

DISCUSSION PAPER

# GENDER EQUALITY AND HUMAN RIGHTS



No. 4, July 2015

**SANDRA FREDMAN AND BETH GOLDBLATT**  
FOR PROGRESS OF THE WORLD'S WOMEN 2015-2016

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This paper has been produced for the UN Women flagship report *Progress of the World's Women 2015-2016* by Sandra Fredman FBA QC, Hon Rhodes Professor of the Laws of the British Commonwealth and the USA, Oxford University and Beth Goldblatt, Associate Professor, University of Technology, Sydney (With valuable research assistance by Meghan Campbell, D Phil candidate, Oxford University).

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ISBN: 978-1-63214-024-1

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Produced by the Research and Data Section  
Editor: Christina Johnson  
Design: dammsavage studio

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# SUMMARY

There is a strong commitment to equality between women and men in international human rights law. The various actors within the treaty system who are tasked with elaborating on the meaning of human rights in international law have given close attention to gender equality. This paper evaluates these elaborations against a conception of equality that is substantive. The achievement of substantive equality is understood here as having four dimensions: redressing disadvantage; countering stigma, prejudice, humiliation and violence; transforming social and institutional structures; and facilitating political participation and social inclusion. The paper shows that, although not articulated in this way, these dimensions are clearly visible in the application by the various interpretive bodies of the principles of equality to the enjoyment of treaty rights. At the same time, it shows that there are important ways in which these bodies could go further, both in articulating the goals of substantive equality and in applying them when assessing compliance by States with international obligations of equality.

The first part of the paper gives a brief introduction to the background principles of substantive equality and explains the four-dimensional framework. The second part draws out the understandings of equality articulated by the interpretive actors within the UN

human rights treaty system within this framework. It also points out some of the shortfalls in the current approach to equality. The third part demonstrates how the four-dimensional approach to equality can be used to evaluate the impact of social and economic policies on women to determine how to make the economy 'work for women' and advance gender equality. It does so by applying the four-dimensional approach to two contested issues in relation to social security: conditionalities and austerity cutbacks. In both of these instances state action, whether in the form of cuts to social security or attaching conditions to social assistance, must be evaluated in terms of the obligations of States that are party to the various human rights treaties. Part of a human rights evaluation involves a consideration of whether measures taken by States contribute to or detract from the right to equality. The substantive equality approach, in its four-dimensional form, provides an evaluative tool with which to assess policy in relation to the right to gender equality.

The paper suggests that there is a growing consensus at the international level on an understanding of substantive equality that reflects the four dimensions set out here. Making this understanding explicit will assist in addressing, through a range of means, the challenges of gendered inequality.

# RÉSUMÉ

Le droit international des droits de l'homme témoigne d'un attachement viscéral à l'égalité de genre. Au sein du système des traités, les différents acteurs chargés de préciser le sens des droits de l'homme au regard du droit international attachent une grande attention à l'égalité de genre. Le présent document examine ces questions en se fondant sur une conception de l'égalité réelle. La réalisation d'une égalité réelle est comprise ici comme un processus quadridimensionnel visant

à : remédier au préjudice subi par les femmes ; lutter contre la stigmatisation, les préjugés, l'humiliation et la violence ; transformer les structures sociales et institutionnelles ; et faciliter la participation politique et sociale. Le présent document montre que, même si elles ne s'organisent pas de cette manière, ces dimensions apparaissent clairement dans l'application des principes d'égalité des droits consacrés dans les traités par les différents organes chargés de leur

interprétation. Ce document montre également que ces organes peuvent aller plus loin, tant en établissant les objectifs relatifs à une égalité réelle qu'en les appliquant au moment de l'examen du respect des obligations internationales d'égalité par les États.

La première partie de ce document donne un bref aperçu des principes fondateurs d'une égalité réelle et présente le cadre quadridimensionnel. La deuxième partie présente les conceptions de l'égalité telles que comprises par les acteurs chargés de l'interprétation des droits au sein du système des instruments relatifs aux droits de l'homme dans ce cadre. Elle met également en exergue certaines lacunes dans l'approche égalitaire actuelle. La troisième partie montre comment il est possible d'utiliser l'approche quadridimensionnelle fondée sur l'égalité pour évaluer l'impact des politiques sociales et économiques sur les femmes afin de s'assurer que l'économie répond aux besoins des femmes et de faire progresser l'égalité de genre. Elle applique, pour ce faire, l'approche quadridimensionnelle à deux

questions contestées touchant à la sécurité sociale : les conditions et les mesures d'austérité. Dans ces deux cas, l'action publique, qu'il s'agisse de réduire les dépenses de la sécurité sociale ou de fixer des conditions à l'octroi de l'assistance sociale, doit être évaluée en termes d'obligations des États parties aux différents traités relatifs aux droits de l'homme. Une évaluation de la situation concernant les droits de l'homme implique notamment d'examiner si les mesures prises par les États contribuent au droit à l'égalité ou y portent atteinte. L'approche fondée sur une égalité réelle, sous sa forme quadridimensionnelle, fournit un outil d'évaluation qui permet d'évaluer les politiques à travers le prisme du droit à l'égalité de genre.

Le présent document tend à montrer qu'il se dégage à l'échelle internationale un consensus grandissant en faveur d'une égalité réelle qui reflète les quatre dimensions présentées ici. Expliciter cette conception permettra de relever les défis liés aux inégalités de genre par divers moyens.

## RESUMEN

En el derecho internacional sobre derechos humanos existe un compromiso firme con la igualdad entre mujeres y hombres. Los diversos agentes que, dentro del sistema de tratados, tienen la misión de profundizar en el significado de los derechos humanos en el derecho internacional han prestado una gran atención a la igualdad de género. En este artículo se evalúan estos análisis frente a una concepción sustantiva de la igualdad. Se considera que el logro de la igualdad sustantiva implica la existencia de cuatro dimensiones: corregir las desventajas; contrarrestar los prejuicios, el estigma, la humillación y la violencia; transformar las estructuras sociales e institucionales; y facilitar la participación política y la integración social. El artículo pone de manifiesto que, si bien no están articuladas de esa manera, estas dimensiones son claramente visibles en la aplicación de los diversos organismos

responsables de interpretar los principios de igualdad para el disfrute de los derechos consagrados en los tratados. Al mismo tiempo, demuestra que existen vías importantes que dichos organismos podrían explorar para llegar más lejos, tanto articulando los objetivos de la igualdad sustantiva como aplicándolos a la hora de evaluar el cumplimiento de las obligaciones internacionales en materia de igualdad por parte de los Estados.

En la primera parte del artículo se ofrece una breve introducción a los principios que subyacen a la igualdad sustantiva y se explica el marco de cuatro dimensiones. La segunda parte presenta las interpretaciones de la igualdad articuladas por los agentes interpretativos en el seno del sistema de tratados de derechos humanos de las Naciones Unidas en este marco. Asimismo,

señala algunas de las deficiencias del actual enfoque sobre la igualdad. La tercera parte demuestra que el enfoque de cuatro dimensiones de la igualdad puede utilizarse para analizar la incidencia de las políticas sociales y económicas sobre las mujeres, con el fin de determinar la forma de conseguir que la economía “funcione en favor de las mujeres” y promueva la igualdad de género. Esto se consigue aplicando el enfoque de cuatro dimensiones a dos cuestiones objeto de debate en relación con la seguridad social: las condicionalidades y las medidas de austeridad. En ambos casos, la actuación del Estado, tanto en forma de recortes de la seguridad social o de imposición de condiciones para obtener asistencia social, debe ser analizada con arreglo a las obligaciones de los Estados partes en los diversos tratados de derechos humanos.

Una parte de la evaluación de los derechos humanos consiste en examinar si las medidas adoptadas por los Estados contribuyen a realizar el derecho a la igualdad o bien limitan este derecho. El enfoque de la igualdad sustantiva, en su formato tetradimensional, constituye una herramienta de análisis que permite evaluar las políticas en relación con el derecho a la igualdad de género.

El artículo sugiere la existencia de un consenso creciente a escala internacional sobre una interpretación de la igualdad sustantiva que refleja las cuatro dimensiones que aquí se establecen. Explicitar esta interpretación ayudará a hacer frente, por medios diversos, a los desafíos en materia de desigualdad de género.

# INTRODUCTION

The principle of equality is a central commitment in international human rights instruments. However, the right to equality is generally defined in open-textured terms. The central covenants simply refer to an obligation on States to ensure human rights without ‘distinction’, ‘discrimination’, ‘exclusion’, or ‘restriction’ or ‘on the basis of equality’ as between men and women. The open-textured nature of this principle has been elaborated through the concluding observations, general recommendations, general comments and case law of the treaty bodies, as well as through the reports of experts operating under the special procedures of the Human Rights Council.<sup>1</sup>

This paper aims to draw out the evolving understandings of equality in order to articulate a clear standard by which to evaluate social and economic policies and thereby to ‘make the economy work for women’ (the purpose of the broader Progress of the World’s Women report). We show that in the context of women, these understandings are best conceived as an elaboration of the principle of substantive equality. Traditionally, equality has been understood in formal terms, requiring simply that likes be treated alike. In the United States, this traditional understanding is known as the ‘anti-classification’ principle, which requires individuals to be treated on their own merit, regardless of their race, or other equivalent characteristics. Formal equality has been of central importance for women, particularly in achieving equality before the law, whether in terms of equal suffrage, equal right to own property or other similar rights. In many countries, formal equality is yet to be achieved. However, even when women are equal before the law, they lag considerably behind in many respects, particularly in social and economic terms. This has highlighted the weaknesses in a concept of equality that focuses only on treating likes alike. Equal treatment, in the context of considerable antecedent disadvantage, might simply entrench that disadvantage. Moreover, equal treatment is agnostic as to the level of treatment: the principle is fulfilled whether all are treated equally well or equally badly. Ultimately, it is not so much the fact of the difference in treatment on the grounds of sex that should be at issue, but that a woman is subjected to disadvantage on the grounds of her sex.

This has prompted the development of more substantive notions of equality. While all agree on the need to move beyond formal equality, there remain several alternative conceptions of substantive equality, such as equality of results, of opportunity or of dignity. While each of these has its strengths, they remain incomplete. Instead, we draw on a synthesis or four-dimensional understanding of substantive equality.<sup>2</sup> The first dimension focuses on redressing disadvantage rather than insisting on like treatment. This moves away from a symmetrical approach and opens the way to different treatment if appropriate to address disadvantage. It also precludes a ‘levelling down’ option, whereby equality is achieved by removing benefits rather than extending them. Thus the first dimension of substantive equality in the context of women is to redress the disadvantage associated with gender. The second dimension is based on an underlying concept of dignity, aiming to address stigma, prejudice, humiliation and violence. The third dimension recognizes that barriers to equality are deeply rooted in institutional and social structures. Rather than aiming at a gender-neutral future, which expects women to conform to a male-defined world, equality for women must be transformative, entailing a redistribution of power and resources and a change in the institutional structures that perpetuate women’s subordination (see Fredman 2003: 115). Most importantly, the transformative dimension recognizes that change must be structural and not dependent solely on correcting the actions of individual perpetrators. Finally, the fourth dimension recognizes that those without voice cannot rely on the

<sup>1</sup> A brief explanation of the UN human rights treaty mechanisms will be provided in Part 2 below.

<sup>2</sup> This formulation was first developed in Fredman 2002 and further developed in Fredman 2011, Chapter 1.

political process to redress their wrongs. It therefore requires equal participation both socially and politically.

In brief, the four dimensions of substantive equality are thus: to redress disadvantage; to counter stigma, prejudice, humiliation and violence; to transform social and institutional structures; and to facilitate participation, both in the form of political participation and social inclusion.<sup>3</sup>

Below we elaborate the four-dimensional framework and evaluate the ways in which the various interpretive bodies understand and apply the principles of equality in international law according to these dimensions. We show that, although not articulated in this way, the dimensions are clearly visible in the

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<sup>3</sup> These terms are similar to Nancy Fraser's articulation of a theory of justice (participatory parity) based on recognition, redistribution and participation. See Fraser and Honneth 2003. The four-dimensional framework was developed independently (see note 2 above) to capture the meaning of substantive equality, but Fraser's concepts, particularly that of recognition, have been very helpful in the further articulation of the framework.

application by the various interpretive bodies of the principles of equality to the enjoyment of treaty rights. At the same time, we show that there are important ways in which these bodies could go further, both in articulating the goals of substantive equality and in applying them in assessing compliance by States with international obligations of equality.

The first part of this paper gives a brief introduction to the background principles of substantive equality and explains the four-dimensional framework. The second part draws out the understandings of equality articulated by the interpretive actors within the UN human rights treaty system within this framework. It also points out some of the shortfalls in the current approach to equality. The third part of the paper demonstrates how the four-dimensional approach to equality can be used to evaluate the impact of social and economic policies on women to determine how to make the economy 'work for women' and advance gender equality. It does so by applying the four-dimensional approach to two contested issues in relation to social security.

1.

# SUBSTANTIVE EQUALITY: A CONCEPTUAL FRAMEWORK

The principle of equality in international human rights instruments is expressed in very general and open-textured terms. Thus, Article 2 of the Universal Declaration of Human Rights (UDHR) provides that every human being is entitled to all the rights and freedoms within the Declaration ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (UN General Assembly 1948). Similarly the International Covenant on Civil and Political Rights (ICCPR) requires States to respect and ensure the rights in the Covenant ‘without distinction’ (UN General Assembly 1966a, article 2), while the International Covenant on Economic Social and Cultural Rights (ICESCR) requires State parties to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind on the grounds mentioned in the UDHR (UN General Assembly 1966b, article 2(2)). Both the ICCPR (article 3) and ICESCR (article 3) have specific provisions for the ‘equal right’ of women and men to the enjoyment of all rights in the respective Covenants. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) focuses specifically on women, stating that ‘discrimination against women’ shall mean ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’ (UN General Assembly 1979, article 1).

The generalized, open-textured reference to equality and non-discrimination has made it possible for the interpretation of equality to evolve as the problems faced by women are better understood and as new challenges arise. The first step in the development of a legal principle of equality requires the dismantling of formal legal impediments. These include the exclusion of women from the right to vote or hold public office, to enter into the paid labour market, to hold property or to have custody over their own children

(Fredman 1997). In many countries, legal equality was only achieved in the first part of the twentieth century; but in a disturbing number of countries, such equality has still not been achieved. This is reflected in the number of reservations entered to CEDAW, many of which are entered by States that cite Sharia law as regulating matters of personal status such as marriage, divorce, custody and inheritance (Freeman 2009). As many as 30 States have entered reservations to article 16 of CEDAW (equality in marriage) either in

part or in full (UN Women 2011). As Freeman puts it, such reservations ‘relegate laws and practices that critically affect women’s human rights to a system that is unreachable by and unaccountable to international norms’ (2009: 6).

Legally mandated and institutionalized inequality between women and men has a serious effect on women’s ability to access economic resources and empowerment. In some countries, exemptions from the constitutional equality guarantee are provided for personal or customary law, with the result that it remains legal to discriminate against women in relation to marriage, divorce, marital property ownership and succession. Examples of practices that might fall within this exception and that directly impact women’s economic opportunities and affluence include early marriage, property grabbing by the husband’s family on his decease, and polygamy. In rural areas, customs and traditional practices frequently prevent women from inheriting or acquiring ownership of land and other property and from accessing financial credit and capital. The fact that women are subjected to *de jure* discrimination in relation to marriage, succession, divorce, custody of children, social security and other rights also has significant consequences for their ability to access paid work. Women who are subject to early marriage, to treatment as minors under the guardianship of male relatives, to eviction from their property on widowhood and to other legal forms of discrimination are inevitably highly limited in their ability to undertake paid work or to benefit from paid work in terms of income, training, career progression or solidarity at work. Without secure rights to education, property, social security or contract, labour market participation is severely compromised: where women can access jobs at all, they are likely to be precarious or on poor terms and conditions (for more details, see Freeman 2013a: 8–10). This is often exacerbated by the absence of reproductive rights, prohibitions on abortion and express legal prohibitions, such as ‘protective legislation’ barring women from certain types of work or night work.

Although equality before the law is a major achievement, it is far from sufficient. In many countries, women are still subjected to discriminatory customary and religious norms that directly impact inheritance, property ownership, rights on divorce and widowhood and access to resources. Even where such patterns do not exist, women are still unequal in the labour market and the home. Particularly pervasive is gender-based violence, which continues to occur at alarming rates across the globe and frequently remains without legal sanction.

This reflects the need for a legal approach that goes beyond equality before the law and takes the form of legal prohibitions on discrimination or unequal treatment, whether by public or private actors. The starting principle has generally been that of equal treatment or a prohibition of direct discrimination. Direct discrimination is based on the underlying principle that likes should be treated alike. It prohibits less favourable treatment on the grounds of sex or other ‘protected’ characteristic. In the United States, this has taken the form of the ‘anti-classification’ principle.

The equal treatment or anti-classification principle remains of central importance in addressing blatant prejudice, that is, where women are treated less favourably than men simply because they are women. However, this principle cannot address more institutional or deep-seated forms of inequality. There are several reasons for this.<sup>4</sup>

First, the principle of equal treatment only applies if there is a similarly situated man who has been more favourably treated on grounds of sex than the woman. The reliance on a male comparator is a highly conformist principle. In the powerful words of Catherine MacKinnon: ‘Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man. . . . Gender neutrality is thus simply the male standard’ (MacKinnon 1987: 34). For example, women will only be entitled to equal pay or equal treatment to men if they can do the same jobs

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4 This section draws on Fredman 2011, p. 9ff.

and work the same hours as their male counterparts. Women with childcare responsibilities will be excluded from equal treatment unless they are able to find other women to look after their children, and the latter are invariably low paid. The principle that likes should be treated alike is particularly ill-suited to deal with pregnancy as there is no suitable comparator for pregnant women. It is also unsuited to deal with the wage gap in situations of job segregation. Where women are clustered in low-paying occupations, there may be no male comparator doing like work for higher pay. Thus the principle of equal treatment requires women to conform to male-oriented social structures. It does nothing to challenge the structures themselves.

Second, the principle that likes should be treated alike is a symmetric principle. It assumes that any different treatment on the ground of sex is wrong in itself, regardless of whether its aim is to perpetuate or redress pre-existing disadvantage. Yet unequal treatment might be necessary to achieve equal results, particularly where women have been subjected to disadvantage in other spheres.

Third, as long as men and women are treated alike, there is no difference in principle between treating them equally badly and treating them equally well. Moreover, because the equal treatment principle is agnostic as to the substantive outcome, it can be fulfilled by removing benefits from men rather than extending benefits to women (Fredman 2011:356–

357). The result is that women might be worse off and men no better off.

Fourth, the equal treatment principle assumes that the cause of the violation can be traced to the behaviour (or fault) of individual perpetrators. Yet structural inequality requires change even if no individual or state body can be proved to be ‘at fault’.

It was to address these limitations of the principle that likes should be treated alike that substantive equality was developed. To do so, substantive equality should have at least four features. First, it should be asymmetric. That is, it should distinguish between different treatment that causes further detriment to a disadvantaged group and different treatment that aims to redress past disadvantage and therefore improve the position of a disadvantaged group. Second, it should move away from the assumption of conformity to a male norm. Instead, it should accommodate difference and change existing structures. Third, it should insist on levelling up rather than down. And fourth, it should entail a positive responsibility to bring about change, regardless of whether individual culpability or violation has been established. Several different concepts have been used to address these challenges, such as equality of results, equality of opportunity and equality of dignity. All of these have their advantages and limitations. Drawing on their strengths leads to a four-dimensional approach to equality, which is sketched below (Fredman 2002; 2011: 25–33).

