4. Culture, religion and gender: an overview

(The original article, 'Culture, religion, and gender', published in the *International Journal of Constitutional Law*, Volume 1, No. 4, October 2003, pp. 663–715, includes a wider comparative analysis, which includes non-Commonwealth countries.)

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Constitutional law

This article explores the intersection of culture, religion and gender in the context of international and constitutional human rights law. The clash between religious or cultural autonomy and gender equality is a pervasive problem for constitutional law, one that arises in connection with claims of immunity from gender equality provisions on the grounds of cultural or religious freedom. I will describe how the resulting conflict has been addressed in international law and in the decisions of various constitutional courts and propose a theoretical basis for structuring the hierarchy of values to resolve this issue in a constitutional framework of human rights.

Human rights doctrine, as we know it today, is a product of the shift from a religious to secular state culture at the time of the Enlightenment in eighteenth-century Europe. The religious paradigm was replaced by secularism, communitarianism by individualism and status by contract.

It is against this background and after the humanitarian trauma of World War II, that the Universal Declaration of Human Rights[1] was adopted in 1948, representing an undertaking by almost all the countries of the world to establish a basic common standard of human rights. This document expressed a vision of a new global order that guaranteed all individuals basic human rights and prohibited discrimination on grounds of race, religion or sex. The human rights principles of the Declaration, which were later elaborated in a series of human rights conventions, include the right to freedom of religion and conscience and the right to enjoyment of one's culture. At the same time,

1. Universal Declaration of Human Rights (UDHR), Dec. 10, 1948, UN G Res. 217 (III of 1948).

these principles include women's right to non-discrimination.[2] The 1966 International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) both included a clause guaranteeing the enjoyment of the rights under them without discrimination between men and women.[3]

In 1979, the Convention for Elimination of All Forms of Discrimination against Women[4] (CEDAW) codified women's right to equality in all spheres of their lives as a global norm. CEDAW introduced not only the right to non-discrimination but also the right to de facto equality for women. It spelled out the way in which states parties had an obligation to guarantee women the equal exercise and enjoyment of human rights, and it imposed on these states the obligation to take all appropriate measures to achieve this without delay. CEDAW has been ratified by 186 countries and, in 2001, the Optional Protocol (OP)[5] came into force allowing individual women in states parties that ratify the OP to bring communications before the CEDAW Committee. Most countries have now endorsed the principle of equality for women and endowed it with normative universality.

The question I pursue here is what solution is provided under this international regime of human rights and under national constitutions, in cases where equality rights clash with cultural practices or religious norms? Such conflicts arise in the context of almost all religions and traditional cultures, since they rely on norms and social practices formulated or interpreted in a patriarchal context at a time when individual human rights in general, and women's right to equality in particular, had not yet become a global imperative. Barriers to women's rights are not specific to one region or to one religion, but their form and severity does vary among regions and religions. The clash between culture or religion and gender equality rights has become a major issue in the global

2. Human rights were, from the 1950s, specifically and gradually extended to women through International Labour Organization (ILO) conventions and by consensus among governments, employers, unions in the field of employment and through UNESCO conventions in the field of education.

3. International Covenant on Civil and Political Rights, Dec. 19 1966, art. 2(1), General Assembly (GA) Res. 2200A (XXI), UN General Assembly Official Records (GAOR), 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966), 999 UN Treaty Series (UNTS) 171, 173 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 3, GA Res. 2200 A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, 5 (entered into force Jan. 3, 1976).

4. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, 1249 UNTS 12 (entered into force Sept. 3, 1981).

5. Optional Protocol on the Elimination of Discrimination against Women, GA Res. 54/4, annex, 54 UN GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000).

arena. It is probably the most intractable aspect of the confrontation between cultural and religious claims and human rights doctrine.

Both cultural practices and religious norms have been frequently invoked, in international and constitutional law contexts, as a form of defence in order to oppose gender equality claims. In legal discourse, judicial proceedings and academic literature, cultural and religious values are usually raised separately without reference to each other and with differences of approach and emphasis. The concept of the cultural defence is well known, while religious claims, in opposition to human rights standards, are commonly made under the umbrella of freedom of religion. Indeed, in the two international conventions in which the clash is expressly regulated, one relates to culture and the other to religion. CEDAW regulates the conflict between 'cultural patterns of conduct' or 'custom' and gender equality,[6] whereas the ICCPR regulates possible conflict between 'the freedom to manifest one's religion or beliefs' and 'the fundamental rights and freedoms of others,'[7] including implicitly the right to gender equality.

I will first define the three constructs – culture, religion and gender – and describe the nature of the conflict between them. I will then analyse current international and constitutional regulation of the clash. Finally, I will critique the current positivist approaches in the context of a theoretical framework for balancing the divergent norms.

Constructs: culture, religion and gender

Although culture, religion and gender are foundational social constructs operating at the basis of social psychology and organisation, the three constructs cannot be placed, separately and equally, on the same level. Culture is a macro-concept, which subsumes religion as an aspect of culture. Culture and with it religion are the sources of the gender construct. Thus, as I will show, religion is derived from culture, and gender is, in turn, derived from both culture and religion.

Culture

Culture is a macro-concept because it is 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. Similarly, any group of people who share a common culture – and, in particular, common rules of behaviour and a basic form of social organisation – constitute a society. As Adam Kuper puts it, '[i]n its most general sense culture is simply a way of talking about collective identities'.[8] Two categories of

6. CEDAW, *supra* note 4, art. 5, 1249 UNTS at p.16.

7. ICCPR, *supra* note 3, art. 18(3), 999 UNTS at p.179.

8. Adam Kuper (1999) *Culture: The Anthropologists' Account*. Harvard: Harvard University Press.

culture are particularly relevant to my inquiry:[9] **social culture**, which pertains to people's forms of social organisation – how people interact and organise themselves in groups, and **ideological culture**, which relates to what people think, value, believe and hold as ideals.

The borderlines of a culture will not necessarily be coextensive with the constitutional realm. Within the constitutional realm, different cultures may coexist concurrently. The coexistence of different cultures may be on three different levels. First, there may be a diversity of cultures on the basis of ethnic or religious differences. Hence, within the constitutional realm, there may be a dominant culture and minority subcultures, or there may be a mosaic of subcultures. Second, there may be a diversity of institutional cultures within the constitutional framework. Thus, for instance, even in an ethnically or religiously homogeneous society, the cultural norms may vary at the levels of family, workplace, church and state. There may be different cultural norms in each of these institutional frameworks. Third, beyond the constitutional realm, there is a developing international or global culture, including an international human rights culture, which has been called 'a particular cultural system ... rooted in a secular transnational modernity.'[10] 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. In this scheme, gender equality may be accepted conceptually in some subcultures while patriarchy prevails in others. I will focus on pockets of patriarchal culture.

As regards the constitutional implications of the clash between cultural and gender equality norms, the widest definition of culture will not be helpful as it includes the gender equality norms themselves. Hence 'cultural patterns of conduct' in CEDAW must be understood as those referring to cultural norms that are at variance with the human rights culture. For these purposes, culture refers to those institutions that maintain the traditional norms that conflict with and resist gender equality. Accordingly, culture will be used here to signify the traditional and the patriarchal.

The practices of patriarchal cultures are, with regard to the treatment of women, necessarily contrary to modern human rights doctrine. However, it is only when these cultures resist and raise a cultural defence that there is a normative clash. Where the patriarchal culture accepts the human rights demand for gender equality, there will be a process of interactive development and not a confrontation. Indeed, there are two differing perceptions of culture. One perception is of culture as a relatively static and

9. See Edward B Tylor (1871) *Primitive Culture*. New York: Brentano. Tylor stated that culture includes socially acquired knowledge, beliefs, art, law, morals, customs and habits.

10. Sally Engle Merry (2003) 'Constructing a Global Law? Violence against Women and the Human Rights System'. *Law and Social Inquiry*, Volume 28, Issue 4, pp. 941–977.

homogenous system, bounded, isolated and stubbornly resistant.[11] The contrasting view regards culture as adaptive, in a state of constant change, rife with internal conflicts and inconsistencies. The kind of culture at issue in the cultural defence claim, and hence in the clash between culture and gender equality, is the static, resistant version. This version of culture – which I shall term traditionalist culture – is the concern of international and constitutional human rights jurisprudence.

Religion

Religion is a part of culture in its wider sense. It might even be said that it is an integral part of culture. Walter Burkert comments that there has never been a society without religion.[12] What exactly constitutes religion remains a conundrum. One classical work on the subject enumerated 48 different definitions.[13] Usually such definitions include some transcendental belief in or service to the divine.[14] In practice, claims against gender equality have been made largely under one of the monotheistic religions – Judaism, Christianity or Islam – or under Hinduism. In this article, I will concentrate on the monotheisms, which, taken in conjunction, are the world's most widely observed religions and will refer in passing to some constitutional cases decided regarding Hinduism.

