

# Culture, religion, and gender

Frances Raday\*

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 clash 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. The modern concept of human rights is the child of secularism. The historian, Yehoshua Arieli, writes:

The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the homocentric world and to ways of thought freed from transcendentalist premises and from the jurisdiction of religious authority. And so, the development of the doctrine of human rights is inseparably connected to the process of secularisation of Western society. . . .<sup>1</sup>

It is against this background, and after the humanitarian trauma of World War II, that the Universal Declaration of Human Rights<sup>2</sup> was adopted in 1948, representing an undertaking by almost all the countries of the world to establish

\* Elais Lieberman Professor of Labour Law, Hebrew University of Jerusalem Faculty of Law, Israel. My warm appreciation goes to my wonderful colleagues in the Committee on Elimination of Discrimination against Women, 2000–2002, whose humanistic insight, all from differing cultural and religious backgrounds, and whose commitment to improving the lives of women inspired me. I also want to thank my assistants Moran Carmon and Maya Seon for their help and comments. The responsibility for the contents of the article remains, of course, mine alone.

<sup>1</sup> Yehoshua Arieli, *The Theory of Human Rights, its Origin and its Impact on Modern Society*, in MISHPAT VE-HISTORYAH [LAW AND HISTORY] 25 (Daniel Gutwein & Menachem Mautner eds., Merkaz Zalman Shazar le-toldot Yisra'el 1999) (in Hebrew).

<sup>2</sup> Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217 (III of 1948) [hereinafter UDHR].

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 that 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, these principles include women's right to nondiscrimination.<sup>3</sup> 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.<sup>4</sup>

In 1979, the Convention for Elimination of All Forms of Discrimination against Women<sup>5</sup> (CEDAW) codified women's right to equality in all spheres of their lives as a global norm. CEDAW introduced not only the right to nondiscrimination 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 170 countries and, in 2001, the Optional Protocol<sup>6</sup> came into force allowing individual women in states parties that ratify the OP to bring communications before the CEDAW Committee. All told, most countries have 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

<sup>3</sup> Human rights were, from the 1950s, specifically and gradually, extended to women through International Labor Organization (ILO) conventions and by consensus among governments, employers, and unions in the field of employment, and through UNESCO conventions in the field of education.

<sup>4</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 3, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>5</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 12 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

<sup>6</sup> Optional Protocol on the Elimination of Discrimination against Women, G.A. Res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000) [hereinafter OP].

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 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 defense 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 one to the other and with differences of approach and emphasis. The concept of the cultural defense 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,<sup>7</sup> whereas the ICCPR regulates possible conflict between "the freedom to manifest one's religion or beliefs" and "the fundamental rights and freedoms of others,"<sup>8</sup> 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 analyze 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.

## 1. Constructs: Culture, religion, and gender

Although culture, religion, and gender are foundational social constructs operating at the basis of social psychology and organization, the three constructs cannot be placed, separately and equally, on the same level. Culture is a macroconcept, 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.

### 1.1. Culture

Culture is a macroconcept because it is definitive of human society. Anthropologists commonly use the term "culture" to refer to a society or

<sup>7</sup> CEDAW, *supra* note 5, art. 5, 1249 U.N.T.S. at 16.

<sup>8</sup> ICCPR, *supra* note 4, art. 18(3), 999 U.N.T.S. at 179.

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 behavior and a basic form of social organization—constitute a society. As Adam Kuper puts it, “[i]n its most general sense culture is simply a way of talking about collective identities.”<sup>9</sup> Two categories of culture are particularly relevant to my inquiry:<sup>10</sup> *social culture*, which pertains to people’s forms of social organization—how people interact and organize 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.”<sup>11</sup> 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

<sup>9</sup> ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT 2* (Harvard Univ. Press 1999).

<sup>10</sup> See EDWARD B. TYLOR, *PRIMITIVE CULTURE* (Brentano 1871). Tylor stated that culture includes socially acquired knowledge, beliefs, art, law, morals, customs, and habits.

<sup>11</sup> Sally Engle Merry, *Constructing a Global Law? Violence against Women and the Human Rights System*, 28 *LAW AND SOCIAL INQUIRY* (forthcoming 2003).

is only when these cultures resist and raise a cultural defense 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 homogenous system, bounded, isolated, and stubbornly resistant.<sup>12</sup> The contrasting view regards culture as adaptive, in a state of constant change, and rife with internal conflicts and inconsistencies. The kind of culture at issue in the cultural defense 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.

## 1.2. 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.<sup>13</sup> What exactly constitutes religion remains a conundrum. One classical work on the subject enumerated forty-eight different definitions.<sup>14</sup> Usually such definitions include some transcendental belief in or service to the divine.<sup>15</sup> However, many modern commentators regard the concept as also including nontheistic and even atheistic beliefs.<sup>16</sup> 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 institutionalized aspect of culture, with

<sup>12</sup> See JEAN & JOHN L. COMAROFF, *OF REVELATION AND REVOLUTION, VOL 1: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA* (1991); *OF REVELATION AND REVOLUTION, VOL. 2: THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER* (1997).

<sup>13</sup> WALTER BURKERT, *CREATION OF THE SACRED: TRACKS OF BIOLOGY IN EARLY RELIGIONS 1* (Harvard Univ. Press 1996).

<sup>14</sup> See discussion in Haim Cohn, *Religious Human Rights*, 19 *DINE ISRAEL* 101 (1997–1998).

<sup>15</sup> Natan Lerner claims that all dictionary definitions of religion incorporate recognition of a supreme being, usually called God. NATAN LERNER, *RELIGION, BELIEFS AND INTERNATIONAL HUMAN RIGHTS 4* (Orbis Books 2000).

<sup>16</sup> Cohn, *supra* note 14. In international documents, such as the ICCPR article 18, the protection of freedom of “belief” is specifically added to the protection of religious freedom. ICCPR, *supra* note 4, art. 18, 999 U.N.T.S. at 179.

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 rationalized education and scientific explanation."<sup>17</sup>

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).<sup>18</sup> The doctrine takes as its premise the authority of the state (secularism)<sup>19</sup> 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;<sup>20</sup> in the clash between the religious prohibition of apostasy or heresy and freedom of speech, conscience, and religion;<sup>21</sup> 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<sup>22</sup> and Islam,<sup>23</sup> issued by individual religious leaders, which are more consonant with a human rights approach. However, this hermeneutical endeavor is far from complete, in the best of cases, and is demonstratively absent in those cases where the religious community is asserting a defense against human rights claims.<sup>24</sup>

<sup>17</sup> RICHARD FENN, TOWARD A THEORY OF SECULARIZATION 36 (Society for the Scientific Study of Religion 1978).

<sup>18</sup> See Talcott Parsons, *On the Concept of Influence*, 27 PUB. OPINION Q. 37 (1963).

<sup>19</sup> See Arieli, *supra* note 1, at 44.

<sup>20</sup> Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIGION 65 (1987).

<sup>21</sup> See Haim Cohn, *The Law of Religious Dissidents: A Comparative Historical Survey*, 34 ISRAEL L. REV. 39 (2000).

<sup>22</sup> 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](http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii LET_29061995_women_en.html).

<sup>23</sup> MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 86 (Oxford Univ. Press 1999).

<sup>24</sup> There is a rich literature on such hermeneutical efforts. See, for example, in Islam, Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13 (1990).

### 1.3. 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 behavior 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 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 defense claim and the claim of religious freedom are employed in an attempt to stem the tide of women’s equality.

### 1.4. 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 defense 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. This religious institutional power is much in evidence at the UN: the Holy See has the status of a non-member state Permanent Observer and the Organization of Islamic Conferences, which represents fifty-three nations, has considerable influence on UN policy making.

In contrast to the claim to religious freedom, the cultural defense is often asserted at a rather abstract level. Thus, it has been argued that the imposition of universal human rights regimes is a Western concept, undermining African or Asian culture,<sup>25</sup> often in the context of postcolonialism,<sup>26</sup> or as antithetical to the claims of indigenous peoples.<sup>27</sup> It has been observed that, by and large,

<sup>25</sup> Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?* 120 *DIAGENES* 75 (1982).

<sup>26</sup> Bonny Ibhawoh, *Cultural Tradition and Human Rights Standards in Conflict*, in *LEGAL CULTURES AND HUMAN RIGHTS: THE CHALLENGE OF DIVERSITY* 85 (Kirsten Hastrup ed., Kluwer Law International 2001).

<sup>27</sup> Inger Sjorslev, *Copywriting Culture: Indigenous Peoples and Intellectual Rights*, in *LEGAL CULTURES AND HUMAN RIGHTS: THE CHALLENGE OF DIVERSITY*, *supra* note 26, at 43.

anthropologists have been ethical relativists<sup>28</sup> and their perspective is often used to base claims for nondiscrimination 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 is an insistence on a cultural defense that demands the preservation of practices infringing human rights.<sup>29</sup>

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 honor 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.<sup>30</sup> 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.<sup>31</sup>

<sup>28</sup> 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, *CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY* 8 (Columbia Univ. Press 1988).

<sup>29</sup> See Martha Nussbaum's fascinating discussion of antiuniversalist conversations. NUSSBAUM, *supra* note 23, at 35–39.

