

EQUITY OR EQUALITY FOR WOMEN? UNDERSTANDING CEDAW'S EQUALITY PRINCIPLES

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INTRODUCTION[†]

What is needed to end global discrimination against women? Gender equity or gender equality? These terms, or their respective translations, are at times used interchangeably. However, in the context of women's rights under international human rights law, clarifying the distinction between the terms equity and equality is a point of increasing concern. "Equality" is the terminology of the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹ The Convention's concept of equality sets broad and objective standards for member states. The CEDAW Committee, which monitors compliance with the treaty,² has responded to the continuing confusion between these two terms by repeatedly reminding the countries submitting their periodic reports under the Convention of the importance of adhering to CEDAW's "equality" approach rather than substituting the vague and subjective term "equity."³

This Essay argues that CEDAW's concept of equality is what is needed to end discrimination against women. It first traces the background of the controversy over the use of the terms equity and equality in international human rights law. It then describes the CEDAW Committee's recent attempts to emphasize the distinction between "equality" and "equity" and its continuing efforts to clarify the meaning of CEDAW's broad concept of gender equality. Next, it examines the three principles that make up CEDAW's concept of equality: the principle of nondiscrimination, the principle of state obligation, and the principle of substantive equality—equality of results. Following this examination of the meaning of equality in CEDAW, it presents a human rights-based critique of attempts to use

[†] *Editor's Note:* This Essay will run as the introduction to MEADOR LECTURES ON EMPIRE (forthcoming 2009), published by the University of Alabama School of Law, in which all the 2007–2008 Meador Lectures on Empire will be reprinted. The lectures were originally printed in this volume of the *Alabama Law Review* or are printed in this issue. See José E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 ALA. L. REV. 943 (2009); Michele Goodwin, *Empires of the Flesh: Tissue and Organ Taboos*, 60 ALA. L. REV. 1209 (2009); Herbert Hovenkamp, *Innovation and the Domain of Competition Policy*, 60 ALA. L. REV. 103 (2008); Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009).

1. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14, 193 [hereinafter CEDAW]. The term "equity" appears only once in CEDAW, in the preamble, and the context makes clear that equality between men and women is what the convention requires. *Id.* at pmlb. ("Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women . . .").

2. See THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (Hanna Beate Schöpp-Schilling & Cees Flinterman, eds., The Feminist Press 2007) (A recent collection in which present and former CEDAW Committee Members and others review the Committee's first twenty-five years.).

3. See *infra* Part III.

"equity" to replace "equality." Finally, to further demonstrate the importance of CEDAW's principles of equality, particularly that of substantive equality, it provides some illustrations of the positive impact these principles have had on domestic gender jurisprudence. The examples here are drawn from Costa Rica, where decisions generally have been receptive to arguments for substantive equality.⁴ The essay closes with a brief look at the impact CEDAW's principles of equality can have in a country such as the United States, which is regrettably one of the few countries that has not yet ratified CEDAW.⁵

I. BEIJING AND BEYOND: BACKGROUND ON THE DEBATE

Some background on the history of the debate over the use of the terms equity and equality with respect to women's international human rights helps in understanding the current attention their use is attracting. In the months leading up to the Fourth World Conference on Women that was held in Beijing in 1995, as well as in the conference itself, there was heated discussion about the use of the concepts of equality and equity in the conference's draft, *Platform for Action*. Those who first proposed the use of "equity" rather than "equality" were fundamentalist Islamic forces and the Vatican, including its followers in Latin America. On the other hand, the Human Rights Caucus lobbied strongly for keeping the term "equality" throughout the draft document, arguing that this is the term used not only in the CEDAW but in all other human rights treaties. Fortunately, the position of the Human Rights Caucus was accepted.⁶ As adopted, most of the paragraphs of the *Beijing Platform for Action* retained the term "equality."⁷ But the debate over the use of the two terms has continued.

4. For examples from other countries, see Ruth Rubio-Marín & Martha I. Morgan, *Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearside of the Bridge*, in GENDER AND HUMAN RIGHTS 113 (Karen Knop ed., Oxford University Press 2004).

5. As of April 2009, when Qatar ratified CEDAW 186 countries have ratified. See Office of the United Nations High Commissioner for Human Rights Status of Ratification, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=326&chapter=4&lang=en> (last visited Aug. 24, 2009). U.S. President Jimmy Carter signed CEDAW in July 1980 but subsequent attempts at Senate ratification have failed. Although the Obama administration's support for ratification has raised hopes for change, as of April 2009, the United States, Iran, Naura, Palau, Sudan, Somalia and Tonga, have failed to ratify CEDAW. For information on the history and progress of the continuing campaign for U.S. ratification of CEDAW, see <http://www.womenstreaty.org> (last visited July 27, 2009).

6. See Gail Hershatter, Emily Honig, & Lisa Rofel, *Reflections on the Fourth World Conference on Women, Beijing and Huairou, 1995*, SOCIAL JUSTICE, Mar. 1996, at 368.

7. Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Platform for Action*, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en> (last visited July 27, 2009).

Although the supporters of the use of “equality” prevailed, the controversy did not end in Beijing. After the conference, because certain regional caucuses had supported the use of “equity,” governments and nongovernmental organizations (NGO’s) in some regions began substituting policies of equity for policies of equality. This was particularly true in Latin America. In fact, even some U.N. agencies have used “gender equity” instead of “gender equality,” especially in Spanish language documents but increasingly in other languages as well.

For example, an article written for the Pan American Health Organization (PAHO)⁸ points out the need to eradicate unjust gender differences that affect the right and access to appropriate health care for women. The piece explains the differences between equity and equality and describes how gender equity should be obtained with respect to women’s health. This is what the author says with regards to these terms:

Equity is not the same as equality, and at the same time, not all inequality can be seen as inequity. The notion of inequity adopted by [the World Health Organization and the Pan American Health Organization] is that of “unnecessary, avoidable and unjust inequalities.”

Therefore, while equality is an empirical concept, equity represents an ethical imperative associated with the principles of social justice and human rights.⁹

Contrary to the author’s assertion, human rights treaties all enshrine the principle of “equality” as a goal which States are legally obligated to achieve. Equity is not a concept associated with human rights, except maybe in the sense that both have to do with social justice. The principle of equality is directly associated with human rights as is the right to equality. In fact, without equality, human rights have no meaning.

Even more problematic is the fact that some justify their use of “gender equity” instead of “equality between men and women” by arguing that the term “equity” goes beyond equality. During the Beijing process and since, many women have supported the term equity as being more acceptable than equality because it does not require exactly the same treatment or identical measures for men and women, as they misunderstand the principle of equality to do. Equity, they say, requires that each person is given according to their needs. They believe that if you speak of equity instead

8. Elsa Gómez Gómez, *Equity, Gender and Health: Challenges For Action*, REV PANAM SALUD PUBLICA, May/June 2002, at 454-61.

9. Elsa Gómez Gómez, *Equity, Gender and Health: Myths and Realities*, WOMEN’S HEALTH JOURNAL, Apr. 2004, at 54 (footnote omitted).

of equality, it will be clear that the objective is not treating women the same as men but, more importantly, giving women what they need. The problem with this reasoning is that it flows from a narrow and incorrect understanding of equality, which is especially dangerous because equality is the term used in human rights language. We will discuss the dangers posed by substituting equity for equality later. For now, suffice it to say that, though it is understandable that some women got fed up with the restricted meaning or content of "equality"—which many judges and legal scholars have interpreted as limited to formal equality—substituting a different term does not get women any closer to enjoying the full range of human rights.

The equality versus equity debate has attracted less attention among women's rights activists and scholars in the United States, owing in large part to the country's shameful failure to ratify CEDAW. Although the terms are sometimes used interchangeably in the U.S., in this country as well equity sometimes has been used in attempts to circumvent or move beyond cramped notions of formal equality.

For example, "pay equity" has been used in educational campaigns and legislative proposals designed to combat the persistent wage gap between men and women and, specifically, the glaring wage disparities between jobs traditionally held by women and those traditionally held by men.¹⁰ Unlike CEDAW's Article 11(d) which, in requiring State parties to take all appropriate measures to eliminate discrimination against women in the field of employment, specifically includes "[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work,"¹¹ the Equal Pay Act of 1963,¹² speaks of equal pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."¹³

In *County of Washington v. Gunther*,¹⁴ Justice Brennan's majority opinion for the U.S. Supreme Court rejected claims that the prohibition on

10. Another U.S. example of the frequent use of the term equity rather than equality is with regards to sex discrimination under Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (2006). See also generally Gary R. Roberts, *Evaluating Gender Equity Within the Framework of Intercollegiate Athletics' Conflicting Value Systems*, 77 TUL. L. REV. 997 (2003); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006).

11. CEDAW, *supra* note 1, at art. 11.

12. 29 U.S.C. § 206(d) (2000).

13. *Id.* In Canada, which has ratified CEDAW, the term "pay equity" has been used to promote measures that move beyond "equal pay" to address wage differentials between traditional male and female job categories at the federal level and in some of the provinces. For information about Canadian pay equity legislation, see Equal Pay Coalition, <http://www.equalpaycoalition.org> (last visited July 27, 2009).

14. 452 U.S. 161 (1981).

sex-based wage discrimination in Title VII of the Civil Rights Act of 1964, was restricted to claims of equal pay for “equal work.” But the Court emphasized that the claim before it was “not based on the controversial concept of ‘comparable worth,’”¹⁵ and was careful to note that the case before it did “not require a court to make its own subjective assessment of the value of the . . . jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.”¹⁶ Since the 1980’s, the U.S. Congress has considered various proposals to address what is referred to as pay equity or comparable worth.¹⁷ Although none of these broader measures have been adopted, it recently passed the Lilly Ledbetter Fair Pay Act of 2009, which overturns the U.S. Supreme Court’s decision in *Ledbetter v. Goodyear Tire and Rubber Co.*,¹⁸ which held that charges of sex-based discrimination in pay under Title VII of the Civil Rights Act of 1964 must be filed within 180 days of the original discriminatory act rather than within 180 days of the last paycheck reflecting the disparate pay.¹⁹

Closer analysis of the significance of the terminology “equity” and “equality” could be beneficial to a better understanding of women’s human rights in the U.S. and might help in broadening understandings of what is needed to achieve true equality for women there.

