

# From social welfare to human rights for girls – a path to achieving gender equality

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## Abstract

*Despite international and national human rights norms and standards, gender equality remains a goal in most countries. The recent discourse on substantive equality as a strategy for addressing the gender discrimination, disadvantage and deep-rooted social biases has reinforced the importance of working towards indivisible human rights for girls and women under CRC and CEDAW. This paper uses international and comparative national experiences on law and policy to argue that the failure to adopt an indivisibility of rights approach in relation to girl children has made it more difficult to achieve a norm of substantive equality for women. It is argued that the adoption of an intergenerational and rights-based, rather than a social welfare approach, is a necessary step to achieving substantive equality for women.*

## I. Introduction

Inequality in the family of communities and nations is a phenomenon that has existed through centuries of human history and has spawned social instability, conflict and violence. The human rights project has been developed in a context of war, social and economic upheavals and revolutions that protested against unequal power relations, disempowerment and abuse of power. The Universal Declaration of Human Rights, 1948, declares in Article 1 that ‘all human beings are born free and equal in dignity and rights’, and the whole body of international human rights law that has developed since then focuses on realising this core norm of equality. This norm of equality has also been recognised in non-Western philosophical traditions (Ali, 2006, pp. 7–61; Piyadassi Thero, 1975, pp. 91, 94).<sup>1</sup> Yet inadequate access to resources, birth into poverty or into a particular ethnic, religious or caste group, and gender bias against the female sex contribute to a denial of equality in dignity and rights. Achieving equality in general, and gender equality in particular, has thus been a complex problem and elusive goal through many centuries.

The conceptual understanding of equality as a human right has been strengthened over recent decades. This paper discusses the development of the concept of substantive equality in international human rights law, and its relevance in providing a normative framework for addressing gender-based discrimination against women and girls at the national level. The paper deals with some critical challenges in achieving a norm of substantive equality for girls. It advocates integrating substantive equality into the child rights agenda, and the human rights of girls, suggesting this can help promote universal standards in addressing gender-based discrimination, and create an enabling context and environment that is supportive of law and policy reform and initiatives to achieve gender equality.

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<sup>1</sup> Vasala Sutta (Buddha’s Discourse on Outcastes) stanza 21 undermines caste hierarchy by recognising that human conduct rather than birth determines categories such as high and low caste.

## II. Evolving standards of equality<sup>2</sup>

The norm of equality, as expressed in provisions in domestic constitutions and international instruments, is often expressed as ‘equality before the law’. This term is associated with a Western model of liberal democratic governance, and originally referred only to the right to be subject to the same laws, with equal access to courts and tribunals responsible for the administration of justice. Subsequently it was expanded to refer to ‘equal protection of law’, and involved the existence of a legal regime that did not permit discrimination in the content of the law. Many constitutions and human rights instruments combine both these concepts and refer to ‘equality before the law and equal protection of the law’ as, for example, in the constitutions of India, Sri Lanka, South Africa, Columbia and Canada (Pylee, 2006).<sup>3</sup> A similar approach to the definition of equality can be seen in regional instruments such as the American Convention on Human Rights and the European Convention on Human Rights.<sup>4</sup> Where only the phrase ‘equal protection of the law’ is used, national jurisprudence has expanded it to include equality before the law. Similarly, where constitutions refer only to equality before the law, courts have interpreted it to include equal protection of the law (Goonesekere, 2012, p. 388). The Canadian Charter of Rights and Freedoms (1985) and Constitution of South Africa (1996) have defined equality even more broadly to refer to the combined concepts of equality and equal protection of the law and ‘equal benefit of the law’.<sup>5</sup> These developments have contributed to a definition of equality that goes beyond the original focus on law and law enforcement. Equality now becomes a norm that requires more than purely law-based strategies to achieve de jure equality, with a focus on eliminating de facto discrimination and scrutinising the result and outcome of equality laws, policies and initiatives.