## 1.1

### Redressing disadvantage

The first dimension of substantive equality concentrates on remedying disadvantage rather than achieving gender neutrality. Disadvantage is both material and social. Gender-based disadvantage includes the lack of empowerment of women within the context of family and social relations. Substantive equality aims to redress disadvantage in its specifically gendered context, including women’s subordinate position in the family and reproduction, in the paid workforce and in other relationships of

power. The focus on redressing disadvantage has two important implications. First, it is incompatible with a ‘levelling down’ solution, as only if the position of those who are worse off is raised to that of the better off can equality in this sense be satisfied. Second, it contemplates different treatment in order to redress disadvantage. This means that affirmative action measures in favour of women do not breach the principle of equality as long as their aim is to redress discriminatory disadvantage.

## 1.2

### Stigma, stereotyping, humiliation and violence

The second dimension of substantive equality includes stigma, stereotyping, humiliation and violence on grounds of gender. This dimension is best understood in terms of what Nancy Fraser calls ‘recognition’ wrongs. The concept of ‘recognition’ is based on the Hegelian notion that our identity is constructed (at least partially) in terms of the ways in which others regard us. ‘Recognition’ wrongs consist in

‘misrecognition’ or inequality in the mutual respect and concern that people feel for one another in society (Fraser 2003: 29).

Such wrongs can be experienced regardless of relative socio-economic disadvantage and distributive wrongs.

## 1.3

### Accommodation and transformation

The third dimension of substantive equality entails a recognition of the ways in which the structures of society entrench women’s disadvantage. Instead of requiring women to conform to male norms, it requires transformation of existing male-oriented institutions and social structures. With this comes the imperative to transcend the public-private divide, recognizing

the ways in which imbalances in power in the family can reinforce power imbalances in the public sphere and vice versa. This in turn entails the requirement of positive duties to achieve equality as well as negative duties to prevent discrimination. Substantive equality also requires the accommodation of differences between women.

## 1.4

### Agency and voice

The final dimension of substantive equality is the importance it attaches to women’s agency and voice. As has been recognized in several jurisdictions, equality should specifically compensate for the absence of political power of groups ‘to whose needs and wishes elected officials have no apparent interest in attending’ (Ely 1980: 46). Substantive equality requires decision makers to hear and respond to the voices of women rather than imposing top-down decisions. The challenges of giving women voice cannot be underestimated. Articulating women’s interests from a gendered perspective requires closer attention to

the diversity of women’s voices, to the possible disjuncture between those who speak and those who are affected and to the need to ensure that the least vocal are nevertheless heard. Moreover, as much as women’s voices should be heard in engendering social and economic rights, so social and economic rights are necessary to give women the capability of articulating their perspectives. Substantive equality also has the important effect of imposing positive duties on the state to treat women differently, provide opportunities for participation and restructure institutions appropriately.

## 1.5

### Interaction between the dimensions

One of the key advantages of a multi-dimensional approach is that it provides a framework within which to address the interaction between dimensions. The idea of the four-dimensional structure is to draw explicit attention to all four dimensions in evaluating positions or programmes. Rather than viewing one as a trump over the others, the dimensions should mediate each other, leading to a synthesis or more nuanced response. For example, measures aimed at redistribution can themselves cause recognition harms, such as the stigma experienced by welfare beneficiaries. Affirmative action measures are similarly said to be associated with increased stigma. The four-dimensional approach makes it possible to address these tensions. Given that equality aims to redress disadvantage as well as to address stigma, it is crucial to design both welfare and affirmative action measures in ways that advance dignity as well as redistribution. On the other hand, simply addressing recognition harms without paying serious attention to structural change, such as improving the quality of educational provision, is

unlikely to achieve substantive equality. Moreover, affirmative action measures may not be sustained unless there is underlying structural or transformative change. For example, in the United Kingdom, the increase in women Members of Parliament following on the Labour Party's policy of 'women-only shortlists' was soon reversed because there was no change in parliamentary hours, which make it very difficult to be a participative parent. Similarly, the multi-dimensional approach precludes the argument that measures increasing disadvantage do not breach equality because they have no impact on the dignity of the claimant.<sup>5</sup> The participatory dimension also needs to be considered together with other dimensions. While voice is important, it is not necessarily an end in itself if those women who speak have the effect of worsening other women's disadvantage or perpetuating stigma, prejudice or violence. As an extreme example, the fact that some women perpetuate harmful practices such as female genital mutilation or breast ironing does not in itself justify the devastating effects on women.

## 1.6

### Substantive equality: legal concepts

Concepts and terminology within the framework of substantive equality have evolved in the enactment and interpretation of equality at the international and domestic level. Particularly important was the development of the concept of disparate impact, developed by the US Supreme Court to address the limitations of sole reliance on the principle of equal treatment. In the landmark case of *Griggs v Duke Power*,<sup>6</sup> the employer had applied a uniform aptitude test to both white and African American job candidates. But because African-American applicants had long received inferior education in segregated schools, the test operated to disqualify such applicants at a substantially higher rate than whites. The court held that, under

Title VII of the Civil Rights Act, equal treatment could be discriminatory if it led to unequal results unless justified by business necessity. In the United Kingdom and the European Union (EU), this principle is known as indirect discrimination. Indirect discrimination makes it unlawful to apply an apparently neutral criterion, provision or practice that puts persons of one sex at a particular disadvantage compared with persons of a different sex, unless it is a proportionate means of achieving a legitimate aim.<sup>7</sup> At the same

5 *Gosselin v Quebec* 2002 [SCC] 84 (Supreme Court of Canada). See now *R v Kapp* 2008 SCC 41 (Supreme Court of Canada).

6 *Griggs v Duke Power Co.* 401 US 424, 91 S Ct 849 (1971) (US Supreme Court).

7 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, article 2(1)(b). See also: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, article 2(2)(b); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation Article 2(2)(b); UK Equality Act 2010 s19.

time, the concept of indirect discrimination or disparate impact is under sustained attack in the country of its origin – the United States. Soon after *Griggs*, the US Supreme Court held that the concept did not apply to constitutional review. Only in cases of purposeful discrimination could a violation of the Equal Protection Clause in the 14th Amendment of the US Constitution be established.<sup>8</sup> More recently, some justices in the US Supreme Court have doubted whether the concept of disparate impact is ever compatible with the constitutional equality guarantee.<sup>9</sup>

Addressing indirect discrimination is an important step towards substantive equality in that it focuses on equality of impact rather than equality of treatment. For example, if workers' pensions depend on contributions through a continuous working life, then women who have had to take time out for childcare will be subject to a particular disadvantage. However, indirect discrimination is an incomplete version of substantive equality. A major reason for this is that inequality of results may be justified for business reasons or even on the grounds of state public policy. For example, if it can be shown that a qualification is

necessary for the proper fulfilment of the job, there is no indirect discrimination. On its own, the principle of indirect discrimination does not require steps to be taken to improve the skills or qualifications of the disadvantaged group. In this sense, it does not redress disadvantage, nor require institutional change, and therefore does not satisfy at least two of the dimensions of substantive equality.

A further and related legal concept aiming to advance substantive equality is that of reasonable accommodation or adjustment. This principle requires an express adaptation of the existing environment in order to make it possible for a disadvantaged individual to participate. It works best in relation to disability, where it imposes a duty on employers, service providers or other public bodies to find a way of reasonably accommodating the needs of a person with a disability so that she can participate fully in a job or service. However, accommodation is usually addressed to the individual rather than the overall structure. In addition, it is limited to 'reasonable' adjustment, or adjustment without causing the provider undue hardship.

## 1.7 Multiple locations and identities

The fact that women have multiple locations and identities impacts on their experience of discrimination and the need for an approach to equality that can recognize and deal with these complexities. Thus, in a particular country, laws relating to dress codes might operate harshly against Muslim women but not against women of other cultures or Muslim men. The same is true for countries with Muslim personal laws, which impact on Muslim women but not on other women or Muslim men. Similarly, laws that prevent girls from inheriting might impact on African women subject to customary law but not on African men or on women of other racial or ethnic groups in that society. A less direct example might occur where

a company, trying to meet affirmative action targets on race and gender, hires white women and black men. Black women will lose out because the policy or law does not take account of what has been described as 'intersectional discrimination' (Crenshaw 1989: 139; Iyer 1993; Grabham et al. 2009) – the combination of status-based inequalities that create additional forms of discrimination. Multiple forms of discrimination might also compound the experience of discrimination. Thus, all women might fear for their safety in a society where gender-based violence is common and policing is poor. However, poor women who cannot afford public transport and must walk home from work in the dark would face greater dangers than their better-off counterparts. Substantive equality requires detailed attention to the context in which discrimination occurs so as to unpack the often complex and hidden forms of gender inequality.

8 *Washington v Davis* 426 US 229, 96 S Ct 2040 (1976) (US Supreme Court).

9 *Ricci v. DeStefano* 129 S. Ct. 2658 (2009) (US Supreme Court)B.

## 1.8

### The individual and the group

A multi-dimensional approach also allows us to address one of the key challenges facing the move from formal to substantive equality, namely the relationship of the individual to the group or collective. Formal equality, and its associated legal principle of direct discrimination, tends to focus on the individual, the assumption being that prejudice and stereotyping are generalizations that obscure individual merit. This in turn ignores the group-based nature of inequality and the need to address systems and institutions that perpetuate such inequality. On the other hand, a focus on groups might disguise intra-group inequalities and submerge individual agency and autonomy. In this

context, it is important to be transparent about the interaction between the different dimensions. This requires us to ask whether affirming cultural diversity in practice aggravates women's disadvantage because of harmful intragroup practices in relation to women, or whether the real distinctions between women should be respected in order to enhance their choice and agency. Particularly important is the question of who speaks for the group and whether minority voices within the group can be heard. The multi-dimensional approach requires us to weigh cultural justifications against evidence of gendered stigma and disadvantage and the possibilities of meaningful consent and choice.

## 1.9

### The evolution of substantive equality in international human rights law

As was seen above, human rights instruments in international law follow similar patterns in their approach to the rights to equality and non-discrimination. The concept of equality tends to be stated in general terms, without further elaboration. The UDHR begins by affirming that 'all human beings are born free and equal in dignity and rights' (Article 1). Both the ICCPR (article 3) and ICESCR (article 3) have specific provisions for the 'equal right' of women and men to the enjoyment of all rights in the respective Covenants. Several covenants have more specific provisions. Both the UDHR and ICCPR provide that men and women are entitled to equal rights in marriage and its dissolution.<sup>10</sup> The ICESCR provides for 'equal pay for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work' (article 7(a)(i)).

The principle of *non-discrimination* has more explicitly evolved towards a substantive understanding. This can be seen in both CEDAW and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which go beyond the other conventions in that they include distinctions, inclusions or restrictions that have either the purpose or the effect of impairing the recognition, enjoyment or exercise of human rights. This recognizes that equal treatment might lead to unequal results, and therefore that it is not just the purpose but also the effect that matters. In its 1989 General Comment, the Human Rights Committee (HRC) took the view that the more expansive definition in CEDAW and CERD should apply to the term 'discrimination' as used in the ICCPR (HRC 1989, para 7).

A second important step in the evolution towards substantive equality is the inclusion of positive duties on States to respect, protect and fulfil the rights to equality and non-discrimination. The traditional view of equality and non-discrimination focuses on an individual interaction, requiring proof that a perpetrator has violated that non-discrimination norm resulting

<sup>10</sup> UDHR, Article 16 states that men and women are entitled to equal rights as to marriage, during marriage and its dissolution. As in the Universal Declaration, there is also specific provision in article 23(4) of the ICCPR for equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

in damage to an individual victim. However, the focus on proof of breach by a named perpetrator means structural and institutional inequalities that cannot be traced to an individual perpetrator are outside the scope of enforcement. The seeds of such a positive duty are found in article 26 of the ICCPR, which provides that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [the protected grounds].' In its 1989 General Comment, the HRC has affirmed that this guarantees not only equality before the law and equal protection of the law, but also places a positive duty on the State to prohibit discrimination and guarantee equal and effective protection (HRC 1989, para 1). Note also that whereas article 2 applies only to the rights contained in the Covenant, article 26 prohibits discrimination in any field regulated by public authorities (*ibid.*, para 12).

However, the real push towards an integrated understanding of substantive equality focussed on the re-interpretation of the meaning of 'temporary special measures' in CEDAW. Article 4(1) of CEDAW provides that 'adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention'. Special measures or affirmative action are controversial in that they appear to breach the equal treatment principle by requiring preferential treatment on the grounds of gender. However, once it is recognised that advantageous treatment might be necessary to counter previous disadvantage, it becomes clear that 'special measures' are not a derogation from equality, but a means to achieve it. The wording of article 4 of CEDAW demonstrates this tension. It appears to accept that gender-based provisions constitute a prima facie breach of the equal treatment principles, while at the same time recognizing that measures specifically benefitting women might be necessary. Hence the need to call these measures 'special' and to insist that they are 'temporary.'<sup>11</sup>

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<sup>11</sup> This section is taken from Fredman 2003.

In a very productive expert meeting in Maastricht in 2002, these tensions were explored as part of the process of formulating a new general recommendation on the issue of temporary special measures.<sup>12</sup> It was stressed that article 4(1) makes it clear that 'accelerating de facto equality' of men and women is one of the goals of the Convention and therefore contributes to the understanding that substantive equality is prevalent in the Convention (Holtmaat 2003: 215). Particular importance was placed in the meeting on the need to develop an understanding of substantive equality that made it clear that the adoption of measures benefitting women was not an exception to equality but a means of achieving it. For example, although CEDAW speaks with several different voices, it was argued that the conception of equality embodied in the convention should be regarded as a transformative one (Fredman 2003: 115).

In its landmark General Recommendation No. 25 on temporary special measures, the CEDAW Committee stressed that the Convention was a dynamic instrument, which went 'beyond the concept of discrimination used in many national and international legal standards and norms' (2004, para. 5). Most importantly: 'In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.' Moreover, 'The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women

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<sup>12</sup> *Ibid.*

and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns' (ibid., para. 10). Several of the key aspects of the multi-dimensional understanding of substantive equality are clearly evident here.

The lead taken by the CEDAW Committee was soon followed in relation to the ICESCR. In General Comment No. 16 in 2005, the Committee on Economic, Social and Cultural Rights (CESCR) elaborated on the meaning of article 3 of the Covenant, which provides for the equal right of men and women to the enjoyment of all economic, social and cultural rights. In this Comment, the Committee made it clear that 'The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. ...Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience' (CESCR 2005, paras. 6–7). It should be noted that the reference to alleviating rather than maintaining disadvantage registers the commitment within substantive equality to a 'levelling up' approach. This also differentiates

the equality right from basic minimum rights. As the Special Rapporteur on water has put it: 'While universality is about ensuring access for all, equality is about "levelling up" or working towards improving the quality and levels of service of groups that lag behind' (UN General Assembly 2012a, para. 29). As will be seen below, however, the commitment to levelling up is under-developed in the practice of the committees.

While the CESCR's General Comment 16 was concerned with the equal rights of women and men, the later General Comment 20 in 2009 elaborated on more general principle of non-discrimination on a wide range of grounds, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (CESCR 2009). Building on the framework in General Comment 16, it specifically differentiates formal and substantive discrimination, where the latter requires 'paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations' (ibid. para. 8). The General Comment is also more explicit than previous documents in distinguishing expressly between direct and indirect discrimination, and in its use of the concept of systemic discrimination, or discrimination against some groups that is 'pervasive and persistent and deeply entrenched in social behaviour and organization' (ibid., paras. 10 and 12).

2.

## EQUALITY IN INTERNATIONAL LAW: THE FOUR-DIMENSIONAL APPROACH

The second part of this paper considers the extent to which a multi-dimensional notion of substantive equality is already reflected in current interpretations of international treaty obligations, and the extent to which there is room for continuing development of these interpretations in order to make further progress towards an international commitment to substantive equality. It will be seen that, while there is little attempt to articulate and apply a consistent framework to evaluate progress towards substantive equality, there is nevertheless a strong, implicit adherence to the aims encapsulated in the concept. It is suggested here that by making these connections explicit and fully articulating the growing consensus at the international level on an understanding of substantive equality that reflects the four dimensions set out above, the extent to which policies can be shaped to address the specific challenges of gendered inequality can be considerably enhanced.

The UN treaty body system is comprised of international treaties on various aspects of human rights. The treaties set up committees to monitor compliance based on country reports. Their comments and recommendations are called concluding observations. They also provide interpretations of aspects of the treaties in general comments or recommendations. In some cases, where optional protocols exist for a particular treaty, the committee makes a decision in response to individual complaints about the compliance of a State

party with its treaty obligations.<sup>13</sup> In addition to the treaty system, the Human Rights Council has special procedures that provide mandates to individuals or groups who are independent human rights experts on a particular topic. They report and advise on their areas of expertise.

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<sup>13</sup> There is also provision in some treaties for inter-state complaints and inquiries. These are not examined in this report.

The following table identifies the treaties discussed in this paper and the acronyms used; the bodies for each treaty; and the types of output that the body produces.

**TABLE 1-1**  
**Overview of treaties**

Treaty	Treaty Body	Work of Treaty Body
International Covenant on Civil and Political Rights (ICCPR)	Human Rights Committee (HRC)	Concluding observations General comments Individual complaints
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Committee on Economic Social and Cultural Rights (CESCR)	Concluding observations General comments Individual complaints (as of 5 May 2013)
Convention on the Elimination of Racial Discrimination (CERD)	Committee on the Elimination of Racial Discrimination (CERD)	Concluding observations General recommendations Individual complaints
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Committee on the Elimination of Forms of Discrimination Against Women (CEDAW Committee)	Concluding observations General recommendations Individual complaints
Convention on the Rights of People with Disabilities (CPRD)	Committee on Rights of People with Disabilities (CPRD)	Concluding observations General recommendations Individual complaints

The most recently reported concluding observations (during 2012 and 2013) were used in relation to these treaties. The large number of reports completed during the lifespan of these committees makes it difficult to survey every report for this study. For reasons of methodological practicality as well as contemporary relevance, the most recent reports were therefore chosen for examination. It should be noted that the concluding observations of the five treaty committees during the past two years do not necessarily reflect their entire historical approach to the particular issues discussed here but rather their most recent views. However, all general comments and recommendations prepared by each of the committees were considered in this study. Thus, the analysis of these, which are fully representative of

the committees' work, carry greater methodological weight than the analysis of the concluding observations given the longer period of time over which they were produced.

Table 1-2 shows the regional breakdown of the State reports for the last three sessions (July 2012–February 2013) of the CEDAW Committee. Of these, the following countries were selected for examination: Angola, Austria, the Bahamas, Bulgaria, Chile, Macedonia, Pakistan and Togo (with occasional reference to other country reports). Because there were no country reports from the MENA region in this reporting period, we have also included the report from Jordan, which was from an earlier reporting period (February 2012).