II. EQUITY VS. EQUALITY: THE CEDAW COMMITTEE

In recent sessions, the CEDAW Committee has repeatedly called reporting countries’ attention to the distinction between equity and equality both in its dialogues with country delegates and in its concluding comments or observations.²⁰ For example, the following exchanges are taken from the summary records of the Committee’s constructive dialogues with

15. *Id.* at 166 (evaluating Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e -2(a), -2(h)).

16. *Id.* at 181.

17. For a description of the history of federal legislative attempts to address this issue, see LINDA LAVINE, CONG. RESEARCH SERV., THE GENDER WAGE GAP AND PAY EQUITY: IS COMPARABLE WORTH THE NEXT STEP? (2003), available at http://www.policyalmanac.org/economic/archive/pay_equity.pdf; CHARLES V. VALE & LINDA LEVINE, CONG. RESEARCH SERV., PAY EQUITY LEGISLATION IN THE 109TH CONGRESS (2005), available at http://holt.house.gov/pdf/CRS_on_pay_equity_leg_109th_Congress.pdf; WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., THE FAIR LABOR STANDARDS ACT: CONTINUING ISSUES IN THE DEBATE (2008), available at http://assets.opencrs.com/rpts/RL34510_20080528.pdf.

18. 127 S. Ct. 2162 (2007), superseded by statute, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 181, 123 Stat. 5.

19. *Ledbetter*, 127 S. Ct. at 2165.

20. As part of its efforts to harmonize its work with that of other treaty bodies, in 2008 the CEDAW Committee began using the terminology “concluding observations” rather than “concluding comments.” Under the Committee’s rules, these written responses to reporting countries are restricted to matters members raise in their questions to country delegations during the “constructive dialogue” session. In 2008, the CEDAW Committee also adopted for its future use the terminology “General Comments” rather than “General Recommendations” but continues to use both. We will use the terminology in effect at the time of the adoption of documents referenced herein.

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the reporting countries of Chile and Cape Verde during the Thirty-Sixth Session in August 2006.

During her long service on the Committee, Hanna Beate Schöpp-Schilling,²¹ from Germany, was a leader in the committee's efforts to urge governments to use the Convention's concept of "equality," as reflected in this summary of her questioning of the Chilean delegation during the committee's review of their country's most recent periodic report:

[Ms. Schöpp-Schilling] asked the delegation to clarify the distinction in its usage of the terms "equality" and "equity," noting that the Committee preferred the concept designated by the term "equality."²²

Ms. Schöpp-Schilling recalled that, when the Beijing Declaration and Platform for Action had been adopted, conservative forces had attempted to replace the word "equality" with the term "equity." Why had the Chilean Government chosen to use the latter in its report and how was that term understood by the authorities?²³

Ms. Clark of the Chilean delegation responded for the government.

As to the use of the terms "equity" and "equality," she clarified that the Government's ultimate goal was to ensure gender equality and that it used the word "equity" in connection with the mechanisms by which it sought to attain that goal.²⁴

During the same session, CEDAW Committee member Maria Regina Tavares da Silva, from Portugal, reminded the delegation from Cape Verde of the distinction between the two terms:

Ms. Tavares da Silva also sought clarification of the National Action Plan for the Advancement of Women, 1996–2000, and its priorities. How had the gender mainstreaming strategy worked and what evaluation had been carried out? Referring to the new action plan's title, the National Gender Equality and Equity Plan, she recalled that the Convention was concerned with the objective goal of gender equality, whereas equity was a subjective concept. What

21. Dr. Schöpp-Schilling, who served on the Committee from 1989 to 2008, died in July 2009.

22. Comm. on the Elimination of Discrimination Against Women, 36th Sess., *Summary Record of the 749th Meeting*, ¶ 20, U.N. Doc. CEDAW/C/SR.749 (Aug. 16, 2006).

23. Comm. on the Elimination of Discrimination Against Women, 36th Sess., *Summary Record of the 750th Meeting*, ¶ 18, U.N. Doc. CEDAW/C/SR.750 (Aug. 16, 2006).

24. Comm. on the Elimination of Discrimination Against Women, 36th Sess., *Summary Record of the 750th Meeting*, ¶ 33, U.N. Doc. CEDAW/C/SR.750 (Aug. 16, 2006).

were the new Plan's priorities and targets, and how would progress towards equality be measured?²⁵

The CEDAW Committee's concluding comments or observations to reporting countries build upon such interchanges and contain frequent reminders of the importance of the distinction between these terms. For example, the Committee's January 2007 Thirty-Seventh Session's Concluding Comments to Colombia include the following concerns and recommendations.

While noting that the State party's definition of the principle of equality of women and men is directly in line with that of the Convention, and has been upheld by the Constitutional Court of Colombia, the Committee is concerned that, when applying temporary special measures, the State party's goal often is to achieve equity for women rather than to accelerate the achievement of de facto equality of women with men. It also notes that the concept of equity, rather than equality, is often used in the design and implementation of policies and programmes for women.²⁶

The Committee draws the State party's attention to article 2 (a) of the Convention, which calls for the practical realization of the principle of equality between men and women. The Committee also draws the State party's attention to article 1 of the Convention, providing a definition of discrimination against women, and its link to article 4, paragraph 1, of the Convention and the Committee's general recommendation 25 on temporary special measures, in which the Committee clarified that such temporary special measures are a necessary means for accelerating achievement of women's de facto equality with men. It recommends that the State party encourage dialogue between representatives of public entities, academia and civil society in order to ensure that when the State party pursues the goal of equity for women its efforts are placed within the overall framework of the Convention's principle of de facto (substantive) equality between women and men.²⁷

25. Comm. on the Elimination of Discrimination Against Women, 36th Sess., *Summary Record of the 753rd Meeting*, ¶ 39, U.N. Doc. CEDAW/C/SR.753 (Aug. 18, 2006).

26. Comm. on the Elimination of Discrimination Against Women, 37th Sess., *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Colombia*, ¶ 16, U.N. Doc. CEDAW/C/COL/CO/6 (Feb. 2, 2007).

27. *Id.* ¶ 17.

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The Committee continued to stress the importance of using equality rather than equity in its Concluding Comments to Vanuatu from the Thirty-Eighth Session in June 2007.

The Committee notes with concern that, while the Convention refers to the concept of equality, the terms "equality" and "equity" are used in the State party's plans and programmes in such a way that could be interpreted as being synonymous or interchangeable.²⁸

The Committee requests the State party to take note that the terms "equity" and "equality" are not synonymous or interchangeable, and that the Convention is directed towards eliminating discrimination against women and ensuring *de jure* and *de facto* (formal and substantive) equality between women and men. The Committee therefore recommends that the State party expand the dialogue among public entities, civil society and academia in order to clarify the understanding of equality in accordance with the Convention.²⁹

The CEDAW Committee is not alone in its concern about the dangers of using equality and equity interchangeably. In its 2000 paper, *Building on Achievements: Women's Human Rights Five Years after Beijing*, the United Nations High Commissioner for Human Rights pointed out the cross-cutting nature of the important distinction between the words "equity" and "equality" in international human rights law:

The legal principles of equality and non-discrimination are at the core of human rights treaties and declarations, and provide the foundation for the enjoyment of human rights. The Convention on the Elimination of All Forms of Discrimination against Women elaborates this principle as it applies in all aspects of women's lives.

It is clear that the term "equity", which is conditioned by subjective criteria, cannot become a substitute for the fundamental legal principle of equality. Thus any language in the draft document for the five-year review of the Fourth World Conference on Women that would suggest replacement of the principle of equality

28. Comm. on the Elimination of Discrimination Against Women, 38th Sess., *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Vanuatu*, ¶ 14, U.N. Doc. CEDAW/C/VUT/CO/3 (June 11, 2007).

29. *Id.* ¶ 15.

by “equity” would undermine this principle, and should be avoided.³⁰

III. CEDAW’s EQUALITY PRINCIPLES

A. The Principle of Nondiscrimination

CEDAW’s title itself announces its purpose of eliminating “all forms” of discrimination against women. The general definition of “discrimination against women” in Article 1 embodies a broad principle of equality.

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.³¹

Article 1’s definition of discrimination against women helps us greatly in understanding the close relationship between equality and nondiscrimination. But it is also important because it is a legal definition that states are obligated to make part of their national normative framework when they ratify the convention.³² This means that legislators, judges, and other officials charged with promulgating laws or administering justice must not base their work in a different conception, though admittedly they sometimes do. Over the years, how many Latin American judges and legislators have been heard to say that they do not consider it discriminatory or in violation of the principle of equality when different evidence is required to prove adultery depending on whether the offender is the man or the woman, or that they do not see a problem with extinguishing the penalty if a rapist marries his victim? Obviously, these ideas can only be maintained if one does not understand what is legally prohibited by CEDAW.

Moreover, if we carefully analyze CEDAW’s definition of discrimination we see that there are other important aspects. First, it establishes that discrimination can exist in different forms: distinctions, exclusions, or restrictions. This alerts us to the variety of discriminatory practices that

30. U.N. High Comm’r for Human Rights, *Building on Achievements: Women’s Human Rights Five Years After Beijing*, May 2000, available at <http://www.unhchr.ch/html/menu2/contributbeijing.htm>, ¶ 11–12 (last visited July 27, 2009).