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 institutionalised aspect of culture, with bureaucratic institutions that are focal points for economic and political power within the society. 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 rationalised education and scientific explanation'.[15]

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11. See Jean and John L Comaroff (1991) *Of Revelation and Revolution, Vol 1: Christianity, Colonialism, and Consciousness in South Africa*; (1997) *Of Revelation and Revolution, Vol. 2: The Dialectics of Modernity on a South African Frontier*. Chicago: University of Chicago Press.
12. Walter Burkert (1996) *Creation of the Sacred: Tracks of Biology in Early Religions*. Harvard: Harvard University Press.
13. See discussion in Haim Cohn (1997–1998) 'Religious Human Rights'. *Dine Israel*, Volume 19, p. 101.
14. Nathan Lerner claims that all dictionary definitions of religion incorporate recognition of a supreme being, usually called God. Nathan Lerner (2000) *Religion, Beliefs and International Human Rights*. Maryknoll: Orbis Books.
15. Richard Fenn (1978) *Toward a Theory of Secularization* at p.36. Storrs, CT: Society for the Scientific Study of Religion.

The fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine. Human rights doctrine is humancentric; it is based on the autonomy and responsibility of the individual (individualism) and systemic-rational principles (rationalism).[16] The doctrine takes as its premise the authority of the state (secularism)[17] and as its goal the prevention of abuse of the state's power over the individual. Monotheistic religion, in contrast, is based on the subjection of the individual and the community to the will of God and on a transcendental morality. The confrontation between monotheistic religion and modern human rights is clearly evidenced in the gap between the concept of religious duty and human right;[18] in the clash between the religious prohibition of apostasy or heresy and freedom of speech, conscience, and religion;[19] and, as discussed below, in the patriarchal, religious opposition to women's right to equality. Within some divisions of monotheism as a whole 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[20] and Islam,[21] issued by individual religious leaders, which are more consonant with a human rights approach. However, this hermeneutical endeavour is far from complete in the best of cases, and is demonstratively absent in those cases where the religious community is asserting a defence against human rights claims.[22]

Gender

Gender is the social construct of sex. Unlike sexual identity, which results from the differing physiological makeup of men and women, gender identity results from the norms of behaviour imposed on men and women 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

16. See Talcott Parsons (1963) *On the Concept of Influence* 27. Pub. Opinion Q.37.
17. See Arieli Yehoshua (1999) 'The Theory of Human Rights, its Origin and its Impact on Modern Society', in Daniel Gutwein and Menachem Mautner (eds.) *Mishpat Ve-Historyah* [Law and History] 25 (in Hebrew) at p.44.
18. Robert Cover (1987) 'Obligation: A Jewish Jurisprudence of the Social Order' at p.5 *Journal of Law and Religion* 65.
19. See Haim Cohn (2000) 'The Law of Religious Dissidents: a comparative historical survey' at p.34. *Israel Law Review* 39.
20. Pope John Paul II, Letter to Women, June 29, 1995. Available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html [last accessed 29 April 2010]
21. Martha Nussbaum (1999) *Sex and Social Justice* 86. New York: Oxford University Press.
22. There is a rich literature on such hermeneutical efforts. See, for example, in Islam, Abdullahi Ahmed An-Na'im (1990) 'Human rights in the Muslim world: socio-political conditions and scriptural imperatives'. *Harvard Human Rights Journal* 3/4, pp.13–52.

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 religion remain bastions of patriarchal values and practices, and both the cultural defence claim and the claim of religious freedom are employed in an attempt to stem the tide of women's equality.

The interaction between culture, religion and gender

Culture and religion are frequently treated as different categories, and in some ways they are, as noted above. Nevertheless, in the context of the defence against human rights principles, they also have much in common. Religion, as part of culture, must both influence and be influenced by social and ideological culture. However, the flow of influence is not necessarily symmetrical and, 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.

In contrast to the claim to religious freedom, the cultural defence 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,[23] often in the context of post-colonialism,[24] or as antithetical to the claims of indigenous peoples.[25] It has been observed that, by and large, anthropologists have been ethical relativists[26] and their perspective is often used to base claims for non-discrimination against sub-cultures and for the protection of cultural identity – as expressed in language, dress or communal institutions. This view is unproblematic. The problem arises when there

23. Raimundo Pannikar (1982) 'Is the Notion of Human Rights a Western Concept?' at p.120 *Diogenes*, Volume 30, No. 720, pp.75–102.

24. Bonny Ibhawoh (2001) 'Cultural Tradition and Human Rights Standards in Conflict' at p.85 in Kirsten Hastrup (ed.) *Legal Cultures and Human Rights: The Challenge of Diversity*. Kluwer Law International.

25. Inger Sjorslev (2001) 'Copywriting Culture: Indigenous Peoples and Intellectual Rights' in *Legal Cultures and Human Rights: The Challenge of Diversity, supra* note 24, at p.3.

26. Melville Herskovits, an anthropologist, regarded cultural relativism as the 'social discipline that comes of respect for differences – of mutual respect. Emphasis on the worth of many ways of life, not one, is an affirmation of the values in each culture.' Elvin Hatch (1983) *Culture and Morality: The Relativity of Values in Anthropology*. New York: Columbia University Press.

is an insistence on a cultural defence that demands the preservation of practices infringing human rights.[27]

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); 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 marriage arrangements, allowing the husband control over land, finances, freedom of movement; husband's right to obedience and power to discipline or commit acts of violence against his wife, including marital rape; family honour killings by the shamed father or brothers of a girl who has been sexually violated, whether with consent or by rape; witch-hunting; compulsory restrictive dress codes; customary division of food, which produces female malnutrition; and restriction of women to the roles of housewives or mothers, without a balanced view of women as autonomous and productive members of civil society.[28] Many of these practices have been the subject of criticism in the Concluding Comments on Country Reports by the Committee for Elimination of Discrimination against Women.[29]

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27. See Martha Nussbaum's fascinating discussion of anti-universalist conversations. Nussbaum, *supra* note 19, at pp.35–39.

28. For a fuller description of these cultural practices, see Christina M Cerna and Jennifer C Wallace (1999) '1 Women and Culture' in Kelly D Askin and Dorean M Koenig (eds.) 623, 630–40 *Women and International Human Rights*. Transnational Publishers Inc. See also Radhika Coomaraswamy, Integration of the Human Rights of Women and the Gender Perspective, Violence against Women, UNCHR E/CN.4/2002/83, pp.70–81 (son preference), pp.12–20 (FGM), pp.55–64 (marriage), pp.45–48 (witch-hunting), pp.38–44 (the pledging of girls for economic and cultural appeasement), pp.21–37 (honour killings), pp.89–95 (practices that violate women's reproductive rights), pp.85–88 (restrictive practices). Available at http://www.un.org/womenwatch/daw/cedaw/ [last accessed 29 April 2010].

29. Examples from the CEDAW Concluding Comments include: Re. Algeria, 20th session (1999) 91 ('The Committee is seriously concerned by the fact that the Family Code still contains many discriminatory provisions which deny Algerian women their basic rights, such as free consent to marriage, equal rights with fathers, the right to dignity and self-respect and, above all, the elimination of polygamy'); Re. Cameroon, 23rd session (2000) 54 (urging 'the government to review all aspects of this situation and to adopt legislation to prohibit discriminatory cultural practices, in particular those relating to female genital mutilation, levirate, inheritance, early and forced marriage and polygamy'); Re. Democratic Republic of the Congo, 22nd session (2000) 230, 232 (expressing concern 'about the situation of rural women ... Customs and beliefs are most broadly accepted and followed in rural areas, preventing women from inheriting or gaining ownership of land'; also expressing concern about the 'food taboos'); Re. Guinea, 25th session (2001) 122, 138 (expressing 'concern that, despite prohibitions in statutory law, there is wide social acceptance and lack of sanctions for such practices as female genital mutilation, polygamy and

Of the harmful cultural practices, which have been legitimised and defended, some are geoculturally diffuse, 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 opportunity to participate in public life, whether political or economic.[30] Other patriarchal practices, which were widely prevalent in the past, have been eliminated in some societies but have survived in others, such as allowing the husband control over land, finances or freedom of movement;[31] a husband's right to obedience and power to discipline or

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forced marriage, including levirate and sororate, and discrimination in regard to child custody and inheritance' and that 'customs and beliefs that prevent women from inheriting or gaining ownership of land and property are most broadly accepted in rural areas'); Re. Uganda, 14th session (1995) 332 (noting 'prevalent religious and cultural practices still existing that perpetuated domestic violence and discriminated against women in the field of inheritance'); Re. India, 22nd session (2000) 68 (expressing concern over 'a high incidence of gender-based violence against women, which takes even more extreme forms because of customary practices, such as dowry, sati and the devadsi system'); Re. Jordan, 22nd session (2000) 179 (expressing concern that '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'); Re. China, 20th session (1999) 299 (noting 'the discriminatory tradition of son preference, especially regarding family planning, and 'illegal practices of sex-selective abortions, female infanticide and the non-registration and abandonment of female children'); Re. Indonesia, 18th session (1998) 284 (mentioning 'laws which discriminate against women regarding family and marriage, including polygamy, age of marriage, divorce and the requirement that a wife obtain her husband's consent for a passport ... sterilisation or abortion, even when her life is in danger'); Re. Maldives, 24th session (2001) 143 (calling on 'the government to obtain information on the causes of maternal morality, malnutrition and morbidity and the morality rate of girls under the age of five years, and to develop programmes to address those problems'). Available at http://www.un.org/womenwatch/daw/cedaw/ [last accessed 29 April 2010].