**TABLE 1-2**  
**Regional breakdown of State reports for last three sessions of the CEDAW Committee**

Region	Number of reports	States
Middle East North Africa (MENA)	0	
Central and Eastern Europe and Central Asia	5	Bulgaria, Cyprus, Hungary, The Former Yugoslav Republic of Macedonia, Turkmenistan,
Developed Regions	3	Austria, Greece, New Zealand
East Asia and Pacific	3	Indonesia, Samoa, Solomon Islands
Caribbean and Latin America	5	Bahamas, Chile, Guyana, Jamaica, Mexico
South Asian	1	Pakistan
Sub-Saharan Africa	4	Angola, Comoros, Equatorial Guinea

The reports of the following special procedures bodies and individuals were also examined:

- the Special Rapporteur on extreme poverty and human rights (formerly the Independent Expert) (Special Rapporteur on poverty);
- the Special Rapporteur on the right to food;
- the Special Rapporteur on the right to housing;
- the Special Rapporteur on the human right to safe drinking water and sanitation (Special Rapporteur on water);

- the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on health);
- the Special Rapporteur on the right to education;
- the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (Independent Expert on foreign debt);
- the Working Group on the issue of discrimination against women in law and in practice.

## 2.1 Redressing disadvantage

As previously discussed, the first dimension of substantive equality requires a focus not simply on treating people in the same way, regardless of their gender, but on redressing women's specific disadvantage. This entails a recognition of the interlocking nature of women's disadvantage: how imbalances of power within the home and family radiate outwards into inequalities in the labour force and more generally in access to resources and public life.

This section examines the extent to which treaty bodies and special procedures mandates pay specific attention to the ways in which gendered relationships within the family impact on women's access to resources, including property rights, paid work and socio-economic rights such as health, housing and social welfare. It is not enough to point to the many situations in which women remain subject to formal legal disabilities; it is also important for UN bodies to highlight substantive disadvantage, whether or not caused by legal inequalities. As the Special Rapporteur on the right to food has shown, discrimination against women may be the result of unequal laws but is more generally caused by a cycle of interrelated forms of discrimination that include: 'social norms or customs, linked to certain stereotypes about gender roles; unequal access to productive resources such as land

and to economic opportunities, such as decent wage employment; unequal bargaining position within the household; gendered division of labour within households, that result both in time poverty for women and in lower levels of education; and women's marginalization from decision-making spheres at all levels' (HRC 2012a, para. 3). He adds that lack of recognition of reproductive rights is also part of this cycle since women lose out on work and education by having to marry and have children early (ibid., para. 4).

This section explores the extent to which the UN bodies have recognised and reflected the interlocking nature of women's disadvantage. It begins by considering the ways in which the UN bodies have linked inequality in marriage to women's wider material disadvantage. It then moves on to examine the UN bodies' approach to other key forms of women's disadvantage: in housing, at work (both paid and unpaid), in health and education, and in relation to poverty and access to social security.

### (a) Marriage, succession and property

As well as insisting on formal equality in relation to marriage and property, the treaty bodies have made some attempts to draw contracting States' attention to

the ways in which substantive equality can be breached by inequality in marriage and property (ICCPR 2012, paras. 38 and 95). Thus in its interpretation of the equality principle in article 23 of the ICCPR (the right to equality in marriage), the Human Rights Committee (HRC) has addressed the role of marriage laws and customs in facilitating and perpetuating other forms of disadvantage against women.<sup>14</sup> For example, the absence of divorce laws in the Philippines is identified as potentially compelling victims of sexual and gender-based violence to remain in violent relationships.<sup>15</sup> Behind this is the recognition that disadvantage is not just material, but is also about power. The CEDAW Committee, in interpreting the equivalent provision in the Convention it monitors,<sup>16</sup> has taken this further, focusing on both the legal rights and the practice that contribute to women's disempowerment and disadvantage through the institution of marriage.<sup>17</sup> The Committee is particularly concerned at the persistence of polygamy and early marriage.<sup>18</sup> All the committees stress the importance of prohibiting child marriage,<sup>19</sup>

which perpetuates women's disadvantage in many ways, including obstructing their education, exposing them to violence and risking their reproductive health,

The redistributive dimension of substantive equality further focuses attention on the ways in which inequality within marriage leads to women's disadvantage in access to resources. This is reflected in the concern expressed by treaty bodies at the ways in which discriminatory marriage and inheritance laws bar women's access to land, and with it the possibilities of credit and other capital resources.<sup>20</sup> This is further linked with the recommendation that the State party ensure equality in the devolution of matrimonial property.<sup>21</sup> As well as legal prohibitions, the CEDAW Committee points to customary laws discriminating against women with regard to inheritance of land.<sup>22</sup> It also points to the plight of widows in some State parties who are subject to property dispossession or 'grabbing', often contrary to customary obligations to maintain widows and their children (CEDAW Committee 2013, para. 50). From the other direction, the absence of proper regulation of unmarried cohabiting couples may negatively affect the woman partner, particularly in relation to maintenance and the distribution of property on the cessation of the relationship.<sup>23</sup>

It is notable too that the committees do not consider that religious codes are a good reason for discriminatory family law. Thus in relation to the Philippines, the HRC recommends that the Government amend its Muslim personal laws to achieve equality for women.<sup>24</sup> Similarly, in relation to Pakistan, the CEDAW Committee expresses concern that under Muslim law, women have unequal rights with respect to inheritance, the dissolution of marriage and its economic

14 ICCPR, article 23 requires States Parties 'to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'. According to the ICCPR Reporting Guidelines for contracting States, States should report specifically on discrimination in the minimum age of marriage; unequal rights in marriage; equality in divorce arrangements, including custody of children; rules concerning acquisition or loss of nationality by reason of marriage; and polygamy and forced marriage (ICCPR. 2010. "Reporting Guidelines", op. cit., paras 38 and 95.)

15 HRC. 2012. "Concluding Observations the Philippines Fourth Periodic Report." CCPR/C/PHL/CO/4, para 12.

16 CEDAW, article 16, requires States to ensure the same rights for men and women to enter into marriage and freely choose a spouse, as well as the same rights during marriage and on its dissolution, including in respect of property ownership

17 For example, CEDAW Committee. 2012. "Concluding Observations Chile Combined Fifth and Sixth Periodic Report." CEDAW/C/CHL/CO/5-6, para 46-47.

18 CEDAW Committee. 2013. "Concluding Observations Angola Sixth Periodic Report." CEDAW/C/AGO/CO/6, para 35; CEDAW Committee. 2012. "Concluding Observations Togo Combined Sixth and Seventh Periodic Report." CEDAW/C/TGO/CO/6-7, para 40-41; CEDAW Committee. "Concluding Observations Pakistan Fourth Periodic Report." CEDAW/C/PAK/CO/4, para 2 and para 33-4; CEDAW Committee. 2012. "Concluding Observations Jordan Fifth Periodic Report." CEDAW/C/JOR/CO/5, para 49-50.

19 HRC. 2013. "Concluding Observations Angola First Periodic Report." CCPR/C/AGO/CO/1, para 11; HRC, the Philippines, op. cit., para 11; CESCR. 2012. "Concluding Observations Mauritania First Periodic Report." E/C.12/MRT/CO/1, 18; CEDAW Committee, Angola, op. cit., para 35-6.

20 CEDAW Committee, Togo, op. cit., para 39.

21 HRC, the Philippines, op. cit., para 12.

22 CEDAW Committee, Angola, op. cit., para 35; CEDAW Committee, Togo, op. cit., para 40-41; CEDAW Committee, para 2 and paras 33-4; CEDAW Committee, Jordan, op. cit., para 49-50.

23 CEDAW Committee. 2013. "Concluding Observations Austria Combined Seventh and Eighth Periodic Report." CEDAW/C/AUT/CO7-8, para 50; CEDAW Committee. 2012. "Concluding Observations Bahamas Combined First thru Fifth Periodic Report." CEDAW/C/BHS/CO/1-5, para 37-8; CEDAW Committee, Togo, op. cit., para 40.

24 HRC, the Philippines, op. cit., para 11.

consequences, and the guardianship of children, and asks the State party to enact legal provisions to ensure that, on dissolution of marriage, women have equal rights to property acquired during marriage.<sup>25</sup>

### **(b) Housing**

The importance of understanding the interlocking issues of power and resources in fleshing out the concept of substantive equality is highlighted by the Special Rapporteur on the right to housing, who emphasizes the ‘close connection that exists between the right to adequate housing and the right to equality’ since ‘adequate housing for women goes to the heart of social inequality and discrimination’ (HRC 2011). In her report she makes it clear that: ‘When a woman is unable to access adequate housing and land mainly because she is a woman, she is not only affected in terms of her immediate material needs, she is also relegated to a subordinate and dependent position within society because of her gender. Ensuring that women have access to and control over, vital resources such as housing and land is essential to challenging and changing gender power structures and patterns of gender inequality which continue to oppress, exclude and relegate women to the margins.’<sup>26</sup>

### **(c) Work: paid and unpaid**

How to detect and address inequality in relation to work, both paid and unpaid, has been central to the quest for substantive equality for women. The treaties on the face of it take a fairly formal equality view of this issue. Thus article 11(1) of CEDAW requires States only to ensure the ‘same’ rights for women and men in relation to the rights to work, to employment opportunities, to free choice of profession, promotion, job security and training, to equal remuneration, to social security and to protection of health and safety at work, including safeguarding reproduction. Article 3 of the ICCPR simply requires State parties to ‘ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant’. However, it is now well established that the same treatment for men and women is unlikely to bring about change. This is because the world of paid

work is modelled on a ‘male norm’, privileging those who are able to work full-time and continuously, and placing higher value on work that has been traditionally done by men. Thus in order to address women’s inequality, it is necessary to focus on the specificity of women’s disadvantage, particularly by recognizing the link between discrimination in the home and discrimination at work and the extent to which women’s primary responsibility for childcare and unpaid work in the home impacts on their ability to access good quality paid work. The extent to which this link is drawn is investigated below by considering the various bodies’ approaches to gender pay gaps, the informal sector, domestic workers, and unpaid work.

Concluding observations show that the treaty bodies have moved away from an equal treatment model of equality in the way that they deal with inequalities at work and are generally sensitive to the ways in which women’s disadvantage at work is interlinked with their position in the home, thus reflecting the dimension of substantive equality that aims to redress disadvantage. However, their recommendations are frequently limited to proposing that measures be taken to address this issue, without being more specific as to the kind of remedies needed.

**(i) Gender pay gap:** The tenacity of a gender pay gap in all the countries in the current reporting round is striking. Recent concluding observations repeatedly require States to take concrete measures to close the wage gap between men and women.<sup>27</sup> However, the nature of such measures is rarely specified. In addition, not enough attention is paid to the need to recognize that women’s disadvantage in the labour market needs to be addressed not just through labour market measures but also by paying more at-

<sup>25</sup> CEDAW Committee, Pakistan, op. cit., para 37.

<sup>26</sup> Ibid.

<sup>27</sup> HRC. 2013. “Concluding Observations Belize First Periodic Report.” CCPR/C/BLZ/CO/1, para 12; HRC. 2012. “Concluding Observations Germany Sixth Periodic Report.” CCPR/C/DEU/CO/6, para 8; HRC. 2012. “Concluding Observations Portugal Fourth Periodic Report.” CCPR/C/PRT/CO/4, para 4; HRC. 2013. “Concluding Observations Macao, China.” CCPR/C/CHN-MAC/CO/1, para 9; CEDAW Committee. 2013. “Concluding Observations Macedonia Combined Fourth and Fifth Periodic Report.” CEDAW/C/MKD/CO/4-5, para 31; CEDAW Committee. 2012. “Concluding Observations Bulgaria Combined Fourth thru Seventh Periodic Report.” CCPR/C/BGR/CO/4-7, para 33–4; CEDAW Committee, Togo, op. cit., para 33.

tention to women's burden in the home. The ICESCR reporting guidelines require countries to report on measures taken to reconcile personal, professional and family life,<sup>28</sup> but this issue is pursued less frequently in concluding observations. One good example of a substantive approach is in relation to Estonia, where the Committee recognizes the difficulty women face in reintegrating into the labour market and urges the State party to ensure the availability and affordability of day-care services.<sup>29</sup> Article 11(2) of CEDAW requires States to prohibit dismissal on grounds of pregnancy, as well as providing for paid maternity leave and 'encouraging the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities'. However, it does not require equal parental rights for fathers.

**(ii) Informal sector:** Women's disproportionate presence in the informal sector consistently across countries is a further symptom of the gendered distribution of labour in the home, which prevents women from competing on equal terms in the formal labour force. All the committees express concern at the specific disadvantage of informal workers, particularly in relation to lack of access to social security, employment protection or decent wages and conditions.<sup>30</sup> The ICESCR guidelines require State parties to provide information on the informal economy, and in particular on measures taken to ensure access of informal workers, especially older workers and women, to basic services and social protection (ICESCR 2008, para. 16). Although in the concluding observations in this study CESCR does not explicitly draw the connection with women's disadvantage, it consistently notes with concern the size of the informal sector

and the poor conditions of informal workers.<sup>31</sup> For example, in relation to Argentina, the Committee expressed concern at the conditions of work and minimum wages experienced in particular by outsourced workers, and women in domestic work, the textile industry and the agricultural sector.<sup>32</sup> In the United Republic of Tanzania, the CESCR recommended that measures be taken to increase the access of women to employment in the formal sector, in particular those living in rural areas.<sup>33</sup>

The CEDAW Committee expresses the most consistent concern at the concentration of women in the informal sector with no legal protection and no access to social security. For example, the Committee notes with concern that 56.6 per cent of the female working population in Mexico is engaged in the informal labour sector and hence lacks access to social security benefits,<sup>34</sup> while in Turkmenistan, 52.8 per cent of women work in the informal sector.<sup>35</sup> Similarly, in relation to Pakistan, the Committee is concerned at the situation of women working in the informal sector (agriculture, domestic and home-based work), in particular the fact that they are not recognized in the existing labour legislation as workers and as such are unprotected and do not have access to social security and benefits.<sup>36</sup> This is true too for Angola, Guyana, Samoa and Togo.<sup>37</sup> Also of concern to the Committee is the high proportion of women doing unpaid family work. Its response is generally to recommend the provision of a regulatory framework for the informal

28 ICESCR. 2008. "Reporting Guidelines." CESCR 41st Session. E/C.12/2008/2, para 20; CESCR. 2011. "Concluding Observations Argentina Third Periodic Report." E/C.12/ARG/CO/3, para 14.

29 CESCR. 2011. "Concluding Observations Estonia Second Periodic Report." E/C.12/EST/CO/2, para 14; see also CEDAW Committee, Macedonia, op. cit., para 31.

30 HRC, the Philippines, op. cit., para 9; CESCR, Argentina, op. cit., para 14.

31 CESCR. 2012. "Concluding Observations Cameroon Second and Third Combined Periodic Report." E/C.12/CMR/CO/2-3, para 14 and 18; CESCR. 2012. "Concluding Observations Ecuador Third Periodic Report." E/C.12/ECU/CO/3, para 15; CESCR, Ethiopia, op. cit., para 10; CESCR, Mauritania, op. cit., para 14. CESCR. 2012. "Concluding Observations United Republic of Tanzania First, Second and Third Combined Periodic Report." E/C.12/TZA/CO/1-3, para 9.

32 CESCR, Argentina, op. cit., para 14.

33 CESCR, United Republic of Tanzania, op. cit., para 9.

34 CEDAW Committee. 2012. "Concluding Observations Mexico Seventh and Eighth Combined Periodic Report." CEDAW/C/MEX/CO/7-8, para 28

35 CEDAW Committee. 2012. "Concluding Observations Turkmenistan Third and Fourth Combined Periodic Report." CEDAW/C/TKM/CO/3-4, para 32.

36 CEDAW Committee, Pakistan, op. cit., para 29.

37 CEDAW Committee, Angola, op. cit., para 29; CEDAW Committee, Togo, op. cit., para 32-33; CEDAW Committee, Pakistan, op. cit., para 29-30.

sector, with a view to providing women in this sector with access to social security and other benefits.<sup>38</sup> In a more concrete measure, the International Labour Organization (ILO) extended labour protections to homeworkers (who are predominantly women) in 1996 through Convention No. 177.

The committees have also been sensitive to the ways in which these issues are exacerbated for women with intersectional identities. For example, the CESCR expressed concern at the disparity in social security coverage in Ecuador: whereas 22 per cent of the total population is covered, this figure is only 12 per cent for indigenous women and 18 per cent for Afro-Ecuadorian women.<sup>39</sup>

**(iii) Domestic workers:** A similar pattern is evident in relation to domestic work. The CESCR pays particular attention to poor working conditions of domestic workers, again with the implicit acknowledgement of the specifically gendered nature of this disadvantage.<sup>40</sup> For example, in Ecuador, the law sets a lower minimum wage for domestic workers,<sup>41</sup> and in many countries domestic workers are simply excluded from minimum wage and other employment protection, as in Kuwait<sup>42</sup> and Qatar.<sup>43</sup> Kuwait is identified by the CERD Committee as of particular concern because of the type and extent of abuse suffered by domestic workers at the hands of their employers, police and immigration officers. Some have to remain in untenable abusive situations because they can only change employers after

three years.<sup>44</sup> Nor is legislation improving domestic workers' conditions sufficient: implementation and enforcement are crucial.<sup>45</sup>

The CEDAW Committee, in the concluding observations covered in this study, consistently expresses concern at the precarious situation and vulnerability of domestic workers. In the latest reporting round, this was particularly true for the Bahamas, Chile, Cyprus, Indonesia, Jamaica, Mexico, Pakistan and Togo. It is here that intersectional discrimination is particularly acute, with the vast majority of domestic workers being either migrant women, such as in Chile and Cyprus, or members of racialized groups. In Indonesia, it points to the persistence of child labour, in particular the situation of girl child domestic workers who work long hours, do not have access to education and may be subjected to violence, and the lack of effective and concrete measures to eliminate this phenomenon.<sup>46</sup> The same is true for Togo, where the Committee is deeply concerned about the exploitation of a large number of children, especially girls, in domestic work.<sup>47</sup> In this respect, the Committee's recommendations have been more specific. As well as placing particular emphasis on the extension of labour rights to domestic workers, it has helpfully stressed the importance of monitoring, inspection, enforcement and awareness-raising.

An extraordinarily important breakthrough was achieved in June 2011 when the Domestic Workers' Convention (C189) was overwhelmingly passed by members of the ILO. It came into force on 5 September 2013, having been ratified by the Plurinational State of Bolivia, Italy, Guyana, Mauritius, Nicaragua, Paraguay, the Philippines, South Africa and Uruguay. In an important attempt to achieve consistency and co-ordination between international human rights

38 CEDAW Committee, Angola, op. cit., para 30; CEDAW Committee. 2012. "Concluding Observations Guyana Seventh and Eighth Periodic Report." CEDAW/C/GUY/CO/7-8, para 31(b); CEDAW Committee, Mexico, op. cit., para 29(d); CEDAW Committee, Pakistan, op. cit., para 30(b); CEDAW Committee, Samoa, op. cit., 31(b); CEDAW Committee, Togo, op. cit., 33(b); CEDAW Committee, Turkmenistan, op. cit., para 33(b)

39 CESCR, Ecuador, op. cit., para 20.

40 CESCR, Argentina, op. cit., para 14; CESCR, Mauritania, op. cit., para 14.

41 CESCR, Ecuador, op. cit., para 15.

42 CERD Committee. 2012. "Concluding Observations Kuwait Fifteenth thru Twentieth Combined Periodic Report." CERD/C/KWT/CO/15-20, para 16.