31. CEDAW, *supra* note 1, at art. 1.

32. CEDAW, *supra* note 1, at art. 2.

can be encountered, at times even in the form of “rights” or “protection.” For example, according to this definition, any action that affects women’s right to reproductive health by restricting our options to decide about our own bodies is discriminatory. It is also discriminatory when women are excluded from certain careers even through indirect means, as well as when we are viewed as the only ones capable of doing certain jobs.

Another important aspect of the definition is that it recognizes that discriminatory acts include those that have either the “purpose” or the “effect” of violating the human rights of women. This means that it prohibits not only those acts that intentionally discriminate such as laws that provide that married women cannot freely dispose of their property, but also those acts that, without having the intent to do so, result in discrimination against women. Examples of discrimination in results are laws that supposedly “protect” women by prohibiting them from engaging in dangerous jobs, night jobs, etc. and laws that have a disproportionately negative impact on women.

This definition also makes clear that there can be differing degrees of discrimination, as it can be partial (“threaten”) or can be total (“annul”). Thus CEDAW not only prohibits the total negation of a right but also negating certain aspects of a right. One example of the latter is presented by laws that allow women to be citizens of a country but do not allow us to pass citizenship to our daughters and sons.

Article 1 also expressly provides that the discriminatory act can occur at different stages in the existence of a right: the recognition, the enjoyment, or the exercise. The first stage refers to the moment of creation of laws that establish the right. The second refers to the necessities for satisfying this right, and the third to the active aspect of the right. This implies that there must be some mechanism through which the rights holder can denounce the violation of her right and obtain redress for it. Thus CEDAW obligates the State (1) to recognize women’s rights, (2) to provide the material and spiritual conditions so that we can enjoy them, and (3) to create the mechanisms for denouncing their violation and obtaining redress.

CEDAW defines discrimination as an act that violates the principle of equality and it recognizes women as legal subjects equal to men in human dignity, establishing a concept of equality that is not androcentric but based on the protection of women’s human rights.

Article 1 also specifies that discrimination is prohibited “irrespective of their marital status”³³ to emphasize that the Convention intends to eliminate all discrimination against women, including discrimination within matrimony.

33. CEDAW, *supra* note 1, at art. 1.

Finally, the Convention's definition prohibits discrimination in all spheres. The last phrase, "or any other field,"³⁴ clearly includes the private or family sphere where so many violations of women's human rights occur. It also means that discrimination against any woman based on other conditions such as race, class, disability, or sexual identity or orientation is prohibited.

Reading Article 1's definition of discrimination alongside other articles of CEDAW reveals that by intending to eliminate the de facto and de jure discrimination that any woman can suffer, the convention intends to achieve not only de jure equality but de facto equality not only between men and women but also between women. The goal is social transformation, social change that goes far beyond legislative change, though including it.

B. The Principle of State Obligation

Article 2 on state obligations is another key provision for understanding CEDAW's broad concept of equality.

States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

34. *Id.*

- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.³⁵

The adoption of CEDAW was a first step in the necessary development of a judicial doctrine that joins equality between women and men and nondiscrimination against women with the principle of state responsibility. CEDAW differs from other international instruments that declare equality and prohibit discrimination. CEDAW does not stop with imposing a general obligation on States to recognize the equality before the law of women with men, as well as to recognize women's right to identical legal capacity and to the same opportunities to exercise this capacity.³⁶ It goes further to describe in detail state obligations relating to a series of human rights in order to achieve this equality. Also, as already pointed out, it not only prohibits discrimination against women but gives it a very detailed and extensive definition.

Among the obligations that CEDAW's separate articles establish to achieve equality between men and women are, for example, the mandate to State parties to eliminate discrimination against women in marriage and the family and to assure equality between men and women in the enjoyment of the right to choose a domicile and residence.³⁷ CEDAW also obligates State parties to assure women the right to vote and be elected, to participate in the formulation of public policies and in nongovernmental organizations and associations.³⁸ States are obligated to adopt all appropriate measures to eliminate discrimination against women in the spheres of employment,³⁹ health,⁴⁰ education,⁴¹ and to assure women's participation

35. CEDAW, *supra* note 1, at art. 2.

36. *Id.* at art. 15.

37. *Id.* at art. 16.

38. *Id.* at art. 7. See also Françoise Gaspard, *Unfinished Battles: Political and Public Life*, in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 145.

39. CEDAW, *supra* note 1, at art. 11. See also Pramila Patten, *Personal Reflection: Opportunities and Traps—The Informal Labor Market*, in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 179; Hanna Beate Schöpp-Schilling, *Impediments to Progress: The Formal Labor Market*, in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 159.

40. CEDAW, *supra* note 1, at art. 2(f); *id.* at art. 5(a); *id.* at art. 10h; *id.* at art. 11.1(f); *id.* at art. 11.2(d); *id.* at art. 12; *id.* at art. 14.2(b); *id.* at art. 14.2(h); *id.* at 16(e)(1). See also Carmel Shalev, *Women's Health: Accommodating Difference*, in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 196.

41. CEDAW, *supra* note 1, art. 10.

in social and economic life in conditions of equality with men.⁴² A special article addresses ending discrimination against rural women.⁴³ CEDAW also establishes that State parties must prohibit all discrimination in law or in practice and guarantees women effective protection against all acts of discrimination practiced by any person, organization, or company.⁴⁴ Perhaps even more important, given that masculine and feminine roles are socially constructed and maintained through patriarchal culture, CEDAW provides that State parties are obligated to take all appropriate measures to modify socio-cultural patterns and stereotypes, and to eliminate prejudices and cultural practices based in sexist ideas.⁴⁵ And through its General Recommendation 19, the CEDAW Committee has clarified that violence against women is discrimination against women that states are obligated to address.⁴⁶

CEDAW also addresses the particularities of the biological differences between men and women, establishing among other things, that measures directed to protecting maternity are not considered discriminatory.⁴⁷ Also, as will be discussed in greater detail below, recognizing the unequal history that women have suffered, CEDAW sanctions, and when appropriate requires, special measures of a temporary character, or affirmative action, in order to accelerate the achievement of equality between women and men.⁴⁸

C. The Principle of Substantive Equality

1. Substantive Equality and Equality of Results

To achieve substantive equality in all spheres CEDAW requires two types of actions by the State: (1) actions to achieve equality of opportunity between men and women, and (2) actions to correct the inequalities of power between men and women. The first type of action requires that all women regardless of their race, ethnicity, etc. have the right to equality of

42. *Id.* at art. 13.

43. *Id.* at art. 14. See also Aida González Martínez, *Rights of Rural Women: Examples from Latin America*, in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 212.

44. CEDAW, *supra* note 1, at art. 2.

45. *Id.* at art. 5. See also Frances Raday, *Culture, Religion, and CEDAW's Article 5(a)*, in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 68.

46. CEDAW, *supra* note 1, art. 5; Comm. on the Elimination of Discrimination Against Women, 11th Sess., *General Recommendation 19* (Jan. 20–30, 1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations>. See also Heiso Shin, *CEDAW and Violence Against Women: Providing the "Missing Link,"* in THE CIRCLE OF EMPOWERMENT, *supra* note 2, at 223; SALLY ENGLE MERRY, *HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 72 (2006).

47. CEDAW, *supra* note 1, at art. 4.2.

48. *Id.* at art. 4.1; Comm. on the Elimination of Discrimination Against Women, 30th Sess., *General Recommendation 25* (Jan. 12–20, 2004), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations>.

opportunities with men of access to the resources of a country or community. This must be guaranteed through laws and policies with their respective mechanisms and institutions to assure compliance.

Also, CEDAW establishes that the basis for evaluating whether a state is providing women equal opportunities to those of men is equality of results.⁴⁹ Thus, for CEDAW the indicators of equality are not in policies, law, or institutions that have been created to give opportunities to women, but in what all these laws and policies have achieved. For example, according to CEDAW, substantive equality has not been achieved, even though laws and special policies exist to advance or improve women's opportunities, if these have not really and effectively resulted in women having the opportunities that men have in all spheres of life.

To achieve equal opportunities, CEDAW requires that the differences and inequalities between men and women be taken into account. Obviously, there are real biological differences between men and women. But according to human rights theory and the principle of equality contained in domestic constitutions, these differences do not have to cause inequality. Rather, such inequality is prohibited. If the principle of equality referred only to equality between people who have no differences, there would be no reason for its existence. The prohibition on discrimination is a prohibition on discriminating based on factors such as sex, race, age—all conditions that have biological and social elements that differentiate some from others.

Biological differences produce inequalities or disadvantages for women because due to androcentrism most laws and policies function with a standard that is based on the masculine sex. Thus, physical force and the fact that men do not get pregnant are conditions that translate into demands on women if we want to have the same opportunities. But in addition, there are inequalities in the social order due to gender that result in disadvantages and inequalities for women. For example, inequalities are generated due to women's double or triple workloads, the fact the women are more vulnerable to sexual violence, and the fact that we have been subjected to thousands of years of subordination and oppression. All these are conditions generated by the social construction of gender and not by biological differences.⁵⁰ For this reason, it is important that laws, policies, mechanisms, and institutions that are created to achieve equal opportunities for women take into account the various ways in which women are unequal to men. This means that they must take into account when inequality is due to biology and when it is due to gender, and that they also must

49. CEDAW, *supra* note 1, at art. 2(a).

50. See generally A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2001).

reflect an awareness that most existing policies are not neutral but are based on the masculine standard.