## III. Substantive equality and the human rights of women

This shift of emphasis in the definition of equality is also seen in the work of international human rights bodies that have responded to the reality of discrimination, including gender-based discrimination. They too require responses that go beyond purely law-based interventions, so as to achieve what is described as ‘substantive equality’, thus addressing disadvantage and systemic discrimination. The concept of ‘substantive equality’ has been incorporated into the work of the CEDAW Committee in interpreting the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which seeks to achieve gender equality and eliminate discrimination against women, to ensure the ‘full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights ... on a basis of equality with men’.<sup>6</sup> Substantive equality has become the basis for the Committee’s Concluding Observations in reviews of state party reports, as well as interpretations of the Convention in Communications on individual complaints and General Recommendations.<sup>7</sup>

2 This section is drawn from Byrnes (2012, p. 52) and Goonesekere (2012, p. 388).

3 India, art. 14; Sri Lanka, art. 12(1); Constitution of the Republic of South Africa, s. 9; Columbia, art. 13; Canadian Charter of Right and Freedoms, s. 15.

4 American Convention on Human Rights, art. 24, European Convention on Human Rights, art. 14 and Protocol No. 12.

5 Canadian Charter, s. 15(1); South Africa, s. 9.

6 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), art. 3.

7 Art. 2, especially art. 2(c); art. 4, General Recommendations No 24 (1999) para. 13, No. 25, (2004) paras. 4, 7–9, No. 28, (2010) paras 9, 10–13, 16; Concluding Observations discussed in Byrnes (2012, pp. 62–65; *AT v. Hungary*, CEDAW Communication No 2/2003 (2005) CEDAW/C/32/D 2003.

This holistic approach to a state's obligation to work towards the norm of substantive equality reinforces the obligation in international human rights law to 'respect, protect, promote and fulfill' these rights (Symonides, 2002, p. 135). Recent General Recommendations of the CEDAW Committee, which interpret the state's obligations to achieve substantive equality, clarify that the obligation to respect is a negative obligation to prevent discrimination and inequality through laws and policies. The obligation to protect, on the other hand, refers to the obligation to ensure that non-state actors do not violate the right to equality and non-discrimination. The obligation to fulfil is a positive obligation to adopt all supportive measures conducive to the exercise and enjoyment of the right to equality.<sup>8</sup> This broader standard covers both direct and indirect discrimination and violations of equality by the state and non-state actors, such as private individuals, families and communities. The state must take measures, sometimes described as an obligation of 'due diligence' to prevent violations of women's rights by non-state actors.

The concept of substantive equality has been reinforced in the work of the Human Rights Committee and the Committee on Economic Social and Cultural Rights.<sup>9</sup> These developments have contributed to a much more dynamic interpretation of equality in international human rights law that can be used to address diverse and complex manifestations of gender-based discrimination. They recognise that all human rights are for all women, and the need to conform to a universal and indivisible norm of equality which seeks to fulfil both civil and political and socio-economic rights.

The concept of substantive equality is described in the CEDAW Committee's General Recommendations as de facto equality, which is different from an earlier model of purely de jure equality. This requires more than formal equality of opportunity, associated with de jure equality. Scholars argue for moving beyond substantive equality to a model of transformational equality, where society and public institutions are restructured so as to eliminate patriarchy and women's disadvantage and disempowerment. (Fredman, 2011; Byrnes, 2012, p. 53). However, if substantive equality is envisaged as a continuing process to achieve equality in substance and outcome, it can be argued that it is a norm that must incorporate measures of formal de jure equality, provide equal opportunities in impact and outcome, and also include many non-law-based initiatives that can promote institutional and attitudinal change. It is only such a multidimensional, holistic response that can eliminate disadvantages arising from sex and gender, and break down power structures, attitudes and values that perpetuate inequality. A concept of substantive equality that seeks to eliminate both de facto and de jure discrimination, and attitudinal and institutional change, emphasises the universality and indivisibility of human rights, and can have a transformative impact, making it unnecessary to distinguish between what are, in fact, stages in achieving a meaningful standard of equality and non-discrimination.