30. See ibid. Re. Georgia, 21st session (1999) 30 (the committee criticises 'the prevalence of stereotyped roles of women in government policies, in the family, in public life based on patterns of behaviour and attitudes that overemphasise the role of women as mothers'); Re. Indonesia, 18th session (1998) 289 (expressed 'great concern about existing social, religious and cultural norms that recognise men as the head of the family and breadwinner and confine women to the roles of wife and mother, which are reflected in various laws, government policies and guidelines').

31. These patriarchal powers were prevalent throughout the world, but they were removed at the end of the nineteenth century in Europe and the United States in married women's property and capacity legislation. They currently remain a part of women's lives in many African, Asian and Latin American cultures, although change is now occurring. See, for instance, the 2000 Reform of Guatemala's Civil Code concerning the rights of married women, Annual Report of the IACHR 2000, OEA/Ser.L/V/II.111, Doc. 20 rev., 16 April 2001, ch III.

commit acts of violence against his wife, including marital rape;[32] and witch-hunting.[33] Some cultural practices that are harmful to women have always been peculiar to certain areas, such as family honour killings;[34] FGM;[35] and a preference for sons leading to female infanticide.[36]

Religious norms also impose patriarchal regimes that disadvantage women. It has often been said that the three monotheistic religions recognise the full humanity of woman. Woman was created in imago dei (*bezelem*). Yet, notwithstanding acceptance of women's equal personhood as a spiritual matter, monotheistic religions have promulgated patriarchal gender relations. Women have been excluded from the hierarchies of

32. See Reva B Siegel (1996) *The Rule of Love: wife-beating as prerogative and privacy*, p.105 Yale L.J. 2117. However, the legitimacy of patriarchal spousal violence has gradually been disappearing. In many countries and cultures, there is prohibition of domestic violence. Nevertheless, light sentences for domestic violence by a husband and recognition of a defence of provocation in cases of what are, euphemistically, called 'crimes of passion' continue to give residual expression to cultural tolerance for such forms of violence. In most parts of the Americas and Europe, marital rape has been criminalised. Even now, however, in the majority of countries, criminal law still cannot be invoked for marital rape. See Coomaraswamy, *supra* note 28, p.62.

33. Persecution of witches was common in sixteenth- and seventeenth-century Europe and up until the Salem Witch Trials in 1692 in the US; it is still a cultural practice found in some Asian and African communities. See Coomaraswamy, *supra* note 28, pp.45–48.

34. Radhika Coomaraswamy, the UN Special Rapporteur on Violence against Women, in her 2002 report, writes: 'Honour killings are carried out by husbands, fathers, brothers or uncles, sometimes on behalf of tribal councils ... They are then treated as heroes.' She lists the countries in which family honour killings are reported: Egypt, Iran, Jordan, Lebanon, Morocco, Syria, Turkey and Yemen. It should be added that in many of these countries such behaviour 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 honour was stalled in the Pakistani Parliament. Coomaraswamy, *supra* note 28, p.22, 37.

35. FGM is believed to have started in Egypt about 2,000 years ago. It is practised 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. See Coomaraswamy, *supra* note 28, 14. It is sometimes argued that FGM should not be prohibited anymore than male circumcision. See, e.g., Sander L Gilman, *Barbaric Rituals (*1999) in Susan Moller Okin (ed.) *Is Multiculturalism Bad for Women?* 53. Princeton, NJ: Princeton Univ. Press. However, the WHO and other UN bodies have targeted FGM as harmful in ways not attributed to male circumcision.

36. China is regarded as a major culprit for female infanticide in the wake of its one-child policy. However, while female infanticide is practised in rural areas, it is not condoned by the central authorities. See Carmel Shalev (2001) 'China to CEDAW: An Update on Population Policy', p.23 *Human Rights Quarterly* 119.

canonical power and subjected to male domination within the family.[37] 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.

Under most of the monotheistic religious norms, women are not entitled to equality in inheritance, guardianship, custody of children, or division of matrimonial property. In most of the branches of the monotheistic religions, women are not eligible for religious office and, in some, they are limited in their freedom to participate in public life, whether political or economic.

This schematic separation of the norms of cultural and religious patriarchy does not accurately represent the way in which traditionalist cultures and religion actually interact. Although the injurious cultural practices mentioned above are not directly mandated in the documentary sources of religion, there appears to be a correlation between certain cultural practices and the religious environments in which they thrive. A definitive correlation would require careful research, but an example of the symbiosis between the two may be found in the policy of the Islamic Republic of Iran to expand the culture of chastity, impose stricter veiling requirements, and to provide for imprisonment of up to 12 months and flogging of up to 74 lashes for offences relating to the dress code.[38] While the requirement of the veil is considered a cultural practice and not a religious norm, it seems clear that these moves by the Iranian government have been made under the aegis of Islamic religious purity.

International human rights law

The clash with which we are dealing is not between culture or religion on one side, and the right to gender equality on the other, but between those norms of culture or religion that inculcate patriarchal values and rely on a claim to cultural tradition or religious freedom in order to perpetuate these patterns of behaviour to the disadvantage

37. Much has been written in defence of the humanism of the Bible's treatment of women in the context of biblical times. See Michael S Berg and Deborah E Lipstadt, *Women in Judaism from the Perspective of Human Rights, in* Martinus Nijhoff (1996) John Witte and Johan D van der Vyver (eds.) *Religious Human Rights in Global Perspectives: Religious Perspectives* 304, 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; thus, for instance, women were given protection against excesses of physical violence by their husbands when exercising the right of chastisement. Such protections enhanced the prospects of health and survival of women, but they did not bestow autonomy or power. The basis remained unchanged: an image of women marked by inferiority and as being of instrumental worth to men rather than having their own intrinsic worth.

38. General Assembly Report of Special Representative of the Commission on Human Rights on the Situation of Human Rights in the Islamic Republic of Iran 15.10.97, A/52/472.

of women. The conflict with gender equality rights may arise with regard to a majority culture in a constitutional framework or a cultural or religious subgroup within the constitutional society. Patriarchal claims by cultural or religious subgroups may range from negative demands for privacy and non-intervention to positive demands for autonomous control of their own social institutions and active support by the state.[39] Deference to any of these could result in an infringement of women's right to equality.

International human rights conventions

International conventions variously protect all three of the human rights discussed here: the right to freedom of religion or belief, including its manifestation individually or in community with others; the right to enjoy one's culture; and the right to gender equality. It seems clear that the protection of religious rights is at a higher level than the protection of cultural rights. 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 behaviours implicated in the freedom of religion.[40] The UN Declaration on Intolerance and Discrimination Based on Religion or Belief[41] further details the rights to freedom of thought, conscience, and religion for adults and children, some of which may prove

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39. Jack T Levy establishes a useful typology for the rights claims of subgroups, identifying a range of claims, such as immunity from unfairly burdensome laws; assistance; self-government; external rules limiting freedom of non-members; internal rules limiting the freedom of members; recognition and enforcement of autonomous legal practices; guaranteed representation in government bodies; and symbolic claims. Jack T Levy (1997) 'Classifying Cultural Rights' in Ian Shapiro and Will Kymlicka (eds.) *Ethnicity and Group Rights* 39. New York: New York Univ. Press.

40. Universal Declaration of Human Rights, article 18, states 'Everyone has the right to freedom of thought, conscience and religion; this right includes ... freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.' UDHR, *supra* note 1, art. 18. See also Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, GA res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN Doc. A/36/684 (1981) [hereinafter Declaration on Discrimination Based on Religion or Belief]; ICCPR, *supra* note 3, arts. 18, 27, 999 UNTS at 175, 180. On religious freedom in the education of children, see ICESCR, *supra* note 3, arts. 3, 6, 13(3), 999 UNTS at 5, 6, 9; Convention on the Rights of the Child, Nov. 20, 1989, arts. 14, 30, GA Res. 25, annex, UN GAOR, 44th Sess., 61st plen. mtg., Supp. No. 49 at 167, UN Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) [hereinafter Children's Convention]. For discussion, see Natan Lerner (1996) 'Religious Human Rights under the United Nations' in Martinus Nijhoff, John Witte and Johan D van der Vyver (eds.), *Religious Human Rights in Global Perspectives: Religious Perspectives* p.304, 310.

41. Declaration on Discrimination Based on Religion or Belief, *supra* note 40. Although not a treaty, the declaration carries the weight of UN authority and may be seen as stating rules of customary international law. Lerner, *supra*, at p.123.

at odds with gender equality rights. For instance, the right 'to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief'[42] may involve 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.[43]

The clash – between culture and religion on the one hand, and human rights or gender equality on the other – is expressly regulated in two international conventions – CEDAW[44] and ICCPR.[45] Article 5(a) of CEDAW imposes a positive obligation on states parties to 'modify ... social and cultural' practices in the case of a clash,[46] and article 2(f) imposes an obligation to 'modify or abolish ... customs and practices'[47] that discriminate against women.[48] Culture, as noted above, is a macro-concept, definitive of human society, and the concept of 'cultural practices' thus subsumes the religious norms of societies. Custom is the way in which the traditionalist cultural norms are sustained in a society. It is clear, then, that article 5(a) and article 2(f) give superior force to the right to gender equality in the case of a clash with cultural practices or customs, including religious norms, thus creating a clear hierarchy of values.