For example, a policy to equalize women's opportunities in employment, however good it is, will not result in women having equal opportunities with men in employment if it does not take into account that there are other laws and policies that influence employment that disadvantage women. For this reason, CEDAW demands that in implementing a policy of equal opportunities, the social factors that affect this inequality be taken into account. It is not only necessary that women have equal opportunities with men but also that we have equal access to these equal opportunities. Thus Article 3 of CEDAW establishes that the State is obligated to create the social and economic conditions and the services, such as childcare centers, safe transportation, security against sexual and gender violence, access to information, etc, that are required, whether due to women's biological conditions or gender, to enable women to take advantage of the opportunities offered.⁵¹

But taking differences into account does not always result in substantive equality. We know that another form in which the State has treated the theme of equality between men and women is by taking women's differences from men into account in order to "protect" them, as for example, by prohibiting them to work at night. According to CEDAW, these protections are not appropriate means of achieving equality because they do not result in women having the same opportunities that men have of access to all the resources of the country. Also such protective measures are not appropriate means for achieving substantive equality if they reinforce myths and stereotypes that for centuries have resulted in sex discrimination and in inequality of women.

2. Article 4.1 and Temporary Special Measures

The second type of action CEDAW requires of the State in order to achieve substantive equality is the implementation of corrective measures where needed to eliminate the inequalities and disadvantages of women with respect to men. This means measures that eliminate the inequalities of power between the sexes. CEDAW addresses the issue of special measures in Article 4.1 and 4.2:

1. 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, but shall in no way entail as a consequence the maintenance of un-

51. CEDAW, *supra* note 1, at art. 3.

equal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.⁵²

Article 4.1 sanctions and encourages states' adoption of special measures of a temporary nature to compensate women for masculine privileges due to the structures of gender that have been based on the masculine standard. Indeed, resort to such measures is required under CEDAW's repeated mandates that "State Parties shall take . . . all appropriate measures" to eliminate discrimination against women.⁵³ Given that for centuries men have had privileges based on their sex/gender, the state is required to take measures that give women advantages in order to equalize access to a determined space or right. Thus, to achieve substantive equality in employment, for example, the State may be obligated to adopt corrective measures or engage in affirmative actions that give women priority to compensate for the privileges that men have had in the past and that they continue to enjoy so long as the standards continue being masculine. These measures must be maintained until real or substantive equality between men and women is achieved, bearing in mind that there are also unequal power relations between subgroups of women that must be taken into account.⁵⁴

i. The History of Article 4.1's Concept of Temporary Special Measures

To understand the Convention's concept of special measures, it is useful to look at the history of the drafting of Article 4. From the beginning, Member States participating in the working group of the Commission on the Status of Women which was preparing the draft text of CEDAW struggled to reach agreement on the proper placement and wording of the provision that became Article 4. Their differences of opinion on placement issues focused (1) on whether such a provision should be in the section on general provisions and (2) on the nature of the provision's relationship to other articles of CEDAW. Their discussions also stressed the need for clearly distinguishing between temporary special corrective or compensa-

52. *Id.* at art. 4.

53. *Id.* at art. 3.

54. See generally International Woman's Rights Action Watch, *Addressing Intersectional Discrimination With Special Temporary Measures*, Asia Pacific Occasional Papers Series, No. 8 (2006), available at <http://ssrn.com/abstract=1146820>.

tory measures aimed at achieving de facto equality and special protective measures aimed at protecting maternity. The final text of Article 4 addresses these two different types of special measures in separate paragraphs, Article 4.1 and 4.2, respectively.⁵⁵

The consensus of the working group for the draft convention is reflected in the final text of Article 4. Article 4 was included as a general provision, thus implicitly interrelated with the other articles of CEDAW. The reference to “accelerating de facto equality” in Article 4.1 underscores the compensatory or corrective aims of the measures addressed in this paragraph. This language demonstrates Article 4.1’s embrace of the concept of substantive rather than merely formal equality. In response to an amendment proposed by the United States, the final text of the first paragraph of Article 4 reiterates the temporary nature of such measures by incorporating language, similar to that of Article 1(4) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), indicating that such measures “shall in no way entail as a consequence the maintenance of unequal or separate standards” and “shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”⁵⁶

ii. Overview of General Recommendation 25 on Temporary Special Measures

At its January 2004 session, the Committee on the Elimination of Discrimination Against Women gave final approval to General Recommendation No. 25, interpreting the meaning and scope of “temporary special measures” under Article 4.1.⁵⁷

General Recommendation 25 is not the first general recommendation that the Committee has issued addressing temporary special measures under Article 4.1. Two of the Committee’s early general recommendations called on State parties to pay closer attention to Article 4.1. During its seventh session in 1988, the Committee adopted GR 5 and GR 8, both related to temporary special measures.⁵⁸

55. See LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 66–76, (1993); Hanna Beate Schöpp-Schilling, *Background Paper for a General Recommendation on CEDAW Article 4.1*, U.N. Doc. CEDAW/C/2002/I/WP.1 (Nov. 14, 2001).

56. CEDAW, *supra* note 1, at art. 4.1.

57. Comm. on the Elimination of Discrimination Against Women, 25th Sess., *General Recommendation 25* (Jan. 12–30, 2004), available at <http://www.un.org/womenwatch/daw/cedaw/> recommendations.

58. See Comm. on the Elimination of Discrimination Against Women, 7th Sess., *General Recommendation 5* (Feb. 16–Mar. 4, 1988), available at <http://www.un.org/womenwatch/daw/cedaw/> recommendations; Comm. on the Elimination of Discrimination Against Women, 7th Sess., *General Recommendation 8* (Feb. 16–Mar. 4, 1988), available at <http://www.un.org/womenwatch/daw/cedaw/> recommendations.

In General Recommendation 5, the Committee took note that though “significant progress has been achieved in regard to repealing or modifying discriminatory laws, there is still a need for action to be taken to implement fully the Convention by introducing measures to promote de facto equality between men and women.”⁵⁹ Accordingly, the Committee reminded States parties of Article 4.1 and recommended that they “make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics and employment.”⁶⁰

General Recommendation 8 addressed the implementation of Article 8 of the Convention, which provides that “States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.”⁶¹ In General Recommendation 8, the Committee recommends that States parties “take further direct measures in accordance with article 4 of the Convention to ensure the full implementation of article 8 of the Convention.”⁶²

In 1997, at its sixteenth session, the Committee again issued a general recommendation touching on temporary special measures, this time directed to States parties’ specific obligations under Article 7 of the Convention, addressing discrimination against women in political and public life. Paragraph 15 of this lengthy general recommendation specifically refers to Article 4 in speaking to the use of temporary special measures:

15. While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas

59. See Comm. on the Elimination of Discrimination Against Women, 7th Sess., *General Recommendation 5* (Feb. 16–Mar. 4, 1988), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations>.

60. *Id.*

61. G.A. Res. 34/180, art. 8, U.N. Doc. A/RES/34/180 (Dec. 18, 1979).

62. See Comm. on the Elimination of Discrimination Against Women, 7th Sess., *General Recommendation 8* (Feb. 16–Mar. 4, 1988), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations>.

and targeting women for appointment to public positions, such as the judiciary or other professional groups, that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.⁶³

The Committee's consideration of what became General Recommendation 25 began in 2000. At its twenty-third session, the Committee decided to prepare a more comprehensive general recommendation on temporary special measures under Article 4.1. At its twenty-fourth session in early 2001, it began discussion of this new general recommendation. In July, it received a requested report by the Secretariat containing a detailed analysis of the Committee's approach to Article 4.1, including its reports to World Conferences, its general recommendations, and its review of reports of States parties. As part of its further consideration of a general recommendation on Article 4.1, in August 2002, members of the Committee met with NGOs and academics in a one-day workshop in New York City to discuss the conceptual framework of temporary special measures and issues relating to their implementation and monitoring.⁶⁴ The new General Recommendation 25 was adopted by the Committee at its thirtieth session in January 2004.⁶⁵

63. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women*, ¶ 15, U.N. Doc. A/52/38 (July 7–25, 1997).

64. See TEMPORARY SPECIAL MEASURES: ARTICLE 4.1 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: WORKSHOP REPORT (IWRW Asia Pacific and U.N Division for the Advancement of Women, 2002). The authors were invited to participate in this workshop, and author Morgan presented a paper critiquing opposition to affirmative action—Martha Morgan, *Challenges and Objections to Temporary Special Measures*, in TEMPORARY SPECIAL MEASURES: ARTICLE 4.1 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: WORKSHOP REPORT, *supra*, at 5, 35–40.

65. See Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women*, ¶ 333, U.N. Doc. A/55/38 (June 12–30, 2000); Comm. on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women*, ¶ 372, U.N. Doc. A/56/38 (Jan. 15–Feb. 2, 2001); U.N. Secretariat, *Committee's approach to article 4, paragraph 1 of the Convention*, U.N. Doc. CEDAW/C/2001/II/1 (June 8, 2001); Comm. on the Elimination of Discrimination against Women,

General Recommendation 25 begins with a two paragraph introduction placing the new general recommendation in context by referencing the earlier general recommendations discussed above. The Committee identifies its aim as “to clarify the nature and meaning of article 4, paragraph 1, in order to facilitate and ensure its full utilization” and urges States parties to translate the new recommendation into national and local languages and widely disseminate it.⁶⁶

The second section of General Recommendation 25 (Paragraphs 3–14) provides further background on the object and purpose of the Convention, beginning with the Committee’s description of CEDAW as a “dynamic instrument.”⁶⁷ The Committee emphasizes that Article 4.1 must be read in the context of the overall object and purpose of CEDAW, “which is to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms.”⁶⁸ State parties are reminded of their four-fold legal obligation “to respect, protect, promote and fulfill this right to nondiscrimination for women.”⁶⁹ This section then elaborates on the Convention’s broad concept of substantive equality; on the need to distinguish temporary special measures from measures designed to address women’s biologically determined permanent needs; on the multiple forms of discrimination certain groups of women face;⁷⁰ and on the Committee’s hope that by using Article 4.1’s term “temporary special measures,” GR 25 “will contribute to a clarification of terminology.”⁷¹ The section concludes with the statement that “the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of nondiscrimination and equality.”⁷²

In Section III (Paragraphs 15–24), GR 25 addresses the meaning and scope of temporary special measures in CEDAW. Subsections address the relationship between paragraphs 1 and 2 of Article 4, the decision to use

Report of the Committee on the Elimination of Discrimination against Women, ¶ 428, U.N. Doc. A/59/38 (Jan. 12–30, 2004).

66. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women*, ¶ 2, U.N. Doc. A/59/38 (Jan. 12–30, 2004).

67. *Id.* ¶ 3.

68. *Id.* ¶ 4.

69. *Id.*

70. *Id.* ¶ 12. Section II, Paragraph 12 states:

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them. *Id.*

71. *Id.* ¶ 13.

72. *Id.* ¶ 14.

Article 4.1's terminology "temporary special measures," and the key elements of Article 4.1. Separate paragraphs discuss the meaning of each of the terms "temporary," "special," and "measures." "Temporary" special measures "to accelerate the achievement of a concrete goal for women of de facto or substantive equality" are distinguished from "other general social policies adopted to improve the situation of women and the girl child."⁷³ The term "special" is not meant to portray women as "weak, vulnerable and in need of extra or 'special' measures in order to participate or compete in society," but means "designed to serve a specific goal."⁷⁴ The term "measures" is broadly defined with choice of particular measures dependent on context.⁷⁵ The section ends by underscoring that the language in Articles 6 to 16 of CEDAW stipulates that State parties "shall take all appropriate measures" and

[c]onsequently, the Committee considers that States parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality.⁷⁶

Finally, Section IV (Paragraphs 25–39) contains detailed recommendations to States parties on how to fulfill their implementation, monitoring, and reporting duties. For example, State parties are advised that their reports should include information on whether they have adopted temporary special measures, should explain their reasons for choosing particular measures, and should provide adequate explanations of any failure to adopt such measures.⁷⁷

IV. CRITIQUING EQUITY

The examination of CEDAW's three principles of equality helps place in context the importance of the debate over attempts to replace the term equality with the term equity. In this section we provide a further human rights-based critique of the use of "equity."

It is understandable that through the years women have grown so tired or frustrated with the restrictive formal way the concept of equality has been interpreted and applied that they have been willing to drop equality and adopt a different term which they think will work for them. But it is

73. *Id.* ¶ 19.

74. *Id.* ¶ 21.

75. *Id.* ¶ 22.

76. *Id.* ¶ 24.

77. *Id.* ¶ 25–39.

most disturbing that even U.N. agencies, who are obligated to use a human rights framework, and maintain that they are doing so, have made the substitution without thinking or analyzing what equality in human rights terms really means. After all, U.N. agencies have an obligation to know and understand that equity is not a term used in the human rights language, nor does it have a concrete meaning within the human rights terminology. At the most, equity is an illusive social goal which allows governments to offer all types of justifications when they fall short, whereas equality is a human right and therefore a legal obligation. U.N. agencies should know that human rights are not discretionary and neither is equality. Human rights, based on the principle of equality, are not societal goals or political aspirations. Unlike developmental goals regarding women's status, equality—as a human right—must be respected, protected, and fulfilled by all governments.

One problem is that the content that has been given to the concept of equality has been androcentric, which is to say that men are the frame of reference and their experience is the norm. In other words, the male human is seen as the model or standard for the human experience and as the subject for whom human rights have been established. Thus, many believe that when we speak of equality between men and women, what we are talking about is making women equal to men—the standard. This in turn has been understood as meaning that for there to be equality between women and men, women need to be more like men. Men, on the other hand, do not need to be more like women. But this is not the understanding of equality enshrined in human rights treaties, and it especially is not CEDAW's concept of equality.

Neither is this the kind of equality feminists have sought for centuries, though admittedly, sometimes this search for equality may look like women trying to be like men. This is contradictory only if one fails to understand that because men have been the frame of reference for the human experience, when women demand to be treated like humans, it is necessarily perceived as women demanding to be treated like men.

So, while feminists are not seeking to be identical to men, we are seeking to enjoy those rights which men have enjoyed before us, and we are seeking to enjoy the status of "human" which men already enjoy. In other words, we are not proposing an equality that translates into an identical treatment of women and men; we are demanding an equality that translates into whatever treatment enhances the enjoyment by both sexes of all human rights. And, in order for women and men to enjoy their human rights on an equal basis, a state is obligated to eliminate all forms of discrimination, which is precisely the kind of equality set forth in the CEDAW Convention.

As discussed, the concept of "equality" that CEDAW uses is one of substantive equality or equality of results, which necessarily requires the

elimination of all forms of discrimination against women. Furthermore, as with all other human rights, equality as a human right demands state action to achieve it. The term "equity" does not obligate the state and therefore does not demand any state intervention, nor is it linked to the elimination of discrimination. Equity is a subjective term that can mean different things to different people, whereas the term equality is measurable in that it can only be reached when there no longer exist any of the various forms of discrimination against women.

It is important to remember that the term "equality" obviously includes diversity because it would not be possible to eliminate all the forms of discrimination against all women without taking into account their enormous differences. Without taking into account the intersectionality of gender with ethnicity, economic class, geographic location, immigration status, sexual identity and orientation, age, abilities, and other such factors, equality between the sexes can never be achieved because equality is based on the elimination of all forms of discrimination.

Replacing "equality" with the more ambiguous term "equity" will not correct the problem of the limited content that the powerful may give to whichever of the two terms is used. From the perspective of human rights, what we have to do is re-conceptualize equality in conformity with the CEDAW Convention and not invent new terms that are not guaranteed in any legal document. For this reason, it is wrong to replace the term equality with equity.

Substituting equity for equality is wrong because it is based on several errors, some of which are conceptual and others which are political-strategic. Although some of the reasons this substitution is wrong have been mentioned, the next few paragraphs analyze these errors further.

First of all, it is not true that equality, or even equality before the law, always demands the same treatment or identical measures for men and women. Indeed, one of the fundamental principles of constitutional law and of the theory of human rights is that it is discriminatory to treat things that are different as identical. Thus, it has always been understood that the principle of equality or equality before the law requires that law and public policy not always treat men and women as if they were identical. It is true that formal equality generally does require identical treatment. But we must not forget that there are many circumstances in which this is what women need. For example, we need the state to respect our rights to education, freedom of expression, to vote, to food, to access to justice, etc. even though we may need to re-conceptualize those rights from a gender perspective. Other times we need different treatment of men and women, whether this is because of mutual biological differences or because of the historical inequality of power between the genders. What is important is to understand that equality, according to the theory of human rights, and especially according to CEDAW, requires nondiscriminatory treatment,

which is to say requires treatment that results in the full enjoyment of human rights for persons of whatever gender, of all ages, colors, and abilities. In other words, the principle of equality requires that sometimes the state give identical treatment to men and women and at other times, different treatment. What equality always requires is that this treatment, whether it be different or identical, result in both men and women enjoying their human rights on an equal basis.

Second, because the term "equity" is such a subjective concept, it means different things to different people, in different languages, or even within the same language. In Spanish, for example, the Ideological Dictionary of the Spanish Language gives as one definition for equity, "natural justice as opposed to the letter of the positive law."⁷⁸ Let us not forget that, according to many thinkers, it is just and natural that women do not rise to decision-making positions because they have the power of maternity. According to the Vatican, it is "just" that women do not have sexual and reproductive rights. And for fundamentalist Muslims of Afghanistan, for example, divine justice requires that women wear the burka; not receive remuneration for their work; not be educated; and be in the world only to serve men, give them children, and care for them.⁷⁹ Under the prevailing concepts of justice in many African countries, it is considered equitable that women do not inherit from their fathers because they will not have to be providers like their brothers will.⁸⁰

Turning to the English language, Black's Law Dictionary also refers to "natural law" and "natural justice" among other terms such as "fairness" and "impartiality," in defining "equity."⁸¹ In contrast, it defines equality as "[t]he quality or state of being equal; esp., likeness in power or political status."⁸² In common law legal systems such as the U.S., as Black's further definitions point out, the term equity is also used to refer to "[t]he system of law or body of principles originating in the English Court of Chancery" where appeal was to the "king's conscience."⁸³ This history further underscores the discretionary nature of the term. Moreover, even after the merger of courts of law and equity, the distinction continues to be used to identify different forms of remedy, creating possibilities for confusion when equity is also used as the legal standard for measuring whether a violation has occurred.

78. JULIO CASARES, DICCIONARIO IDEOLOGICO DE LA LENGUA ESPANOLA [IDEOLOGICAL DICTIONARY OF THE SPANISH LANGUAGE] 344 (2d ed. 1985).

79. See Ravi Mahalingam, *Women's Rights and the "War on Terror": Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalism*, 34 CAL. W. INT'L L.J. 171, 181-83 (2004).

80. See Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 503-04 (2002).

81. BLACK'S LAW DICTIONARY 579 (8th ed. 2004).

82. *Id.* at 576.

83. *Id.* at 579.

Another reason that we have to be dubious about replacing equality with equity is the fact that the first to propose this along the road to Beijing were fundamentalist Islamic forces and the Vatican and its followers in Latin America. None of these groups have distinguished themselves for their respect for women's human rights. So why should we think that their proposal to replace equality with equity was made because they want a better world for women? To the contrary, these groups argued, for example, that it would be better to use equity instead of equality with respect to inheritance rights because the term equity would permit parents to be more "just" in the division of their property: sons could inherit the lands and means of production because they will be the providers, while daughters could inherit the kitchen utensils because they will be the queens of the home.