#### **IV. Substantive equality as a framework for addressing gender-based discrimination**

Global cultural barriers, stereotypical attitudes on gender relations in society, and weak institutions have been identified as common reasons for inadequate progress on the gender equality agenda (Cook and Cusack, 2010). The concept of substantive equality requires a new model of legal and

8 *Ibid.*

9 Human Rights Committee of the International Covenant on Civil and Political Rights (General Comment No. 18, 1989), Committee of the International Covenant on Economic Social and Cultural Rights (General Comment No. 16, 2005; No. 20 2009).

developmental initiatives that link to social policies and resource allocation, and promote attitudinal change.

#### 4.1 Integrating socio-economic rights into development

Substantive equality has special relevance for developing countries in Asia, the Pacific and Africa, where formal law-making is often a sterile exercise because it is not combined with institutional reform and resource allocation for the connected and continuing measures required for effective implementation. Access to basic socio-economic rights, in particular, is essential for creating an enabling environment, and eliminating inequality and discrimination. A concept of state obligation to fulfil socio-economic rights to health and education in CEDAW encourages the integration of equality and disparity reduction in relation to women and girls into the development process. It requires a rights-based rather than a discretionary social welfare approach, which ignores women's and girls' rights of citizenship, in accessing national wealth and resources for the satisfaction of basic socio-economic needs. Substantive equality necessarily challenges an approach that perceives civil liberties as legally enforceable 'hard' rights, and economic and social needs as subject to discretionary state policies and programmes that are dependent on what governments perceive as economic resources (Alston and Robinson, 2005).

#### 4.2 Promoting universality in the understanding of equality

While the concept of gender equality has been forged over a century of local activism in the West, it is the comparatively recent international human rights agenda that has helped to foster local movements in other regions to achieve this norm. Progress has often been limited because States Parties use the argument of respect for culture and religion, as well as legal pluralism and diversity of legal traditions and courts, to justify gender-based discrimination and deny the universality of women's human rights. Scholarship from the global south and some feminist discourse also criticise norms of universality in human rights as Western cultural imperialism that is insensitive to the importance of the ethics of care and communitarian values. The transformative nature of custom, and the manner in which custom and religion have been manipulated to create discrimination and disadvantage against women, is not understood or recognised (Goonesekere, 2007; Raday, 2007, p. 68). Although de jure equality has been achieved in most countries, to a limited extent, in the last five decades (according to CEDAW progress reviews), the concept of customary law and alternative systems of dispute resolution continue to be used to deny both the universality and indivisibility of women's rights. (Byrnes, 2012; Freeman, 2012; Goonesekere, 2012; UN Women, 2011).

A normative standard of 'equity' rather 'equality' is then considered the appropriate lens for analysing gender relations and suitable interventions of law and policy and programming. It is argued that 'gender equity' is a nuanced concept that takes account of women's experience, rejecting a Western adversarial and individualistic approach to gender relations that alienates women from their communities. The legal systems of countries with a colonial heritage of English law are also familiar with equity as a positive concept that introduced flexibility and fairness to modify the rigidity of the common law (Facio and Morgan, 2008–2009; 2009).

Some states supported using the term 'equity' instead of 'equality' in the Beijing Platform for Action. This was rejected as it was recognised that the term 'equity' can provide opportunities for discretionary and subjective interpretations, often based on culture and religion, encouraging governments and communities to default on the obligation to eliminate gender bias (Facio and Morgan, 2008–2009, p. 21).<sup>10</sup> The broader meaning of substantive equality helps to challenge

<sup>10</sup> Beijing Declaration para. 8 and Platform for Action, Fourth World Conference on Women, Beijing China, 1995 New York (1996) United Nations.

cultural relativist approaches that justify gender-based discrimination as ‘home-grown’ equitable solutions, as well as forms of identity politics that reject women’s human rights in the name of respect for diversity in cultures and religions.