In ICCPR's article 18(3), there is express regulation of any potential conflict between the right to manifest one's religion and the fundamental rights or freedoms of others, including, implicitly, the right to gender equality. The article provides that '[t]he 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

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42. Declaration on Discrimination Based on Religion or Belief, *supra* note 40, art. 6(g).

43. ICCPR, *supra* note 3, art. 27, 999 UNTS at 180; Children's Convention, *supra* note 40, art. 30.

44. CEDAW, *supra* note 4.

45. ICCPR, *supra* note 3.

46. CEDAW's article 5 (a) states: 'The parties shall take all appropriate measures: ... To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.' CEDAW, *supra* note 4, art. 5(a), 1249 UNTS at 16.

47. Under article 2(f), states parties agree: ' ... to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: to take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. *Ibid.* art. 2(f), 1249 UNTS at 14.

48. The effect of article 5(a), combined with article 2(f) of the convention which requires states parties to proceed without delay, is to establish an immediate obligation and not an obligation merely to take steps with a view to achieving progressively the full realisation of rights, as in the CESCR. Henry J Steiner and Philip Alston (2nd ed. 2000). *International Human Rights in Context* 179. Oxford: Oxford University Press.

and freedoms of others.'[49] Article 18(3) thus provides an exception to the right to the freedom to manifest one's religion, should a confrontation materialise with the fundamental rights and freedoms of others, including, by clear implication, the right to gender equality also protected in the ICCPR. CEDAW and the ICCPR thus balance the right to religion and culture with human rights and women's rights. While both conventions recognise the need for balancing, there are significant differences between their formulations. First, the conception of a mandatory hierarchy of values in article 5(a) of CEDAW is not matched by a similar edict in article 18(3). Second, the choice to regulate the clash is with culture, in one convention, and with religion, in the other (further discussed below). Third, there is a difference in wording as regards the protected parties; in CEDAW, the reference is to 'men and women,' while in ICCPR it is to 'others.' The obvious reference in CEDAW is to men and women within the culture; in ICCPR, the primary reference may be to those outside the religion, although, as pointed out, the Human Rights Committee has not adopted a restrictive approach.[50]

In using the construct of culture in CEDAW, the overarching concept under which religion is included, arguably the intention of the drafters was to give the widest possible range of protection to the human rights of women covered by the convention. When creating a clear hierarchical deference to women's human rights, the drafters arguably preferred to use the term 'culture' as a fig leaf for religion, which is a more rigidly defended construct than culture in the human rights treaties, hoping for greater readiness by states to ratify CEDAW. This latter explanation gains weight when the reservations of states parties are analysed; there are at least 20 reservations that clearly indicate that the state party wishes to conserve religious-law principles for either its entire population or for minority communities. These reservations are made primarily under article 16 of the convention dealing with women's rights to equality within the family,[51] yet only four countries[52] have entered reservations to article 5(a). This indicates that states parties may not have been fully aware of the incorporation of religion within culture.

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and **culture, including religious attitudes** ... States parties

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49. ICCPR, *supra* note 3, art. 18(3), 999 UNTS at 177.

50. Human Rights Committee, General Comment 22 on article 18, UN Doc. HRIGEN1Rev.1 at 35 (1994).

51. CEDAW, *supra* note 4, art. 16, 1249 UNTS 17. 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, Morrocco, Saudi Arabia, Tunisia and Turkey. A few of the reservations were in order to allow continued application of various different religious laws. See, e.g., reservations of Israel, India and Singapore.

52. India, Niger, Malaysia and New Zealand–Cook Islands.

should ensure that **traditional, historical, religious or cultural attitudes** are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights ... The rights which persons belonging to minorities enjoy under article 27 of the Covenant **in respect of their language, culture and religion do not authorise** any state, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.[53]

So, like the CEDAW Committee, the Human Rights Committee has rejected the cultural defence and the claim of religious freedom as justifications for discrimination against women.

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.

Human rights cases: constitutional and international

The cultural defence and the right to religious freedom have, as said, been raised in opposition to women's claims to gender equality in constitutional courts and international tribunals. The way courts have dealt with the dichotomy depends on many factors and, not least, on the constitutional framework or international treaty jurisdiction. In the following discussion, however, I will not address these important legal issues but will concentrate on the rhetoric and the outcome of the judgments as they relate to the hierarchy of values between culture, religion, and gender. To gauge the level of judicial activism involved, I provide some indication of the statutory provisions impacting on the specific clash of values under discussion. I analyse separately a sample of cases that appear, according to the judicial rhetoric, to be purely cultural, purely religious, or based on a mixture of cultural and religious considerations, in order to begin to assess whether there are significant differences in the way the various categories are treated.[54] The cases are organised in chronological order, according to subject matter or by country, depending on the analytical context.

A comparative assessment of constitutional cases

The cultural defence

There have been two similarly decided North American cases on discrimination against women regarding their right to membership in tribal minorities. In the Canadian Supreme Court, in 1973, Jeanette Lavell lost her challenge to invalidate Canada's

53. HRC General Comment 28, CCPR/C/21/Rev.1/Add.10, 5, 32 (emphasis added).

54. The cases discussed below are not an exhaustive collection, but rather present a preliminary survey of the way in which the clash between culture, religion and gender equality has been dealt with by courts in different countries and by international tribunals.

Indian Act.[55] The Indian Act provided that, unlike a Native man, a Native woman who married a non-Native lost her status as an Indian, as did her children.[56] In 1985, in the aftermath of a decision of the Human Rights Committee, discussed below, and subsequent to the enactment of the Canadian Charter of Rights and Fundamental Freedoms, the Indian Act was amended and the statutory discrimination against women eliminated. In the United States *Martinez* case, in 1978, the Supreme Court refused to intervene to invalidate a Santa Clara Pueblo Ordinance that imposed similar discriminatory membership rules for tribal members.[57] Judith Resnik offers an explanation of the decision, namely, 'that membership rules that subordinate women do not threaten federal norms (either because federal law tolerates women holding lesser status than men or because federal law has labelled the issue one of 'private' ordering and non-normative).'[58] Whatever the real explanation may be, the result is deference to tribal sovereignty (and hence culture) and the denial of the right of the Santa Clara women to equal membership.

Two African court decisions on discrimination against women in their land rights under traditional customary law were decided in diametrically opposed ways. In the *Pastory* case in 1992, the Tanzanian High Court held that the law of customary inheritance, which barred women, unlike their male counterparts, from selling clan land, unconstitutionally discriminated against women.[59] In invalidating the rule of customary law, Justice Mwalusanya relied on the language of Tanzania's Constitutional Bill of Rights and the ratification of CEDAW. Quoting Julius Nyerere's call for socialist equality – 'If

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55. *Canada (Attorney General) v. Lavell*, [1974] SCR 1349.

56. This constituted one of the issues of gender equality in a later constitutional struggle over the drafting of the Canadian Charter. The established male leadership contended that the Charter should not apply to Indian governments because it would undermine their inherent right to self-government and place an emphasis on individual rights not in keeping with traditional Native values. In contrast, the NWAC, the Native Women's Association of Canada, fought for the applicability of the Charter in order to protect themselves against patriarchal dominance. Joyce Green highlights the problem of the silenced voice within autonomous subcultures: 'Native women identify a shared experience of oppression as women within the Native community, together with (instead of only as) the experience of colonial oppression as Aboriginals within the dominant society.' She concludes: '[u]ltimately the process excluded women qua women.' Joyce Green (1993) *Constitutionalising the Patriarchy: Aboriginal women and Aboriginal government*, 4 Constitutional Forum 110.

57. *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978). Under the tribe's rules, the children of female members who married outside the tribe could not retain their membership in the tribe, while the children of male members who married outside the tribe would remain members.

58. Judith Resnik (1989) 'Dependent Sovereigns: Indian Tribes, States and the Federal Courts', 56 University of Chicago Law Review 671.

59. *Ephrahim v. Pastory*, 87 International Law Report 106.

we want our country to make full and quick progress now, it is essential that our women live on terms of full equality with men,' – he observed: 'From now on females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land ... is concerned. It is part of the long road to women's liberation.' In 1999, a similar issue arose in Zimbabwe in the *Magaya* case.[60] Venia Magaya, the daughter of her deceased father's first wife, claimed ownership of the estate; this was opposed by a son of the father's second wife. The Supreme Court – relying on an exemption for customary law under the constitution and rejecting the binding effect of the international human rights instruments to which Zimbabwe was party – refused to invalidate a customary law rule that gave preference to males in inheritance. Judge Muchechetere held that this customary law rule was part of the fabric of the African socio-political order, at the heart of which lies the family. He said: 'At the head of the family there was a patriarch, or a senior man, who exercised control of the property and lives of women and juniors. It is from this that the status of women is derived. The woman's status is therefore basically the same as that of any junior male in the family'.[61] He added: 'While I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration ... I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts'.[62]

Religious freedom

The rights of religious groups to regulate family law in accordance with their religious law and in ways that are discriminatory toward women have been examined by courts in India.