<sup>30</sup> For a fuller description of these cultural practices, see Christina M. Cerna & Jennifer C. Wallace, *Women and Culture*, in 1 *WOMEN AND INTERNATIONAL HUMAN RIGHTS* 623, 630–40 (Kelly D. Askin & Dorean M. Koenig eds., Transnational 1999). See also Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective, Violence against Women*, UNCHR E/CN.4/2002/83, 70–81 (son preference), ¶¶ 12–20 (FGM), ¶¶ 55–64 (marriage), ¶¶ 45–48 (witch-hunting), ¶¶ 38–44 (the pledging of girls for economic and cultural appeasement), ¶¶ 21–37 (honor killings), ¶¶ 89–95 (practices that violate women's reproductive rights), ¶¶ 85–88 (restrictive practices), available at <http://www.un.org/womenwatch/daw/cedaw/>.

<sup>31</sup> 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



Of the harmful cultural practices, which have been legitimized 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.<sup>32</sup> 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;<sup>33</sup> a husband's right to obedience and power to discipline or commit acts of violence against his wife, including marital rape;<sup>34</sup> and

(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 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 devadasi 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 . . . sterilization 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 mortality, malnutrition and morbidity and the morality rate of girls under the age of 5 years, and to develop programmes to address those problems"), available at <http://www.un.org/womenwatch/daw/cedaw/>.

<sup>32</sup> See *id.* Re Georgia, 21st session (1999) ¶ 30 (the committee criticizes "the prevalence of stereotyped roles of women in government policies, in the family, in public life based on patterns of behaviour and attitudes that overemphasize the role of women as mothers"); Re Indonesia, 18th session (1998) ¶ 289 (expressed "great concern about existing social, religious and cultural norms that recognize 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").

<sup>33</sup> 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, where change is occurring now. 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.

<sup>34</sup> See Reva B. Siegel, *The Rule of Love: Wife-beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). However, the legitimacy of patriarchal spousal violence has gradually been disappearing.

witch-hunting.<sup>35</sup> Some cultural practices that are harmful to women have always been peculiar to certain areas, such as family honor killings;<sup>36</sup> FGM;<sup>37</sup> and a preference for sons leading to female infanticide.<sup>38</sup>

Religious norms also impose patriarchal regimes that disadvantage women. It has often been said that the three monotheistic religions recognize 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 canonical power and subjected to male domination within the family.<sup>39</sup> The Old Testament, the source book of

In many countries and cultures, there is prohibition of domestic violence. Nevertheless, light sentences for domestic violence by a husband and recognition of a defense of provocation in cases of what are, euphemistically, called "crimes of passion" 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 criminalized. Even now, however, in the majority of countries, criminal law still cannot be invoked for marital rape. See Coomaraswamy, *supra* note 30, ¶ 62.

<sup>35</sup> Persecution of witches was common in sixteenth and seventeenth century Europe and up until the Salem Witch Trials in 1692 in the U.S.; it is still a cultural practice found in some Asian and African communities. See Coomaraswamy, *supra* note 30, ¶¶ 45–48.

<sup>36</sup> 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 honor killings are reported: Egypt, Iran, Jordan, Lebanon, Morocco, Syria, Turkey, and Yemen. It should be added that in many of these countries such behavior is regarded with extreme latitude under the criminal law and either immunity or reduced sentences are prescribed by statute. For instance, Coomaraswamy points out that an attempt to outlaw crimes of honor was stalled in the Pakistani parliament. Coomaraswamy, *supra* note 30, ¶¶ 22, 37.

<sup>37</sup> FGM is believed to have started in Egypt about 2,000 years ago. It is practiced in many African countries. It entails short- and long-term health hazards, an ongoing cycle of pain in sexual relations and childbirth, and a reduction of women's capacity for sensual pleasure. Although not restricted to Muslim communities, Islamic religious grounds are given for its continuation in some societies. See Coomaraswamy, *supra* note 30, ¶ 14. It is sometimes argued that FGM should not be prohibited any more than male circumcision. See, e.g., Sander L. Gilman, *Barbaric Rituals*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 53 (Susan Moller Okin ed., Princeton Univ. Press 1999); however, the WHO and other UN bodies have targeted FGM as harmful in ways not attributed to male circumcision.

<sup>38</sup> China is regarded as a major culprit for female infanticide in the wake of its one-child policy. However, while female infanticide is practiced in rural areas, it is not condoned by the central authorities. See Carmel Shalev, *China to CEDAW: An Update on Population Policy*, 23 *HUM. RTS. Q.* 119 (2001).

<sup>39</sup> Much has been written in defense of the humanism of the Bible's treatment of women in the context of biblical times. See Michael S. Berg & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES: RELIGIOUS PERSPECTIVES* 304, 310 (John Witte & Johan D. van der Vyver eds., Martinus Nijhoff 1996). 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

the three monotheistic religions, forcefully frames gender as a patriarchal construct in the story of creation: “And Adam said: This is now bone of my bones and flesh of my flesh; she shall be called Woman because she was taken out of Man.”<sup>40</sup> This story constitutes a paradigmatic expression of the “otherness” of woman,<sup>41</sup> as recounted by Simone de Beauvoir.<sup>42</sup> This patriarchal story of creation was not incorporated in the Qur’an; nevertheless, the Qur’an contains verses that expressly state the inferiority of women to men.<sup>43</sup> In the

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.

<sup>40</sup> Genesis 2:23.

<sup>41</sup> There have been subsequent interpretations that express the view that the story is not one of domination and inequality. IBN JANACH, *BEREISHIS: GENESIS—A NEW TRANSLATION WITH COMMENTARY ANTHOLOGISED FROM TALMUDIC, MIDRASHIC AND RABBINIC SOURCES*, 1 ARTSCROLL TANACH SERIES 104 (Rabbi Meir Zlotowitz ed., Mesorah Publications 1977). There is also an alternative version of the creation of men and women in an earlier chapter of Genesis. According to that version, “So God created man in his own image, in the image of He created He him; male and female created He them.” Genesis 1:27; V 1–2. This paragraph has been interpreted as allowing the fundamental equality of men and women in the Jewish tradition. However, the relationship of this version of the Creation to the story of Adam and Eve is a subject of much controversy. See W. GUNTHER PLAUT, *THE TORAH: A MODERN COMMENTARY* 32 (Union of American Hebrew Congregations 1981). In any case, it is incontrovertible that there are only two versions, one androcentric and one neutral, while there is no female-centered alternative version and so the patriarchal theme remains clear.

<sup>42</sup> SIMONE DE BEAUVOIR, *THE SECOND SEX* 718 (H. M. Parshley trans. & ed., Knopf 1989) (1952).

<sup>43</sup> The Qur’an primarily adopted the gender-neutral version of creation, “male and female created He them.” Qur’an 53:45. This has been said to indicate the establishment of equality for women and men, along with additional passages from the Qur’an itself. “Be you male or female you are members of one another” or “whoever works a righteous deed—whether man or woman—and is a believer—such will enter the Garden of bliss.” Qur’an 4:124; 40:40. Leila Ahmed, in her account of women in Islam, emphasizes that Islam’s conceptual “ethical vision” was “stubbornly egalitarian, including with respect to the sexes” and that it was on the pragmatic plane that patriarchy was instituted, in particular through the introduction of hierarchy to the family. But the egalitarian paragraphs, too, cannot be judged out of context. Alongside these expressions of oneness of origin between manhood and womanhood, there is assertion in the Qur’an of the superiority of men. “And it is for the women to act as they (the husbands) act by them, in all fairness; but the men are a step above them”; or, “Men have authority over women because Allah has made one superior to the other.” Qur’an 2:228; 4:34. This view of the Qur’an as determining the inferiority and instrumentality of women is given even greater credence in the Hadith: “The prophet once said to a woman: watch how you treat your husband for he is your paradise and your hell”; or, more brutally, “[t]he woman is *Awrah* (external genitals, a thing to be ashamed of). When she goes outside the house, the devil welcomes her.” These misogynistic assertions cannot be marginalized as pragmatic or as secondary to a basically egalitarian perception. Thus, although, in some passages the Qur’an addresses women directly and on a par with men, this was not the norm. See LEILA AHMED, *WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE* 63 (Yale Univ. Press 1992). See Suyuti, commenting on Qur’an 4:34 and *Kanz-el-Ummal*, vol. 22, Hadith No. 868, quoted in M. RAFIQU-L-HAQQ & P. NEWTON, *THE PLACE OF WOMEN IN PURE ISLAM* (1996), available at <http://debate.domini.org/newton/womeng.html>.

Old Testament, the punishment of womankind at the exile from the garden of Eden is quite explicitly patriarchal: “Unto the woman He said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, *and he shall rule over thee.*”<sup>44</sup> This patriarchal version of the story of creation and original sin, while not present in the Qur’an, was later included in Islamic tradition.<sup>45</sup>

There has been much variety among different monotheistic religions, and among the branches within each of them, concerning the nature of their patriarchal norms and their adaptation to changes in women’s roles. Judaism originally allowed polygamy (though it was prohibited beginning in the eleventh century), reserved to the husband absolute power over the woman’s right of divorce, and imposed on women harsher penalties for adultery in the law of divorce and *mamzerut* (bastardy). However, it also prohibited marital rape and allowed abortion in circumstances where the mother’s health was threatened. In the nineteenth to twentieth centuries, reform and conservative movements emerged that adopted a hermeneutical approach geared toward improving women’s status within the religion, including women’s participation in religious office and ceremonies and improvements in their family law status. Christianity, from the outset, established monogamy and a fair measure of symmetry between men and women as regards chastity and adultery. On the other hand, Christianity abandoned the prohibition on marital rape and Catholicism adopted a prohibitive attitude towards abortion.<sup>46</sup> Within Christianity, the many denominations developed differing norms and some branches of Protestantism, Lutheranism, and Anglicanism have shown a readiness to abandon formal patriarchal rules regarding women’s eligibility for religious office. Islam has remained more closely attached to its sources, and, in many forms of Islam and in many of the countries that have Islamic regimes, it has retained Shari’a law, polygamy, harsh penalties (including, in some systems, the possibility of stoning) for the offense of adultery by married

<sup>44</sup> Genesis 3:16; italics added by the author.