The term ‘equality’ rather than ‘equity’ is now used in international human rights law and policy and the work of international agencies and financial institutions (Byrnes, 2012, p. 66).<sup>11</sup> The CEDAW Committee has pointed out in its Concluding Observations that the term ‘equity’ postulates a relativism in normative standards that hampers the capacity of a state to fulfil its obligation to achieve equality and eliminate discrimination against all women. General Recommendation No. 28 now requests states to ‘use exclusively the concept of equality ... or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention’.<sup>12</sup> A benchmark of achieving ‘equity’ as a general standard of fairness that recognises women’s experience and the diversity of culture and religion, and varying stages of economic development no longer conforms with the international human rights project.

Substantive equality thus focuses on the realities of women’s disadvantage and moves beyond the traditional norm of *de jure* equality. It takes account of the criticism that equality rights ignore women’s experience. It facilitates the adoption of a range of diverse measures such as institutional reform, legal awareness and advocacy on rights, and legal aid to enable women to obtain relief and remedies for gender-based discrimination and violence by state and non-state actors within the family and the community. Impunity and non-prosecution, often justified in the name of diversity in cultures and traditions, tends to legitimise violence against women, denying victim-centred solutions, and community recognition of women’s right to bodily integrity personal security and access to safe spaces in the family and community. Substantive equality therefore shifts the focus from ‘protecting’ women as people vulnerable to violence, to the obligation to protect their human right to personal security and safety.

## V. Linking treaty obligations on substantive equality and the human rights of girl children

### 5.1 CRC and CEDAW

The term ‘woman’ is not defined in CEDAW and only one article (Article 10) refers to girls under the age of adulthood. Article 10, on education, has several subarticles which address discrimination against girls.<sup>13</sup> The CEDAW Convention, however, adopts an intergenerational approach to equality, both in its text and in the quasi-jurisprudence of the Committee. General Recommendation No 28, paragraph 31, states that the state obligation to realise the norm of substantive equality continues throughout the lifespan of women.

The CEDAW Committee therefore engages issues of girls’ rights in relation to education, gender-based violence, harmful customs, health and trafficking in Concluding Observations that specifically address the impact of gender-based discrimination on girls (Freeman, Chinkin and Rudolf, 2012). Article 16(2) of CEDAW refers to the state’s obligation to prevent betrothal and marriage of ‘children’. Though the term is gender-neutral, child marriage of girls as an issue of discrimination has consistently been addressed by the Committee (Freeman, 2012, p. 436).

11 Beijing Declaration and Platform For Action, *supra* note 10; Gender Equality and Development (2011), The World Bank Washington; Economic and Social Survey of Asia and the Pacific (2012), Thailand, UN (ESCAP); the term is also used in documents of the UN gender architecture, Division For the Advancement of Women (DAW) and UNIFEM (now UN Women).

12 Para. 22; Concluding Observations, CO Guyana A/60/38 (2005) paras. 287–288, CO Dominican Republic A/59/38 (2004) paras. 288–289, CO Venezuela CEDAW/C/VEN/CO/6 (2006) para. 22.

13 Arts.10 (b), (c), (f).

Article 2 of the Committee on the Rights of the Child (CRC) sets a general norm of equal rights for all children without discrimination on various grounds, including sex. It refers, in gender-neutral language, to the state obligation to realise this norm of equality ‘irrespective of the child or his or her parents or legal guardian’s sex ... birth or status’. An early study of the Convention demonstrates that the CRC can be interpreted in such a way as to address the specificities of girls’ experiences of discrimination (Price Cohen, 1997, p. 29). The scope for interpretations that reinforce the normative framework and standards on gender-based discrimination has been highlighted in research on the two Conventions (Goonsekere, 1999, p. 2001; Todres, 2003–2004). However, the CRC Committee’s General Comments are often gender-neutral. They have not interpreted Article 2 in a General Comment on Girl Children, but rather referred to aspects of discrimination against girls in General Comments on specific issues.<sup>14</sup> The General Comment on General Measures of Implementation No. 5 of 2003 is gender-neutral, and does not specifically address the nuances of discrimination and inequality and girl children. Where Concluding Comments refer to the reality of gender-based discrimination against girls, they do not focus on the achievement of a norm of substantive equality. They merely address specific issues relevant to girls, such as denial of educational opportunity, sexual abuse, violence and trafficking, exploitation in domestic service, early marriage, teenage pregnancy, and harmful customs and practices such as genital mutilation and female foeticide (Goonsekere and de Alwis, 2005, pp. 13–14). These are all issues addressed by the CEDAW Committee too, and provide an opportunity to reinforce CEDAW’s interpretation of substantive equality.