In her 1996 Edward A. Smith Lecture at Harvard Law School, Radhika Coomaraswamy, United Nations Special Rapporteur on Violence Against Women, pointed to the role that countries such as Sudan have played in promoting the use of "equity" rather than "equality."

Although some feminists have attempted to go "beyond equality" to a deeper analysis of what it means to say that men and women are equal, a few state actors in the international arena such as Sudan, have taken a different direction, one that threatens to restrict women's rights. They argue that the word "equality" be replaced with the word "equity" with respect to gender-based issues. Equality is not seen as desirable. Rather, equity and fairness, as more abstract and flexible provisions that could readily depart from the principle of formal equality, should guide state action toward women. Of course such provisions would likely draw on contextual mores and particular traditions to develop their meaning and guide their applications.⁸⁴

An additional reason for not substituting equity for equality is that it is dangerous. As previously noted, the reasons often given for the substitution only serve to entrench the incorrect, though widely accepted, notion that equality requires identical treatment of men and women. This is doubly dangerous. First, because some of the most potent instruments we have today for promoting women's welfare are the human rights instruments, all of which enshrine the principle of equality, substituting equity for equality leaves us without these legal instruments upon which to base our claim to human rights. Second, and more worrisome still, the human

84. Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community*, 23 COMMONW. L. BULL. 1249, 1258 (1997).

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rights instruments with which we are left are weakened because the equality they do enshrine is then understood to mean identical treatment.

This point also raises a political-strategic reason for rejecting equity as a substitute for equality. Because international human rights instruments use the terminology of equality rather than equity in prohibiting discrimination based on sex, it is more effective to use the language of human rights. For example, women cannot go to the CEDAW Committee under the Optional Protocol or to the Human Rights Committee or a regional human rights court or commission to accuse states of not having equitably distributed resources between men and women, for the state has no legal obligation to do so. But we can accuse states of violating the mandate of equality and nondiscrimination against women if women are given fewer resources than men and if this distribution results in women not enjoying certain rights on an equal basis with men.

Many people and organizations who have substituted the term equity for equality insist that they are working under a human rights framework. But this is dubious. Without equality, human rights for women will not have any practical worth because there will be thousands of justifications for limiting them for reasons of sex, ethnicity, age, ability, sexuality, etc. Those of us who believe in equality, and thus in equality of women and men, believe that the sexes, like ethnicities, races, generations, etc. are equally different and equally similar to each other and that neither our differences nor our similarities should be reason for exploiting, discriminating against, oppressing, or in any other form dehumanizing us.

For those who still are not convinced that equity is not a good substitute for equality, perhaps the best option would be to use both of the concepts but very carefully. For example, it is correct to say that we will introduce policies for equity and equality between the genders because this is the same as saying that we want justice and equality between the genders. In this phrase we have a subjective concept such as "just" and an objective concept such as "equality". No problem with that. But when we are speaking about our human rights, when we are speaking of the rights to work, to a dignified salary, to education, to health, we must understand that women do not want to enjoy these rights in a fair or just or equitable way, for these terms are too subjective and can mean different things to different people. When we are speaking about rights, we need to state quite categorically that we demand to enjoy them equally and without discrimination. That is to say, we demand an equal right to work, an equal right to health, and an equal right to all rights.

V. IMPACT OF CEDAW'S CONCEPT OF EQUALITY

A. Influence in Countries That Have Ratified CEDAW: Costa Rican Examples

CEDAW's broad understanding of equality has positively affected Constitution drafting and reform, legislation, and equality jurisprudence in many of the countries that have ratified it.⁸⁵ For purposes of illustration, the focus here is on the positive influence that CEDAW's concept of substantive equality has had on the constitution, legislation, and equality jurisprudence of Costa Rica.⁸⁶

In Costa Rica, the Constitutional Chamber of the Supreme Court, which has the authority to interpret the Costa Rican Constitution, has interpreted Article 7 of the Constitution⁸⁷ as according supra-constitutional status to ratified human rights treaties such as CEDAW⁸⁸ and as making them self-executing, or of immediate applicability.⁸⁹ Accordingly, Costa Rican opinions frequently cite and rely upon CEDAW and other international treaties among other sources of law in gender discrimination cases. Gender norms from CEDAW and other international treaties have also played a role in shaping the understanding of the general equality guarantee of Article 33 of the Costa Rica Constitution. Article 33 was amended in 1999 to replace the term "hombre" (man) with the term "persona" (person) and now provides "[e]very person is equal before the law and there shall not be any discrimination contrary to human dignity."⁹⁰

Costa Rican gender jurisprudence has also been influenced by other important legislative and constitutional reform during the 1990s that further implemented Costa Rica's constitutional and international gender equality norms. The first of these was the 1990 Law for the Social Promotion of Women which included various statutory reforms designed to achieve "real and effective" equality for women.⁹¹ Section 5 of this law

85. See Rubio-Marín & Morgan, *supra* note 4 (for examples from other countries).

86. The discussion of much of this Costa Rican jurisprudence is adapted from the authors' prior works on Latin American gender jurisprudence, including our contributions to THE GENDER OF CONSTITUTIONAL JURISPRUDENCE (Beverley Baines & Ruth Rubio-Marin eds., Cambridge University Press 2005), GENDER AND HUMAN RIGHTS (Karen Knop ed., Oxford University Press 2004), and other of our works cited therein.

87. Article 7 states:

Public treaties, international conventions and agreements, duly approved by the Legislative Assembly, shall have, from their promulgation or from the date that they designate, authority superior to the laws.

CONSTITUCION POLITICA [CONSTITUTION] art. 7, *as reformed by* Law No. 4123 (May 31, 1968) (Costa Rica).

88. Costa Rica ratified CEDAW in 1984. Law No. 6968 (Oct. 2, 1984).

89. See Rubio-Marín & Morgan, *supra* note 85, at 124.

90. CONSTITUCION POLITICA [CONSTITUTION] art. 33, *as reformed by* Law No. 7880 (May 27, 1999) (Costa Rica).

91. Ley de Promoción de la Igualdad Social de la Mujer [Law for the Social Promotion of Wom-

required political parties to adopt measures to assure participation of women within the parties and as electoral candidates, and under Section 6, thirty percent of funds under Article 194 of the Electoral Law were to be designated to promote the training and participation of women.⁹² In 1996, the Electoral Code was amended to impose a 40% quota for women's participation on party lists of electoral candidates at all levels of popular elections and to require that women hold 40% of other party positions.⁹³ Following the adoption of this electoral law reform, in 1997, Article 95 of the Constitution was amended to include "guarantees for the designation of authorities and candidates of political parties, according to democratic principles and without discrimination based on gender" among the list of principles to be followed in electoral laws.⁹⁴

This discussion will focus on three areas where CEDAW's concept of substantive equality is reflected in Costa Rican decisions: electoral law quotas, representation of women on public boards and legislative committees, and the criminalization of violence against women.

1. Electoral Law Quotas⁹⁵

In Costa Rica, the Supreme Electoral Tribunal, which functions as a fourth coequal branch of government and has jurisdiction over electoral matters, has played an important role in advancing gender equality through its interpretation, development, and application of the electoral law provisions requiring corrective measures within the electoral sphere. The Tribunal's interpretations have progressively clarified and strengthened these provisions in accordance with equality provisions of the Costa Rican Constitution, CEDAW, and other international treaties ratified by the country.

For example, in 1999 the Tribunal received a request that it revise, clarify, and extend its 1997 interpretation of the Costa Rican Electoral Code's 1996 provision imposing a 40% quota for women's participation on party lists of electoral candidates. Its earlier interpretation had allowed the names of women candidates to be placed in any order on a party list of candidates.⁹⁶ Magistrada Anabelle León Feoli, who since has been named to the Supreme Court,⁹⁷ wrote the opinion for the Tribunal in the new

en], Law No. 7142 (Mar. 8, 1990) (Costa Rica).

92. *Id.*

93. CODIGO ELECTORAL [ELECTORAL CODE], arts. 58(n), 60 (1996) (Costa Rica).

94. CONSTITUCION POLITICA [CONSTITUTION] art. 95(8), as reformed by Law No. 7675 (July 2, 1997) (Costa Rica).

95. For discussion of how other countries have dealt with this issue, see Blanca Rodriguez Ruiz and Ruth Rubio-Marin, *Constitutional Justification of Parity Democracy*, 60 ALA. L. REV. 1169 (2009).

96. Resolución No.1863-E-99, Tribunal Supremo de Elecciones [Supreme Electoral Tribunal] (1999) (Costa Rica). Costa Rica uses a proportional representation electoral system.

97. ALDA FACIO, RODRIGO JIMINEZ SANDOVA, & MARTHA I. MORGAN, THE GENDER OF

case. The Tribunal first concluded that the National Institute on the Condition of Women did not have legal standing to seek the opinion it had requested. But relying on its authority to recognize, on its own, the need for further interpretation of the electoral order, it proceeded to issue the requested clarification.