<sup>45</sup> The story of Eve’s role in the fall from the Garden of Eden was not reproduced in the Qur’an, and Riffat Hassan has, on this basis, persuasively argued that there is no justification at source for attributing Eve’s guilt to women in Islam. Nevertheless, Hassan concludes: “Underlying the rejection in Muslim societies of the idea of man-woman equality are the three deeply rooted beliefs . . . namely, that women are inferior to men in creation (having been created from a crooked rib), and in righteousness (having helped Ash-Shaitan in defeating God’s plan for Adam), and in having been created mainly to be of use to men who are superior to them.” JOHAN VAN DE VYER & JOHN WITTE, *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE* 385 (Martinus Nijhoff 1996).

<sup>46</sup> The Pope’s Letter to Women issued in 1995 demonstrates a growing sensitivity to women’s issues within the Catholic Church; however, although it mentions women’s right to freedom from sexual violence, it stops short of explicitly condemning marital rape and of permitting abortion, even where it is necessary for the mother’s physical or mental health. Pope’s Letter to Women, *supra* note 22.

women,<sup>47</sup> unequal inheritance rights, and the husband's power of unilateral divorce. The outstanding example of an Islamic regime that has prohibited polygamy is Tunisia. Other than that, gender equality as an accepted norm in Islam is still at the level of individual religious leaders, intellectuals, and women's NGOs and has certainly not been accepted at normative institutional levels.

We can sum up the current clash between monotheistic religious norms and women's right to equality in both the private (family) and the public (political and economic) spheres of their lives, as follows. 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.

It is clear from the lack of homogeneity among religions, as well as within them, that some of the patriarchal religious norms, defended on religious freedom grounds, are not agreed upon by the different faiths or even by the various branches within each. Nevertheless, certain general patterns of differentiation can be traced among these religions. Orthodox Judaism retains the patriarchal norms in the division of matrimonial property, divorce, inheritance, the penalty for adultery of *mamzerut* (bastardy), and denial of eligibility for religious office and participation in certain religious ceremonies. Reform and Conservative Judaism have adapted many of these norms to newer circumstances but have not yet found a solution to the patriarchal power of the husband to refuse divorce or to the penalty of *mamzerut*. Some segments of Christianity have retained rules that disadvantage women, mandating obedience of a wife to her husband, denying eligibility for religious office, and prohibiting contraception and abortion. Islam, in its most widely practiced forms, has maintained and asserted the validity of all its patriarchal religious norms, including polygamy, the recognition of the husband as the head of the family, unequal inheritance, denial of eligibility for religious office, and, in many cases, restrictions of participation in public life.

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

<sup>47</sup> Islamic courts in Northern Nigeria have twice sentenced women to death by stoning in 2002, on the grounds that this is the Shari'a punishment. Dan Isaacs, BBC News, July 8, 2002, available at <http://news.bbc.co.uk/1/low/world/africa/2116540.stm>. Similarly, the courts in Pakistan, see Seth Mydans, *Raped Woman is Sentenced to Death in Pakistan*, INT'L HERALD TRIB., May 18–19, 2002, at 2; also in Iran, see 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.

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 twelve months and flogging of up to seventy-four lashes for offenses relating to the dress code.<sup>48</sup> 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.

## 2. 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 behavior to the disadvantage 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 nonintervention to positive demands for autonomous control of their own social institutions and active support by the state.<sup>49</sup> Deference to any of these could result in an infringement of women's right to equality.

### 2.1. 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

<sup>48</sup> 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.

<sup>49</sup> 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 nonmembers; 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, *Classifying Cultural Rights*, in *ETHNICITY AND GROUP RIGHTS* 39 (Ian Shapiro & Will Kymlicka eds., New York Univ. Press 1997).

religion in all societal contexts and the protection of all behaviors implicated in the freedom of religion.<sup>50</sup> The UN Declaration on Intolerance and Discrimination Based on Religion or Belief<sup>51</sup> further details the rights to freedom of thought, conscience, and religion for adults and children, some of which may prove 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”<sup>52</sup> 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.<sup>53</sup>

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<sup>54</sup> and ICCPR.<sup>55</sup> Article 5(a) of CEDAW imposes a positive obligation on states parties to “modify . . . social and cultural” practices in the case of a clash,<sup>56</sup> and article 2(f) imposes an obligation to “modify or

<sup>50</sup> 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 2, art. 18. *See also* Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981) [hereinafter Declaration on Discrimination Based on Religion or Belief]; ICCPR, *supra* note 4, arts. 18, 27, 999 U.N.T.S. at 175, 180. On religious freedom in the education of children, see ICESCR, *supra* note 4, arts. 3, 6, 13(3), 999 U.N.T.S. at 5, 6, 9; Convention on the Rights of the Child, Nov. 20, 1989, arts. 14, 30, G.A. Res. 25, annex, U.N. GAOR, 44th Sess., 61st plen. mtg., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) [hereinafter Children’s Convention]. For discussion, see Natan Lerner, *Religious Human Rights under the United Nations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 87 (Johan D. van der Vyver & John Witte, Jr. eds., Martinus Nijhoff 1996).

<sup>51</sup> Declaration on Discrimination Based on Religion or Belief, *supra* note 50. 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* note 50, at 123.

<sup>52</sup> Declaration on Discrimination Based on Religion or Belief, *supra* note 50, art. 6(g).

<sup>53</sup> ICCPR, *supra* note 4, art. 27, 999 U.N.T.S. at 180; Children’s Convention, *supra* note 50, art. 30.

<sup>54</sup> CEDAW, *supra* note 5.

<sup>55</sup> ICCPR, *supra* note 4.

<sup>56</sup> 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 5, art. 5(a), 1249 U.N.T.S. at 16.

abolish... customs and practices”<sup>57</sup> that discriminate against women.<sup>58</sup> Culture, as noted above, is a macroconcept, 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 and freedoms of others.”<sup>59</sup> Article 18(3) thus provides an exception to the right to the freedom to manifest one’s religion, should a confrontation materialize with the fundamental rights and freedoms of others, including, by clear implication, the right to gender equality also protected in the ICCPR. Through this exception, a hierarchy of rights is implicitly introduced, albeit in less categorical language than in CEDAW. The intention of article 18(3) is to legitimize limitations on the right to manifest one’s religion where it infringes women’s human rights. Indeed, the article, in providing an exception for such limitations as may be “necessary” to protect fundamental rights, may be read to imply that there will be an obligation on states parties to impose them. This seems to be the reading implicit in the Human Rights Committee’s General Comment on the Equality of Rights between Men and Women, which, although not expressly referring to article 18(3), holds that the right to religion does not allow any state, group, or person to violate women’s equality rights.<sup>60</sup> Article 18(3) also protects the fundamental rights of “others,” and this could have been read to exclude protection of members of the religion themselves. However, the Human Rights

<sup>57</sup> 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.

*Id.* art. 2(f), 1249 U.N.T.S. at 14.

<sup>58</sup> 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 realization of rights, as in the CESCR. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 179 (Oxford Univ. Press, 2nd ed. 2000).

<sup>59</sup> ICCPR, *supra* note 4, art. 18(3), 999 U.N.T.S. at 177.

<sup>60</sup> HRC General Comment 28, CCPR/C/21/Rev.1/Add.10, ¶¶ 5, 32.



Committee seems to have adopted a more liberal approach to the interpretation of the clause, condemning polygamy, even though it is a religious practice of the members of the religion.<sup>61</sup>

CEDAW and the ICCPR thus balance the right to religion and culture with human rights and women's rights. While both conventions recognize 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). Indeed, article 18(3) provides an exception to a human rights standard and, as such, the Human Rights Committee has said it must be strictly interpreted.<sup>62</sup> 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.<sup>63</sup>

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 analyzed; there are at least twenty reservations that clearly indicate that the state party wishes to conserve religious-law principles for either its entire population or for minority communities. These reservations are made primarily

<sup>61</sup> In relation to polygamy, see, for example, conclusive observations regarding Nigeria, July 24, 1996, ¶ 291; Yemen, July 26, 2000. Notwithstanding the Human Rights Committee approach, Natan Lerner, writing on article 18(3), remarks that "there are virtually no problems regarding the religious practices of the major, well established religions." Lerner, *supra* note 50, at 92. This is a rather remarkable conclusion. Indeed, the references by Lerner to difficulties with ritual slaughter in the Jewish tradition and the wearing of turbans, skull caps, and veils alongside his omission in this context of any mention of polygamy, *agunot* (women refused a divorce), contraception, abortion, or exclusion of women from religious office underlines the invisibility of religious patriarchy or discrimination against women among many of even those academics who deal with the topic. In contrast, Donna Sullivan, although not commenting directly on article 18(3), reaches the conclusion that: "A major area of conflict between religious law and human rights law is that of women's rights." Donna Sullivan, *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religions Tolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

<sup>62</sup> Human Rights Committee General Comment 22, HRI/GEN/1/Rev.1 at 35, ¶ 8.

