and the *devadasi* system (CEDAW Report 2000, 11, para. 68); laws in Indonesia discriminate against women regarding family and marriage, including polygamy, age of marriage, divorce, the requirement that a wife obtain her husband’s consent for a passport, and sterilization or abortion, even when the woman’s life is in danger (CEDAW Report 1998, 26, para. 284); Jordan’s Article 340 of the Penal Code excuses a man who kills or injures his wife or his female kin caught in the act of adultery (CEDAW Report 2000, 20, para. 178). The Committee’s concluding comments call on the Government of Maldives to obtain information on the causes of maternal morality, malnutrition and morbidity, and the mortality rate of girls under the age of five years, and to develop programs to address those problems (CEDAW Report 2001, 18, para. 143). Uganda perpetuates domestic violence and discriminates against women in the field of inheritance (CEDAW Report 1995, 69, para. 332). Most CEDAW Reports are available at <http://www.un.org/womenwatch/daw/cedaw>.

6. Examples are criticism of the prevalence of stereotypes controlling women’s lives in Georgia in government policies, in the family, and in public life (CEDAW Report 1999, 57, para. 99; 58, para. 105), or great concern about existing social, religious, and cultural norms in Indonesia that recognize men as the head of the family and breadwinner and confine women to the roles of wife and mother and that are reflected in various laws, government policies, and guidelines (CEDAW Report 1998, 26, para. 289).

7. Patriarchal control over land, finances, or freedom of movement were prevalent throughout the world, but they were removed at the end of the nineteenth century in Europe and the United States with married women’s property and capacity legislation. They currently remain a part of women’s lives in many African, Asian, and Latin American cultures, though change is occurring. The legitimacy of patriarchal spousal violence has gradually been disappearing, and many countries and cultures now prohibit domestic violence. Nevertheless, light sentences for domestic violence by a husband and recognition of a defense of provocation in cases of what are, euphemistically, called “crimes of passion” reveal continued cultural tolerance for such forms of violence. While in most parts of the Americas and Europe, marital rape has been criminalized, this is not the case in the majority of countries (United Nations 2002b, para. 62). Persecution of witches was common in sixteenth- and seventeenth-century Europe and up until the Salem Witch Trials in 1692 in the United States; it is still a cultural practice found in some Asian and African communities (United Nations 2002b, paras. 45–48).

8. Radhika Coomaraswamy, then UN Special Rapporteur on violence against women, lists the countries in which family “honor” killings are reported: Egypt, Iran, Jordan, Lebanon, Morocco, Pakistan, Syria, Turkey, and Yemen. It should be added that in many of these countries such behavior is regarded with extreme latitude under the criminal law, and

either immunity or reduced sentences are prescribed by statute. For instance, Coomaraswamy points out that an attempt to outlaw “crimes of honor” was stalled in the Pakistani parliament (United Nations 2002b, 22 and 37). FGM is believed to have started in Egypt about two thousand years ago. It is practiced in many African countries. It entails short- and long-term health hazards, an ongoing cycle of pain in sexual relations and childbirth, and a reduction of women’s capacity for sensual pleasure. Although not restricted to Muslim communities, Islamic religious grounds are given for its continuation in some societies (United Nations 2002b, 14). China is regarded as a major culprit for female infanticide in the wake of its one-child policy. However, while female infanticide is practiced in rural areas, it is not condoned by the central authorities (Shalev 2001).

9. Walter Burkert comments that there has never been a society without religion (Burkert 1996).

10. Natan Lerner claims that all dictionary definitions of religion incorporate recognition of a supreme being, usually called God (Lerner 2000, 4). However, many modern commentators regard the concept as also including nontheistic and even atheistic beliefs (Cohn 1997–1998). In international documents, such as the ICCPR Article 18, the protection of freedom of “belief” is specifically added to the protection of religious freedom.

11. This religious institutional power is much in evidence at the United Nations: The Holy See has the status of a nonmember State Permanent Observer, and the Organization of Islamic Conferences, which represents fifty-three nations, has considerable influence on UN policy-making.

12. The confrontation between monotheistic religion and modern human rights is clearly evidenced in the gap between the concept of religious duty and human right (Cover 1987); in the clash between the religious prohibition of apostasy or heresy and freedom of speech, conscience, and religion (Cohn 2000); and, as discussed here, in the patriarchal, religious opposition to women’s right to equality.

13. There is a rich literature on such hermeneutical efforts. See, for example, in Islam (An-Na’im 1990).

14. The Old Testament, the source book of the three monotheistic religions, forcefully frames gender as a patriarchal construct in the story of creation, which constitutes a paradigmatic expression of the “otherness” of woman, as recounted by Simone de Beauvoir (de Beauvoir 1952). The patriarchal version of the story of creation and original sin, while not present in the Qur’an, was later included in Islamic tradition.