43 CERD Committee. 2012. "Concluding Observations Qatar Thirteenth thru Sixteenth Combined Periodic Report." CERD/C/QAT/CO/13-16, para 13.

44 Ibid., para 23.

45 CEDAW Committee, Chile, op. cit., paras 30–31.

46 CEDAW Committee. 2012. "Concluding Observations Indonesia Sixth and Seventh Periodic Report." CEDAW/C/IND/CO/6-7, para 37.

47 CEDAW Committee, Togo, op. cit., para 32.

bodies, the CEDAW Committee regularly recommends that States ratify the Convention.<sup>48</sup>

**(iv) Role of unpaid work:** It is not only paid work but also unpaid work that is highlighted by the distributive dimension of substantive equality. The CEDAW Committee has drawn attention to the problem of unpaid work of women in family enterprises in rural and urban settings (1991a). It has also noted the need to measure and value the unpaid domestic work that women provide all over the world (1991b). This is made particularly clear by the Special Rapporteur on water, who makes specific reference to the ‘distributional dimensions of inequality’ as part of the principles of non-discrimination, equality and equity within the framework for advancing these rights (UN General Assembly 2012a, paras. 11 and 13). Thus she notes that ‘women and girls are overwhelmingly tasked with collecting water and are physically and sexually threatened when they fetch water’. True to the principles of substantive equality, she emphasizes that efforts to achieve goals on the provision of water and sanitation must target the most disadvantaged rather than focus on aggregate outcomes. Moreover, ‘while universality is about ensuring access for all, equality is about “levelling up” or working towards improving the quality and levels of service of groups that lag behind’ (ibid., para. 14). A rights-sensitive analysis identifies patterns of inequality in service provision (ibid., para. 18).

The crucial importance of recognizing the role of unpaid caring work in order to advance substantive equality for women has been most vividly highlighted in the 2013 report of the Special Rapporteur on extreme poverty (UN General Assembly 2013). She shows how the ‘heavy and unequal responsibility for unpaid care is a barrier to women’s greater involvement in the labour market’ (ibid., para. 8). Moreover, ‘the amount, intensity and drudgery of unpaid care work increase with poverty and social exclusion’ (ibid.,

para. 14). In particular, because of inadequate state provision of key infrastructure such as energy, water and sanitation, poor women and girls living in rural areas in developing countries spend large amounts of time collecting water and fuel. Indeed, studies show that women and girls in sub-Saharan Africa spend a shocking 40 billion hours a year collecting water, which the Rapporteur points out is equivalent to one year of work by the entire French workforce (ibid., para. 15).

#### **(d) Health and education**

Health is a further arena where the specificity of women’s disadvantage needs to be recognized as part of a substantive equality approach (CEDAW Committee 1999). The treaty bodies in the concluding observations in this study consistently refer to high maternal mortality rates, lack of access to birth assistants, particularly in rural areas, the prevalence of vesico-vaginal fistulas and the disproportionately high levels of women infected with HIV and AIDS.<sup>49</sup> The Special Rapporteur on the right to health has noted the discrimination in access to medicines for vulnerable and disadvantaged groups, including women and girls (UN General Assembly 2006). All of these entail an implicit recognition of the power structures causing and perpetuating women’s disadvantage. Similarly, the Special Rapporteur on extreme poverty has highlighted the impact of the disproportionate burden of unpaid work on the health of carers, who are predominantly women. As she points out: ‘There are limits to how much care a person can give without negative impacts on their own health. Thus, when public policies implicitly assume the free and limitless availability of unpaid care, and fail to take it into account by supporting, funding or provisioning care, this can have a major impact on the health of women caregivers and the quality of care that they are able to provide’ (UN General Assembly 2013, para. 43).

Women are also particularly disadvantaged in relation to education. The Special Rapporteur on education has noted that girls and women make up the majority of those facing discrimination in this

48 CEDAW Committee, Bahamas, op. cit., para 33(e); CEDAW Committee, Chile, op. cit., para 31(c); CEDAW Committee, 2013. “Concluding Observations Cyprus Sixth and Seventh Combined Periodic Report.” CEDAW/C/CYP/CO/6-7, para 28(c); CEDAW Committee, Indonesia, op. cit., para 38(a); CEDAW Committee, Pakistan, op. cit., 30(d) CEDAW Committee, Togo, op. cit., para 33(a).

49 For example, CEDAW Committee, Togo, op. cit., paras 34–35; CEDAW Committee, Pakistan, op. cit., paras 30–31.

area (HRC 2011b, para. 13). A human rights framework is critical in challenging the ‘multiple forms of discrimination which women and girls in vulnerable and marginalized situations suffer’. On the face of it, the human rights instruments tend to stress equal treatment in relation to education rather than taking a substantive approach. Thus CEDAW article 12 requires State parties to give women the same opportunities in relation to education as men, including the same conditions for access to studies, access to the same curricula and examinations and the same opportunities to benefit from scholarships and to participate actively in sports. On the other hand, there are important provisions in CEDAW that take a substantive perspective, especially a requirement to reduce female student dropout rates and increase access to family planning education. In applying these provisions, the CEDAW Committee is in a position to stress the more substantive aspects, in particular by highlighting women’s particular disadvantage. This can be seen, for example, in relation to Jordan, where the Committee raises concerns about the exclusion of young married women from schooling and the underrepresentation of women in post-secondary education in non-feminized areas such as technical-vocational training.<sup>50</sup>

The Special Rapporteurs have developed this further, pointing out that lack of education has a multiplier effect on other kinds of disadvantage. The Special Rapporteur on education has shown that gender inequities in education put girls at risk of HIV infection and rape due to their subordinate position (Commission on Human Rights. 2006, para. 17). Conversely, equal education is crucial to achieve substantive equality. Thus, the Special Rapporteur on the right to food has said that equal education of women is a key determinant of food security. Similarly, the Special Rapporteur on extreme poverty has shown the extent to which unpaid caring work can impinge on the education of girls, whether because they simply have less time for studying or because they are actually taken out of school to undertake unpaid care work, particularly where mothers are disabled or deceased (UN General Assembly 2013, para. 40).

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<sup>50</sup> CEDAW Committee, Jordan, op. cit., para 35.

## **(e) Poverty, access to resources and social security**

Although poverty affects both men and women, it is compounded for women by gendered inequality (UN General Assembly 2012a, para. 20). This can be seen in relation to key rights such as access to water and sanitation, and the right to food. This is particularly well demonstrated by the Special Rapporteur on water who explains: ‘When households share sanitation facilities, women and girls may be required by social norms concerning privacy to avoid using the facilities except during hours of darkness, when their personal safety may be at increased risk’ (ibid., para. 19).

This is exacerbated in the current financial crisis. Various UN-appointed human rights experts have noted the links between the global financial crisis, austerity and growing poverty facing women that is impacting on women’s access to employment and services. For example, the independent expert on foreign debt has called on States to address the unequal gender impacts of austerity including ‘reductions in public services, social security benefits, childcare facilities and public employment, and ... the increased level of unemployment among women’ (UN General Assembly 2012b, para. 23). He has also linked principles of equality, non-discrimination and participation as an approach to commenting on ‘the impact of foreign debt and related policy conditionalities on the realization of women’s rights, in particular their economic, social and cultural rights’ (ibid., para. 5). International financial institutions in relation to loans and conditionalities often fail to consider and address the needs of women (ibid., para. 20). Without this perspective, policies contribute to the ‘feminization of poverty and deepening gender inequality’ (ibid., para. 22). States should promote women’s involvement in development planning and decision-making related to debt management (ibid., para. 23). Moreover, ‘States should adopt temporary special measures to accelerate the equal enjoyment by women of all economic, social and cultural rights’ to address this situation’ (ibid.).

This is endorsed by the Special Rapporteur on extreme poverty, who emphasizes that ‘scarcity of resources

in times of economic hardship is not an acceptable justification for discriminatory measures or failing to implement anti-discrimination policies' (HRC 2011, para. 21). She adds that 'considering that gender inequality is a cause of and a factor that perpetuates poverty, effective recovery policies must take into account State obligations regarding gender equality and the protection of women's full range of rights' (ibid., para. 23). The ILO recently passed the Social Protection Floors Recommendation, which links the right to social security to the promotion of 'equal opportunity and gender and racial equality' (ILO 2012).

It is important in this context to bear in mind the interaction between the different dimensions of substantive equality. Redistributive measures are not in themselves sufficient to address gendered disadvantage. It is here that the transformative dimension should also come into play. Social security schemes that depend on contributions from continuous, full-time participation in the paid workforce will not benefit women with interrupted careers due to childcare obligations or women in precarious work or the informal sector. This aspect is sporadically highlighted by the various bodies. In relation to Austria, the CEDAW Committee expresses concern at social security pension systems based on contributions that are penalizing women who have taken childcare career breaks and part-time employment.<sup>51</sup> The HRC found violations of gender equality following a

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51 CEDAW Committee, Austria, op. cit., para 36.

complaint relating to social security in *Zwaan-de Vries v. the Netherlands*, where a married woman had more onerous conditions attached to her unemployment benefit claim than a married man.<sup>52</sup> An even more holistic approach is taken by the Special Rapporteur on the right to food, who stresses the importance of social protection and asset transfer programmes that are gender sensitive. Improved worker rights, access to employment, childcare and access to land, extension services and finance are crucial to address discrimination against women in relation to their rights to food (HRC 2012a).

#### **(f) Intersectional disadvantage**

Disadvantage is clearly compounded in relation to intersectional identity, particularly among indigenous and migrant women<sup>53</sup> and, in Europe, the Roma. The CERD Committee has noted that forms of racial discrimination may be specifically directed at women because of their race and gender. Examples include abuse of informal and domestic workers (CERD Committee 2000). Similarly the Special Rapporteur on extreme poverty shows how the 'discriminatory beliefs about marginalized ethnic minorities exacerbate their marginalization and are linked to the common overrepresentation of women of marginalized ethnic groups in low-paid unprotected work' (UN General Assembly 2013, para. 18).

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52 HRC. 1984. "Communication No. 182/1984." CCPR/C/OP/2 (1990).

53 For example, CEDAW Committee, Chile, op. cit., para 33.

## 2.2

# Addressing stigma, prejudice, stereotyping and violence

Redressing disadvantage does not fully capture all aspects of the inequality experienced by women. It is also crucial to take account of prejudice, denigration, stigma, stereotyping and violence on the ground of gender. This dimension is premised on the foundational value of dignity. It also draws on the helpful concept of recognition, developed by Fraser and Honneth from Hegel's notion that individual identities are constructed through mutual recognition. By using the concept of recognition to complement dignity, we acknowledge that the right to equality is more than an individual right but depends centrally on relationships between people within communities, and in particular on inequality in the mutual respect and concern that people feel for one another in society (Fraser and Honneth, 2003).

Dignity and recognition wrongs can be experienced regardless of relative socio-economic disadvantage but they can also compound it. Thus, for example, the stigma attached to welfare recipients or the poor increases their disadvantage. Similarly, dignity and recognition wrongs can cause disadvantage.<sup>54</sup> Undervaluing women's work is a recognition wrong that directly causes socio-economic disadvantage; hence the right to equal pay for work of equal value is an important synthesis of the first two dimensions of the right to equality: redressing disadvantage and addressing stigma and stereotyping. This step has been taken by both the CESCR and the CEDAW Committee. Thus the formal requirement in article 7 of ICESCR that women and men be given equal pay for equal work is interpreted substantively to require equal pay for work of equal

value.<sup>55</sup> The same is true for CEDAW.<sup>56</sup> However, many States do not take the step from a formal to a substantive approach. The CEDAW Committee regularly expresses its concern that equal pay provisions do not include the principle of equal pay for work of equal value for women and men.<sup>57</sup>

Recognition has been central to CEDAW's approach to equality. Under article 5, State parties are required to take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

<sup>54</sup> In *RKB v Turkey*, the CEDAW Committee found that court proceedings in relation to a labour matter were based on the 'stereotyped perception of the gravity of extramarital affairs by women, that extramarital relationships were acceptable for men and not for women and that only women had the duty to "refrain from even the slightest offence against morality"' (CEDAW/C/51/D/28/2010).

<sup>55</sup> ICESCR. 2008. "Reporting Guidelines", para 29; CESCR, Ecuador, *op. cit.*, para 15; CESCR, Estonia, *op. cit.*, para 14; CESCR, Ethiopia, *op. cit.*, para 11; CESCR. 2012 "Concluding Observations Iceland Fourth Periodic Report." E/C.12/ISL/CO/4, para 8; CESCR. 2011. "Concluding Observations Israel Third Periodic Report." E/C.12/ISR/CO/3, para 13; CESCR. 2012. "Concluding Observations New Zealand." E/C.12/NZL/CO/3, para 14; CESCR. 2012. "Concluding Observations Peru Second, Third and Fourth Periodic Report." E/C.12/PER/CO/2-4, para 9; CESCR. 2012. "Concluding Observations Second Periodic Report Slovakia." E/C.12/SVK/CO/2, para 14; CESCR. 2012. "Concluding Observations Fifth Periodic Report Spain." E/C.12/ESP/CO/5, para 13; CESCR. 2011. "Concluding Observations Turkmenistan." E/C.12/TKM/CO/1, para 12.

<sup>56</sup> CEDAW Committee, Macedonia, *op. cit.*, para 31; CEDAW Committee, Bahamas, *op. cit.*, para 33; CEDAW Committee, Chile, *op. cit.*, paras 32–33; CEDAW Committee. 2012. "Concluding Observations Equatorial Guinea Sixth Periodic Report." CEDAW/C/GNQ/CO/6, para 34.

<sup>57</sup> CEDAW Committee, Chile, *op. cit.*, para 32; CEDAW Committee, Pakistan, *op. cit.* paras 29–30.

## (a) Stereotyping

The CEDAW Committee's concluding observations in this study demonstrate the importance of addressing gender stereotyping in order to achieve substantive gender equality. For example, in relation to Macedonia, the Committee expresses its concern about the persistence of stereotypes that overemphasize the traditional role of women as mothers and wives, thus undermining their social status and their educational and professional careers. It notes with particular concern that the media persistently convey 'stereotyped and sometimes degrading images of women'.<sup>58</sup> It therefore calls on the State party to put in place a comprehensive policy to overcome stereotypical attitudes about the roles and responsibilities of women and men in society, and to take all appropriate measure to raise the media's awareness of the need to promote positive images of women actively participating in social, economic and political life and to encourage them, through self regulatory mechanisms, to address the degrading representation of women in the media.<sup>59</sup> Similarly, in relation to Austria, the Committee expresses its concern at the persistence of traditional stereotypes, including responsibility for childcare, which affect women's educational paths and ultimately reduce their chances in the labour market.<sup>60</sup> In relation to the Bahamas, Chile, Pakistan and other State parties, the Committee expresses its deep concern at the persistence of patriarchal attitudes and deep-rooted stereotypes, according to which men are considered breadwinners and women family caregivers.<sup>61</sup> Also highly problematic is the stigma and discrimination against women and girls in relation

<sup>58</sup> CEDAW Committee, Macedonia, op. cit., para 20.

<sup>59</sup> Ibid., para 21

<sup>60</sup> For example, CEDAW Committee, Austria, op. cit., para 22; CEDAW Committee, Bulgaria, op. cit., para 21–22; CEDAW Committee, Chile, op. cit., para 16; CEDAW Committee, Cyprus, op. cit., para 15; CEDAW Committee, Equatorial Guinea, op. cit., para 23; CEDAW Committee. 2013. "Concluding Observations Greece Seventh Periodic Report." CEDAW/C/GRC/CO/7, para 18; CEDAW Committee, Guyana, op. cit., para 20; CEDAW Committee. 2013 "Concluding Observations Hungary Seventh and Eighth Periodic Report." CEDAW/C/HUN/CO/7-8, para 18; CEDAW Committee. 2012. "Concluding Observations Jamaica Sixth and Seventh Combined Periodic Report." CEDAW/C/JAM/CO/6-7, para 27; CEDAW Committee, Mexico, op. cit., para 34.

<sup>61</sup> CEDAW Committee, Bahamas, op. cit., para 21; CEDAW Committee, Chile, op. cit., para 16–17, CEDAW Committee, Pakistan, op. cit., para 21.

to menstruation in many countries, as noted by the Special Rapporteur on water (UN General Assembly 2012a, para. 20).

The ways in which stigma and stereotyping can themselves compound disadvantage are given particularly helpful attention by the Special Rapporteur on extreme poverty in her report on unpaid care work. As she points out: 'Owing to gender stereotypes related to family and work, such as "male breadwinners", "women as carers/nurturers", this generally means that women assume the bulk of the work, to the detriment of their human rights enjoyment' (UN General Assembly 2013, para. 8). Indeed, she argues 'The unequal distribution of unpaid care work is highly reflective and determinative of power relations between women and men. Discriminatory gender stereotypes, which construe women as second-class citizens whose place is in the home, cause and perpetuate this unequal distribution of work, rendering women's equal enjoyment of rights impossible. Addressing care responsibilities is thus an essential component of the obligations of States to ensure gender equality at home, work and in society more broadly' (ibid., para. 13).

## (b) Education: the role of stereotyping

The CEDAW Committee, in the concluding observations explored in this study, has also consistently recognized the role stereotyping in education plays in perpetuating women's disadvantage. According to CEDAW article 10(c), States should take all appropriate measures to ensure 'the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.' This too is reflected in the concluding observations. Thus in relation to several countries, the Committee expresses its concern at the existence of gender stereotypes in school textbooks.<sup>62</sup> In relation to Austria, the Committee recommends that the State party improve the gender awareness of teaching personnel to the ways in which

<sup>62</sup> CEDAW Committee, Angola, op. cit., para 27; CEDAW Committee, Togo, op. cit., paras 30–31.

gender stereotypes are reproduced through various aspects of schooling.<sup>63</sup> The Special Rapporteur on the right to education has noted the negative impact of gender stereotyping that ‘keep[s] girls in a position of subordination and hinders their participation in the dynamics of schooling’ (Commission on Human Rights 2006, para. 16). The Special Rapporteur on extreme poverty puts it even more strongly: ‘Entrenched gender stereotypes about the place of women in the home and the family, and the unpaid care work girls and women are expected to perform throughout their lives, often deprive women and girls of time, autonomy and choice to exercise this right’ (UN General Assembly 2013, para. 39).

### (c) Gender-based violence

A further issue that reflects the crucial role of the recognition dimension concerns gender-based violence, which is shockingly pervasive throughout the world. Legislation criminalizing assault, murder and other forms of violence against the person is standard across States. But its pervasive lack of application to gender-based violence reflects a deep-seated negation of women as persons, the antithesis of recognition. This in turn both stems from and reinforces gendered power relations in society. The international treaty bodies have robustly endorsed this dimension of equality in their expectation that State parties enact legislation specifically dealing with domestic and other gender-based violence, prohibiting such vicious practices as female genital mutilation (FGM),<sup>64</sup> breast ironing,<sup>65</sup> acid throwing, stove burning, honour killing,<sup>66</sup> sexual violence at school<sup>67</sup> and at work and rape as a result of conflict.<sup>68</sup> General legislation criminalizing assault is not considered sufficient: specific legislation is

required, such as making domestic violence specifically punishable by law.<sup>69</sup>

At the very heart of the negation of women as worthy of equal respect is the refusal by many States to criminalize marital rape.<sup>70</sup> At the other end of the continuum is sexual harassment at work, the recognition of which has been a direct result of the development of substantive equality, but which many countries still do not address.<sup>71</sup> Abuse and sexual harassment of girls at schools function as major barriers to the education of young girls and women.<sup>72</sup> This then compounds women’s disadvantage. Recognition issues are compounded for women with intersectional identities, such as Maori women in New Zealand, Aboriginal women in Canada<sup>73</sup> and women with disabilities,<sup>74</sup> against whom violence abounds.