<sup>63</sup> Human Rights Committee, General Comment 22 on article 18, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

under article 16 of the convention dealing with women's rights to equality within the family,<sup>64</sup> yet only four countries<sup>65</sup> 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.

However, in international forums, cultural practices have been taken to include religious norms. The interwoven nature of culture and religion, insofar as they affect women's rights, has resulted in a merging of the two by all agencies or bodies involved with the application and enforcement of the human rights treaties.<sup>66</sup> It is in this spirit that the committees of experts,

<sup>64</sup> CEDAW, *supra* note 5, art. 16, 1249 U.N.T.S. 17. In many cases, the state party expressly indicates that the reason for the reservation is in order to apply the Shari'a. See the reservations of Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mauritius, Morocco, Saudi Arabia, Tunisia, and Turkey. A few of the reservations were in order to allow continued application of various different religious laws. See, e.g., reservations of Israel, India, and Singapore.

<sup>65</sup> India, Niger, Malaysia, and New Zealand–Cook Islands.

<sup>66</sup> In the context of its General Recommendation on Equality in Marriage and Family Relations, the CEDAW Committee explicitly states: "The form and concept of the family can vary from State to State... Whatever form it takes and whatever the legal system, *religion, custom or tradition* within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice... as Article 2 of the Convention requires" (emphasis added). CEDAW Committee, General Recommendation No. 21, 13th Sess. (1994), Equality in Marriage and Family Relations.

The Declaration on the Elimination of Violence against Women, in 1993, stated this explicitly, obliging states to condemn violence against women and not to invoke custom, religion, or culture to limit their obligations. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993).

The Beijing Platform for Action (1995) stated that "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms," including women's human rights, and that, "while religion may contribute to filling women's and men's moral, ethical and spiritual needs, . . . any form of extremism may have a negative impact on women and can lead to violence and discrimination." Beijing Declaration and the Platform for Action, Sept. 15, 1995, A/CONF. 177/20 (1995) & A/CONF. 177/20/Add. 1 (1995), ¶¶ 9, 24. The Secretary General of the United Nations, in a 2001 Report, included polygamy, a religious as well as cultural norm, among the traditional practices and cultural norms prejudicial to women that create an obstacle to implementation of the Beijing Platform. FROM BEIJING TO BEIJING + 5 30 (United Nations 2001). In a general overview of developments regarding the human rights of women and the girl child in the Beijing + 5 Review Conference, Mary Robinson, the UN High Commissioner for Human Rights, said:

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

charged with monitoring compliance by the states parties to the two treaties, have applied article 5(a) and article 18(3).<sup>67</sup> In its concluding comments, the CEDAW Committee has recommended that states parties enact laws making illegal cultural practices discriminatory against women or enforce existing laws aimed at ending such practices. These cultural practices have included religious practices that are prejudicial to women.<sup>68</sup> The committee not only held that the typical concept of “the cultural,” in this context, such as the practice of FGM,<sup>69</sup> is a violation of the convention. It has also consistently expressed its concern about the continuing authorization of polygamy, whether or not based on religious belief, and has asked governments to take measures to prevent its practice.<sup>70</sup> The Human Rights Committee has also stated its policy on the relationship between culture, religion, and gender in its General Comment on the Equality of Rights between Men and Women:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and *culture, including religious attitudes*. . . . States parties should ensure that *traditional, historical, religious or cultural attitudes* are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights. . . . The rights which persons belonging to minorities enjoy under article 27 of the Covenant *in respect of their language, culture and religion do not authorize* 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.<sup>71</sup>

So, like the CEDAW Committee, the Human Rights Committee has rejected the cultural defense 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.

Statement by Mary Robinson, Beijing + 5 Review Conference, June 9, 2000, *available at* <http://193.194.138.190/hurricane/hurricane.nsf/view01/DB6643258A4CC97F802568FD005B10BA?opendocument>.

<sup>67</sup> For a full description of the work of these committees, see ANNE F. BAYESKY, *THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* (Transnational 2001).

<sup>68</sup> *See, e.g.*, Re Jordan, 22nd Session, Off Rep A/55/38, ¶ 167; Re Guinea, 25th Session, Off Rep A/56/38/Rev.1, ¶¶ 122, 123; Re Singapore, 25th Session, Off Rep A/56/38/Rev.1.

<sup>69</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 14, Female circumcision, (Ninth session, 1990), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.1 at 79 (1994).

<sup>70</sup> *See, e.g.*, Re Egypt, 24th Session, Off Rep A/56/38, ¶¶ 354, 355; Re Jordan, 22nd Session, Off Rep A/55/38, ¶¶ 174, 175; Re Indonesia, 18th Session, Off Rep A/53/38/Rev.1.

<sup>71</sup> HRC General Comment 28, CCPR/C/21/Rev.1/Add.10, ¶¶ 5, 32 (emphasis added).

### 3. Human rights cases: Constitutional and international

The cultural defense 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 analyze, 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.<sup>72</sup> The cases are organized in chronological order, according to subject matter or by country, depending on the analytical context.

#### 3.1. A comparative assessment of constitutional cases

##### 3.1.1. *The cultural defense*

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 1974, Jeanette Lavell lost her challenge to invalidate Canada's Indian Act.<sup>73</sup> 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.<sup>74</sup> In 1985, in the aftermath of a decision of the

<sup>72</sup> 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.

<sup>73</sup> *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349.

<sup>74</sup> 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 fights 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, *Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government*, 4 CONST. FORUM 110 (1993).

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.<sup>75</sup> 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 labeled the issue one of ‘private’ ordering and non-normative).”<sup>76</sup> 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.<sup>77</sup> 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 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.<sup>78</sup> 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 sociopolitical 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,

<sup>75</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 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.

<sup>76</sup> Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

<sup>77</sup> *Ephraim v. Pastory*, 87 INT’L L. REP. 106.

<sup>78</sup> *Magaya v. Magaya*, [1999] 3 L.R.C. 35 (Zim.).

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."<sup>79</sup> 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."<sup>80</sup>

The issue of women's freedom of movement was raised in Egypt, in November 2000.<sup>81</sup> The Cairo Court of Cassation ruled that an Interior Ministry decree that allowed men the authority to prevent their wives from traveling was unconstitutional because it infringed women's equality rights under the Constitution.<sup>82</sup> Nevertheless, in September 2001, it was still reported that all Egyptian women needed permission from their father or husband in order to travel freely because, in order to travel, a woman must obtain her husband or father's signature on her passport.<sup>83</sup> Attempts to introduce a legislative guarantee of women's right to travel and to obtain a passport without male approval were defeated by a conservative opposition that regarded the proposed freedom as an assault against immutable gender roles.<sup>84</sup>

### 3.1.2. 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 the United States, India, and Israel.

In a series of cases, starting in 1879, the United States Supreme Court held that the free exercise clause did not protect polygamy from criminal sanction. The decisions related to the Mormons, a minority sect of Christianity, which is the religion of the majority. In *Reynolds*, the U.S. Supreme Court upheld a prohibition of the Mormon practice of polygamy.<sup>85</sup> In *Davis v. Beason*, in 1890, Justice Field said: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marriage

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Heather Bourbeau, *Egyptian women push for right to travel freely—As it is now, male relative's OK is required*, S.F. CHRON., Sept. 28, 2001, at D3.

<sup>82</sup> See reports on the annulling of decree 3937 of 1996 by the Supreme Constitutional Court at the Al-Ahram website (November 9, 2000), at <http://weekly.ahram.org.eg/2000/507/eg2.htm>.

<sup>83</sup> Bourbeau, *supra* note 81.

<sup>84</sup> *Id.*

<sup>85</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

relation, to disturb the peace of families, to degrade women, and to debase man.”<sup>86</sup> As a constitutional matter, he held that, “[w]hilst legislation for the establishment of religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as ‘religion.’”<sup>87</sup> In 1946, in *Cleveland*, the majority opinion, delivered by Justice Douglas, held that the transportation of women across state lines for the purpose of polygamous cohabitation was “an immoral purpose” under the statutory language and, hence, a criminal offense.<sup>88</sup> Citing *Reynolds*, the Court ruled: “. . . it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy.”<sup>89</sup> In his dissent, Justice Murphy introduced a note of doubt. He said:

It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is as well as what it is not. . . . Historically its use has far exceeded any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygamy, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. . . . There is no basis in fact for including polygamy within the phrase “any other immoral purposes” [along with prostitution and debauchery].<sup>90</sup>

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.<sup>91</sup>

In the 1985 *Shah Bano Begum* case, the Supreme Court confirmed a maintenance award for a divorced Muslim woman, allegedly contrary to Shari’a law.<sup>92</sup> The Court was composed of five Hindu judges and the case was

<sup>86</sup> *Davis v. Beason*, 133 U.S. 333, 341 (1890).

<sup>87</sup> *Id.* at 345.

<sup>88</sup> *Cleveland v. United States*, 329 U.S. 14 (1946).

<sup>89</sup> *Id.* at 20.

<sup>90</sup> *Id.* at 25.

<sup>91</sup> C.I.S. Part II (1955), Hindu Marriage Act, New Delhi, May 18, 1955.

<sup>92</sup> *Mohammed Ahmed Khan v. Shah Bano Begum*, (1985) 2 S.C.C. 556.

decided unanimously. On the question of the religious claims underlying opposition to the maintenance award, Chief Justice Chandrachud was, on the one hand, 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?"<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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

<sup>93</sup> *Id.* at 559.