15. Much has been written in defense of the humanism of the Bible’s treatment of women in the context of biblical times (see Berger and Lipstadt 1996, 310). Indeed, women were in some respects protected by biblical law against abuse. However, protections for women were paternalistic, given to them as unequals like those given to slaves or children, as in the case of protection against excesses of physical violence by husbands exercising their right of chastisement. Such protections did not bestow autonomy or power.

16. Islamic courts in Northern Nigeria have twice sentenced women to death by stoning in 2002, on the grounds that this is the Sharia punishment (Isaacs 2002). Courts in Pakistan (Mydans 2002, 2) and Iran (United Nations 1997) have acted similarly.

17. Jack T. Levy establishes a useful typology for the rights claims of subgroups, such as immunity from unfairly burdensome laws; assistance; self-government; external rules limiting freedom of nonmembers; internal rules limiting the freedom of members; recognition and enforcement of autonomous legal practices; guaranteed representation in government bodies; and symbolic claims (Levy 1997).

18. These include Article 18 of the Universal Declaration of Human Rights (UDHR); the Declaration on the Elimination of All Forms of Intolerance and of Discrimination

Based on Religion or Belief; Articles 18 and 27 of the ICCPR; Article 13 (3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on religious freedom in the education of children; and Articles 14 and 30 of the Convention on the Rights of the Child (CRC). For discussion, see Lerner (1966).

19. Although not a treaty, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief carries the weight of UN authority and may be seen as stating rules of customary international law (Lerner 1996, 123).

20. The Vienna Declaration and Programme of Action provides: “The persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination” (United Nations 1993b, para. 19).

21. The effect of Article 2, which requires States Parties to proceed without delay, combined with Articles 5 (a) and 2 (f) of the Convention to eliminate discriminatory cultural practices and stereotypes, is to establish an *immediate* obligation and not an obligation merely to take steps with a view to achieving progressively the full realization of rights, as in the ICESCR (Steiner and Alston 2000, 179).

22. In relation to polygamy, see, for example, concluding observations regarding Nigeria (Human Rights Committee 1996, 291) and Yemen (2005, 9). Notwithstanding the Human Rights Committee’s approach, Natan Lerner, writing on ICCPR, Article 18 (3), remarks that “there are virtually no problems regarding the religious practices of the major, well established religions” (Lerner 1996, 92). This is a rather remarkable conclusion. Indeed, the references by Lerner to difficulties with ritual slaughter in the Jewish tradition and the wearing of turbans, skull caps, and veils, alongside his omission in this context of any mention of polygamy, *agunot* (women refused a divorce), contraception, abortion, or exclusion of women from religious office underlines the invisibility of religious patriarchy or discrimination against women among many of even those academics who deal with the topic (see Raday 1992 for more on this topic). In contrast, Donna Sullivan, although not commenting directly on Article 18 (3), reaches the conclusion that: “A major area of conflict between religious law and human rights law is that of women’s rights” (Sullivan 1988).

23. In many cases, the State Party expressly indicates that the reason for the reservation is in order to apply the Sharia. See the reservations of Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mauritius, Morocco, Saudi Arabia, Tunisia, and Turkey. A few of the reservations were in order to allow continued application of various different religious laws (for example, see reservations of India, Israel, and Singapore).

24. The CEDAW Committee clearly states in its General Recommendation No. 21 on equality in marriage and family relations that whatever the form and concept of family and whatever “the legal system, religion, custom or tradition within the country” the legal treatment of women in public and private must be according to Article 2 of the Convention. Similar statements can be found in the UN Declaration on the Elimination of Violence against Women (1993) (United Nations 1993a, Article 4) and in the Beijing Platform for Action (United Nations 1995a, paras. 9 and 24).

The UN Secretary-General, in a 2001 Report, included polygamy, a religious as well as cultural norm, among the traditional practices and cultural norms prejudicial to women that create an obstacle to implementation of the Beijing Platform (United Nations 2001b, para. 30). And Mary Robinson, then UN High Commissioner for Human Rights, in a general overview of developments regarding the human rights of women and the girl child in the Beijing +5 Review Conference, referred to the fact that certain States still refuse to

recognize marital rape, “honor” killings and domestic violence as violations of these rights (Robinson 2000).

25. The Court’s reliance on secular civil authority for intervention was made clear in *Bavli v. Rabbinical Court of Appeals* 1994, and in *Shakdiel v. Minister of Religions* 1998.

26. The European Convention norms are similar to the provisions of the ICCPR in Article 9.

27. Thanks go to the editors for the suggestion, made on the basis of the commentary in the article, that CEDAW write a general recommendation.