In India, with its Hindu majority, the clash between religion and women's right to equality has been examined in relation to the two minority religions (Islam and Christianity). For Hindu women, India follows a system in which personal status laws are determined by the law of the religion of the parties involved but are applied in civil courts. Many of the problems of inequality in Hindu family law were removed by the Hindu Marriage Act.[63]

In the 1985 *Shah Bano Begum* case, the Supreme Court confirmed a maintenance award for a divorced Muslim woman, allegedly contrary to Sharia law.[64] The court was composed of five Hindu judges and the case was decided unanimously. On the question

60. *Magaya v. Magaya* [1999] 3 LRC 35 (Zim.).
61. *Ibid.*
62. *Ibid.*
63. CIS Part II (1955) Hindu Marriage Act, New Delhi, 18 May 1955.
64. *Mohammed Ahmed Khan v. Shah Bano Begum* (1985) 2 SCC 556.

of the religious claims underlying opposition to the maintenance award, Chief Justice Chandrachud was scathing about the inequality wrought by the Muslim personal code: 'Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But is the only price of that privilege the dole of pittance during the period of *iddat*? And is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of *iddat*, the mere fact that he has paid something, no matter how little, absolves him forever from the duty of paying adequately so as to enable her to keep her body and soul together?'[65] The court also found Islamic authority in verses 241 and 242 of the Qur'an for the proposition that there is an obligation to pay maintenance to divorced wives who are unable to maintain themselves.[66] The ratio of the case was, however, based on the Code of Criminal Procedure, under which a maintenance obligation may be imposed on a person who neglects or refuses to pay maintenance to a wife who is unable to maintain herself. In the aftermath of the *Shah Bano* judgment, the statutory Muslim Personal Law Board campaigned to reverse the ruling. It succeeded on all fronts. The ruling Congress Party introduced legislation to reverse the judgment, and the petitioner waived all her rights under the Supreme Court judgment.[67]

In the *Mary Roy* case in 1986, the Indian Supreme Court considered the constitutionality of the unequal inheritance provisions in the Christian Succession Act of 1916.[68] The petitioner, a Christian woman resident in Kerala, had claimed that the act infringed women's right to equality in that it provided for a lower inheritance share for women. The Supreme Court avoided the issue of constitutionality, holding that the Indian Succession Act of 1925, which grants equal inheritance rights to men and women, governed Christians in Kerala. According to Martha Nussbaum, the Synod of Christian

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65. *Ibid*. at 559.

66. *Cf. Abu Bakar Siddique v. S M A Bakkar*, 38 DLR (AD) (1986). In Bangladesh, in 1986, the High Court ruled on a petition by a mother to retain custody of her son after the age of seven. The Court held that although the principles of Islamic law allowed the woman to be guardian of a male child only until the age of seven, a deviation from this rule would be possible where the child's welfare required it. According to the judge, there was no authoritative ruling on this issue in the Qur'an or the Sunnah, and hence he was within the principles of Islamic law in awarding custody to the mother in this unusual case, where the child was afflicted with a rare disease and the mother, a doctor, was able to take care of his treatment. In that case, the Court was ruling on a Muslim issue in a Muslim state and the decision does not appear to have been opposed by public opinion.

67. Amendments to the code of criminal procedure have strengthened women's right to maintenance in divorces. See III India Code (Act No. 2 of 1974) § 125.

68. *Mary Roy v. State of Kerala*, A.I.R. 1986 SC 1011.

Churches has supported opposition by the Christian community to the *Mary Roy* decision and has financed the drafting of wills to disinherit female heirs.[69]

In 1995, in *Sarla Mudgal*, the Indian Supreme Court decided in the case of a man who was married in a monogamous Hindu marriage, under the Hindu Marriage Act, and who converted to Islam, only to remarry without dissolving the first marriage, that the second marriage was prohibited.[70] The court refused to recognise the second marriage as a polygamous marriage under the Muslim law. The court, pointing out that polygamy had been held injurious to public morals in the US, said: '... in the Indian Republic, there is to be only one Nation – the Indian Nation – and no community can claim to be a separate entity on the basis of religion.'[71] In 1997, the Indian Supreme Court handed down a more ambivalent decision on polygamy. In *Ahmedabad Women Action Group*, the court dismissed constitutional challenges by a women's NGO to the Muslim practices of polygamy and triple *talaq* (a form of summary unilateral divorce by the husband) and to provisions of the Hindu Succession Act that discriminated against women.[72] The court used very different rhetoric from that used only two years earlier: '... a uniform law, though highly desirable, may be counter-productive to the unity and integrity of the nation' and 'polygamy is recognised as a valid institution when a Muslim male marries more than one wife'.[73]

Cultural-religious claims

In the *Saroj Rani* case, in 1984, the Indian Supreme Court upheld the right of a husband to restitution of conjugal rights, as provided in the Hindu Marriage Act of 1955,[74] reversing the decision of Justice Choudary in the lower court that restitution of conjugal rights was unconstitutional and was 'a savage and barbarous remedy,

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69. Nussbaum, *supra* note 21, at 98. See also Marc Galanter and Jayanth Krishnan, 'Personal Law and Human Rights in India and Israel', 34 *Israel L Rev*. 101 (2000). According to Galanter and Krishnan, the rejection of the decision by the Christian minority group demonstrates concern about losing their identity if they do not keep the established personal law.

70. *Sarla Mudgal v. Union of India* (1995) 3 SCC 635.

71. *Ibid*. at 650. See also K N Chandrasekharan Pillai (1999) 'Women and Criminal Procedure' in Amita Dhanda and Archana Parashar (eds.) *Engendering Law: essays in honour of Lotika Sakar* 161–72. India: Eastern Book Company.

72. *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573.

73. *Ibid*. at 577.

74. *Saroj Rani v. Sudarshan Kumar Chadha* (1984) 4 SCC 90. The Supreme Court overruled *T Sareetha v. T Venata Subbaiah*, AIR 1983 AP 356. Sareetha had been given in marriage by her parents at the age of 16 and, after a few months of marriage, Subbaiah, her husband had left her because of her wish to become an actress. Five years later, after Sareetha had become a famous actress, Subbaiah sued for restitution of conjugal rights.

violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution ... [making] the unwilling victim's body a soulless and joyless vehicle for bringing into existence another human being'.[75] Judge Choudary had also held that, although apparently gender neutral, in the context of Hindu culture in which women are not regarded as the social equals of men, conjugal restitution was 'a source of sexual oppression and brutalisation for women at the hands of men'.[76] The Supreme Court, in reversing this judgment, held that the decree of restitution 'serves a social purpose as an aid to the prevention of break-up of marriage'.[77] In 1982, the High Court in Bangladesh held the remedy of forcible restitution of conjugal rights unconstitutional since it infringed women's right to equality.[78] The court did not in its judgment expressly refer to culture or religion, but, nevertheless, indicated that it was overriding traditionalist culture by referring to the remedy of forced restitution as 'outmoded'.

International judicial decisions

Cases on the difficult encounter between religion or culture and human rights can be brought before international tribunals or committees only after the exhaustion of domestic remedies, and, hence, are brought in the wake of decisions by domestic courts.

In 1977, Sandra Lovelace submitted a communication to the UN Human Rights Committee contesting the application to her of the decision by the Canadian Supreme Court regarding Lavell (discussed above) and challenging her loss of Indian status as the result of marrying a non-Indian. The Human Rights Committee held the Indian Act unreasonably deprived Sandra Lovelace of her right to belong to the Indian minority and to live on the Indian reserve.[79] This was an unjustifiable denial of her right to enjoy her culture under article 27 of the ICCPR.[80] In an individual opinion, Nejib Bouziri added that the Indian Act also breached article 2 of the ICCPR in that it discriminated between men and women.[81]

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75. *T Sareetha v. T Venata Subbaiah*, AIR 1983 AP 356, 370.
76. *Ibid*.
77. *Saroj Rani*, (1984) 4 SCC at p.102. The Supreme Court further justified the issuing of the decree on the grounds that a woman who did not wish to return to the marital home could avoid doing so by paying a fine. As Martha Nussbaum has rightly commented, 'the Court did not ask how likely it was that a woman fleeing from an abusive marriage would be able to pay the fine.' Nussbaum, *supra* note 21, at 4.
78. *Nelly Zaman v. GiaSuddin Khan*, 34 DLR 221 (1982).
79. Communication No. 24/1977 (1)-(2), decided July 30, 1981, UN Doc. CCPR/C/OP/2 at 224 (1990).
80. ICCPR, *supra* note 3, art. 27, 999 UNTS at 185.
81. Individual opinion submitted along with Communication No. 24/2977. Available at www.riga.lv/minelres/un/cases/24_1977.htm [last accessed 29 April 2010].

In 1981, the Human Rights Committee considered a communication in which a Mauritian woman alleged Mauritius immigration law discriminated against women in violation of articles 2(1) and 3 of the ICCPR.[82] 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 may be refused. If, however, a Mauritian man married a foreign woman, the foreign woman was automatically entitled to residence. The Human Rights Committee held that Mauritius had violated the covenant by discriminating between men and women without adequate justification.