<sup>94</sup> *Cf.* *Abu Bakar Siddique v. S. M. A. Bakkar*, 38 D.L.R. (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.

<sup>95</sup> 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.

<sup>96</sup> *Mary Roy v. State of Kerala*, A.I.R. 1986 S.C. 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.<sup>97</sup>

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.<sup>98</sup> The Court refused to recognize 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 U.S., 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."<sup>99</sup> 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.<sup>100</sup> 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 recognized as a valid institution when a Muslim male marries more than one wife."<sup>101</sup>

In Israel, there have been a number of decisions regarding women's rights to equal treatment under religious personal laws and their right to participate actively in ceremonial prayer.

In 1971, in *Boronovski*, the Supreme Court sitting as High Court of Justice, rejected a woman's claim to cancel the rabbinical license, issued in accordance with Jewish law, allowing her husband to remarry without her agreement to give him a *ghet* (divorce).<sup>102</sup> The woman petitioner had claimed discrimination on grounds of gender, since women are not symmetrically entitled to a similar rabbinical license in case of refusal of a *ghet* by their husbands. The majority decision by Justice Agranat rejected the petitioner's claim. Justice Agranat recognized the injustice to women and expressed his regret, but this did not

<sup>97</sup> NUSSBAUM, *supra* note 23, at 98. See also Marc Galanter & 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.

<sup>98</sup> *Sarla Mudgal v. Union of India*, (1995) 3 S.C.C. 635.

<sup>99</sup> *Id.* at 650. See also K. N. Chandrasekharan Pillai, *Women and Criminal Procedure*, in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SAKAR* 161–72 (Amita Dhanda & Archana Parashar eds., Eastern Book Company 1999).

<sup>100</sup> *Ahmedabad Women Action Group v. Union of India*, (1997) 3 S.C.C. 573.

<sup>101</sup> *Id.* at 577.

<sup>102</sup> *Boronovski v. Chief Rabbinate*, 25(1) P.D. (1974) 7.

bring him to find unjustifiable discrimination.<sup>103</sup> Justice Haim Cohen, in a minority opinion accepting the claim, concluded that there were no differences between men and women that could justify the difference in treatment.<sup>104</sup>

The *Bavli* case, in 1994, involved the division of matrimonial property.<sup>105</sup> Jurisdiction for determining the division of matrimonial property is sometimes under the rabbinical courts and sometimes the civil courts. Different regimes regarding the division of matrimonial property are applied in the two jurisdictions; in the rabbinical courts, the Jewish law regime of property separation is applied, and, in the civil courts, there is both a judicial and statutory presumption of community property, which is to be divided equally between the spouses on dissolution of the marriage. In the case in hand, the rabbinical courts had jurisdiction and refused to divide the matrimonial property equally. The divorced wife's petition to the High Court of Justice was accepted and the case returned to the rabbinical courts. Justice Barak, the president of the High Court, rejected the claim that the Jewish law regime of separate matrimonial property could not be considered discriminatory as it applied to men and women equally, holding that the social facts showed women are disadvantaged where a separate property regime is applied.<sup>106</sup> Following this decision, there were vociferous protests from Orthodox Jewish groups, and it is common knowledge that the rabbinical courts do not apply the ruling by the High Court of Justice.

In *Rephaeli*, a woman petitioned to overturn the refusal of the Grand Rabbinical Court to oblige her husband, separated from her for more than six years, to give her a divorce.<sup>107</sup> The High Court of Justice ruled unanimously to dismiss, holding that it could not intervene in the Grand Rabbinical Court's decision. Justice Cheshin, although concurring in the ruling, remarked that, under Jewish law, the situation of a slave was preferable to that of a wife since even a slave would have been released after seven years of bondage.<sup>108</sup>

In *Hoffman I*, in 1994, Israel's High Court of Justice rejected the petition of the Women of the Wall (WOW) to pray at the Kotel (the Western Wall of the second Temple and a central national, cultural, and religious site for Jews) in a group, wearing prayer shawls and reading aloud from the Torah Scroll, a manner of prayer customary for men but not for women and a subject of much

<sup>103</sup> Boronovski, 28(1) P.D. (1974) at 48.

<sup>104</sup> *Id.* at 18. It is interesting to note that the Court's validation of the legislation results in a situation of greater equality, on the issue of men's multiple marriages for Muslim and Christian than for Jewish women.

<sup>105</sup> *Bavli v. Rabbinical Court of Appeals*, 48(2) P.D. (1994) 221 (in Hebrew).

<sup>106</sup> *Id.* at 234.

<sup>107</sup> *Rephaeli v. Rephaeli*, 51(1) P.D. (1997) 198 (in Hebrew).

<sup>108</sup> *Id.* at 213. Nevertheless, despite this powerful rhetoric, Justice Cheshin, like the other judges, did not find a way to intervene.

controversy among Orthodox Jewish authorities.<sup>109</sup> The women's prayer in this manner had been greeted with violent opposition from other Orthodox worshippers and prohibited by the secular authorities. Although rejecting the petition, the Court recognized, in principle, the WOW's right of access and freedom of worship, and Justice Shamgar recommended that the government make arrangements to enforce this right with minimum injury to the sensitivities of other worshippers.<sup>110</sup> In 1998, after a series of governmental committees had failed to find a solution, WOW petitioned the High Court of Justice again. The Court, in *Hoffman II*, composed of two women justices and one man, directed the government to implement the WOW's prayer rights at the Kotel within six months.<sup>111</sup> Orthodox Jewish political parties immediately presented a bill to convert the area in front of the Kotel into a religious shrine exclusively for Orthodox religious practice with a penalty of seven years' imprisonment for any person violating the current Orthodox custom of prayer. The attorney general requested a further hearing and the president of the Supreme Court appointed an expanded panel of nine justices to reconsider the issue. The Court held by a majority of nine to two that the members of WOW were entitled to pray at the Kotel; however, it also decided, by a majority of five to four, that, in order to prevent injury to the sensitivities of other worshippers, the government should make arrangements for a suitable prayer area for WOW at an adjacent site (Robinson's Arch) and only if the government failed to do so within a year would the WOW have the right to pray at the Kotel.<sup>112</sup>

### 3.1.3. 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,<sup>113</sup> reversing the decision of Justice Choudary in the lower court that restitution of conjugal rights was unconstitutional and was "a savage and

<sup>109</sup> Anat Hoffman v. Commissioner of the Western Wall, 48(2) P.D. (1994) 265 (in Hebrew).

<sup>110</sup> *Id.* at 356.

<sup>111</sup> Anat Hoffman v. Director General of Prime Minister's Office, Tak-Al 2000 (2) 846 (in Hebrew). The author acts as counsel for the WOW. For a full discussion, see Frances Raday, *The Fight Against Silencing*, in *WOMEN OF THE WALL: ANTHOLOGY* 215 (Phyllis Deutsch ed., New England Univ. Press 2003).

<sup>112</sup> Director General of Prime Minister's Office v. Anat Hoffman High Court of Justice, June 4, 2003, not yet published, available at <http://62.90.71.124/files/00/280/041/g13/00041280.g13.HTM>.

<sup>113</sup> *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 S.C.C. 90. The Supreme Court overruled *T. Sareetha v. T. Venata Subbaiah*, A.I.R. 1983 A.P. 356. Sareetha had been given in marriage by her parents at the age of sixteen 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 she had become a famous actress, Subbaiah sued for restitution of conjugal rights.

barbarous remedy, 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."<sup>114</sup> 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 brutalization for women at the hands of men."<sup>115</sup> The Supreme Court, in reversing this judgment, held that the decree of restitution "serves a social purpose as an aid to the prevention of breakup of marriage."<sup>116</sup> 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.<sup>117</sup> 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."

There has been a series of cases on the wearing of Muslim head scarves—the *hijab*—in educational institutions or workplaces. The issue of compulsory dress codes to ensure women's modesty has been raised both as a religious and as a cultural matter. The most rigid dress code has been the *burkha* (head-to-toe covering, with a veiled window for seeing through) or the veil (head-to-toe covering with an open slit for the eyes) and, in less extreme forms, the *hijab* (headscarf tied under the chin). The conflict between culture, religion, and gender has arisen as a constitutional issue, not in the theocratic Islamic states, which mandate women's dress codes with extremely severe penalties for any breach, but, rather, in secular countries in which religious Muslim communities demand that their women and girl children observe the dress code.

In 1989, the Constitutional Court in Turkey held unconstitutional a bylaw of the Institutions of Higher Education that, as an exception to the requirement of "modern clothing" in universities, allowed the neck and hair to be veiled by a head scarf because of religious belief.<sup>118</sup> The Court held that the bylaw undermined the secular character of the state, was inconsistent with the law requiring civil servants to have their heads unveiled, and was invalid. This decision thus obliged the universities to ban the wearing of Muslim head scarves. The French courts, however, have wavered on the issue of Muslim head scarves. In 1989, the Conseil d'État ruled that "the ostentatious wearing"

<sup>114</sup> T. Sareetha v. T. Venata Subbaiah, A.I.R. 1983 A.P. 356, 370.

<sup>115</sup> *Id.*

<sup>116</sup> Saroj Rani, (1984) 4 S.C.C. at 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 23, at 4.

<sup>117</sup> Nelly Zaman v. GiaSuddin Khan, 34 D.L.R. 221 (1982).