The gender-neutral approach of the CRC Committee represents a lost opportunity to address discrimination against girl children, as the starting point of gender-based discrimination, and carry forward the agenda of substantive equality for women in a holistic manner within countries. The CRC Committee has emphasised that all the rights in the Convention, including socio-economic rights, are indivisible and interrelated, and referred to Article 4 of the Convention which requires States Parties to allocate maximum available resources (rather than progressive realisation) to fulfil these rights. The Committee has also required countries to include sex-disaggregated data ‘covering all areas of the Convention’.<sup>15</sup> These are positive measures that must be interpreted through a gender equality lens in order to affect the rights of girl children at the national level. Harmonising CEDAW interpretations and CRC commitments can strengthen the allocation of resources for implementation of CRC Commitments on the rights of girls. This is demonstrated clearly in reviewing the provisions on education in the two Conventions. Article 28(1)(a) of the CRC focuses on providing access to compulsory education at the primary level. CEDAW’s provisions on girls’ education in Article 10 are broader and provide for programmatic measures to achieve substantive equality. Affirmative action in the form of preferential access and scholarships at all levels to eliminate disadvantage, and curricula reform to promote attitudinal change on gender relations, are incorporated into the state obligation. Interpreting education rights in CEDAW and CRC through a common normative framework can fertilise law reform, policy and resource allocation in development. The reinforcement of a conceptual link to CEDAW and the norm of substantive equality, as interpreted by the CEDAW Committee, can contribute to a more holistic approach in addressing discrimination faced by girls because of their sex.

<sup>14</sup> General Comment No. 1 (2001) (The Aims of Education), General Comment No 3 (2003) (HIV Aids), General Comment No 4 (2003) Adolescent Health and Development, General Comment No 13 (2011) The Rights of the Child to Freedom from All Forms of Violence; General Comments Nos. 6–12 (2005–2009).

<sup>15</sup> General Comment No. 5 of 2003, paras. 48–50 (Data collection and analysis and development indicators) and CRC Committee Guidelines for Reporting, paras. 6–7 (Resources).

## VI. Challenges in achieving substantive equality for girl children at the national level

According to a UNICEF Report (2011), the majority of children live in developing countries. It is predicted that this demographic profile will continue in sub-Saharan Africa and South Asia, even though an ageing population will predominate in Europe and some developed countries of Asia. Though boys outnumber girls in all regions, there is almost parity in the boy and girl population in Africa. Issues regarding the rights of girls, and challenges faced in realising them, therefore have immediate and continuing relevance for the broader agenda of gender equality in developing countries.

### 6.1 Incorporating rights into girl child issues in domestic laws and policies

#### 6.1.1 Constitutional and legal frameworks

The rights discourse and the concept of equality as a human right has fertilised constitutional reform and facilitated the incorporation of gender equality, and sometimes even specific child rights, in national constitutions. Countries with diverse legal systems, such as South Africa, Ghana, Kenya, Uganda, Brazil, Venezuela and Columbia, and many others, have incorporated constitutional provisions that have benefited from the more recent interpretations of equality. The definition of equality has been broadened and sometimes covers children specifically, or equality rights within marriage and the prevention of violence. Some constitutions have also moved away from distinguishing between 'programmatic' socio-economic policies and civil rights. Following developments in international law on the indivisibility of rights, they recognise that socio-economic rights are enforceable in the courts. Governments must implement these rights as a matter of priority and allocate necessary financial resources (Pylee, 2006; Gauri and Brinks, 2008, Chapters 1, 3, 5, 6).<sup>16</sup> These changes have created a context and legal environment that encourages working towards substantive equality.