Theoretical framework for constitutional balancing

The purpose of the theoretical examination that follows is to discuss the way in which constitutional norms should, as a matter of constitutional principle, deal with clashes between the right to culture or religion on the one hand, and the right to gender equality on the other.[83] Arguably, the very existence of the international human rights norms discussed above should be enough to decide this issue on a normative level. Certainly, for the 170 states parties to CEDAW, this seems compelling; even where states have entered reservations, it is widely considered that these are not valid where they are contrary to the essence of the treaty obligation. This is, however, an argument based on the normative legal standards of universalism and, as such, has been attacked from various political philosophy perspectives. Although the international norms are sufficiently well established to justify an obligation of state compliance, I will briefly analyse – as a supplementary matter – the question of constitutional principle. In order to ascertain the principles that should govern the role of constitutional law in regulating the interaction between religious and equality values, I shall examine the theoretical arguments that support deference to cultural or religious values over universalist values. To the extent that such contentions fail, I argue that we should regard gender equality as a universalist value entitled to dominance in the legal system.

A number of theories of justice have been advanced in support of deference to cultural or religious values. I will examine three. The first, or 'multiculturalist' approach, contends that preservation of a community's autonomy is a sufficiently important value to override equality claims. The second, which I call the 'consensus' approach, argues that if cultural or religious values have the sanction of political consensus in a democratic system, then this is enough to legitimate their hegemony. The third, which I label the 'consent or waiver' approach, claims that where there is individual consent to cultural or religious values it must be respected.

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82. *Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius*, Communication No. R.9/35, (May 2, 1978), UN Doc. Supp. No. 40 (A/36/40) at 134 (1981).

83. For a fuller exploration of certain aspects of the hierarchy of values, see Frances Raday (1995) 'Religion, Multiculturalism and Equality – the Israeli case', *25 Israel Yearbook on Human Rights* 193.

Multiculturalism

Communitarian claims that adherence to the traditions of a particular culture is necessary in order to give value, coherence and a sense of meaning to our lives are used to justify traditionalist cultural or religious hegemony over universalist principles of equality. Alasdair MacIntyre argues that the ethics of tradition, rooted in a particular social order, are the key to sound reasoning about justice.[84] Normative communitarianism is thus oriented to the preservation of tradition within the culture. Where the communitarian norms are based on religion, traditionalism often means deference to written sources formulated in an era from the sixth century BC (the Old Testament), to the first century AD (the New Testament), to the seventh century AD (the Qur'an).[85]

Two aspects of the communitarian argument – cultural relativism and the preservation of tradition – deserve particular attention in examining the impact of communitarianism on women. First, the cultural relativism implicit in normative communitarianism must displace the value of gender equality as, by definition, traditionalist cultures and religions, in which gender equality is not an accepted norm, are in no way inferior to those social systems in which it is. This communitarian argument is, however, logically flawed. If cultural relativism is taken to its logical conclusion, it undermines not only the value of human rights and gender equality but also the value of communitarianism itself, since communitarianism is also the product of a particular cultural pattern of thinking.[86] Indeed, taken to extremes, cultural relativism is another name for moral nihilism; if cultural relativism were to be taken as the dominant value basis of a legal system, it would be impossible to justify any moral criticism of the system's norms.[87] At this level, multiculturalism could not be useful in any attempt to engineer legal policy in a positive legal system.

Alternatively, we could regard cultural relativism merely as a tool that helps us to distinguish ethnocentric from universal standards, so that we will be able to refrain from insisting on ethnocentric values as mandatory on a global scale. This form of multiculturalism would not, I contend, override the value of gender equality. This stems from the fact that gender equality is one of the universally shared ideals of our time[88] and, hence, its global application is neither ethnocentric nor morally imperialistic. The vast majority

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84. Alasdair Macintyre (1981) *After Virtue: a study in modern theory*. Notre Dame, Ind.: University of Notre Dame Press.

85. Yosef Qaro (c. 1500s) *Shulkan Aruch [Code of Jewish Law]*

86. See Alison Dundes Renteln (1990) *International Human Rights – universalism versus relativism* pp.61–78. CA: Sage Publications, Inc.

87. Clyde Kluckhohn (1995) 'Ethical Relativity: Sic et Non'. *The Journal of Philosophy*, Volume 52, No. 23, pp.663–677. 'Morality differs in every society and is a convenient tenet for socially approved habits'.

88. See discussion of international norms, *supra*.

of states have ratified CEDAW and few of them have entered wide-ranging reservations for culture or religion. Even in the states with such reservations, there are significant dissenting elements that seek full gender equality, as can be seen from the NGO shadow reports to CEDAW coming out of these countries.

Second, let us take a look at the way in which the preservation of tradition impacts on gender equality. If the preservation of tradition is an aspect of communitarianism, as some of its proponents suggest, then the legitimacy of the claims of communitarianism to override universal principles (such as the right to equality) must stand or fall along with the legitimacy of the claim that traditionalism itself should also override universal principles. There is a whole battery of reasons why traditionalism cannot legitimately be regarded as overriding the principle of equality. Traditional patterns cannot form the dominant foundation for contemporary meaningfulness, except in a static society. It may be that the ethical norms of a society are themselves a factor in determining the dynamism of the society, and it is not inconceivable that a society that believed in traditionalism as an ethical imperative might 'choose' to be static. However, where and when, as an empirical fact, a society does change as a result of environmental or socio-economic developments not dictated by the ethical traditions of the society, a rigid application of traditional norms will produce dissonance. Communitarians do not tell us how we can continue to apply the community's traditional values to changed socio-economic institutions.[89] A central example demonstrating this dissonance is the clinging to traditionalist patriarchal norms that exclude women from the public sphere in a world where women, in fact, work outside the home and are often responsible for their own and their children's economic survival, in a world where, in fact, they are not 'protected' and 'supported' within the hierarchy of an extended traditional family.

As a matter of political ethics, if traditionalism is allowed to oust egalitarianism, it will be an effective way of continuing to silence any voices that were not instrumental in determining the traditions. As Susan Okin shows, the Aristotelian-Christian traditions chosen by MacIntyre to demonstrate the appeal of his communitarian theory are not women's traditions.[90] Women were excluded not only from the active process of formulating those traditions but also from inclusion, as full human subjects, in the very

89. In his discussion of the changing meaning of child sacrifices, Peter Winch writes: ' ... it would be no more open to anyone to propose the rejection of the Second Law of Thermodynamics in physics. My point is not just that no-one would listen to such a proposal but that no-one would understand what was being proposed. What made child sacrifice what it was, was the role it played in the life of the society in which it was practised; there is a *logical* absurdity in supposing that the very same practice could be instituted in our own very different society'. Peter Winch, 'Nature and Convention', in *The Philosophy of Society*, *supra* note 87, at 15–16.

90. See Susan Okin (1989) *Justice, Gender and the Family,* pp.41–62. New York: Basic Books.

theories of justice developed within those traditions.[91] The same can be said for Judaism and Islam. Women's voices are silenced where traditionalist values are imposed.[92]

Consensus

If communitarianism does not justify the domination of religious/traditionalist patterns of social organisation in the legal system, might a broad social consensus become a legitimising factor? Michael Walzer has argued that justice is relative to social meanings and a given society is just if its substantive life is lived in a way faithful to the 'shared understandings' of its members.[93] This view legitimises the adoption of particularist principles of justice in preference to universalist ones. The process of reaching shared understandings is seen as a dynamic one based on a dialectic of affirmation by the ruling group and the development of dissent by others. Walzer's theory of justice has been criticised in so far as it applies to situations of 'pervasive domination.'[94] Okin points out that in societies with a caste or gender hierarchy, it is not just or realistic to seek either shared understandings or a dialectic of dissent.[95] Where there is pervasive inequality, the oppressed are unlikely to acquire either the tools or the opportunity to make themselves heard. Under such circumstances, it cannot be assumed that the oppressed participate in a shared understanding of justice. Rather, there would be two irreconcilable accounts of what is just. Application of a shared understandings theory only could be justified if the dissenters were assured equal opportunity to express their interpretation of the world and to challenge the status quo. The principle and practice of equality are, hence, a prerequisite for the application of the shared understandings theory and the claim for gender equality must be immune to oppression by the dominant shared understanding if the system is to operate in a just fashion.

If the cultural practices or religious convictions of the community condone the unequal treatment of groups within it, at what level should 'shared understanding' be ascertained? If there are slaves, Dalits (treated as untouchables) or women within the community, excluded from equality of opportunity, such subgroups cannot be taken to join in the community's shared understanding, even if it does not formulate its own dissent. The silencing of any such subgroup should pre-empt wholesale deference to community autonomy; such deference to the community's autonomy would defeat

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91. See *ibid*.

92. See Jean Bethke Elshtain (second ed. 1993) *Public Man, Private Woman: women in social and political thought.* Princeton: Princeton University Press.