The need to eliminate stigma, prejudice and stereotyping does not end, however, with criminalization. In the concluding observations reviewed in this study, the treaty bodies consistently stress the importance of the need to change attitudes, among both the community in general and those responsible for compliance. Thus even in countries that have enacted legislation against gender-based violence, the persistence of such violence has prompted the treaty committees to insist on effective law enforcement through investigation, conviction, punishment and compensation, together with national awareness campaigns or ‘sensitization’ among the population and systematic training of

63 CEDAW Committee, Austria, op. cit., para 22.

64 CESCR, Cameroon, op. cit., para 20.

65 Ibid. ‘Breast ironing’, or ‘flattening’, aims to stem the growth of the breasts in the hope that it will help prevent unwanted male attention and delay a girl’s sexual activity. It is usually carried out by the mother or another member of the family, sometimes, even the girl herself. For some mothers the alternative for their daughters seems much worse. The average age of rape victims in Cameroon is 15’ (Hall 2013).

66 CEDAW Committee, Pakistan, op. cit., para 21.

67 CESCR, Ecuador, op. cit., para 21.

68 HRC. 2012. ‘Concluding Observations Bosnia and Herzegovina Second Periodic Report.’ CCPR/C/BIH/CO/2, para 8.

69 HRC, Macao, China, op. cit., para 18; CESCR, Peru, op. cit., para 10; CESCR. 2012. ‘Concluding Observations Bulgaria Fourth and Fifth Periodic Report.’ E/C.12/BGR/CO/4-5, para 15; CESCR, Estonia, op. cit., para 20; CESCR, Iceland, op. cit., para 15; CESCR, Israel, op. cit., para 18.

70 CESCR, Cameroon, op. cit., para 20; CESCR, Ethiopia, op. cit., para 14.

71 HRC, Macao, China, op. cit., para 18; CESCR, Cameroon, op. cit., para 20; CESCR, Slovakia, op. cit., para 16.

72 CEDAW Committee, Togo, op. cit., paras 30-31.

73 CERD Committee. 2012. ‘Concluding Observations Canada Nineteenth and Twentieth Combined Periodic Report.’ CERD/C/CAN/CO/19-20, para 17; CESCR, New Zealand, op. cit., para 18.

74 CPRD Committee. 2012. ‘Concluding Observations Argentina First Periodic Report CRPD/C/ARG/CO/1, para 29; HRC. 2013. ‘Concluding Observations Hong Kong, China Third Periodic Report.’ CCPR/C/CHN-HKG/CO/3, para 57; HRC, Macao, China, op. cit., para 90. [pls check-fixed]

public officers involved.<sup>75</sup> For example, in relation to Iceland, the CESCR expressed its concern at persisting attitudes and stereotypes leading to violence against women.<sup>76</sup> Similarly in relation to Estonia, the CESCR noted with concern the absence of large-scale awareness-raising campaigns on domestic violence in the country's development plan for the reduction and prevention of violence, and recommended that 'the State party conduct media campaigns targeting all segments of the population with a view to changing the society's attitudes regarding domestic violence.'<sup>77</sup> The CEDAW Committee has highlighted the particular challenges faced by migrant women and their heightened vulnerability to sexual harassment, abuse and physical violence.<sup>78</sup>

Similarly, the CEDAW Committee expressly makes the connection between misrecognition and violence when it points to the ways in which stereotypes contribute to the persistence of violence against women.<sup>79</sup> It points this out in relation to Togo with reference to violent and harmful practices including polygamy, forced and early marriage, FGM and bondage.<sup>80</sup> Similarly, in relation to Greece, it notes that patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men perpetuate discrimination against women and girls and are reflected in the persistence of violence against them.<sup>81</sup> Lack of recognition also means that fewer women are able to report their experience of violence. In addition, the Committee notes with concern that despite the criminalization of FGM, it remains highly prevalent in rural areas in Ethiopia. As well as recommending proper enforcement, it urges the State party to raise awareness among women and girls to

encourage reporting of criminal acts and, equally important, to ensure that those to whom they report provide adequate assistance.<sup>82</sup> In Pakistan, although honour killing is now criminalized, perpetrators are often pardoned, or not prosecuted and punished under the Qisas and Diyat ordinances, which allow private parties to pursue their grievances through retribution and vengeance.<sup>83</sup>

Perhaps the strongest antithesis of the principle of recognition of people as worthy of respect comes from human trafficking, which is compounded in the case of women when overlaid with sexual violence or compulsion and forced prostitution. All the committees repeatedly express their concern at the extent of human trafficking, particularly among women and girls for sexual exploitation.<sup>84</sup> This includes internal trafficking as in Pakistan where children, especially girls, are then subjected to bonded labour, domestic servitude and child marriage.<sup>85</sup> Here too, the committees see part of the solution lying in public awareness campaigns,<sup>86</sup> in addition to proper policing, reparations and shelters.

#### **(d) Stigma, stereotyping, prejudice and violence as compounding material disadvantage**

In this context, as with others, it is important to see the ways in which the different dimensions of equality need to work together. All the committees are highly aware of the importance of the role of stereotyping and prejudice in sustaining disadvantage within marriage. It is not sufficient to change the law: there also needs to be an underlying change

75 HRC, Angola, op. cit., para 10; HRC, Belize, op. cit., para 15; HRC, Hong Kong, China, op. cit., para 18; CESCR, Bulgaria, op. cit., para 15; CESCR, Cameroon, op. cit., para 20; CESCR, Peru, op. cit., para 14.  
 76 CESCR, Iceland, op. cit., para 15; CESCR, Israel, op. cit., para 18.  
 77 CESCR, Estonia, op. cit., para 20.  
 78 CEDAW Committee, 2009. "General Recommendation No 26 on women migrant workers." CEDAW/C/2009/WP.1/R.  
 79 CEDAW Committee, Bahamas, op. cit., para 21. Also see V.K. v Bulgaria, CEDAW/C/49/D/20/2008; Vertido v The Philippines, CEDAW/C/46/D/18/2008.  
 80 CEDAW Committee, Togo, op. cit., para 21.  
 81 CEDAW Committee, Greece, op. cit., para 18; CEDAW Committee, Indonesia, op. cit., para 23.

82 CESCR, Ethiopia, op. cit., para 14.  
 83 CEDAW Committee, Pakistan, op. cit., para 22.  
 84 HRC, Angola, op. cit., para 17; HRC, Belize, op. cit., para 17; HRC, the Philippines, op. cit., para 18; HRC, Macao, China, op. cit., para 13; HRC, Hong Kong, China, op. cit., para 20; CESCR, Peru, op. cit., para 20; CESCR, Slovakia, op. cit., para 19; CESCR, Turkmenistan, op. cit., para 17; CERD Committee, 2012. "Concluding Observations Republic of Korea Fifteenth and Sixteenth Combined Periodic Report." CERD/C/KOR/CO/15-16, para 16; CERD Committee, 2011. "Concluding Observations Maldives Fifth thru Twelfth Periodic Report." CERD/C/MDV/CO/5-12, para 12; CEDAW Committee, Angola, op. cit., para 21.  
 85 CEDAW Committee, Pakistan, op. cit., para 23.  
 86 CESCR, Slovakia, op. cit., para 19; CEDAW Committee, Pakistan, op. cit., para 23.

in the ways in which women are regarded within the culture. Thus in relation to several countries, the CEDAW Committee recommends that the State party sensitize traditional leaders on the importance of eliminating discriminatory practices such as polygamy and early marriage and put an end to customary laws that discriminate against women in relation to the inheritance of land.<sup>87</sup>

Similarly, the Special Rapporteur on the right to food has highlighted that women face multiple forms of discrimination in accessing land (HRC 2012a, para. 15). He notes that inheritance laws discriminate against women in many countries, but that discriminatory social and cultural norms prevail even where these are removed. He gives the following example: 'Where a sister could inherit land on an equal basis with her brothers, she may accept a lump-sum payment in lieu of her portion of the land in order to maintain good relations with her brothers'. The Special Rapporteur on the right to housing has also identified the lack of equality in inheritance laws, customs and traditions that lead to harsh impacts on women's housing rights (HRC 2011a, para. 8). Inequality in relation to marital property has the same effect (*ibid.*, paras. 9–10).

Lack of recognition of women's unpaid work also affects laws dealing with land acquired during marriage. The Special Rapporteur on the right to food notes that in some regions, particularly in South Asia, 'a separation of property regime is applied, according to which assets brought into the marriage or acquired during marriage remain the individual property of the spouse who acquired said assets from his or her personal funds' (HRC 2012, para 15). This leads to 'deeply inequitable outcomes, as it does not recognize the important non-monetary contribution that women make to the household by looking after the house, child-rearing, caring for the elderly, or various other chores' (*ibid.*, para. 15).

Violence and material disadvantage mutually aggravate each other in a vicious downward cycle. The

Special Rapporteur on the right to housing, pointing to the link between violence against women in the home and violations of women's housing rights, has urged that women victims of domestic violence be able to access emergency shelter, transitional accommodation and social housing when forced to leave their homes (HRC 2011a, para. 19). The Special Rapporteur on extreme poverty and human rights has noted that gender-based violence and sexual harassment may act as barriers to women's participation in social protection programmes and has recommended monitoring and accountability mechanisms be built into such programmes to take account of these realities (UN General Assembly 2010, para. 64).

Stigma, stereotyping, prejudice and violence also compound material disadvantage in relation to health. In particular, socio-cultural norms need to be recognized as barriers to women's basic health care.<sup>88</sup> This is stressed in relation to maternal mortality by the Special Rapporteur on health, who has linked the provision of health services to issues of substantive gender discrimination in practice: 'Preventing maternal mortality and enhancing access to maternal health care is not simply about scaling up technical interventions or making the interventions affordable. It is also vital to address social, cultural, political and legal factors which influence women's decisions to seek maternal or other reproductive health-care services. This may require addressing discriminatory laws, policies, practices and gender inequalities that prevent women and adolescents from seeking good quality services' (UN General Assembly 2006, para. 17).

Stigmatization is particularly problematic when it is officially sanctioned by the State, through the criminal law. One of the key areas in which this can be seen is in relation to sexual and reproductive health. As the Special Rapporteur on the right to health puts it, 'where the criminal law is used as a tool by the State to regulate the conduct and decision-making of individuals in the context of the right to sexual and reproductive health the State coercively substitutes its will for that of the individual' (UN General Assembly 2011, para. 12).

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87 CEDAW Committee, Angola, *op. cit.*, para 36; CEDAW Committee, Togo, *op. cit.*, para 41.

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88 CEDAW Committee, Togo, *op. cit.*, para 35.

Such laws both stigmatize and compound women's disadvantage. Thus, he states: 'The causal relationship between the gender stereotyping, discrimination and marginalization of women and girls and their enjoyment of their right to sexual and reproductive health is well documented. Criminalization generates and perpetuates stigma; restricts their ability to make full use of available sexual and reproductive health-care goods, services and information; denies their full participation in society; and distorts perceptions among health-care professionals which, as a consequence, can hinder their access to health-care services. Criminal laws and other legal restrictions disempower women, who may be deterred from taking steps to protect their health, in order to avoid liability and out of fear of stigmatization. By restricting access to sexual and reproductive health-care goods, services and information these laws can also have a discriminatory effect, in that they disproportionately affect those in need of such resources, namely women. As a result, women and girls are punished both when they abide by these laws, and are thus subjected to poor physical and mental health outcomes, and when they do not, and thus face incarceration' (ibid., para. 17).

The Special Rapporteur on water has paid particular attention to the role of stigma in perpetuating discrimination: 'Identifying human rights violations as rooted in stigma demands an exploration of the origins of discrimination and other human rights violations. To start, speaking openly about what seems "unmentionable" can act as an eye-opener, precisely because stigma is instrumental in propagating silence and imposing a culture of invisibility and shame, allowing human rights violations to continue unabated and with impunity' (HRC 2012b, para. 6).

Stigmatized people such as homeless people and women who are menstruating or suffering from

obstetric fistula are often perceived as 'dirty' (ibid., para. 13). Menstruation is often associated with negative cultural practices such as: 'the seclusion of women and girls, reduced mobility, dietary restrictions, and/or women and girls being required to use different water sources or prohibited from preparing food for others during menstruation – practices that are often deeply rooted in sociocultural and patriarchal interpretations of religious prescriptions. Even where such restrictions are not followed, women and girls may continue to harbour internalized stigma and are embarrassed to discuss menstruation. The lack of privacy for cleaning and washing, the fear of staining and smelling, and the lack of hygiene in school toilets are major reasons for being absent from school during menstruation, and have a negative impact on girls' right to education' (ibid., para. 25.)

### **(e) Intersectionality**

Issues of stigma and stereotyping are particularly salient in relation to multiple identities, where it is easy for the intersectional identity to be invisible. The CERD Committee notes that racial discrimination may primarily affect women, or affect them in different ways or to a greater degree than men in some circumstances. Examples include sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict and the coerced sterilization of indigenous women (CERD Committee 2000, paras. 1–2). The CEDAW Committee recommends greater recognition of multiple forms of discrimination faced by certain women on grounds of sexual orientation, gender identity, indigenous origin or being HIV/AIDS positive.<sup>89</sup> In *Kell v Canada*, the CEDAW Committee found that an aboriginal woman's property rights were violated when she fled her home following domestic violence.<sup>90</sup>

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89 CEDAW Committee, Chile, op. cit., paras 16–17.

90 CEDAW/C/51/D/19/2008.

## 2.3

### Accommodation and transformation

This dimension is challenging for equality law. It entails accommodation of difference and changes in structures that impede women's equality. This requires careful distinctions to be drawn between differential treatment that entrenches women's disadvantage and that which advances equality. Thus 'special measures' for women advance women's equality but 'protective' legislation, such as excluding women from work deemed unsafe, is more problematic. This distinction appears clearly in the CESCR's Concluding Observations on Turkmenistan. Noting with concern that certain professions are not accessible to women on the ground of protecting their physical well-being, it instead recommends that current obstacles for women in employment be reviewed and that the country adopt temporary special measures to promote the access of women to all types of employment and occupation.<sup>91</sup> The HRC has said that the ICCPR requires State parties to 'not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women' (HRC 2000, para. 3). The CESCR has adopted the term 'substantive equality' and has said that laws, policies and practices of State parties may perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities experienced by women (CESCR 2005).

The Special Rapporteur on the right to food has given particular emphasis to a transformative approach as part of a human rights-based strategy to address gender discrimination. He notes that: 'As long as we simply recognize the role of women in the "care" economy by accommodating their specific needs, the existing division of roles within the household and associated gender stereotypes will remain in place, and could even be reinforced. Redistributing roles and challenging the associated gender stereotypes require a transformative approach, whereby the support provided to women not only recognizes their specific needs, but provides the opportunity to

question existing social and cultural norms' (HRC 2012a, para. 18). He explains that this transformative approach, supported by the language of CEDAW, requires that women's special needs are simultaneously accommodated while traditional gender divisions are subverted.

#### (a) Temporary special measures

Temporary special measures are a key aspect of the transformative dimension of substantive equality. This dimension is stressed by the HRC with surprising robustness in relation to under-representation of women in politics and in the public and private sectors, where State parties are regularly urged to institute temporary special measures to address the problem.<sup>92</sup> Article 4(1) of CEDAW requires State parties to make it clear that temporary special measures aimed at accelerating de facto equality between women and men should not be considered discriminatory, but they should be discontinued when the objectives of equality of opportunity and treatment have been achieved. (This contrasts with special measures, such as those aimed at protecting maternity, which should not be temporary – article 4(2).) Although temporary special measures are permissive, rather than mandatory, the CEDAW Committee encourages State parties to take such measures in order to correct under-representation of women in any area in which it occurs, particularly in relation to the inclusion of women in decision-making. This should include 'outreach and support programmes, quotas and other pro-active and result-oriented measures aimed at achieving substantive equality of women with men in all areas'.<sup>93</sup> Even when some special measures, such as quotas for women in the National Assembly, are in place, the CEDAW Committee will encourage such measures to be used more widely in all areas in which women are under-represented or disadvantaged.<sup>94</sup>

<sup>91</sup> CESCR, Turkmenistan, op. cit., para 12.

<sup>92</sup> HRC, Angola, op. cit., para 9; HRC, Belize, op. cit., para 12; HRC, Bosnia and Herzegovina, op. cit., para 10; HRC the Philippines, op. cit., 9; HRC. 2013. "Concluding Observations Peru Fifth Periodic Report." CCPR/C/PER/CO/5, para 9; see also CESCR, Mauritania, op. cit., para 11; CESCR, Slovakia, op. cit., para 11.

<sup>93</sup> CEDAW Committee, Angola, op. cit., para 15–16.

<sup>94</sup> CEDAW Committee, Togo, op. cit., para 18–19.

## (b) Reproduction

Transformation requires an acknowledgement of the extent to which existing structures perpetuate inequality, and therefore that simply requiring like treatment will only assist those who can conform to existing structures. Instead, difference must be accommodated by changing structures. This is most salient in relation to women's reproductive role. While pregnancy and childbirth are uniquely female, childcare and parenting are not. Substantive equality requires stereotypical expectations in relation to childcare to be dislodged while insisting that pregnancy and childbirth receive specific treatment. This has been acknowledged by the committees in the attention paid to women's reproductive health, abortion, contraception, early marriage and teenage pregnancy. Thus it is recognized that control over their own reproduction is central to women's ability to participate on equal terms in society.

For the ICCPR, this is achieved by interpreting the right to life from the perspective of substantive equality. Thus the Reporting Guidelines on article 6, the right to life, require States to provide information on birth rates and pregnancy and childbirth-related deaths of women, as well as measures taken to help women prevent unwanted pregnancies and to ensure they do not have to undergo life threatening clandestine abortions (ICCPR 2012). In the concluding observations examined in this survey, all the committees frequently expressed concern at the absolute ban on abortions and the lack of availability of free contraception, and stress the right to reproductive health.<sup>95</sup> In *LC v Peru* the CEDAW Committee required the State party to provide an appropriate legal framework for therapeutic abortion providing for rapid decision-making to avoid risk to the pregnant mother. This decision related to a situation where a 13-year-old girl, pregnant following rape and injured after an attempted suicide,

95 HRC, the Philippines, op. cit., para 13; HRC, Peru, op. cit., para 14; CESCR, Argentina, op. cit., para 22; CESCR, Bulgaria, op. cit., para 20; CESCR, Cameroon, op. cit., para 22; CESCR, Ecuador, op. cit., para 28; CESCR, Peru, op. cit., para 2; CESCR, United Republic of Tanzania, op. cit., para 24; CEDAW Committee, Macedonia, op. cit., para 33; CEDAW Committee, Angola, op. cit., para 27; CEDAW Committee, Chile, op. cit., paras 34–35; CEDAW Committee, Pakistan, op. cit., paras 31–32; CEDAW Committee, Jordan, op. cit., para 39–40.

was not given an abortion that could have prevented her from becoming permanently disabled.<sup>96</sup>

For both the CESCR and the CEDAW Committee, a gendered reading of the rights to health and education lead to specific attention to reproductive rights, teenage pregnancy and maternal mortality.<sup>97</sup> This also has specific ramifications for women in relation to HIV and AIDS. Thus the CEDAW Committee points to the disproportionately high number of women in Angola living with HIV and AIDS and the need for more effective implementation of national strategies on combating the spread of the virus.<sup>98</sup>

A further aspect of transformation, mentioned above in relation to recognition, concerns the importance of addressing and changing stereotypical roles in society. For example, changes in the law on birth control are recognized as being insufficient on their own and should be supplemented by education and awareness-raising programmes on the significance of using contraceptives and the right to reproductive health.<sup>99</sup>

From an intersectional perspective, the issue of free choice of contraception manifests itself in the opposite direction: preventing forced sterilization. Thus in the concluding observations in this study the CRPD Committee consistently calls for States to insist on informed choice on the part of women with disabilities in relation to both abortion and sterilization.<sup>100</sup> In other countries, such as Peru, forced sterilization was used as part of a campaign of eugenics and population control against poor and ethnic minority women, a crime for which, by 2012, victims had not received reparation.<sup>101</sup>

96 CEDAW/C/50/D/22/2009.

97 CEDAW Committee, Bulgaria, op. cit., para 36; CEDAW Committee, Chile, op. cit., paras 34–35.

98 CEDAW Committee, Angola, op. cit., para 27–28.

99 HRC, the Philippines, op. cit., para 13; HRC, Peru, op. cit., para 14; CESCR, Slovakia, op. cit., para 25; CESCR, United Republic of Tanzania, op. cit., para 24.