The opinion began by reviewing the Costa Rican Constitution's equality guarantees, provisions of CEDAW, other international treaties, and jurisprudence from the Constitutional Chamber of the Supreme Court upholding compensatory measures in other areas.⁹⁸ In particular, the opinion quoted from Article 2(f) of CEDAW in which state parties agree "[t]o take all appropriate measures, including legislation, to modify or abolish existing law, regulations, customs and practices which constitute discrimination against women" and noted that states are also obligated to adopt special temporary measures designed to accelerate de facto equality between men and women.⁹⁹ The Tribunal revised its prior interpretation of Article 58 to require that the names of women candidates be placed on the list in an order that makes them electable.¹⁰⁰

A later opinion by the Tribunal further clarified that the 40% requirement was a minimum, not a limit, on the number of women candidates and gave suggested mechanisms for meeting the requirement that women's names be placed in positions that give them real possibilities of being elected.¹⁰¹ These suggestions included alternating the names of women and men on the lists and using the history of previous elections to determine the number of positions that had real possibilities of being elected.¹⁰²

A more recent ruling of the Electoral Tribunal concerning quotas for women's political participation is its 2005 decision in favor of the New Feminist League Party whose inscription had been rejected by the Ministerial Department of the Civil Registry on the grounds that the party's internal organization (which was more than 60% women) did not comply with Article 60 of the Electoral Code.¹⁰³ The Tribunal rejected arguments, based in part on Article 33 of the Costa Rican Constitution's equality pro-

CONSTITUTIONAL JURISPRUDENCE 110 (Beverly Baines & Ruth Rubio-Marin eds., Cambridge University Press 2005).

98. In particular, the Tribunal quoted from the 1998 opinion of the Constitutional Chamber of the Supreme Court involving representation of women on public boards that is discussed in the following section, Voto No. 00716-98. Resolución No.1863-E-99, Tribunal Supremo de Elecciones [Supreme Electoral Tribunal] (1999) (Costa Rica).

99. *Id.*

100. *Id.*

101. Resolución No. 2837-E-99, Tribunal Supremo de Elecciones [Supreme Electoral Tribunal] (1999) (Costa Rica).

102. *Id.*

103. Resolución No. 2096-E-2005, Tribunal Supremo de Elecciones [Supreme Electoral Tribunal] (2005) (Costa Rica).

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vision, that Article 60's requirement of participation of not less than 40% women must be read to also require a minimum of 40% men:

The normative basis for development of the quota for women's participation in articles 58 and 60 of the Electoral code is the legislature's recognition that, despite the guarantee of the principle of equality in the Constitution and in the different human rights instruments ratified in the country, historically there has existed an inequality between men and women in the political-electoral sphere that must be palliated with affirmative actions to eliminate this discrimination.¹⁰⁴

The Constitutional Chamber of the Costa Rican Supreme Court has also contributed to the jurisprudence on the quota provisions of the 1996 revisions to the Electoral Code. In 2001, it rejected a constitutional challenge to the final portion of Article 60 of the Electoral Code, which requires that political parties include at least 40% female members of party assemblies at the district, cantonal, and provincial levels.¹⁰⁵ The opinion drew heavily from the Court's 1998 opinion dealing with candidates for public boards discussed below. It found the challenged provision was a reasonable affirmative action measure that was designed to allow female participation in the political processes and that it provided a partial solution to the disadvantages women face in this realm.¹⁰⁶

2. Representation on Public Boards and Legislative Committees

A leading case in Costa Rica's gender jurisprudence is the 1998 opinion of the Constitutional Chamber of the Supreme Court ruling in favor of Legislative Assembly Deputy Marlene Gómez Calderón, who filed an amparo against the President of the Republic and the President of the Legislative Assembly challenging their failure to include the names of any women among candidates for political appointment to the Board of Directors of the Public Services Regulatory Authority.¹⁰⁷ Magistrada Ana Virginia Calzada Miranda wrote the opinion for the Court, accepting Deputy Gómez Calderón's assertion of "diffuse interest" claims on behalf of all Costa Rican women.

The Court held that the failure to name women candidates was unconstitutional discrimination against women by an act of omission.¹⁰⁸ In explaining its reasoning, the opinion quoted from Article 7 of CEDAW and

104. *Id.*

105. Sentencia No. 2001-03419 (2001) (Costa Rica).

106. *Id.*

107. Voto No. 00716-98 (1998) (Costa Rica).

108. *Id.* at 8-9.

from Article 4 of the 1990 Law for the Promotion of Social Equality for Women, both requiring state authorities to take appropriate measures to eliminate discrimination and promote women's participation in public positions.¹⁰⁹ It reasoned that differences in women's appreciation of the reality of society "strengthens democracy."¹¹⁰ The failure to nominate and name women to the Board of Directors was "contrary to the democratic principle of equality established in article 33 of the Constitution."¹¹¹

Although the following year the majority failed to apply the reasoning of this case to a different factual situation,¹¹² in 2003, the Court not only embraced but extended its concept of substantive equality. This 2003 opinion upheld a claim against the President of the Legislative Assembly based upon his appointments to legislative committees.¹¹³ Five assembly members, four women and one man, challenged the President's failure to name proportional numbers of women and men to the assembly's 2002–2003 permanent committees.

As a result of the influence of Costa Rica's 1996 provisions on electoral quotas, thirty-five percent (twenty of the fifty-seven members) of the 2002 Assembly were women. But the President's committee appointments were as follows: Housing Affairs—8 men (73%) and 3 women (27%); Agricultural Affairs—8 men (89%) and 1 woman (11%); and Social Affairs—3 men (35%) and 6 women (65%). The challengers argued that the disproportionate representation on these committees meant that the respective perspectives of men and women on the reality of Costa Rican society were missing from their deliberations and decision-making.

The Court unanimously ruled that the Assembly President's omissions were inconsistent with the guarantee of equality under the Costa Rican Constitution, and those of CEDAW and the Inter-American Convention on Human Rights.¹¹⁴ The opinion quoted article 7 of CEDAW as well as relevant articles from the Law for the Social Promotion of Women and the Electoral Code. It condemned the President's failure to name women and men in proportionality, or to provide sufficient evidence that he had deliberately and adequately considered or paid attention to the demands for women's participation legally required by the governing legal norms. His actions not only limited the challengers' advancement to proportional

109. *Id.* at 6.

110. *Id.* at 7.

111. *Id.* at 8.

112. Voto No. 2166-99 (1999) (Costa Rica). This case involved elections for the board of directors and executive committee of a workers assembly of a mixed public and private bank. Although only 50 of the 290 delegates were women and no women were elected, the majority applied a formal equality approach, finding no unconstitutional discrimination because women and men had the same opportunity to form lists and be elected. Three justices, including two women justices, dissented.

113. Res. No. 2003-04819 (2003) (Costa Rica).

114. *Id.*

membership in the committees but their participation in the formation of laws of national interest.

3. Criminalization of Violence Against Women

On March 31, 2004, as part of its disposition of a legislative consultation on the constitutionality of a Proposed Law Penalizing Violence Against Women, the Court unanimously rejected arguments presented by several members of the Legislative Assembly that the legislation violated the equality provision of the Costa Rican Constitution because it protected only females.¹¹⁵

According to the Court, the proposed law neither infringed the principle of equality under the law nor discriminated based on gender against men. The clear legislative intent was to comply with Costa Rica's obligations under international human rights instruments, in particular under CEDAW,¹¹⁶ as well as under the Inter-American Convention to Prevent, Sanction, and Eradicate Violence Against Women.¹¹⁷ The Court declared that Costa Rica had agreed to "adopt concrete measures for the eradication of discrimination against women, including legislative measures adequate for its punishment as well as those of a special and temporary character designed to accelerate the process of obtaining de facto equality between men and women (Articles 2 (b) and 4 of CEDAW)."¹¹⁸ It emphasized the special situation of women victimized by discrimination manifested through the medium of violence and concluded:

In reality, what the legislator has done in this legislation is a legitimate exercise of what is called affirmative action, manifested in penal legislation, given the specificity and gravity of the matter regulated. With respect to affirmative action, understood as the necessary use of specific regulations to abolish discrimination against women, this Chamber has said that it is a legitimate response of the State that does not infringe upon the principle of equality, because it imperatively intends to abolish a situation of discrimination that is considered to be overcome only if women are given a reinforced protection or participation through special measures. From this special and calibrated treatment or particularly accentuated protection, it is not reasonably possible to exclude the promulgation of a special and specific penal norm.¹¹⁹

115. Sentencia No. 2004-03441 (Mar. 31, 2004) (Costa Rica).

116. *Id.* (citing Law No. 6968, Oct. 2, 1984 (Costa Rica)).

117. *Id.* (citing Law No. 7499, May 2, 1995 (Costa Rica)).

118. *Id.* at 20.

119. *Id.* at 21-22 (citing Sentencia No. 2001-3419 (May 2, 2001) (Costa Rica)).

Despite this opinion's strong language supporting substantive equality, a more recent opinion raises serious questions about the future of the Law Penalizing Violence Against Women, which after an eight-year campaign was finally enacted in 2007.¹²⁰ Notwithstanding its unanimous approval of provisions of the draft law in the 2004 pre-enactment legislative consultation discussed above, on October 17, 2008, the Constitutional Chamber, in a divided vote, invalidated two of the 46 articles of the new law.¹²¹ The majority's decision, reportedly based on vagueness, resulted in the release of more than 100 men from prison.¹²² The Court struck down Article 22 which provides that those who repeatedly inflict grave physical injuries on a woman in a marriage or other form of union can be sentenced to six months to two years in prison, and Article 25 under which those who inflict psychological abuse, such as insults, threats or ridicule, on a female partner can be sentenced to six months to two years in prison. In striking down Article 22, the Court reportedly noted that another section of the Penal Code already defines grave injury as injury that incapacitates someone for over a month and thus women are already protected by that provision which allows for a sentence of one to six years.¹²³ Other provisions of the Penal Code provide for sentences of three months to a year for injuries that keep a person from working for more than 10 days, and a fine for injuries that cause someone to be out of work for less than 10 days.

B. Influence on Rights Discourse and Jurisprudence in the United States

One might assume that CEDAW could have little impact in the United States. Although the recent election of President Barack Obama, who has supported ratification of CEDAW, is promising, thus far the country has failed to ratify CEDAW, along with many other human rights treaties. Moreover in this country, even ratified treaties, which have the same status as federal laws in the U.S. legal hierarchy, are frequently heavily laden with reservations and are generally viewed as non-self-executing.¹²⁴

120. Katherine Stanley, *President Signs Long-Awaited Domestic Violence Law*, DAILY NEWS, May 25, 2007, at ticotimes.net.