93. Michael Walzer (1983) *Spheres of Justice: a defense of pluralism and equality* 312-13. New York: Basic Books.

94. *Ibid.*

95. Okin, *supra* note 90, at pp.62–73.

concern for the autonomy of oppressed subgroups within it.[96] This is true of the subgroup of women in traditionalist cultures and monotheistic religions. Their sharing of the community understanding – where that understanding is based on a patriarchal tradition – cannot be taken for granted, even if they do not express dissent. In the words of Simone de Beauvoir: 'Now what peculiarly signifies the situation of women is that she – a free and autonomous being like all other human creatures – nevertheless finds herself living in a world where men compel her to assume the status of the Other ... How can independence be recovered in a state of dependency? What circumstances limit women's liberty and how can they be overcome?'[97]

More recently, in the words of Okin: 'When the family is founded in law and custom on allegedly natural male dominance and female dependence and subordination, when religions inculcate the same hierarchy and enhance it with the mystical and sacred symbol of a male god, and when the educational system ... establishes as truth and reason the same intellectual bulwarks of patriarchy, the opportunity for competing visions of sexual difference or the questioning of gender is seriously limited'.[98]

The premise to be derived from an analysis of the divide between the cultural and the religious versus equality and human rights is that, in constitutional societies, equality and liberty should be the governing norms – the *Grundnorm* on which the whole system rests, including the right to enjoy one's culture and religion. Constitutional democracy cannot tolerate enclaves of illiberalism whose inhabitants are deprived of access to human rights guarantees.

Consent

Even if we reject the arguments of multiculturalism and consensus as justifying the imposition on individuals of inegalitarian cultural or religious norms, this will not invalidate direct individual consent to those norms. The autonomy of the individual is the ultimate source of legitimacy. It seems clear that a genuine choice to accept certain cultural practices or religious norms should be accepted as valid even if they are to the disadvantage of the acceptor. This liberty to choose is an essential part of the

96. In John Cook's words: '[Cultural relativism] amounts to the view that the code of any culture really does create moral obligations for its members, that we really are obligated by the code of our culture – *whatever it may be*. In other words, Herskovits's interpretation turns relativism into an endorsement of tyranny.' John Cook (1978) *Cultural Relativism as an Ethnocentric Notion* in *The Philosophy of Society*, *supra* note 87, at 289, 296 (emphasis in original).

97. Simone de Beauvoir (1952, 1989) *The Second Sex* (H M Parshley trans. and ed.) at 688–89. Knopf.

98. Okin, *supra* note 90, at p.66.

freedom of religion and of the right to equal autonomy of the individual.[99] The need to recognise the autonomy of the individual is a practical as well as a theoretical matter because, in situations of genuine consent, there will be no complaint emanating from women disadvantaged by the patriarchal community nor much opportunity to intervene. However, recognition of individual consent to patriarchy and the concomitant disadvantage as a woman is problematic. Consent cannot be assumed from silence, since subjection to patriarchal authority inherently reduces the capacity for public dissent. Thus, consent is suspect, and it is incumbent on the state to increase the possibility of and to verify the existence of genuine consent by a variety of methods. I shall indicate some of them.

Consent cannot be recognised as effective when inegalitarian norms are so oppressive they undermine, at the outset, the capacity of members of the oppressed group to exercise an autonomous choice to dissent. In such a situation, no consent can be considered genuine. Such oppressive practices can properly be classified as repugnant, and consent will not validate them.[100] In such extreme cases, mandatory legal techniques should be employed to protect individuals from their inegalitarian status.[101] Thus, the invalidation of consent may be applied in cases of extreme oppression – examples of which include slavery, coerced marriage, mutilation, including FGM, as well as polygamy, where it forms part of a coercive patriarchal family system.[102]

However, absent repugnant practices, even formal consent is not necessarily evidence of genuine consent in the context of pervasive oppression or discrimination. In such situations, all consent must be suspect, since pervasive oppression seriously diminishes the possibility of dissent and hence the probability of genuine consent. Individuals who consent to the perpetuation of their inequality, within the religious/cultural community to which they belong, often have little real choice but to accept their oppression. Because

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99. See Nitya Duclos (1990) 'Lessons of Difference: Feminist Theory on Cultural Diversity', 38. *Buffalo Law Review* 325.

100. See Sebastian Poulter (1987) 'Ethnic Minority Customs, English Law and Human Rights', 36 *International and Comparative Law Quarterly* 589. Indeed, even those writers who regard autonomous choices to forfeit autonomy as irrevocable impose a strict test of voluntariness on consent to such severe forms of self-harm. See Joel Feinberg (1986) *Harm to Self: the moral limits of the criminal law,* 71–87, 118–19. New York: Oxford University Press.

101. Thus, for instance, in the case of polygamy, wives should be released of all marital obligations but their rights to maintenance, property and child custody should be protected.

102. But see Martha Nussbaum (2000) *Women and Human Development: the capabilities approac,* 229–30. New York: Cambridge University Press. Joel Feinberg, in reviewing the writings of John Stuart Mill on the issue of polygamy, concentrates on the impact of the voluntary decision of the woman to marry on her future autonomy, stating: ' ... but it would be an autonomously chosen life in any case, and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice.' Feinberg, *supra* note 100, at 78.

of their socio-economic status, their alternatives to acceptance of the group's dictates may be very limited or non-existent. Where individuals are compelled by socio-economic necessity to accept an inferior status, their consent cannot be freely given. Ascertaining that consent is genuine, without negating the right of women to choose cultural diversity at the cost of gender equality, presents a difficult challenge for normative systems. Nevertheless, some measures can negotiate this precarious divide and enhance women's autonomy, thus facilitating their power to give or withhold genuine consent.

States must take *a priori* measures to augment women's autonomy and their power to dissent. Women's ability to withhold consent should be buttressed by provision of an educational and economic infrastructure that will nurture their autonomy and ability to dissent from discriminatory norms or practices. The state, endeavouring to ensure that consent is informed, should insist on the disclosure of options so that all members of society, including girls and women, will be able to make their decisions on the basis of full information. Ensuring women's literacy and free access to information is a primary requirement. Beyond this, compulsory education laws should incorporate a core curriculum requirement that all children be exposed to information regarding fundamental human rights, including the right to gender equality.[103] However, information alone is not enough. In order to be able to dissent from patriarchal family patterns, women need to have feasible economic options. Socio-economic alternatives to consent must be made available. Thus, the state must provide women with the right to own resources and to inherit property, including land. The state should also provide training to girls and women for income-generating occupations, which will allow women the economic 'luxury' of not remaining totally dependent on patriarchal family support, thereby increasing their ability to dissent.

The state should also scrutinise, *ex posteriori*, individual women's consent to inequality within a strongly patriarchal context and should be able to void it where it is not genuine. If the inequality is not repugnant, the state cannot intervene to void consent unless requested by women to do so. However, acknowledging that consent to inequality is suspect, the state should be highly responsive to women's requests to void their consent. Thus, where women wish to withdraw prior consent to inequality within a traditionalist cultural or religious community, their subsequent dissent should be given full recognition.[104] In legal terms, this would mean that the consent to inequality should

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103. *Compare Wisconsin v. Yoder*, 406 US 205 (1972) *with Re State in Interest of Lack*, 283 P. 2d 887 (1955).

104. See Okin, *supra* note 90, at 137. The liberal notion of freedom of religion includes the right of each individual to change his religion at will; people have a basic interest in their capacity to form and to revise their concept of the good. See Will Kymlicka (1993) Two Models of Pluralism and Tolerance (unpublished manuscript). This is especially so where the revised concept of the good that is being chosen is the fundamental human right to equality.

be considered voidable.[105] Since the possibility of legitimising inequality rests primarily on consent, which, in situations of pervasive inequality, is suspect, the voidability of consent is an effective ex post facto way of ensuring that women are not being forced to consent. Consent to a patriarchal marriage regime, for instance, will usually be made when a woman is young and dependent on her own traditionalist family; such consent should be voidable at any later stage, if and when the woman finds the terms of her traditionalist marriage unacceptable.

That women rebel against patriarchal standards that disadvantage them in traditionalist societies is an empirical fact. There are two different ways in which women members of traditionalist cultural or religious communities may seek equality: one is the attempt to achieve equal personhood within the community, the other is the attempt to ensure egalitarian alternatives outside the community. The former is a more holistic claim, is more far-reaching, and a state response to the claim carries with it greater potential for intervention in community autonomy.

Equal cultural or religious personhood is the kind of claim made by tribal women, in the United States and Canada, for example, who wished to retain their tribal membership when marrying persons outside the tribe. The claim of women within such groups is absolutely valid – it is an attempt to improve their terms of membership and to bring their communities into line with modern standards of gender equality. However, there is also an apparent anomaly in this claim; on the one hand, it is based on the right to membership, and on the other, on a rejection of the terms of membership as offered. The claim of women for equality within a traditionalist group may transform the modus vivendi of the group in a way that conflicts with the wishes of the majority of members of the group, both men and women. Thus, it seems clear that states should be more reluctant to intervene in religious or cultural groups and, for the most part, should not invalidate the community rule per se. Thus, individual women's dissent will not necessarily justify state intervention to prohibit the internal norms and practices of traditionalist communities. The justification for intervention should increase with the severity of the discrimination. If the discrimination results in the infringement of women's human dignity, in violence, or in economic injury, intervention is justified. It may not be so where the discrimination is purely functional or ceremonial. Even in cases of functional or ceremonial discrimination, there will be situations in which intervention is justified; for instance, where the claim for equality would be consonant with some authoritative internal interpretation of the group norms or, alternately, where a critical mass of women within the group support the claim for equality. Furthermore, although states should be circumspect in intervening to invalidate functional or ceremonial discrimination, they should be decisive in denying state support, facilities, or subsidies for the discriminatory activities of the traditionalist groups.