100 CRPD Committee. 2012. "Concluding Observations Argentina First Periodic Report." CRPD/C/ARG/CO/1, para 31–32; CRPD Committee. 2012. "Concluding Observations China First Periodic Report." CRPD/C/CHI/CO/1, para 33–34; CRPD Committee. 2011. "Concluding Observations Spain First Periodic Report." CRPD/C/ESP/CO/1, paras 37–38.

101 HRC, Peru, op. cit., para 13.

### (c) Education

A third key issue for the transformational dimension of substantive equality concerns the right to education. This is transformational at a fundamental level: education itself gives girls and women the potential to change structures of oppression through attaining skills allowing them to enter the paid labour force and unravel structures of domination. For example, in Ethiopia, the CESCR noted with concern the very low literacy rates in rural areas, particularly among women and girls, as well as the gender gap in enrolment. It recommended that the State party should take urgent steps generally to increase primary school enrolment and particularly to address the gender gap.<sup>102</sup>

But education itself needs to be changed to accommodate the specific disadvantage experienced by women. Particularly important is the need to accommodate pregnant learners.<sup>103</sup> This can be done both by reducing teenage pregnancies and by providing support services, including measures to enable pregnant girls and women to continue their studies.<sup>104</sup> Thus in relation to the United Republic of Tanzania, the CESCR notes that the high dropout rate from secondary education is due in part to expulsions following positive mandatory pregnancy tests and early marriage. It recommends that mandatory pregnancy testing be abolished and expulsions due to pregnancy prohibited.<sup>105</sup> The CEDAW Committee similarly stresses the need to eliminate the practice of early marriage and to enable young women to stay in school during pregnancy and to return to school after giving birth.<sup>106</sup> Another issue is the need to train female teachers.<sup>107</sup>

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102 CESCR, Ethiopia, *op. cit.*, para 26; CESCR, Peru, *op. cit.*, para 26.

103 HRC, Belize, *op. cit.*, para 23.

104 CESCR, Bulgaria, *op. cit.*, para 20; CESCR, Cameroon, *op. cit.*, para 22; CESCR, Estonia, *op. cit.*, para 24; CESCR, Peru, *op. cit.*, para 21; CEDAW Committee, Angola, *op. cit.*, para 27; CEDAW Committee, Chile, *op. cit.*, paras 28–29.

105 CESCR, United Republic of Tanzania, *op. cit.*, para 27.

106 CEDAW Committee, Angola, *op. cit.*, para 27; CEDAW Committee, Togo, *op. cit.*, para 30; CEDAW Committee, Pakistan, *op. cit.*, paras 27–28.

107 CESCR, Ethiopia, *op. cit.*, para 26; CEDAW Committee, Pakistan, *op. cit.*, para 28.

### (d) Work/life balance

The final key aspect of a transformative approach is to insist on changes to working patterns in order to facilitate women's ability to enter the paid labour force on more equal terms. This requires policies on childcare, parental leave and working time, as the CEDAW Committee recognizes. Thus in relation to Macedonia, it is concerned that the lack of such policies forces women into part-time and low-paid work and reinforces the unequal division of family responsibilities between women and men.<sup>108</sup> Similarly, in relation to Chile (and other State parties), the CEDAW Committee recommends increased efforts to assist women and men to strike a balance between family and employment so that they can both adequately share domestic and childcare tasks.<sup>109</sup>

Crucial for the transformation of women's role in childcare is to ensure not only that women are not prejudiced at work by pregnancy and maternity, but also that men are included in childcare. The ICESCR reporting guidelines under article 5 (the right to family) require States to give information on the system of maternity protection in the workplace, and in particular whether it applies to women involved in atypical work. It also asks whether paternity leave is granted to men and parental leave to both men and women (ICESCR 2008, para. 36), an issue that is also stressed by the CEDAW Committee.<sup>110</sup>

The CEDAW Committee also encourages a transformative approach to the problem of poverty among older women caused by interruptions in their pension contributions due to childcare responsibilities. Contracting States are urged not just to rectify disparities in the pension system resulting from the different roles of women and men in childcare, but also to change existing structures by intensifying efforts to facilitate the re-entry of mothers into the labour market after childbirth and encouraging men to share responsibility for childcare.<sup>111</sup> The

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108 CEDAW Committee, Macedonia, *op. cit.*, para 31.

109 CEDAW Committee, Chile, *op. cit.*, paras 16–17.

110 CEDAW Committee, Bulgaria, *op. cit.*, para 34.

111 CEDAW Committee, Austria, *op. cit.*, para 37; CEDAW Committee, Chile, *op. cit.*, paras 36–37.

CESCR has also stressed the need for State parties to take steps to eliminate the factors that prevent women from making equal contributions to social security schemes – for example, intermittent participation in the workforce on account of family responsibilities and unequal wage outcomes (CESCR 2007, para. 32).

### (e) Trafficking

The transformative approach to equality is particularly noticeable in the CEDAW Committee's approach to human trafficking, where it recommends not just proper enforcement but also the need to 'address the root causes of prostitution of women and girls, including poverty, in order to eliminate their vulnerability to sexual exploitation and trafficking, and strengthen efforts for the rehabilitation and social reintegration of victims'.<sup>112</sup>

## 2.4

### Agency and voice: the participative dimension

The participative dimension of substantive equality operates in several different ways. The first relates to the extent to which women are represented in the workforce, particularly in higher grades and in traditionally male-dominated areas. In this context, the participative and redistributive dimensions operate closely together. The second concerns women's participation in decision-making and power structures in society, whether representative, bureaucratic or corporate. The third is closer to a notion of social inclusion and is concerned with the extent to which women are participants in community life or are secluded in the household, or are otherwise invisible. In all these areas, but particularly the first two, there is inevitably a focus on numerical outcomes, with the aim being to increase numbers of women in higher grades or in decision-making. Care therefore needs to be taken to read this dimension together with the redistributive,

<sup>112</sup> CEDAW Committee, Angola, op. cit., para 21; CEDAW Committee, Togo, op. cit., para 25; CEDAW Committee, Chile, op. cit., paras 40–41.

### (f) Intersectionality

As in other areas, it is those women with intersectional identities that need particular attention. Thus the CEDAW Committee has expressed particular concern at the notably high dropout rates of Roma girls and women in some State parties. Here too it is not enough simply to espouse a policy of equal access: a more transformative approach is needed that, in the words of the CEDAW Committee, requires States to address barriers to the education of women and girls, including negative cultural attitudes and excessive domestic duties, and to implement re-entry policies.<sup>113</sup> In *Alyne da Silva Pimentel Teixeira (deceased) v Brazil* the CEDAW Committee found that Ms da Silva Pimentel Teixeira's death following inadequate obstetric care was discrimination on the basis of sex in conjunction with her status as a woman of African descent and her socio-economic background. The Committee required Brazil to put in place training of medical, judicial and law enforcement personnel on women's reproductive rights.<sup>114</sup>

recognition and transformational dimensions. For example, an increase in women in higher grades of an occupation might coincide with a lowering of status, thus decreasing both the redistributive and recognition measures of substantive equality and possibly negating the gains in the participative dimension. Alternatively, more women might be employed in higher grades without changing male-dominated working hours, so that childcare is simply delegated to other low-paid women. In this way, the participative and even redistributive measures might be improved but no transformational gains will be made.

The Special Rapporteur on extreme poverty and human rights argues for a human rights-based approach to participation that addresses the empowerment of people to engage in decision-making that affects their lives. The principles underlying the right

<sup>113</sup> CEDAW Committee, Macedonia, op. cit., para 30; CEDAW Committee, Bulgaria, op. cit., para 31.

<sup>114</sup> CEDAW/C/49/D/17/2008.

to participation are dignity, non-discrimination and equality (HRC 2013a, para. 5). 'Poverty is not solely a lack of income, but rather is characterized by a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce each other' (ibid., para. 4). The vicious cycle means that 'the greater the inequality, the less the participation; the less the participation, the greater the inequality' (ibid., para. 5). Lack of participation is both a cause and consequence of poverty. Poverty is itself a ground of discrimination, but people living in poverty often experience other forms of discrimination based on, for example, gender, disability, ethnicity, and so on.

Gender equality must be a special focus in designing, implementing and monitoring participatory processes (ibid., para. 11). Participation requires the elimination of power differentials by challenging systemic inequalities. Thus, participation, as part of the four-dimensional substantive equality framework, requires similar attention to the other dimensions – redressing disadvantage, addressing stigma, prejudice and stereotyping, and transformation – because without these, inequality persists and full participation cannot occur. Particular attention must be paid to the underlying gender relations of the groups or individuals involved. States should take into account the different experiences of women and men and gender power relations in the community. They must recognize the multiple forms of discrimination that women experience and address women's specific needs throughout the different phases of their life cycle. Participatory processes must also acknowledge the responsibilities of care providers without reinforcing patterns of discrimination and negative stereotyping.

Participatory processes should focus on those most marginalized and excluded. The process of identifying vulnerable groups should involve a gender analysis and 'members of both sexes must be given the chance to represent their views, including, if necessary, through specially targeted consultations (for example, women-only spaces) and support' (ibid., para. 12). Care responsibilities, illiteracy and personal safety are some of the factors that affect the accessibility of participatory measures for women.

The principle of the interdependence of rights means that the right to participation is linked to many of the civil and political rights such as expression, assembly and access to justice and also to social and economic rights such as education, health and water, the environment and the rights of indigenous peoples. All of these are closely related to rights to non-discrimination and equality.

So far as greater representation in decision-making is concerned, care needs to be taken to ensure that greater numbers of women in decision-making in fact increase their influence on decisions. In countries with strong familial kinship structures, it is possible that the presence of women is as a proxy for their husbands or male relatives. If this is the case, an increase in representation would not contribute to the transformative or redistributive dimensions of substantive equality. There is also a risk, particularly in relation to greater representation, that women might be essentialized and assumed to be in a position to speak for or represent all women. Yet there may be significant diversity among women with different intersectional identities, such as older women, women from ethnic minorities, lesbian women, religious women or women with disabilities. In addition, women's representatives may sometimes hold conservative views on gender issues. As discussed above, the participation dimension must interact with the other dimensions of substantive equality to ensure that gender inequality is fully addressed.

All the treaty bodies take the participative dimension seriously, although they generally use a broad-brush approach to the different strands of the question. The ICCPR reporting guidelines require States to report on 'the proportion of women in positions of responsibility in both the public and the private sector and the measures taken to promote the representation of women in Parliament and in senior positions in Government as well as in the private sector' (ICCPR 2010, para. 38). Concluding observations covered in this study regularly express concern that women remain under-represented in public and political affairs, particularly in the government and judiciary, and State parties are urged to strengthen their efforts to increase this participation, if necessary through temporary special

measures.<sup>115</sup> The emphasis on numerical monitoring is reflected in consistent encouragement of States to collect and present disaggregated statistical data, which are often lacking, particularly in the private sector.<sup>116</sup> Yet the importance of combining such measures with structural change or a transformative dimension could receive more attention.

One important example is seen in the HRC's disappointment in relation to Bosnia and Herzegovina, where, despite the introduction of quotas requiring parties to nominate at least 30 per cent of women candidates and incentives for parliamentary funding for political parties with women's representation in the Parliamentary Assembly, women remain under-represented in legislative and executive bodies at all levels of government.<sup>117</sup> Nor does representation in the public sector necessarily signal participation in the private sector. Thus in relation to Germany, the HRC likewise expressed its disappointment that, while noting progress made to promote equality between women and men in Parliament and the judiciary, the representation of women in leading positions in the private sector remained low.<sup>118</sup> Regarding Jordan, while commending the introduction of a quota of 25 per cent of women in local government, the CEDAW Committee was concerned that similar strategies were not being used in other areas including employment and education.<sup>119</sup>

The Working Group on the issue of discrimination against women in law and in practice has produced a special report on women's political representation (HRC 2013b). It finds that despite commitments at the international level, progress is still very slow in improving women's representation (*ibid.*, paras. 6–8).

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115 HRC, Angola, *op. cit.*, para 9; HRC, Belize, *op. cit.*, para 12; HRC, the Philippines *op. cit.*, para 9; HRC, Portugal, *op. cit.*, para 4; HRC, Peru, *op. cit.*, para 9; CESCR, Mauritania, *op. cit.*, para 11; CESCR, Slovakia, *op. cit.*, para 11.

116 HRC, Angola, *op. cit.*, para 9; HRC, Belize, *op. cit.*, para 12.

117 HRC, Bosnia and Herzegovina, *op. cit.*, para 10.

118 HRC, Germany, *op. cit.*, para 8.

119 CEDAW Committee, Jordan, *op. cit.*, para 21.

At present there is an average of 20 per cent of women in the national parliaments of the world, and women's representation in government is far lower than their representation in parliament. They account for 27 per cent of the judiciary. Special measures, including quotas, are necessary to achieve equality between women and men by addressing structural disadvantage faced by women. But greater numbers of women representatives are not sufficient to advance gender equality in society. Broader participation of women and autonomous women's organizations are critical to the achievement of policy that advances substantive equality between women and men. Undemocratic practices at local levels such as patronage and corruption prevent transparency and accountability and reduce women's effective participation (*ibid.*, para. 12). Similarly, exemption for certain religious and indigenous communities that prevent women from holding leadership positions may limit women's representation. 'Stereotypes of female inadequacy in politics continue to be used as a basis for their marginalization and segregation in decision-making positions' (*ibid.*, para. 16).

### ***Intersectionality***

The effect of intersectionality on political representation is emphasized by the Working Group, which shows that additional discrimination on the grounds of race, caste, ethnicity, etc. can also lead to 'multiple stereotyping'. This is particularly true for disability. The CRPD Committee stresses the need for meaningful participation of people with disabilities, particularly the involvement of children and women with disabilities in the design of legislation and in other matters affecting them (2010, paras. 8–9). The CERD Committee notes that women may lack access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in the private sphere (2000, para. 2). The CEDAW Committee has pointed to obstacles to participation faced by older women such as lack of identification and transportation as well as mandatory lower retirement ages (2010, para. 17).

## 2.5 Evaluation and discussion

The above analysis illustrates that the four-dimensional framework of substantive gender equality set out in the first part of this paper is implicitly followed in the recent observations and recommendations of the human rights treaty bodies and special procedures mandate holders. These groups and individuals routinely locate their work on gender equality within the four dimensions set out above, even if this is not always explicitly stated. This is an encouraging trend as it reflects a deep understanding within the human rights system of the need for a sophisticated approach to equality to achieve far-reaching change in challenging complex inequalities. This evaluation now highlights some of the key areas where the treaty bodies are consistently strong in relation to women's rights. It also considers those issues where these bodies might give greater or more sustained attention in addressing gender equality. Thereafter, we briefly discuss some of the possibilities and limits of international human rights in achieving concrete changes to women's lives and look at some of the strategic considerations that inform a politics around women's rights.

The analysis of the pronouncements of the treaty bodies discussed above demonstrates that various core issues related to women's rights are mentioned consistently. Thus, equality in marriage is referred to specifically in the ICCPR (article 23) and CEDAW (article 16). Women's representation in political structures is also a regular concern of the HRC and the CEDAW Committee. There is overlap between the CESCR and the CEDAW Committee on some of the major social and economic rights, such as health and education.<sup>120</sup> Women's rights in relation to housing, social security, food and water are also increasingly gaining the attention of the committees and special mandate holders. Many of the CESCR general comments make specific reference to gender equality and women's issues in relation to the particular right concerned (CESCR 1997, para 10; 2000, paras. 20 and 21; 2003, para 16; 2006, para 13; 2007, para 32). The rights of women workers in

both the formal and informal sectors are of ongoing concern to the HRC, CESCR, CEDAW Committee and CERD Committee.<sup>121</sup> Feminist campaigning and sustained advocacy on issues of violence against women and reproductive rights has led to regular and strong statements by the various committees on these issues. The consistent approach by the committees to these core areas reflects a deepening understanding of the complex nature of gender inequality and its many manifestations in different countries of the world. Substantive equality requires close attention to context as a full picture of the impact of inequality is often necessary to highlight the hidden nature of disadvantage. The UN treaty body system, with its detailed study of country reports and individual complaints as well as the country visits of special mandate holders, is well suited to this type of inquiry. In many instances the committees – and the CEDAW Committee in particular – are playing a valuable role in exposing public/private divisions that relegate women to a subordinate status in every country of the world.

There are, however, some areas where treaties and their interpretive bodies could be delving more deeply into forms of gender inequality and providing clearer direction to countries on their substantive equality obligations. The above analysis has attempted to systematize the responses of the international human rights institutions according to a framework that reflects the demands of substantive equality. However, the bodies themselves rarely reflect on or articulate the principles driving their responses. We have shown that these principles are nascent and can be made explicit. But, without a conscious attempt to articulate and develop these principles, there will always be gaps and inconsistencies and the potential to continually evolve will remain unfulfilled. Three areas of particularly weakness are highlighted here. The first is a content issue – the failure to adequately acknowledge or address women's unpaid work. The second is

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<sup>120</sup> Discussed above in section 2.3.

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<sup>121</sup> Discussed above in section 2.1.

an issue of scope and co-ordination – the capacity of the treaty system to develop systemic responses to global and national macroeconomic concerns relating to women’s rights. And the third is an issue of application and remedy – the extent to which the treaty bodies are applying substantive equality to require ‘levelling up’ in situations where gender inequality is present so as to achieve more transformative outcomes.