Courts in countries with such constitutional provisions on equality and/or the right to life have used these to declare discriminatory provisions in statutes unconstitutional, or to interpret them so as to recognise gender equality, including the right to freedom from gender-based violence and children's socio-economic rights. Such jurisprudence can be found in countries such as India (education, health, nutrition, child custody and sexual violence and harassment), Kenya (education), South Africa (HIV Aids, education and shelter), Brazil, Nigeria and Indonesia, (health care and education), Botswana (citizenship), Tanzania (land rights), Nepal, the Pacific Islands (domestic violence), Pakistan (forced child marriage) and Costa Rica (medical sterilisation). The courts use tests of reasonableness and proportionality to ensure a balance in the interpretation of socio-economic rights.<sup>17</sup>

16 Protecting the World's Children: Impact of the UN Convention on the Rights of the Child in Diverse Legal Systems (2007), New York, Cambridge University Press; Global Perspectives on Consolidated Children's Rights Statutes (2008), New York, UNICEF; Bringing Equality Home (1998), New York, UNDP; Litigating the Right to Education in Africa, *Interrights Bulletin* 7(2) (2013).

17 Gauri and Brinks (2008); *Gita Hariharan v. Reserve Bank of India* 1999 2 SCC 238 (child custody); *Vishaka v. State of Rajasthan* 1997 6 SCC 241; *Apparel Export Promotion Council v. A K Chopra* 1999 1 SCC 759 (sexual violence and harassment); *Unity Dow v. Attorney General of Botswana* 1992 LRC Const. 623 (Botswana); *Ephraim v. Pastory* 1990 LRC 757 (Tanzania); *Meera Dhunghana v. HMG Nepal* Writ No 55 of 2058, Decided 2059 (Nepal); *Tokerawa v. Republic* 2006 KICA 9 (Kiribati); *State v. Bechu (Fiji)*, *Pacific Islands, Pacific Human Rights Law Digest* Vol. 2 (2008) p. 48, Vol. 1 (2005) p. 53; *Humeira Mehmood v. SHOPS North Cant* (High Court Pakistan, 18.2.1999) Litigating Economic Social and Cultural Rights, Case Studies (2003), Centre For Housing Rights and Evictions, Geneva; Bringing Equality Home, *supra* note 16; Litigating the Right to Education in Africa, *supra* note 16.



Where there is a human rights and equality deficit in governance and law enforcement, and socio-economic rights are not justiciable as rights, this type of judicial activism has provided wider citizen standing, and enabled gender inequality in access to socio-economic needs to be challenged as a dimension of the right to life or right to equality. In India, the jurisprudence on writ remedies has been combined with fundamental rights enforcement in the courts to permit citizen challenges regarding state policies and resource allocation relating to education, health, shelter and nutrition. The jurisprudence in the courts has also contributed to constitutional reform and legislation on access to compulsory education from primary to secondary school, and influenced programmes on improved access to health and education. It is Supreme Court decisions that led to a constitutional amendment in India in 2006 on the right to education, followed by legislation on compulsory education as recently as 2009. Affirmative action policies influenced by CEDAW and CRC commitments have contributed to the increasing enrolment of girls in secondary schools in the Indian state of Tamil Nadu and Bangladesh.<sup>18</sup>

The creation of a legislative environment supportive of gender equality should not be underestimated when *de jure* equality is recognised as a central pillar to achieve substantive equality. Specific legislation has introduced Women's Rights Acts or Equal Opportunity and Anti Sex Discrimination Statutes that incorporate CEDAW standards. Children's Acts (Jamaica, Kenya, Ghana, Botswana, Brazil) have been enacted and incorporated gender equality clauses. Policy statements such as Children Charters (Sri Lanka, Nepal) also contain gender equality clauses.<sup>19</sup>

These significant changes have created an environment for proactively addressing the specific dimension of gender-based discrimination against girls. Comparative experience suggests that programmes by governments and international agencies in the post CRC and CEDAW ratification period have contributed to strengthening service delivery mainly in areas of health and education, and providing some protection against sexual violence and trafficking. These are important, but do not incorporate the holistic rights-based lens of substantive equality or CRC's concept of non-discrimination against girls and the indivisibility of their rights.<sup>20</sup> This is apparent even in the area of girls' education where some progress has been achieved.