<sup>118</sup> Constitutional Court of Turkey, Decision 1989/652.

of head scarves at school violated a law prohibiting proselytization in the schools.<sup>119</sup> This decision was followed by unfavorable media attention to the wearing of the *hijab*; and, in 1994, the Ministry of Education issued a directive prohibiting the wearing of “ostentatious political and religious symbols” in schools.<sup>120</sup> In 1995, however, the Conseil d’État held that the simple wearing of a Muslim head scarf does not provide grounds for exclusion from school.<sup>121</sup>

In 1999, in Switzerland, the Geneva Conseil d’Etat dismissed a teacher’s challenge to a ban imposed by the Educational Department on Muslim teachers wearing headscarves in the public, secular education system. That judgment was upheld by the federal court, which, noting that the applicant’s job made her a representative of the state, held that the head scarf constituted a strong vestimental sign of belief in a particular religion and that the restriction imposed by the education authorities was accordingly necessary to preserve both the principle of neutrality between different faiths and that of equality between the sexes within the school.<sup>122</sup> In 2000, the issue arose in a Danish court, in the context of a Muslim girl’s demand to wear the Muslim head scarf at work.<sup>123</sup> The Court held that, because the workplace did not have a general dress code, it could not forbid the girl to wear the head scarf. Kirsten Ketscher comments: “Regrettably the question of the girl’s rights in relation to the non-discrimination principle of women was not raised. Therefore the outcome of the case was that a religion was being protected not a woman! In Norway the question of Muslim women wearing headscarves is being discussed as a question of discrimination of women. . . . [T]he Danish Court . . . did not go into the question whether headscarves are only worn as religious clothing or whether it can also be viewed as an ethnic or political manifestation or as an obedience to patriarchal authority in the family.”<sup>124</sup>

### 3.2. 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.

<sup>119</sup> Circulaire du 12 décembre 1989, J.O., Dec. 15, 1989, at 15577, quoting Conseil d’État decision of Nov. 29, 1989.

<sup>120</sup> See Bureau of Democracy, Human Rights, and Labor, U.S. Department of State report on France (1995), available at <http://www.usis.usemb.se/human/1995/europe/france.html>.

<sup>121</sup> *Id.*

<sup>122</sup> *Dahlab v. Switzerland*, Eur. H.R. Rep., Case No. 42393/98, available at <http://www.echr.coe.int/Eng/informationnotes/INFONOTENo11.htm>.

<sup>123</sup> Østre Landsrets dome, UfR 2000.2350, August 2000.

<sup>124</sup> Kirsten Ketscher, *Women’s Fundamental Rights and the Freedom of Religion*, unpublished draft of lecture given in the Hebrew University of Jerusalem (2000) (on file with author).

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.<sup>125</sup> This was an unjustifiable denial of her right to enjoy her culture under article 27 of the ICCPR.<sup>126</sup> In an individual opinion, Nejb Bouziri added that the Indian Act also breached article 2 of the ICCPR in that it discriminated between men and women.<sup>127</sup>

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.<sup>128</sup> 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.

The European Commission of Human Rights considered, in 1983, the complaint of a devout practicing member of the Jewish faith that an order of the French Court of Appeals infringed his freedom of conscience and religion under article 9 of the European Convention of Human Rights.<sup>129</sup> The court had ordered the complainant to pay damages to his former wife for his refusal, subsequent to their civil divorce, to provide a letter of repudiation of the

<sup>125</sup> Communication No. 24/1977 (1)–(2), decided July 30, 1981, U.N. Doc. CCPR/C/OP/2 at 224 (1990).

<sup>126</sup> ICCPR, *supra* note 4, art. 27, 999 U.N.T.S. at 185.

<sup>127</sup> Individual Opinion submitted along with Communication No. 24/2977, *available at* [www.riga.lv/minelres/un/cases/24\\_1977.htm](http://www.riga.lv/minelres/un/cases/24_1977.htm).

<sup>128</sup> Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius, Communication No. R.9/35, (May 2, 1978), U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981).

<sup>129</sup> The European Convention provides (similarly to the provisions of the ICCPR) in article 9:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222, 230 [hereinafter ECHR].

marriage (*ghet*), as required under Jewish law to complete the religious divorce allowing the spouses to remarry. The commission held that there was no infringement of article 9. The argument used by the commission was that the refusal to hand over the letter of repudiation was not a manifestation of religious observance or practice. In so deciding, the commission accepted the holding of the French Court of Appeals that "...under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife."<sup>130</sup>

In 1993, the European Commission of Human Rights upheld the decisions of the Turkish courts regarding the prohibition of the wearing of Muslim head scarves on university campuses.<sup>131</sup> "The Commission takes the view that by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestations of observance and symbols of that religion without restriction as to place and manner may constitute pressure on students who do not practice that religion or those who adhere to another religion."<sup>132</sup> Although no direct reference was made to the issue of women's equality, this issue has been seen as intrinsic to questions of women's dress and modesty.

In 2001, the European Court of Human Rights rejected a petition to strike down a ruling of Turkey's Constitutional Court disqualifying the political party Refah from participating in the elections.<sup>133</sup> The Constitutional Court had held that Refah had become a "centre of activities contrary to the principle of secularism, encouraging the wearing of Islamic headscarves in public and educational establishments."<sup>134</sup> It had held that manifesting one's religion in such a manner amounted to exerting pressure on persons who did not follow that practice and created discrimination on the grounds of religion or beliefs. The European Court of Human Rights held: "It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on shari'a, which clearly diverges from Convention

<sup>130</sup>The decision regarding the norms of Jewish law is clearly based on secular logic and not on religious edict. See Frances Raday, *Incorporation of Religious Patriarchy in a Modern State*, in *FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES 209–25* (Barbara Stark ed., J. A. I. Press 1992).

<sup>131</sup>*Senay Karaduman v. Turkey*, Application No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

<sup>132</sup>*Id.* at 108.

<sup>133</sup>*Refah Partisi (Welfare Party) and Others v. Turkey*, 35 Eur. H.R. Rep 56 (2002).

<sup>134</sup>*Id.* at 67.

values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.”<sup>135</sup> Expressing concern about use of “divine rules in order to define the political regime” and Shari’a’s compatibility “with the democratic ideal,”<sup>136</sup> the ECHR held by four votes to three that, because the limitation imposed on the freedom was justified, there was no violation of article 11 of the convention, which guarantees freedom of association.<sup>137</sup>

### 3.3. Analysis of the comparative case law

Analysis of the decisions in the different constitutional cases discussed above must be tentative, both because of the limited number of cases and because key variables not considered, such as the constitutional framework for the court’s jurisdiction, may have been crucial to the outcome. Nonetheless, a few suggestions, intended to promote further inquiry, are in order.<sup>138</sup>

There are a number of variables that prove, on first examination, to be inconclusive as guides to the hierarchy of values adopted by constitutional courts. First, the constitutional courts examined do not seem to be more consistently deferential to claims of religious freedom than they are to cultural defense claims. Second, constitutional courts in different countries having apparently similar religious or cultural rules have sometimes decided in contrary ways, e.g., Tanzania and Zimbabwe, on the issue of customary land rights; India and Bangladesh, on restitution of conjugal rights; or Turkey, France, Switzerland, and Denmark, on the Muslim head scarf. Third, there does not seem to be a clear and consistent distinction in the way the constitutional courts treat majority and minority issues. Majority claims to a cultural or religious defense were accepted by the courts in Zimbabwe, India, and Israel, on some occasions, and rejected by the courts in India, Tanzania, Bangladesh, Turkey,<sup>139</sup> and Israel,<sup>140</sup> on other occasions. Similarly, there was no consistency regarding minority claims, which were accepted by the courts in Canada, the U.S., India, France, and Denmark, in some cases, but rejected, in others, by the courts in the U.S., India, Switzerland, and France.

<sup>135</sup> *Id.* at 87.

<sup>136</sup> *Id.*

<sup>137</sup> ECHR, *supra* note 129, art. 11, 213 U.N.T.S. at 232.

<sup>138</sup> Tables summarizing these ideas appear as appendix 1.

<sup>139</sup> It should be noted that the claims to a religious and cultural defense by religious Muslims in Turkey is described here as a majoritarian claim because the claimants are not an ethnic or religious minority, as such; however, in the intense religiosity of their belief, they could be described as a minority.

<sup>140</sup> The point made in the previous note could apply, *mutatis mutandis*, to religious Jewish claims in Israel.



The secular nature of the state seems to be a constantly relevant factor. The handling of religious issues within the majority religious community by the Turkish, Israeli, and Indian courts demonstrates this. In Turkey, in the headscarves decision, the Court relied heavily on the secular character of Turkey since the time of Atatürk to insist on the right of women to equality. In the *Sarla Mudgal* case in India, the Court used the rhetoric of secular nationhood to justify its rejection of polygamy for Hindu converts. In contrast in Israel, the Court has refused to intervene where the state has given jurisdiction to the religious courts, and it has intervened only in those areas of the law that are governed by secular civil law, such as matrimonial property and, in a very limited, ambivalent way, prayer at the Kotel.<sup>141</sup>

There is another theme that appears to be constant. It is that decisions in which constitutional courts have ruled against the popular sentiment of a religious majority or large minority, without the backing of the government, are rare and, when they do occur, are usually ineffectual. This has occurred in Egypt, India, and Israel. In most of these situations, the constitutional courts' victories seem to have been short-lived and other state authorities have reversed the gender equality gains. From these observations, it seems that, although constitutional courts may have been no more circumspect on religious than cultural issues, their decisions have been more vulnerable to popular opposition aroused on a religious basis. In such circumstances, without strong governmental support, the constitutional courts have generally not prevailed in their championing of gender equality.