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105. See FH 22/82, *Beit Yules v. Raviv*, 43(I) PD 441, pp.460–64 (in Hebrew). Consent to inequality may be held contrary to public policy.

In view of the inhibiting factors regarding intervention and prohibition of discriminatory rules within the religion or culture, and the limited efficacy of denying state facilities or subsidies, the state should fulfil its obligation to provide women with the right to equality by assuring them of a right of exit from the traditionalist community norms that discriminate against them. The claim of women who seek egalitarian alternatives outside the community should be given full recognition and support by the state. In this case, there is no real dilemma. The lack of genuine consent is transparent, and since consent is the only ground on which cultural or religious patriarchy should be deferred to, the predominance of the right to equality is, in this case, patent. In such circumstances, the right to equality entails the provision of a parallel system to which women may turn.[106] Thus, for example, where the culture or the religion allows polygamy, women must have the legal option of non-polygamous marriage. It is incumbent on the state to provide the option of civil marriage regulated on the basis of gender equality; this would limit the monopoly of religious marriage and offer a non-patriarchal alternative. Even where women are already in a polygamous marriage and have 'consented' to it, they must be given the greatest number of viable alternatives possible in leaving it, should they later wish to do so. This would entail special provisions for divorce, maintenance and division of matrimonial property. Similarly, where women are subjected to a discriminatory regime of divorce in their cultural or religious communities, they should be given the alternative of applying for a civil divorce governed by egalitarian family law rules.

There can be no denying that traditionalist cultural and religious ways of life have been an important source of social cohesion and individual solace for many people. There is also no doubt that, in the foreseeable future, these traditions are not going to disappear. Hence, on both an ideological and a pragmatic basis, efforts to achieve equality for women should work, as far as possible, within the constraints of the traditionalist or religious culture as well as outside them.

However, the important condition is that all such efforts should respect cultural diversity only so far. Such respect cannot be at the cost of women's right to choose equality. The role of constitutional law is to give expression to the bottom line of the argument, that '[w]e should refuse to give deference to religion when its practices harm people in the areas covered by the major capabilities.'[107] In my view, there is an argument

106. A right of exit is not itself enough to guarantee the autonomy of dissent. 'The remedy of "exit" – the right of women to leave a religious order – is crucial, but it will not be sufficient when girls have been taught in such a way as to be unable to scrutinise the practices with which they have grown up. People's "preferences" – itself an ambiguous term – need not be respected when they are adaptive to unjust background conditions; in such circumstances it is not even clear whether the relevant preferences are authentically "theirs"'. Cass R Sunstein (1999) *Should Sex Equality Apply to Religious Institutions,* in Susan Moller Okin (ed.) *Is Multiculturalism Bad for Women?* 88. Princeton: Princeton University Press.

107. *Ibid*. at 192.

to be made – on the basis of freedom – that some female members of a traditionalist culture may have an interest in its preservation. That is the reason why the preferable course is to encourage the reform of cultures and religions in order to accord equality to women who wish to live within them. It is in the event of failure of this course of action – to achieve equal personhood for women within a culture or religion – that the best the state can offer is a right of exit to those who want it.

The guarantee of the right to equality is a first-order preference. The way in which constitutional principles can incorporate sensitivity to cultural and religious difference is not in the formulation of the right but in tolerance regarding the ways of its implementation.[108] The way of implementation can be regarded as a second-order preference. The application of these different levels of basic capability – right and the implementation of a right – can best be understood through concrete examples.

The case of the veil is a pertinent example. First, does the imposition of an obligation to wear the veil limit women's basic capabilities? Does it undermine, in Nussbaum's terms, women's social bases of self-respect and non-humiliation? Does it prevent them being treated as dignified beings whose worth is equal to that of others? And does it violate protection against discrimination on the basis of sex? The answer to these questions is contextual. If men and women were equally obliged to wear covering approximating the veil, none of these limitations on women's basic capabilities would apply. Where, on the other hand, the veil differentiates between men and women and accentuates the subjection of women to patriarchy and their exclusion from public life, the veil may limit women's basic capacities in all these ways. *Ex contra* arguments have been made that Muslim women prefer to wear the veil because it protects them from social embarrassment or sexual harassment. This argument could be taken to support the view that the veil augments women's basic capabilities. However, there are problems with accepting this version of the preference to wear veils or head scarves. One problem lies in assessing the extent to which patriarchal power pre-empts women's freedom to choose not to wear the veil. Another is that the very reasons given for preferring the veil demonstrate a subjection to far deeper and more repugnant norms of patriarchy, such as the implied right of men to sexually harass women who are not protected by veiling. Furthermore, some of the more extreme forms of veiling are an obstruction to communication and must clearly limit women's ability to function in the public sphere, including in business or workplace settings. A different argument is that women prefer not to enter the public sphere but rather to be secluded from it.[109] This argument may be harder to refute on a theoretical level, but there is no empirical proof that its premises are factually correct, and it does not withstand scrutiny in light of the participation of women in the workforce even in rigidly conservative Islamic regimes.

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108. Warm appreciation goes to Ofer Malchai, who developed this distinction in his paper for my seminar on Religion, Secularism, and Human Rights, Hebrew University, 2001–2002.

109. Unni Wikan (1982) *Behind the Vale in Arabia: women in Oman* 105. Baltimore: Johns Hopkins University Press.

Women have the right not to suffer the discriminatory disabling of their capabilities imposed by those forms of veiling that reinforce patriarchal distinctions and impose asymmetrical requirements of modesty on women as compared with men. This is part of their human right to equality. It follows that coercive laws imposing the wearing of the veil are a clear violation of women's human rights. Where the law does not mandate the wearing of the veil, the freedom of women is apparently preserved, and the wearing of the veil appears to be a matter of personal preference and individual consent, which would preclude intervention by the state. However, as already suggested, such consent will be suspect in strongly patriarchal communities. Even where the wearing of the veil is a patriarchal mandate, perpetuating women's inequality, it cannot, generally, be considered repugnant; thus, implementation of the right to equality should concede cultural or religious differences, here, and the state should not intervene to prohibit the veil. Only in situations of repugnance, such as a refusal to provide women with medical care by male doctors because this would involve removal of the veil, does the state have an obligation to intervene and prohibit such manifestations of veiling. Where veiling violates women's right to equality but is not repugnant, the state should, more minimally, provide a right of exit, making sure that women who refuse to wear the veil will be as well protected as possible against any negative repercussions, such as family violence or divorce. It is also incumbent on states to provide human rights education (including gender equality awareness) to boys and girls and so enable them to make an informed choice regarding veiling.

The issue of veiling that has arisen in the courts in France, Turkey and Denmark involves whether girls in the educational system should be allowed to wear the veil. In this case, genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions. Does the practice of veiling conform to the requirement of providing a core education in human rights and gender equality? A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also, for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girls' rights to equality and freedom. This, indeed, is the message of the Swiss court's decision on veiling by teachers. On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions.[110]

110. See IWRAW Asia-Pacific, The Need to Monitor the Implementation of Temporary Special Measures (on file with author). In a lecture delivered to a CEDAW Workshop, 17 August 2002, Shanthi Dairiam gave a perceptive presentation on the need to ensure that enabling measures are in place so that women can access equality-promoting measures, and that there is a need for protection against backlash and unintended adverse effects.

In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends on the balance between these two conflicting policy priorities in a specific social environment.

Concluding comment

The intersection between traditionalist culture, religious norms and gender speaks patriarchy. This is amply demonstrated by the empirical evidence and by the fact that the cultural defence or claims of religious freedom are used to oppose women's demands for gender equality. The communitarian arguments of multiculturalist ethics and social consensus, used to justify these 'defences' against gender equality, do not stand scrutiny because they marginalise and silence women's voices in the process of establishing community norms. It is only at the level of the right of individual women to consent to living under patriarchal norms that autonomy must be respected, since it is only at the individual level that the systemic impact of patriarchal authority in the community can be avoided. 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. However, 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 upon 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 constitutional equality. This might be achieved, in some cases, by enforcing their rights to equal personhood within their communities but, more usually, by allowing them a right of exit into a civil framework that provides them with an optional and egalitarian position in life.

Thus, where there is a clash between cultural practices or religious norms and the right to gender equality, it is the right to gender equality that must have normative hegemony. At the international level, this hierarchy of values has been adopted in international treaties and in decisions of international treaty bodies and tribunals, 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 cannot be left with the sole burden of securing the human rights of women. It is the duty of the government to implement gender equality obligations, which derive both from international law and constitutional principle, even where the patriarchal norms or practices to be eliminated are based on claims of culture or religion.