### 6.1.2 Girls' education and substantive equality

In Sri Lanka, South Asia, Latin America and the Caribbean, and in East Asian and the Pacific countries, girls' access to education has improved. General policies on equality in giving all children access to education at secondary and or tertiary level that were made pre-ratification have been retained and contributed to realising girls' rights to health and education, as development rights under CRC. In these countries the drop-out rates for girls in low-income families is less than for boys, and retention rates are higher. However, significant gender disparities even in education continue in many countries of South Asia, including India (despite the high levels of economic growth), and in sub-Saharan Africa. The social welfare approach to giving access to primary education in particular has not improved education participation rates for girls. Specific

18 Protecting the World's Children, *supra* note 16; India, Child Rights Index (2011) New Delhi, Haq: Centre for Child Rights; Gender Achievements and Prospects in Education: The Gap Report Part I (2005) New York, UNICEF; Gauri and Brinks (2008); The State of the World's Children (2011) New York: UNICEF; Litigating the Right to Education in Africa, *supra* note 16; *Society For Unaided Pre-Schools of Rajasthan v. UOI and Another* (2012) INSC 248, recognising constitutional validity of Compulsory Education Act, 2009 and its application to non-state actors.

19 Global Perspectives on Consolidated Children's Rights Statutes, Protecting the World's Children, Bringing Equality Home, *supra* note 16.

20 Child Marriage in South Asia (2012) Bangkok Thailand, Australian Aid and UNFPA Asia Pacific Regional Office, XXX, 2007; The State of the World's Children, *supra* note 18; Health Sector Responses to Gender-based Violence in the Asia Pacific Region 2010 Bangkok Thailand UNFPA Regional Office; Gap Report Part I.



disincentives to education, like sibling childcare, household duties and child labour, especially in domestic service, contribute to lower participation and school dropout rates for girls, and reflect gender-based discrimination. These issues receive minimalistic and ad hoc responses in law and policy reform. The importance of providing girls access to secondary and tertiary education as a right, is not prioritised. This approach to a continuing right to education has been adopted in Ghana, which introduced in 2007 the concept of basic education as including schooling for eleven years. The digital divide and gender inequality in access to IT, and adolescent girls' unequal opportunities in access to livelihoods is, reflected in statistical information on developing countries in Asia and Africa.<sup>21</sup>

Though the issue of sexual violence and teenage pregnancy and early marriage has sometimes been addressed in law reform and policies, these are constant problems which deny both development rights and personal security. Weak law enforcement even when the formal laws are in place leads to impunity, reinforcing the legitimacy of these practices (Chinkin, 2012, pp. 454–459; Goonesekere, 2007, p. 52; Raday, 2007, p. 68).<sup>22</sup>

Denial of access to schooling for girls because of armed conflict, and a state's obligations in this regard are increasingly stressed in international standard setting.<sup>23</sup> The recently publicised acts of violence perpetrated by non-state actors preventing girls' education in Pakistan in the Malala case, and the mass kidnapping of schoolgirls by Boko Haram in Nigeria, reflect deeply entrenched gender bias against girls in these societies, exacerbated in situations of armed conflict.<sup>24</sup>

### 6.1.3 Attitudinal change and the rights of girls to substantive equality

Since even positive initiatives on gender-based discrimination and girls have been often ad hoc, and sometimes minimalistic, they have yet to impact significantly in working towards attitudinal change and a norm of substantive gender equality. Attitudes, values and structures that contribute to institutionalised discrimination against women and girls remain within countries that have adopted positive measures. The gap is manifested, for example, in continued son preference in India, where the phenomenon of sex-selective abortion persists even in families with adequate income levels. Similarly, the prevalence of harmful practices that justify violence, such as rape victims' marriage to perpetrators, that also contribute to health risks such as HIV Aids, and specific problems relevant to South Asia, such as early marriage and gaps in the nutritional status of girls. The inadequacies in allocating maximum available resources to fulfil the socio-economic rights of women and girls combined with a failure to take proactive measures to undermine negative and discriminatory social values have created an environment conducive to the violation of a range of protection rights of girls under the CRC and CEDAW. Just as maternal mortality among girls reduces, and access to education improves, we see the continued phenomena of early marriage, female foeticide or murder, gender-based violence and domestic child labour exploitation, including internal and cross-border trafficking. In a vicious cycle, the denial of