At the level of international tribunals, analysis of so few cases cannot be used to produce a principle; anecdotally, however, it is worthy of note that in all the cases, human rights and gender equality were preferred in the result, and the religious and cultural defenses were rejected. Furthermore, it is notable that in contrast with the high courts of Canada and the U.S., the Human Rights Committee was very clear that minority tribal discrimination against women was an unjustifiable denial of women's right to equality.

#### 4. 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.<sup>142</sup> Arguably, the very existence of the international human rights norms, discussed above, should be enough to

<sup>141</sup> The Court's reliance on secular civil authority for intervention was made clear in *Bavli*, 48(2) P.D. 221, and in *Shakdiel v. Minister of Religions.*, 25(2) P.D. 221 (in Hebrew).

<sup>142</sup> For a fuller exploration of certain aspects of the hierarchy of values, see Frances Raday, *Religion, Multiculturalism and Equality—The Israeli Case*, 25 ISRAEL Y.B. HUM. RTS. 193 (1995).

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, nevertheless, briefly analyze—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.

#### 4.1. 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.<sup>143</sup> Communitarianism of this kind is closely allied with anthropological concepts of enculturation and cultural relativism—the idea that moral consciousness is unconsciously acquired in the process of growing up in a specific cultural environment.<sup>144</sup> From this description of the way human morality evolves, some have concluded that there is no objective social justice and that each cultural system has its own internal validity that should be tolerated.<sup>145</sup> The culture is identified by its existing patterns and standards, and recognition

<sup>143</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (Univ. of Notre Dame Press 1981).

<sup>144</sup> MELVILLE J. HERSKOVITS, *CULTURAL ANTHROPOLOGY* 326–29 (Knopf 1955).

<sup>145</sup> Clyde Kluckhohn, *Ethical Relativity: Sic et Non*, 52 *J. PHIL.* 663 (1995). “Morality differs in every society and is a convenient tenet for socially approved habits.” Ruth Benedict, *Anthropology and the Abnormal*, in *THE PHILOSOPHY OF SOCIETY* 279, 286 (Rodger Beehler & Alan Drengson eds., Methuen 1978).

of the culture's intrinsic value seems to go together with a desire to preserve these standards.<sup>146</sup> 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 B.C. (the Old Testament), to the first century A.D. (the New Testament), to the seventh century A.D. (the Qur'an).<sup>147</sup>

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.<sup>148</sup> 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.<sup>149</sup> At this level, multiculturalism could not be useful in any attempt to engineer legal policy in a positive legal system.

Alternately, 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<sup>150</sup> and, hence, its global application is neither ethnocentric nor morally imperialistic. The vast majority 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

<sup>146</sup> ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (Univ. of Notre Dame Press 1988).

<sup>147</sup> YOSEF QARO, *SHULKHAN ARUCH [CODE OF JEWISH LAW]* (c. 1500s).

<sup>148</sup> See ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS—UNIVERSALISM VERSUS RELATIVISM* 61–78 (Sage 1990).

<sup>149</sup> Kluckhohn, *supra* note 145.

<sup>150</sup> See discussion of international norms, *supra*.

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 socioeconomic 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 socioeconomic institutions.<sup>151</sup> 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.<sup>152</sup> Women were excluded not only from the active process of formulating those traditions but also from inclusion, as full human subjects, in the very theories of justice developed within those traditions.<sup>153</sup> The same can be said for Judaism and Islam. Women’s voices are silenced where traditionalist values are imposed.<sup>154</sup>

#### 4.2. Consensus

If communitarianism does not justify the domination of religious/traditionalist patterns of social organization in the legal system, might a broad social

<sup>151</sup> 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 practiced; 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 145, at 15–16.

<sup>152</sup> See SUSAN OKIN, *JUSTICE, GENDER AND THE FAMILY* 41–62 (Basic Books 1989).

<sup>153</sup> See *id.*

<sup>154</sup> See JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (Princeton Univ. Press 1993).

consensus become a legitimizing 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.<sup>155</sup> This view legitimizes 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 criticized in so far as it applies to situations of “pervasive domination.”<sup>156</sup> 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.<sup>157</sup> 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 share in the community’s shared understanding, even if it does not formulate its own dissent. The silencing of any such subgroup should preempt wholesale deference to community autonomy; such deference to the community’s autonomy would defeat concern for the autonomy of oppressed subgroups within it.<sup>158</sup> 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

<sup>155</sup> MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 312–13 (Basic Books 1983).

<sup>156</sup> *Id.*

<sup>157</sup> OKIN, *supra* note 152, at 62–73.

<sup>158</sup> 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, *Cultural Relativism as an Ethnocentric Notion*, in *THE PHILOSOPHY OF SOCIETY*, *supra* note 145, at 289, 296 (emphasis in original).

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?”<sup>159</sup> 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.”<sup>160</sup>

Nevertheless, multiculturalist and consensus philosophers present the clash between the religious and liberal agendas on human rights as symmetrical. On this basis, both Charles Taylor and Paul Horowitz critique the impact of the liberal state on religious subgroups.<sup>161</sup> Arguing for a more supportive and accommodating approach toward religious belief and practices, they claim that liberalism is not value-neutral—it is a “fighting creed”: “At the very least, liberalism’s focus on the autonomous individual and on the maximisation of individual concepts of the good tends to give it in practice an emphasis on freedom over tradition, will over obligation, and individual over community.”<sup>162</sup> The impression given is of symmetry between religious and liberal values. However, in the case of an irresolvable clash of values, the outcome of symmetry would, logically, be stalemate and not, as suggested by Taylor and Horowitz, justification for accommodation and support for religious values that otherwise clash with human rights.

Furthermore, there are good grounds for rejecting the symmetry thesis. There is no symmetry between religious and liberal human rights values. Inverting Taylor’s and Horowitz’s critique of liberalism, you find the values of tradition over freedom, obligation over will, and community over individual. While liberal values leave space for the religious individual and, to a considerable extent, the religious community, religious values do not recognize the entitlement of the liberal individual or community. There is no symmetry between the normative dominance of liberal values (freedom, will, individual) and the normative dominance of religious values (tradition, obligation, community) because the latter does not even acknowledge the private space of

<sup>159</sup> DE BEAUVOIR, *supra* note 42, at 688–89.

<sup>160</sup> OKIN, *supra* note 152, at 66.

<sup>161</sup> CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 249 (Harvard Univ. Press 1995); Paul Horowitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 14 (1996).

<sup>162</sup> Horowitz, *supra* note 161; TAYLOR, *supra* note 161.

the dissident, the heretic, or the silenced voice within its jurisdiction. These values are primarily tools for the perpetuation of existing power hierarchies. The claim for symmetry is, therefore, based on tolerance of inequality and lack of liberty for those deprived of a voice within the religious community. This is a flawed basis for communitarian theory.

There is a flaw, as well, in the reasoning that calls for the autonomy of communities, where that autonomy denies or reduces the right of some to equality and liberty, since the basis for the community's claim to autonomy rests on these very norms of equality and liberty.<sup>163</sup> Autonomy demands by minority communities have been organized in a useful typology by Jack Levy. Under that typology, Levy describes various minority claims for external rules limiting the freedom of nonmembers and for internal rules limiting the freedom of members, all in order to protect an endangered culture or cultural practice.<sup>164</sup> However, were such rules used to defeat gender equality claims, they would use the value of liberty to defeat liberty and of equality to defeat equality. This analysis can be used regarding majority communities as well as minorities, since the very existence of a gender equality claim—by secularists in a religious environment, modernists in a traditionalist culture, or women in a patriarchal society—would show a lack of the kind of homogeneity that might have justified deference to an inegalitarian cultural or religious hegemony over the right to gender equality.

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.

### 4.3. 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 freedom of religion and of the right to equal autonomy of the individual.<sup>165</sup> The need to recognize the autonomy

<sup>163</sup> See RENTELN, *supra* note 148, at 62–65; MELVILLE J. HERSKOVITS, *CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM* 11–34 (Random House 1972).

<sup>164</sup> See Levy, *supra* note 49.

<sup>165</sup> See Nitya Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 *BUFF. L. REV.* 325 (1990).

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 recognized 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.<sup>166</sup> In such extreme cases, mandatory legal techniques should be employed to protect individuals from their inegalitarian status.<sup>167</sup> Thus, the invalidation of consent may be applied in cases of extreme oppression—examples of which include slavery, coerced marriage, and mutilation, including FGM, as well as polygamy, where it forms part of a coercive patriarchal family system.<sup>168</sup>

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 of their socioeconomic status, their alternatives to acceptance of the group's dictates may be very limited or nonexistent. Where individuals are compelled by socioeconomic 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

<sup>166</sup> See Sebastian Poulter, *Ethnic Minority Customs, English Law and Human Rights*, 36 INT'L & COMP. L.Q. 589 (1987). 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, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 71–87, 118–19 (Oxford Univ. Press 1986).

<sup>167</sup> 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.

<sup>168</sup> But see MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 229–30 (Cambridge Univ. Press 2000). 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 166, at 78.



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, endeavoring 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.<sup>169</sup> However, information alone is not enough. In order to be able to dissent from patriarchal family patterns, women need to have feasible economic options. Socioeconomic alternatives to consent must be made available. Thus, the state must, of course, 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 scrutinize, *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.<sup>170</sup> In legal terms, this would mean that the consent to inequality should be considered voidable.<sup>171</sup> Since the possibility of legitimizing 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

<sup>169</sup> Compare *Wisconsin v. Yoder*, 406 U.S. 205 (1972) with *Re State in Interest of Lack*, 283 P. 2d 887 (1955).