### **(a) Unpaid work**

The most glaring content gap in the treaty bodies’ approach to gender equality is in the area of women’s unpaid work, particularly in relation to household reproduction and care. While the preamble to CEDAW talks about the ‘sharing of responsibility between men and women and society as a whole’ this is not operationalized in the body of the Convention other than in the reference to support for parents in the workplace. In fact, these references reinforce the idea of work as being paid work outside of the home. As discussed above, the CEDAW Committee has tried to address this gap in the Convention in two general recommendations.<sup>122</sup> The first deals with women’s unpaid work in family enterprises (CEDAW Committee 1991a). The second focuses on measuring and valuing women’s unremunerated domestic activities in national accounts (CEDAW Committee 1991b), but it fails to consider mechanisms to address the imbalance between women and men in the household or to remunerate women for such work. While this recommendation was a progressive attempt to ‘count’ women’s unpaid work in the home, it failed to take the more radical leap in the direction of social restructuring that would address this underlying and pervasive global phenomenon. Moreover, the CESCR, in two general comments on the right to work (2006) and the right to social security (2007), fails to use these statements as an opportunity to call for the recognition and remuneration of women’s unpaid work. The ILO’s Social Protection Floor Recommendation also fails to recognize women’s unpaid work – it sees social security as a worker’s right rather than a human right (Darooka 2012).

Some of the special rapporteurs have identified the inequality inherent in women’s unpaid work and their responsibilities for household reproduction and care. The recent report by the Special Rapporteur on extreme poverty on unpaid care work is a notable contribution (UN General Assembly 2013). She notes that: ‘Even human rights advocates and monitoring bodies have so far paid little sustained attention to the human rights implications of unpaid care work. This is highly problematic, given that care not only contributes to well-being, social development and economic growth but also has an enormous impact on the enjoyment of human rights of both caregivers and care receivers’ (ibid., para. 4). Thus, greater efforts are needed within the treaty body system to shift male-oriented definitions of work and to require fundamental restructuring of work and care.

### **(b) Macroeconomic analysis**

A focus on the scope of the treaty system’s mandate and purview reveals some limitations in its capacity to pronounce on the macroeconomic forces at State and international level that impact on gender inequality. The committees are to some extent constrained by their functions of interrogating rights compliance within specific countries. This means that they may not always be able to adduce patterns at regional or global levels where, for example, multinational companies are playing a negative role in relation to acquisition of land, harm to the environment or poor employment practices that have particularly harsh impacts on women in the affected countries. The general recommendations/comments are one way in which the committees can address this gap and there have been some important statements on States’ international obligations of cooperation and assistance, although these are not specifically ‘gendered’ (for example, CESCR 2007, paras. 52–58). The committees do, however, provide some valuable insights in their concluding observations on the impact of economic measures. For example, the CEDAW Committee has recently found that austerity measures and cuts to services are having a negative impact on women (particularly older women and women with

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<sup>122</sup> Ibid.

disabilities) in the United Kingdom.<sup>123</sup> The Committee has recommended that ‘spending Reviews (should) continuously focus on measuring and balancing the impact of austerity measures on women’s rights’. The special mandate holders tend to be better placed to analyse the systemic impact of macroeconomic policy. As mentioned, the independent expert on the effects of foreign debt has made a number of important statements linking gender inequality to debt and policy conditionality as well as austerity.<sup>124</sup> Similarly, the Special Rapporteur on extreme poverty has reminded States of their obligations regarding gender equality in response to economic crisis.<sup>125</sup> The Special Rapporteur on the right to food has recommended gender-sensitive agricultural policies, including those relating to land and finance (HRC 2012a, paras. 30–36).

A more comprehensive approach might be achieved through joint inquiries and general recommendations/comments developed by multiple committees such as the CEDAW Committee, the CESCR and the Committee for the Migrant Workers Convention on specific themes such as the rights of women migrant workers.<sup>126</sup> The committees could also consider developing a set of reporting guidelines for States to more fully report on the impact of their macroeconomic policies on women within their countries and beyond their borders. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, drawn up by a group of independent human rights experts, might be of assistance to the committees in defining the global responsibilities of States in the area of economic and social rights.<sup>127</sup> These principles extend

to the role of non-state actors such as multinational corporations that operate under the direction or the control of States.<sup>128</sup> Principles of non-discrimination and equality, including gender equality, inform the obligations of States to fulfil social and economic rights extraterritorially.<sup>129</sup>

### (c) Remedies: levelling up

The treaty bodies do not always take full advantage of the transformative potential of substantive equality in requiring States to introduce measures that target women’s disadvantage by providing special access to benefits and services that are needed to support women to participate fully in society. As mentioned, the Special Rapporteur on water has noted that ‘while universality is about ensuring access for all, equality is about “levelling up” or working towards improving the quality and levels of service of groups that lag behind’.<sup>130</sup> ‘Levelling up’ is about bringing the disadvantaged up to the level of those who are better off to achieve uniformity rather than lowering the level of those with more. While it is an important concept, it has not been used widely by the treaty bodies. For example, although as we have seen much emphasis is placed on the importance of equal pay for work of equal value for women and men, it is rarely made explicit that women’s pay should be increased to that of men.

A particularly challenging issue has been that of ‘protective legislation’, or measures that prohibit the employment of women in certain jobs that are thought to pose a specific danger to them. ILO Conventions have prohibited night-work for women since 1919 (ILO 1919) and underground work in mines for women since 1935 (ILO 1935). In recent decades, there has been strong opposition to such restrictions on the grounds that they breach the equality principle. However, this has led to two quite contradictory responses. The UK Government, with few exceptions,

123 CEDAW Committee. 2013. “Concluding Observations United Kingdom Seventh Periodic Report.” CEDAW/C/GBR/CO/7, paras 20–21.

124 Discussed above in section 2.1.

125 Ibid.

126 Note that the CEDAW Committee and the Committee on the Rights of the Child (CRC) are working on a joint general recommendation on harmful practices, see CEDAW Committee. 2011. “Joint CEDAW-CRC General Recommendation/Comment on Harmful Practices.”

127 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (29 February 2012), Maastricht Centre for Human Rights, Maastricht University.

128 Ibid., para. 12.

129 Ibid., para. 32(c).

130 Discussed above in section 1.8. The CEDAW Committee has encouraged Austria to ensure ‘levelling up’ measures are included in its anti-discrimination legislation: CEDAW Committee, Austria, op. cit., paras 10–11.

simply repealed the protective legislation, thereby withdrawing protection from women without achieving any corresponding benefits for either women or men. By contrast, the European Commission declared specifically that ‘equality should not be made the occasion for a dis-improvement of working conditions for one sex’ (European Commission 1987).<sup>131</sup> The ILO adopted a new convention on night work in 1990 that applies to both women and men. Recognizing that the question of night-work affects all workers, both in respect of their own health and their family obligations, the Convention specifies that special measures should be taken to include minimum protection for night-workers’ health and to assist them to meet family and social responsibilities (ILO 1990).

While the idea of ‘levelling up’ may imply a process of changing unequal conditions over time, this should

not mean that States have space to avoid implementing such measures immediately. Equality and non-discrimination rights in the international treaties require immediate realization. This is a stronger standard than applies to the social and economic rights in ICESCR that must be progressively realized by States (to the maximum of their available resources). Thus, where social and economic provision is occurring unevenly in a country and women are disproportionately disadvantaged in relation to such provision, the State is required to immediately provide special access to women (or certain groups of women facing multiple or intersectional disadvantage). Treaty bodies should be more forceful in requiring States to develop programmes to address women’s disadvantaged access to housing, health services, work and basic services (to name but a few of the areas of inequality in many countries).

## 2.6

### The possibilities and limits of human rights for gender equality

International human rights law – and in particular CEDAW and the work of the CEDAW Committee – has led to many tangible and positive changes around women’s rights in the laws and policies of countries around the world. This has often been due to the determination of NGOs in using concluding observations to push their governments to introduce reforms in countries such as Fiji, India, Kyrgyzstan Morocco, Nepal and Thailand (Byrnes 2013: 60–61). While this valuable impact is acknowledged, it is also important to note the ways in which women’s human rights fail to penetrate the terrible and unfair circumstances of millions of the world’s women and girls. First, there are a number of States that refuse to ratify human rights treaties. Second, even where they do, some enter reservations that question their commitment to the treaties and reduce their accountability on important women’s rights. Third, while submitting to the treaty committees, some States fail to report or take unconscionably long to do so. Fourth, even where they do report, some ignore committee recommendations,

implement them in a half-hearted way or introduce laws without the resources to ensure their proper implementation.<sup>132</sup> Fifth, where States undertake reforms to laws and policies, these do not always filter down to the intended beneficiaries. Women often lack access to the means to enforce laws due to lack of resources, ignorance, illiteracy and numerous other such barriers. Sixth, committee scrutiny and recommendations and subsequent legal changes do not always manage to confront the deeply embedded social, economic and cultural structures that enable gender inequalities and harms.

This last point relates to scepticism about the capacity of law in general and human rights in particular to produce fundamental transformation of society.<sup>133</sup> Some feminist writers have suggested that women’s rights work within the human rights system

<sup>131</sup> See further Fredman 1997, pp. 304–308.

<sup>132</sup> For some suggestions to improve the effectiveness of the CEDAW Committee in enforcement, see Farha 2008, p. 568.

<sup>133</sup> See, for example, Kennedy 2002; Brown 2004. For a critical feminist analysis of international human rights law see Engle 2005; MacKinnon 2006, pp. 1–14.

sometimes fails to unsettle underlying gender stereotypes within human rights law or even perpetuates these (Otto 2005; Kapur 2002).

The reality is that human rights often fail to reach those for whom they are intended. We know that despite 50 years of the International 'Bill of Rights' and 30 years of CEDAW, women still earn less than men in every society of the world, violence against women is similarly prevalent in every country and women and girls fare poorly on many other indicators such as health and education (Otto 2010: 346). Responses to these challenges entail a combination of politics from within the human rights system and framework and politics outside of it.

Feminists engage within the human rights system in a range of ways: International women's NGOs and networks campaign and lobby UN bodies in developing general comments/recommendations and other such position statements. National NGOs representing different groups of women, sometimes in coalition, prepare alternative or 'shadow' reports when their governments report to UN committees. These shadow reports often provide critical information and analysis to counter their governments' versions. They enhance accountability internationally but also nationally where the reporting process enables domestic conversations between civil society advocates and government officials. NGO consultations with community-based women in preparing shadow reports provide an opportunity to educate women on human rights and ensure their voices are heard at national and international levels. In addition, NGOs provide support to individuals

who wish to raise complaints under optional protocol mechanisms. The special rapporteurs also rely on local groupings within countries to point to on-the-ground problems. The Paris Principles (1993) that create international standards for National Human Rights Institutions (NHRIs) have led to the establishment or strengthening of many such bodies in countries around the globe. NHRIs can, and often do, play an important role in holding national governments to account on human rights issues. Women's groups at local level engage with these bodies to address domestic human rights violations. Such groups also challenge their governments to introduce laws consistent with and enabling of human rights. Many countries have adopted constitutional rights and legislation based on international human rights that provide a basis for recourse to courts and political structures by women's groups and individuals within countries. These and other mechanisms ensure that rights have meaning for women's lives and are an important component of strategies used by the women's movement around the world.

A broader politics outside of the human rights system is clearly essential for the women's movement. While human rights treaty processes often focus on individual state compliance, transnational feminists are able to contest global politics outside of what Nancy Fraser describes as the 'state-territorial frame' (Fraser 2008: 112). International activism that exposes the gender inequalities produced by global economic and political forces can support a more integrated focus on the national and international within the human rights treaty system.

3.

## USING THE EQUALITY FRAMEWORK TO EVALUATE SOCIAL AND ECONOMIC POLICY AND PROVISION

The above analysis illustrates that the four-dimensional framework of substantive gender equality set out in the first part of this paper is implicitly followed in the recent observations and recommendations of the human rights treaty bodies and special procedures mandate holders. These groups and individuals routinely locate their work on gender equality within the four dimensions set out above, even if this is not always explicitly stated. This is an encouraging trend as it reflects a deep understanding within the human rights system of the need for a sophisticated approach to equality to achieve far-reaching change by challenging complex inequalities.

This last part of the report reflects on the ways in which the four-dimensional approach to equality can be used as a tool to evaluate social and economic policies and their impact on women. This type of evaluation can provide direction, within a human rights-based approach to law, policy and development, for the reformulation of social programmes that contribute to gendered transformation. The application of the equality approach will focus, by way of example, on social security programmes in two different contexts and consider whether these are advancing gender equality and how they might be better aligned to substantive equality goals.

The current interest in introducing or expanding social security in many parts of the developing world is

a welcome step in the fight against poverty and in the realization of human rights. At the same time, some developed countries are reducing social security programmes as part of 'austerity' approaches to financial challenges facing their economies, or in some cases, as part of an older process of scaling back welfare programmes for a combination of financial and ideological reasons. In both developed and developing contexts, social security programmes are increasingly taking the form of 'conditional cash transfer' programmes. These programmes see social security as a means of linking social policy objectives, such as increasing school and clinic attendance, to poverty reduction. This is done by imposing conditions, usually on mothers, to take their children to school or health clinics in order to qualify for social security payments.

As Aber and Rawlings put it: ‘The more traditional view of social assistance (transfers as a handout in times of need to alleviate poverty) has begun to evolve into a new view of social assistance as a dynamic where protection is complemented by dynamic, tailored support to develop the human capital needed to move out of poverty. The use of incentives to affect individual investments, spur effective practices among providers, and leverage mobility out of poverty are increasingly being applied within this new paradigm’ (2011: 17).

These developments require examination within a rights framework to determine whether States are realizing the human right to social security and whether this right is being provided equality to women and men, as demanded by international human rights law. To do so, the following section uses the four-dimensional equality approach to evaluate (1) conditional social assistance programmes and (2) cutbacks to existing social security programmes from the perspective of substantive equality for women.

Before beginning this examination, the terminology used here is briefly discussed. ‘Social security’ as a human right is defined as: all benefits, whether in cash or in kind, provided to protect against ‘(a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; and, (c) insufficient family support, particularly for children and adult dependents’ (CESCR 2007, para 2). Social security takes a range of forms

including social insurance (generally involving contributions by individuals, employers and sometimes the state) and social assistance, usually provided by the state from tax revenue to certain categories of people, often based on need. Transfers may take the form of cash or some other benefit or may be provided as tax credits. Cash transfers may be provided unconditionally to all eligible groups or on the basis of certain conditions being met by the recipients. As mentioned, conditional cash transfers (CCTs) have increased in popularity in many developing countries. CCTs differ from public works programmes where governments promise a wage in return for labour provided by those involved in the programme. In CCTs conditions may involve attendance at clinics, the delivering of children to schools, participation in courses and so on. Lastly, social protection should be distinguished from social security since both terms are used in the development and human rights literature, often interchangeably. For the purpose of this discussion, social protection is given the meaning provided by the ILO (2012) in its recommendation for social protection floors: “nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion”. Ensuring social protection floors requires a basic level of social security as well as other basic services such as education to be provided in countries that do not yet have minimum levels. The ILO recommends that, at the same time, other countries should extend existing social security provision at higher levels to a wider number of people.

### 3.1 Conditionalities

Social security benefits in advanced welfare states have generally had gendered consequences. Contributions-based benefits privilege those who can work continuously and full-time throughout their working life in the formal sector. Yet women have remained primarily responsible for childcare and therefore tend to have an intermittent relationship with the labour market or to predominate in the informal labour market. The result is that women have

been consistently disadvantaged in their ability to access contributions-based social welfare benefits or social insurance. This is true too for means-tested benefits. In particular, means testing based on household income ignores the fact that women may not have equal access to resources within the family (Fredman 1997; HRC 2009).

In recent years, the perception of women as secondary citizens in relation to welfare rights appears to have reversed. Instead, it is women who are the focus of many modern social welfare programmes. Because the evidence shows that women are likely to prioritize their children's welfare in using available resources, they are now seen as the main vehicle for poverty alleviation and therefore the main recipients of welfare rights (Fiszbein and Schady 2011: 4). Recent CCTs in many parts of the world including Latin America, Mexico, Africa, Asia – and even the city of New York – require mothers to bring children to clinics, ensure school attendance and attend workshops on nutrition and other topics as a condition for receipt of benefits. Older CCTs such as workfare programmes found in North America, Australia, the United Kingdom and elsewhere require mothers to enter the workforce or engage in retraining as a condition for receiving assistance. Although CCTs appear to have some positive impacts on poverty, feminist critiques of CCTs suggest that these programmes add to women's burdens while failing to challenge the existing inequalities that require women to perform the bulk of household labour and care work (Chant 2008; Molyneux 2006).<sup>134</sup>

States are required to realize the right to social security equally for women and men in terms of article 3 of ICESCR. This means that social security measures must be evaluated both in terms of their general compliance with human rights and in terms of their specific compliance with gender equality guarantees in international human rights law. The four-dimensional equality framework enables us to evaluate particular CCT programmes from the perspective of gender equality and to propose appropriate modifications.<sup>135</sup>

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<sup>134</sup> It should be noted that there is a wide-ranging and nuanced debate on the gender impact of CCTs that cannot be considered in detail here. For a recent summary of this debate and the evidence, as well as some interesting conclusions see: Holmes and Jones 2013, Chapter 3. The authors develop a gender-based 'transformative social protection framework' for examining social protection. In a similar vein, see: Waring et al. 2013. The authors also take a gendered approach to transformative social protection but place greater stress on the centrality of human rights in achieving this end.

<sup>135</sup> This section is drawn from Fredman 2013b.

## (a) Redressing disadvantage

Evaluating programmes on this dimension requires us to examine not just generalized distributive gains but also the particular redistributive issues that affect women, such as the distribution of power within the family and the distribution of time. Both require careful evaluation. The World Bank argues that 'attaching strings to the transfers by mandating specific human capital investments could strengthen the mother's bargaining position and reinforce her ability to shift household spending and time allocation decisions' (Fiszbein and Schady 2011: 59). However, there is also evidence suggesting that if women bring more resources into the family, men withhold more of their own resources for personal consumption. Similarly, CCTs might worsen time poverty, an aspect of poverty that is particularly gendered. A study by the United Nations Development Programme (UNDP) of 22 countries in both the developed and developing world found that women work more hours overall than men, and that for women, unpaid reproductive labour accounted for 66 per cent of their work, compared to 24–34 per cent of that of men (Chant 2008: 179, citing Rodenberg 2004). This is particularly marked among low income groups: '... the poorer the household, the longer women work' (ibid.). Given the extensive demands on women's existing time, conditions may well increase women's disadvantage by intensifying their burdens. CCTs often require women to spend time meeting programme conditions when they are already overstretched in terms of both paid work and household responsibilities. Where conditions are particularly unyielding, this can lead to loss of social security benefits for women.

Clearly too, the amount of the cash transfer, and its net value to the woman once time burdens are accounted for, would make a difference to its effect. It is therefore important that claims to redress gender-based disadvantage through making mothers the recipients of cash grants should be supported by clear evidence that the transfer is indeed empowering. On the other hand, the imposition of conditions is by its nature disempowering. Empowerment in this context should include the enhancement of agency, based on improving the range of genuinely feasible choices open to

women. Conditions could only empower women in this sense if they enabled her achieve her own purposes in the face of resistance from her family. There is no evidence that this is how they function: instead, the evidence points, as we have seen, to limitations on choice and agency. Indeed, research seems to suggest that if empowerment of women is indeed the aim, it is far better achieved by giving resources to women without conditions. Thus research by Patel et al. into the Child Support Grant in South Africa, which until very recently was unconditional, found that giving women resources enhanced their power and control over household decision-making in financial matters and general household spending on child well-being (Patel et al. 2012). In evaluating CCT programmes, therefore, it is important to consider whether the cash transfer could achieve the same objectives without attaching onerous conditions.