121. Res. No. 15447-08. As of April 2009, the full opinion had not been officially released.

122. Holly K. Sonneland, *Court Whittles Domestic Violence Law in Costa Rica*, DAILY NEWS, Oct. 20, 2008, at ticotimes.net.

123. *Marchers Seek to Revive Women's Law Ruled Unconstitutional*, A.M. COSTA RICA, Nov. 26, 2008, at 4.

124. Although CEDAW supporters are now pushing for ratification of a "clean" CEDAW, nearly a dozen reservations, understandings, and declarations (RUDs), including a declaration that the treaty would be non-self-executing, were attached when the Senate Foreign Relations Committee previously considered it. See, e.g., *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (Treaties are not binding domestic law unless they convey an intention that they are self-executing or Congress enacts law implementing them. The Vienna Convention's obligation to notify a criminal defendant without delay of his right to consult with his country's consul was not self-executing and not binding on state courts until enacted into law by Congress.); *Medellin v. Texas*, 552 U.S. ____ (2008) (denying stay of execu-

And, some contemporary U.S. judges have been reluctant to accord even persuasive interpretive weight to international or comparative law sources.¹²⁵

Despite these parochial tendencies, there have been a few encouraging signs in recent years.¹²⁶ One of the lead stories in media reports of past terms of the United States Supreme Court has been the Court's references to international human rights and comparative constitutional law sources. These references moved from footnotes in some earlier cases to the body of Justice Kennedy's majority opinions in *Lawrence v. Texas*¹²⁷ and *Roper v. Simmons*.¹²⁸ When read alongside the Court's references to "foreign" materials the previous term, in a footnote to Justice Stevens' majority opinion in *Atkins v. Virginia*,¹²⁹ some predicted the references in *Lawrence* could signal the beginning of a "revolution" in U.S. constitutional law.

But not all members of the U.S. Supreme Court have supported this use of foreign and international human rights law. Dissenting in *Lawrence*, Justice Scalia scornfully objected to what he described as the Court's "dangerous dicta" and decried any imposition by the Court of "foreign moods, fads or fashions on Americans."¹³⁰ It is too early to know the extent to which *Lawrence* and *Simmons* signal a change in the current Court's general lack of "readiness to look beyond one's own shores," in constitutional interpretation.¹³¹ After recent changes on the Court and re-

tion of death sentence).

125. But see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (showing that invocation of international sources is not new and international law has traditionally played a substantial role in U.S. constitutional jurisprudence).

126. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the execution of juvenile defendants; majority opinion refers to the Convention on the Rights of the Child, the Covenant on Civil and Political Rights, and the law of the United Kingdom); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas sodomy statute; majority opinion included references to jurisprudence of the European Court of Human Rights); *Atkins v. Virginia*, 536 U.S. 304 (2002) (invalidating application of the death penalty to the mentally retarded; majority opinion included footnote reference to the opinion of the world community and an earlier brief of the European Union); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (referencing the temporary nature of special measures under CEDAW and CERD).

127. 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and invalidating Texas sodomy law under substantive due process guarantees of the Fourteenth Amendment).

128. 543 U.S. 551 (2005) (invalidating the death penalty for crimes committed by juveniles). Part IV of the majority opinion includes a lengthy discussion of foreign and international sources. *Id.* at 575-78.

129. 536 U.S. at 316 n.21.

130. 539 U.S. at 2488, 2494-95 (Scalia, J., dissenting). See also *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005). Some in Congress weighed in on Justice Scalia's side, proposing the unsuccessful so-called Constitution Restoration Act of 2005, which included a provision for removal of federal judges who rely on foreign materials in interpreting the U.S. Constitution.

131. Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue*, 18 THE BROOKINGS REVIEW 2, 3 (2000) ("[R]eadiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The U.S. Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times and only twice in a majority decision. . . . Nor does the

cent opinions such as that in the March 25, 2008 case of *Medellín v. Texas*,¹³² prospects may be dimmer.

Yet, despite the current federal judiciary's reticence, it behooves equality advocates in the U.S. to devote further careful consideration to how greater resort to international and comparative law sources generally might add to our understanding of the meaning of equality. In particular, special consideration should be given to how CEDAW's equality principles, particularly substantive equality, could help enrich the judicial and academic dialogue about equality and affirmative action.

Indeed, references to the treatment of temporary special measures under CERD and CEDAW have already made their way into one of the separate opinions in the United States Supreme Court's 2003 decisions on affirmative action programs for minority applicants to university and law schools. In her concurring opinion in *Grutter v. Bollinger*,¹³³ Justice Ruth Bader Ginsburg quoted from Article 2(2) of CERD and Article 4(1) of CEDAW in underscoring the temporary nature of affirmative action measures.

Two other CEDAW-related developments from the U.S. highlight the possibilities of using CEDAW and its equality principles in forums other than the federal courts. These developments demonstrate the possibilities of using CEDAW as a tool subnationally¹³⁴ as well as at the level of regional international human rights bodies. First, the City of San Francisco pioneered in using CEDAW at the subnational level when it adopted a municipal ordinance implementing CEDAW principles in April 1998, and

U.S. Supreme Court note the laws or decisions of other nations with any frequency.”).

132. 128 S. Ct. 1346 (Mar. 25, 2008). See also *Medellín v. Texas*, 129 S. Ct. 360 (2008) (per curiam). See generally Adam Liptak, *The Court at a Crossroads*, COLUMBIA LAW SCHOOL MAGAZINE, Winter 2009, at 24.

133. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (“The Court’s observation that race-conscious programs ‘must have a logical end point,’ accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses ‘special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.’ But such measures, the Convention instructs, ‘shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.’”) (quoting *Lawrence*, 539 U.S. 558 *passim*; International Convention on the Elimination of All Forms of Racial Discrimination, Annex to G.A. Res. 2106, 20 U.N. GAOR Res. Supp (No. 14) 47, U.N. Doc. A/6014, art. 2(2), art 1(4) (1965); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G.A. Res. 34/180, 34 U.N. GAOR Res. Supp. (No. 46) 194, U.N. Doc. A/34/46, art. 4(1) (1979) (authorizing “temporary special measures aimed at accelerating *de facto* equality” that “shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”)).

134. See Lesley Wexler, *Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law*, 28 MICH. J. INT’L L. 1, 23–26 (2007); Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1639–43 (2006).

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campaigns to enact similar ordinances have been undertaken in several other cities.¹³⁵

The second development involves the use of CEDAW in a regional human rights forum, the Inter-American Commission on Human Rights (IACHR). The petitioner in this case against the United States is Jessica Gonzales, whose three young daughters were killed by her estranged husband while she alleges police refused to respond to her numerous calls for enforcement of a protective order against him. The United States Supreme Court rejected her claim that failure of police to enforce the protective order violated the U.S. Constitution.¹³⁶ In her petition to the IACHR, Gonzales' lawyers from the American Civil Liberties Union and the Columbia Law School Human Rights Clinic urged the Commission to interpret the human rights contained in the American Declaration of Rights in the context of recent developments in international human rights law and specifically in light of CEDAW and the CEDAW Committee's General Recommendation 19 on Violence Against Women.¹³⁷ The petition includes a request for an advisory opinion on the U.S. obligations under the American Declaration in light of CEDAW and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women.¹³⁸ On July 24, 2007, the IACHR ruled the petition admissible and decided to proceed with analysis of the merits of the case.¹³⁹ On October 22, 2008, the Commission held a public hearing on the merits of this case.¹⁴⁰ Counsel for Petitioner submitted a posthearing brief on March 2, 2009, which included references to the CEDAW Committee's GC 19 concerning violence against women as well as jurisprudence from the European Court of Human Rights.

CONCLUSION

Equality as understood under the broad principles of CEDAW is what is needed to end discrimination against women. Treating the terms equity and equality as synonymous or interchangeable or substituting equity for

135. For information about the successful campaign leading to the adoption of the 1998 San Francisco Human Rights Ordinance and other similar efforts, see <http://www.wildforhumanrights.org/ourwork/sfhroc.html>.

136. *City of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

137. Petition 1490-05, Admissibility, Jessica Gonzales and Others, United States, July 24, 2007. For further materials concerning this case, see <http://www.aclu.org/womensrights/violence/gonzalesvusa.htm>.

138. *Id.* at § III. A. 24.

139. Report No. 52-07, Petition 1490-05 in Case No. 12.626, Admissibility, Jessica Gonzales and Others, United States, July 24, 2007. For further materials concerning this case, see <http://www.aclu.org/womensrights/violence/gonzalesvusa.htm>.

140. For a video of the hearing, see <http://www.oas.org/oaspage/live/OASlive.asp>.

equality threaten to dilute or distort the Convention's goals and requirements.

It is too early to assess the full impact that CEDAW's equality principles, and particularly its concept of substantive equality, will have either in countries that have ratified CEDAW or in yet nonratifying countries such as the United States. However, CEDAW's embrace of substantive equality and temporary special measures has had an important impact on constitutional and legislative reform and on the resulting equality jurisprudence in many countries that have ratified CEDAW, as illustrated by the examination of some of the gender jurisprudence of Costa Rica. The CEDAW Committee's continuing efforts to clarify the distinction between the terms "equity" and "equality" are commendable. The adoption of GR 25, which elaborates on the meaning of temporary special measures, not only provides an additional useful tool for gender advocates in ratifying countries but has the potential to enrich the affirmative action discourse in yet nonratifying countries like the United States. Equality, not equity, is what women in all countries need.