<sup>170</sup> See OKIN, *supra* note 152, 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, *Two Models of Pluralism and Tolerance* (1993) (unpublished manuscript). This is especially so where the revised concept of the good that is being chosen is the fundamental human right to equality.

<sup>171</sup> See F. H. 22/82, *Beit Yules v. Raviv*, 43(1) P.D. 441, 460–64 (in Hebrew). Consent to inequality may be held contrary to public policy.

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. Martha Nussbaum has documented the widespread existence of dissent among women in traditionalist cultures or religious communities in her outstanding work on women and culture.<sup>172</sup> The presence of such dissent is also palpable in the shadow reports of NGOs from the countries reporting to CEDAW, which present the claims of women who seek to have the equality principles of the convention applied in full. 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, and 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. It is the kind of claim made by the Women of the Wall in their demand to be allowed to pray in the public space, in an active prayer mode, customarily reserved for men. The claim of the women within these 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. However, 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

<sup>172</sup> NUSSBAUM, *supra* note 168, at 105.

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.

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 fulfill 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.<sup>173</sup> Thus, for example, where the culture or the religion allows polygamy, women must have the legal option of nonpolygamous 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 nonpatriarchal 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.

An attempt to reconcile the clash between liberal values and cultural or religious norms, without relying on the priority of the right to equality, was made by Martha Nussbaum. Nussbaum examined and analyzed “anti-universalist conversations” and, although answering many of them effectively, concludes: “Each of these objections has some merit. Many universal conceptions of the human being have been insular in an arrogant way and neglectful of differences

<sup>173</sup> 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 scrutinize 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, *Should Sex Equality Apply to Religious Institutions*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 88 (Susan Moller Okin ed., Princeton Univ. Press 1999).

among cultures and ways of life.”<sup>174</sup> Accordingly, she adopts the “capabilities approach” of Amartya Sen to provide “political principles that can underlie national constitutions” in a way specific to the requirements of the citizens of each nation.<sup>175</sup> Nussbaum’s sensitivity to cultural diversity is extremely important. 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, that said, 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. Indeed, Nussbaum herself adds this condition. Although Nussbaum’s approach rightly emphasizes the need for sensitivity to cultural and religious differences, the solution that she provides for the dilemma of the struggle between liberal values and cultural or religious norms, in fact, takes us back to the dominance of equality rights over religious norms. She proposes a universally applicable model for dealing with the religious dilemma: “The state and its agents may impose a substantial burden on religion only when it can show a compelling interest. *But . . .* protection of the central capabilities of citizens should always be understood to ground a compelling state interest.”<sup>176</sup> This required protection of central capabilities extends to those functions particularly crucial to humans as dignified free beings who shape their own lives in cooperation and reciprocity with others. Nussbaum’s list of central human functional capabilities includes many of the capabilities denied women by traditionalist cultures and religious norms: e.g., the right to hold property or seek employment on an equal basis with others; to participate effectively in political choices; to move freely from place to place; to have one’s bodily boundaries treated as sovereign; to be secure against sexual abuse; to have, in Nussbaum’s formulation, the social bases of self-respect and nonhumiliation; and to be treated as a dignified being whose worth is equal to that of others, which, as she adds, “entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.”<sup>177</sup> For legal or constitutional purposes, this all translates with some ease into the language of human rights protected under the UN treaties; indeed, as a constitutional matter, the way to give substance to the Nussbaum/Sen capabilities approach is to guarantee them

<sup>174</sup> NUSSBAUM, *supra* note 23, at 39.

<sup>175</sup> NUSSBAUM, *supra* note 168, at 105.

<sup>176</sup> *Id.* at 202.

<sup>177</sup> *Id.* at 79.

through rights, whether political and civil or economic and social rights. Nussbaum herself acknowledges the closeness of the connection between the two and the importance of rights per se.<sup>178</sup>

I would agree with Nussbaum's emphasis on the need for sensitivity to cultural and religious differences, but I would also contend that the role of constitutional law is to give expression to the bottom line of her argument, according to which "[w]e should refuse to give deference to religion when its practices harm people in the areas covered by the major capabilities."<sup>179</sup> There is a difference of emphasis in this approach from Susan Moller Okin's position that "... no argument [should] be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed they might be better off if the culture into which they were born were either to become extinct (so its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women."<sup>180</sup> In my view, there is an argument 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, as Okin adds, 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.

Thus, I would translate the Nussbaum/Sen ethical requirement—that basic capabilities must be secured for all members of society—into the language of women's human right to equality. This is the language relevant to constitutional law. This is the language in which women would address their claims for the acquisition of basic capabilities to the state. In translating these basic capabilities into rights, there is, to be sure, a need to preserve the sensitivity to cultural diversity engrained in the ethical formulation. However, this cannot be at the cost of individual women's right to choose equality. The guarantee of the right to equality is a first-order preference (which is also the case in the Nussbaum formulation). 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.<sup>181</sup> 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.

<sup>178</sup> *Id.* at 96–101.

<sup>179</sup> *Id.* at 192.

<sup>180</sup> OKIN, *supra* note 152, at 22–23.

<sup>181</sup> 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.

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 nonhumiliation? 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.<sup>182</sup> 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 preempts 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.<sup>183</sup> 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.

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. Nevertheless, even where the wearing of the veil is a patriarchal mandate, and it perpetuates

<sup>182</sup> FATIMA MERNISSI, *BEYOND THE VEIL: MALE-FEMALE DYNAMICS IN A MODERN MUSLIM SOCIETY* 84 (Halsted Press 1975); Bonnie Honig, *My Culture Made Me Do It*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 173; (Princeton Univ. Press 1999); LEILA AHMED, *WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE* 223–24 (Yale Univ. Press 1992).

<sup>183</sup> UNNI WIKAN, *BEHIND THE VEIL IN ARABIA: WOMEN IN OMAN* 105 (Johns Hopkins Univ. Press 1982).

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 socialized 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.<sup>184</sup> 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.

## 5. Concluding comment

The intersection between traditionalist culture, religious norms, and gender speaks patriarchy. This is amply demonstrated by the empirical evidence, and

<sup>184</sup> 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, August 17, 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.

by the fact that the cultural defense 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 "defenses" against gender equality, do not stand scrutiny because they marginalize 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.



## Appendix 1

### Cultural defense

Country	Date	Defense accepted by court	Defense rejected by court	Practice by specific legislation or administrative regulation		Minority/majority ethnic or religious community claim + issue of claim
				Validated	Invalidated	
Canada	1974	✓		✓		<i>Minority:</i> Tribal membership
						<i>after the judgment</i>
USA	1978	✓				<i>Minority:</i> Tribal membership
Tanzania	1997		✓			<i>Majority:</i> Land rights
Zimbabwe	1999	✓				<i>Majority:</i> Land rights
Egypt	1999		✓	✓		<i>Majority:</i> Travel freedom

## Religious freedom

Country	Date	Defense accepted by court	Defense rejected by court	Practice by specific legislation or administrative regulation	Minority/ majority ethnic or religious community claim + issue of claim	
					Validated	Invalidated
USA	1879–	✓	✓	✓	Minority: Polygamy	
	1946		<i>continuously</i>		Minority: Maintenance rights	
India	1985	✓	✓	✓	Majority: Penalties for adultery	
	1985	✓		✓	Minority: Inheritance rights	
	1986		✓	✓	Minority: Polygamy	
	1995		✓	✓	Minority: Polygamy, unilateral divorce	
Bangladesh	1997	✓		✓	Majority: Guardianship	
	1986		✓	✓	Majority: Guardianship	

		<i>religious hermeneutics</i>		Custody rights
Israel	1971	✓		Majority: Bigamy
	1994	✓	✓ <i>matter of controversy</i>	Majority: Matrimonial property
	1994		✓	Majority: Public prayer
	1997		✓	Majority: Divorce
	2000	✓	✓	Majority: Public prayer
		<i>Pending additional hearing</i>		

## Religious—cultural mixed

Country	Date	Defense accepted by court	Defense rejected by court	Practice by specific legislation or administrative regulation		Minority/ majority ethnic or religious community claim + issue of claim
				Validated	Invalidated	
India	1983	✓		✓		<i>Majority:</i> Restitution of conjugal rights
Bangladesh	1962		✓	✓		<i>Majority:</i> Penalties for adultery
Turkey	1989		✓		✓	<i>Minority/ Majority:</i> Head scarf
France	1989		✓		✓	<i>Minority:</i> Head scarf
	1994	✓			✓	<i>Minority:</i> Head scarf
Switzerland	1999		✓	✓	✓	<i>Minority:</i> Head scarf
Denmark	2000	✓				<i>Minority:</i> Head scarf

International Tribunals

Country	Date	Defense accepted by court	Defense rejected by court	Practice by specific legislation or administrative regulation		Minority/ majority ethnic or religious community claim + issue of claim
				Validated	Invalidated	
India	1983	✓		✓		Majority:
India	1983	✓		✓		Majority:
Canada	1977		✓	✓		Minority: Tribal rights
Mauritius	1981		✓	✓		Minority: Jewish Divorce
France	1983		✓	✓		Minority/ Majority: Head scarf
Turkey	1993		✓	✓		Minority/ Majority: Election ban for Islamic political party
Turkey	1998		✓	✓		