### **(b) Redressing stigma, stereotyping and prejudice**

CCTs are problematic in that they are based on the central premise that it is mothers who are the primary child-carers and should therefore be required to deliver the conditions relating to child health or education. Moreover, they assume that, without conditions, some mothers will not take rational steps to enhance their family's well being (Bradshaw 2008: 198–199). In addition, enforcement of conditions can involve punitive measures and close surveillance and monitoring that can be harmful to women's dignity and autonomy. Conversely, CCTs may serve to marginalize fathers since the programmes assume that men will not be committed to addressing the developmental needs of their families.

### **(c) Transformation**

CCTs, by assuming that mothers are better suited to take responsibility for their children's welfare, are inherently non-transformative. Instead of finding ways of involving men in greater responsibility for their families, they reinforce existing gender inequalities in the division of labour in the household and society. CCTs also divert attention from the need to address the structural constraints facing women and men living in poverty. The real reasons for failure to attend school or

health clinics need not be tackled, and yet these may be centrally related to gender disadvantage. For example, girls may not attend school because of safety concerns. More generally, as Sepúlveda and Nyst have pointed out, conditionalities might reinforce poor service provision, in that users are unable to opt out or otherwise exercise pressure for change but instead are dependent on service providers to sign off on their eligibility for receiving grants.<sup>136</sup> A transformative approach would focus on mechanisms to address basic needs rather than transferring the blame for poverty onto the misbehaviour of welfare recipients. While unconditional cash transfers may be transformative in lifting women out of the structural conditions of disadvantage that prevent them from fully engaging in the workforce and society, the conditions included in CCTs do not seem to be helpful in achieving change.

### **(d) Participation**

Unconditional social assistance gives women choice and agency in determining what they and their households need. Conversely, conditions seem to remove women's autonomy by requiring them to behave in defined ways or lose their benefits. In addition, poor women are rarely adequately involved in determining the types of social security programmes that might best meet their needs.

It is important to note that CCTs may impact most harshly on marginalized women within the broader group of poor women at which they are aimed. Thus, for example, indigenous women may have less opportunity to meet the conditions imposed in transfer programmes because of their geographical location further from services or because of racial or other discriminatory attitudes of officials administering such programmes.

Magalena Sepulveda, the independent expert on human rights and extreme poverty (writing with Carly Nyst) has stressed that human rights are not conditional and should be provided as entitlements without demanding certain behaviours in exchange (Sepúlveda and Nyst 2012: 500). She has recommended that 'protections must be put in place to ensure that

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<sup>136</sup> Sepúlveda and Nyst 2012: 48–52.

conditionalities do not create an unnecessary burden on women, expose them to abuse, or perpetuate traditional gender stereotypes within recipient households' (ibid.). Cash transfers must also take care to redress specific gender disadvantage. She has also warned against conditions in cash transfer programmes that place unfair burdens on women (HRC 2009, para. 25; UN General Assembly 2010, para. 6o). She recommends that States should assess whether such programmes affect women's decision-making authority and participation, and whether they perpetuate gender-biased stereotyped roles for men and women.

Substantive equality is most likely to be achieved not by imposing conditions on women but by ensuring that

## 3.2 Austerity cutbacks

While<sup>137</sup> women in developing countries have been the focus of CCT programmes, women in many developed countries have experienced the removal of some of the social security measures on which they had previously relied. Following the global financial crisis, a number of advanced economies have looked at ways of tightening budgets to reduce debt. Social programmes have faced cuts in areas that governments have identified as no longer necessary, as wasteful or as too expensive relative to other programmes that are more important. These are often complex decisions that involve weighing up social need, political reaction and economic advantage. Sometimes missing from the analysis are the human rights implications of particular decisions on a range of affected groups. Women are often among those most affected by such cuts because of their disproportionately greater poverty and disadvantage, but this is not always visible without careful unpacking of the impact of the measures based on appropriate evidence.<sup>138</sup>

<sup>137</sup> World Conference on Human Rights. 1993. Vienna Declaration and Programme of Action (1993), 25 June 1993, A/CONF.157/23, Part 1, para 5.

<sup>138</sup> For a discussion of the impact of austerity measures on women in developed countries see: Lahey and de Villota 2013; Elson 2012. For a consideration of the problems of austerity for women in developing countries see: Ortiz 2013.

poverty is addressed through the provision of good quality services and in a manner that challenges unequal gender relations. The CCT example demonstrates the importance of the principle of international human rights law that rights are universal, indivisible, interdependent and interrelated.<sup>137</sup> Thus, it is not enough to realize one type of right (such as social security) without also providing other rights (such as health, education and work). The set of universal human rights is a holistic package to ensure a life of dignity for all people. These rights need to be understood and shaped according to the dimensions of substantive gender equality in order to ensure that women are equally able to benefit from all of the human rights in the international laws.

A human rights-based approach requires State parties to test new laws and policies against the obligations to which they are bound in terms of international human rights law. According to article 2 of the ICESCR, State parties must take steps to the maximum of their available resources to progressively realize the social and economic rights in the Covenant. (It is important to note, however, that the obligations to ensure that women and men benefit equally from rights and that the rights are exercised without discrimination have immediate effect.) Article 4 states that the rights in the Covenant may only be limited in so far as this is compatible with the nature of the rights and only for the purpose of promoting the 'general welfare in a democratic society'. These two articles place constraints on the extent to which existing rights can be removed by a State party. Among such Covenant rights is the right to social security found in article 9.<sup>139</sup>

The CESCR explains in General Comment no. 19 on the right to social security that improper removal of rights, known as retrogressive measures, are not permissible unless the State party can show that it

<sup>139</sup> The right to social security is also found in other human rights treaties including CEDAW, CERD, CRPD, CRC and International Covenant on the Rights of Migrant Workers.

has carefully considered the alternatives and that the measures are justifiable in relation to all the rights in the Covenant in the context of the State party's full use of its resources. In order to decide if a measure is justified the Committee looks at whether (CESCR 2007, para. 42):

- (a) there was reasonable justification for the action;
- (b) alternatives were comprehensively examined;
- (c) there was genuine participation of affected groups in examining the proposed measures and alternatives;
- (d) the measures were directly or indirectly discriminatory;
- (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and
- (f) there was an independent review of the measures at the national level.

As can be seen from this list, discrimination is a component of the enquiry. Participation, a dimension of the substantive equality framework, is also a consideration. In assessing whether a social security cutback is permissible, the four-dimensional substantive equality approach assists in evaluating any policy in relation to its impact on women and the enjoyment of their rights following the introduction of the policy.

### **(a) Redressing disadvantage**

Any removal or reduction of a payment for single parents of young children requires consideration of whether disadvantage was worsened or alleviated (Goldblatt 2013). In all likelihood, unless it was replaced with an alternative form of income support, the affected parents would be harshly affected. If the nature of the group affected was analysed more closely, it might become clear that the majority was made up of women. Further analysis might show that single mothers are one of the most economically

vulnerable groups in society.<sup>140</sup> From an intersectional perspective, indigenous women, migrants or other minority groups might be overrepresented in the single mother group.

### **(b) Redressing stigma, prejudice, stereotyping and violence**

This dimension requires an analysis of the single mother group to find whether loss of the social security benefit would deepen the discrimination faced by this group, which already faces stigma and stereotyping. For example, by losing benefits, single mothers might be forced to ask family and friends to house or support them and their children or they might be forced to live on the street. This could result in an impairment of their dignity or place them in dangerous situations, exposed to violence and abuse.

### **(c) Transformation**

The removal of a payment to single parents might also make it harder for young mothers to escape their vulnerability and access the same opportunities as young men or couples. The transformative dimension of the equality framework encourages a deeper understanding of the impact of the loss of this social assistance measure. The original objective of the payment may have been seen as a special measure to address the structural disadvantages facing single parents (usually mothers) in accessing education and work opportunities and to make childcare more affordable. Even if this was not the objective of such a payment, but rather it was seen as a means of providing for children in the poorest households (often single parent households), its indirect effect may have been to assist this very disadvantaged group. Removing the payment might undermine efforts to address gender inequalities in this section of the society.

### **(d) Participation**

An examination of the policy in terms of the participative dimension would look at the impact of the payment cut on the major group affected – single mothers. The payment, even if it was small, may have enabled women to fund some childcare and, as a

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<sup>140</sup> Elson 2012 shows that cuts in the UK affected lone parents, most of whom are women, the hardest (p. 186).

result, allowed them to work, pursue their education, participate in their communities and have some time for rest, leisure or social contact. Without this state support, the group's capacity to participate equally would be limited. The lack of participation of single parents in considering the proposed cuts and alternatives to them would contribute to the view

that the measure was retrogressive (as judged by the Committee's listed criteria). The extent to which mothers in the affected group were able to participate

would need to be examined to ensure that they were equally able, alongside fathers, to have their voices heard. The possibilities for equal participation by particularly vulnerable or marginal sub-groups within the single mother group, such as migrant women or women belonging to a particular race group, would need to be assessed to ensure that there were full and equal opportunities for participation by women facing intersectional discrimination.

# CONCLUSION

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This paper has drawn on the evolving understandings of equality in order to articulate a clear standard by which to evaluate social and economic policies and thereby to ‘make the economy work for women’. It aims to show that in the context of women, these understandings are best understood as an elaboration of the principle of substantive equality along four dimensions: the redistributive dimension, which aims to redress women’s specifically gendered disadvantage; the recognition dimension, which aims to address stigma, prejudice, humiliation and violence; the transformative dimension, which aims to reconstruct basic institutional features that function as obstacles to women; and the participative dimension, which aims to enhance women’s voice and social inclusion.

We have aimed to show two things. First, we have demonstrated that these dimensions are already

implicit in the ways in which the various treaty bodies evaluate the extent to which States are in compliance with their treaty obligations not to discriminate against women. Second, by applying the framework to two of the most contested issues within social security policy, we have shown that the four-dimensional understanding of substantive gendered equality provides a valuable evaluative tool for assessing social and economic policies from the perspective of substantive gender equality and for pointing towards fashioning alternatives that score better against these criteria. By making the implicit understandings of substantive equality explicit and by fully articulating the growing consensus at international level on an understanding of substantive equality that reflects the four dimensions set out above, the extent to which policies can be shaped to address the specific challenges of gendered inequality can be considerably enhanced.

# ANNEX 1.

## References to Substantive Equality in Individual Complaints Procedure

Treaty Body	Decision	Aspect of Substantive Equality	Outcome
HRC	<i>Miroslav Lain and Eva Klain v Czech Republic</i> CCPR/C/103/D/1847/2008	The Committee reiterates its jurisprudence that not all differentiation in treatment can be deemed to be discriminatory under article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.11.	Successful
HRC	<i>VDA v Argentine Republic</i> CCPR/C/101/D/1608/2007	The Committee takes note of the author's allegations to the effect that, because it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible...For these reasons, the Committee considers that the author did not have access to an effective remedy and the facts described constitute a violation of article 2, paragraph 3 in relation to articles 3, 7 and 17 of the Covenant.	Successful
HCR	<i>Jacobs v Belgium</i> CCPR/C/81/D/943/2000	In the first place, the Committee notes that the gender requirement was introduced by Parliament under the terms of the Act of 20 July 1990 on the promotion of a balance between men and women on advisory bodies. The aim in this case is to increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there. On this point, the Committee finds the author's assertion that the insufficient number of female applicants in response to the first call proves there is no inequality between men and women to be unpersuasive in the present case; such a situation may, on the contrary, reveal a need to encourage women to apply for public service on bodies.	Successful
HRC	<i>Derksen v The Netherlands</i> CCPR/C/80/D/976/2001	<b>Not Using SE analysis:</b> Taking into account that the past practice of distinguishing between married and unmarried couples did not constitute prohibited discrimination, the Committee is of the opinion that the State party was under no obligation to make the amendment retroactive (in legislation which extends benefits to unmarried couples).	Not successful
HRC	<i>Joslin v New Zealand</i> CCPR/C/75/D/902/1999	<b>Not Using SE analysis:</b> Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other. 8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors.	Unsuccessful

Treaty Body	Decision	Aspect of Substantive Equality	Outcome
HRC	<i>Muller and Engelhard v Namibia</i> CCPR/C/74/D/919/2000	In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach.	Successful
HRC	<i>Vos v The Netherlands</i> CCPR/C/66/D/786/1997	<b>Application of FE (Formal Equality):</b> The issue before the Committee is whether Mr. Vos is a victim of a violation of article 26, because the calculation of the incorporation of his general pension into his ABP pension is different for him as a married man than for married women, as a consequence of which he receives less pension than a married woman...The State party has argued that no discrimination has occurred since at the time when the author became entitled to a pension, married women and married men were not in a comparable position with regard to the general pension... The pension paid to the author as a married male former civil servant whose pension accrued before 1985 is lower than the pension paid to a married female former civil servant whose pension accrued at the same date. In the Committee's view this amounts to a violation of article 26 of the Covenant.	Successful
HRC	<i>Pauger v Austria</i> CCPR/C/65/D/716/1996	<b>Application of FE:</b> The lump-sum payment, consisting of 70 monthly instalments, was calculated partly, i.e. until 31 December 1994, on the basis of the reduced pension. The Committee upholds its views concerning communication No. 415/1990, that these reduced pension benefits for widowers are discriminatory on the ground of sex. Consequently, the reduced lump-sum payment received by the author is likewise in violation of article 26 of the Covenant, since the author was denied a full payment on equal footing with widows	Successful
HRC	<i>Hoofdman v The Netherlands</i> CCPR/C/64/D/602/1994	<b>Application of FE:</b> By choosing not to enter into marriage, the author has not, in law, assumed the full extent of the duties and responsibilities incumbent on married persons. Consequently, the author does not receive the full benefits provided for by law to married persons. The Committee finds that this differentiation does not constitute discrimination within the meaning of article 26 of the Covenant.	Not successful
HRC	<i>Vos v. The Netherlands</i> Communication No. 218/1986	<b>Application of FE:</b> The Committee is of the view that the unfavourable result complained of by Mrs. Vos follows from the application of a uniform rule to avoid overlapping in the allocation of social security benefits. This rule is based on objective and reasonable criteria, especially bearing in mind that both statutes under which Mrs. Vos qualified for benefits aim at ensuring to all persons falling thereunder subsistence level income. Thus the Committee cannot conclude that Mrs. Vos has been a victim of discrimination within the meaning of article 26 of the Covenant.	Not successful
HRC	<i>Zwaan-de Vries v. the Netherlands</i> Communication No. 182/1984	<b>Application of FE:</b> Under section 13, subsection 1 (1), of the Unemployment Benefits Act (WWV) a married woman, in order to receive WWV benefits, had to prove that she was a 'breadwinner' - a condition that did not apply to married men. Thus a differentiation which appears on one level to be one of status is in fact one of sex, placing married women at a disadvantage compared with married men. Such a differentiation is not reasonable.	Successful

Treaty Body	Decision	Aspect of Substantive Equality	Outcome
<b>CEDAW</b>	<i>Ms. A. T. v. Hungary (Communication No. 2/2003)</i> <i>Goeke v Austria (Communication No. 5/2005)</i> and <i>Yildirim v Austria</i> CEDAW/C/39/D/6/2005 (all three cases decided on the same reasoning)	While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings... Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy.	Successful
<b>CEDAW</b>	<i>AS v Hungary</i>	The Committee finds a failure of the State party, through the hospital personnel, to provide appropriate information and advice on family planning, which constitutes a violation of the author's right under article 10 (h) of the Convention. ... The sterilization surgery was performed on the author without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity. Accordingly, the Committee finds the author's rights under article 16, paragraph 1 (e) to have been violated.  (This woman was a Roma, but there was no discussion on this aspect of the case)	Successful
<b>CEDAW</b>	<i>Vertido v The Philippines</i> CEDAW/C/46/D/18/2008	The Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.  ...The Committee finds that one of them, in particular, according to which 'an accusation for rape can be made with facility', reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgement and classified by the author... the author in this situation not having followed what was expected from a rational and 'ideal victim' or what the judge considered to be the rational and ideal response of a woman in a rape situation.	Successful
<b>CEDAW</b>	<i>V.K. v Bulgaria</i> CEDAW/C/49/D/20/2008	The exclusive focus of the Plovdiv courts on physical violence and on an immediate threat to the life or health of the victim reflects a stereotyped and overly narrow concept of what constitutes domestic violence...The Committee concludes that the refusal of the Plovdiv courts to issue a permanent protection order against the author's husband was based on stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence.	Successful
<b>CEDAW</b>	<i>Abramova v Belarus</i> CEDAW/C/49/D/23/2009	The Committee recalls that the fact that detention facilities do not address the specific needs of women constitutes discrimination, within the meaning of article 1 of the Convention.	Successful

Treaty Body	Decision	Aspect of Substantive Equality	Outcome
<b>CEDAW</b>	<i>Teixeria v Brazil</i> CEDAW/C/49/D/17/2008	<p>The lack of appropriate maternal health services in the State party that clearly fails to meet the specific, distinctive health needs and interests of women not only constitutes a violation of article 12, paragraph 2, of the Convention, but also discrimination against women under article 12, paragraph 1, and article 2 of the Convention. Furthermore, the lack of appropriate maternal health services has a differential impact on the right to life of women.</p> <p>In such circumstances, the Committee concludes that Ms. da Silva Pimentel Teixeira was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.</p> <p>(However, there is no discussion on how her identity impacted the discrimination.)</p>	Successful
<b>CEDAW</b>	<i>LC v Peru</i> CEDAW/C/50/D/22/2009	<p>In view of the foregoing, the Committee considers that, owing to her condition as a pregnant woman, L.C. did not have access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. Those services included both the spinal surgery and the therapeutic abortion... The Committee also considers that the facts reveal a violation of article 5 of the Convention, as the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother.</p>	Successful
<b>CEDAW</b>	<i>RKB v Turkey</i> CEDAW/C/51/D/28/2010	<p>The Court examined the evidence adduced by the employer and scrutinized only the moral integrity of the author, a 'female' employee and not that of the male employees, namely Mr. M.A. and Mr. DU.... The Committee is of the view that, in the present case, the court proceedings were based on the stereotyped perception of the gravity of extramarital affairs by women, that extramarital relationships were acceptable for men and not for women and that only women had the duty to 'refrain from even the slightest offence against morality'.</p>	Successful
<b>CEDAW</b>	<i>Kell v Canada</i> CEDAW/C/51/D/19/2008	<p>As the author is an aboriginal woman who is in a vulnerable position, the State party is obliged to ensure the effective elimination of intersectional discrimination... The Committee further observes that, according to the State party's submission, both the author's income and the income of her partner were taken into account in determining their eligibility under the Northern Territorial Rental Purchase Program, yet when her name was removed from the Assignment of Lease, the Northwest Territories Housing Corporation did not take her contribution into consideration or inform her of the removal. These facts considered together indicate that the rights of the author under article 16, paragraph 1 (h), of the Convention have been violated.</p>	Successful
<b>CEDAW</b>	<i>Jallow v Bulgaria</i> CEDAW/C/52/D/32/2011	<p>Considering that the author and her daughter were in a vulnerable position, in particular because the author is an illiterate migrant woman without a command of Bulgarian or relatives in the State party, and dependent on her husband, the Committee concludes that the State party failed to comply with its obligations established in article 2, paragraphs (b) and (c), read in conjunction with articles 1 and 3, of the Convention.</p> <p>The Committee also observes that the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men.</p>	Successful

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