21 The State of the World's Children, *supra* note 18; Child Rights Index 2011, *infra* note 25.

22 Health Sector Responses to Gender Based Violence in the Asia Pacific Region, *supra* note 20; Concluding Observations of the CRC Committee in UN Human Rights Standards and Mechanisms to Combat Violence against Children (2005) Florence, Innocenti Research Centre, 26–27, 28–29; Beninger-Budel and Lacroix (1999); Litigating the Right to Education in Africa, *supra* note 16.

23 CRC, arts. 38(2), Optional Protocol to CRC on Children in Armed Conflict (2000), The State of the World's Children (2006) New York, UNICEF, 14–16, UN Security Council agenda on Peace and Security, Resolution 1325, (2000), 188 (2009), 1889 (2009); CEDAW General Recommendation No 30 (2013).

24 Gunmen's attack on Malala Yousafzai (15), a Pakistan activist on girls' right to education, on a school bus, reported in *Island Newspaper* Sri Lanka, World View 13 November 2012; abduction of girls by terrorist movement Boko Haram ('Western education prohibited') Nigeria, reported by AFP *Island Newspaper* Sri Lanka 21 April 2014.

protection rights becomes the site for denial of survival and the development rights of girls, through denial of access to reproductive and health services. Even when state laws and policies on health provide access to these services as a right, stereotypical attitudes regarding women and sex contribute to denial of equal access and reinforce the violation of the survival, development and protection rights of girls.<sup>25</sup>

The persistence of stereotypical values reinforced in gender-insensitive institutions thus prevents achieving the vision of substantive equality in CEDAW. This is also evident in developed countries, both in relation to girls in low-income groups and in relation to the administration of criminal justice. Stereotypical values in regard to rape and domestic violence may deny access to justice even where there is formal equality.<sup>26</sup>

#### 6.1.4 Participation rights of girls

These realities have undermined the participation rights of girls, incorporated in CRC Articles 12 to 15, which must be integrated in the concept of girls' agency, with evolving capacity. Participation rights are an important aspect of child rights as a child grows from infancy through childhood to adolescence and adult status. The infringement of a girl's right to protection reflects, as we have seen, an infringement of the right to development. Harmful customs and practices that violate these rights, including dedicating a girl child to a god or goddess, female genital mutilation, early and forced marriage, sexual abuse and exploitation including in trafficking and domestic work, also deny a girl's agency. The girl has no voice, and is powerless to prevent the violations because of patriarchal values and power relations in the family or the community.

A norm of substantive equality requires States Parties to eliminate *de jure* and *de facto* discrimination against girls and also take measures to change customs, practices and stereotypical values on girls' disempowered status in the family and community. This approach has not been adopted either by the CRC Committee or within countries, nor have participation rights been linked with survival development and protection in law reform policy and programmes. Laws and policies on sexual exploitation and reproductive health do not adopt a participation rights lens in determining the age threshold for consensual sex or access to contraception and reproductive health services. Yet when sexual violence takes place, the argument of the girl's *de facto* 'consent' is used in some jurisdictions to treat the offence of statutory rape below the age of sexual consent as consensual sex, even as access to contraception is denied because it is perceived as encouraging under-age sex. Similarly, communitarian values and the importance of marriage for a girl is used as justification for perpetuating customs and laws that require the girl to marry a rapist.

Participation rights are most controversial in the context of the involvement of young girls and adolescents in political movements or as child combatants.<sup>27</sup> CRC sets an age threshold of fifteen years for recruitment to the armed forces. Subsequent international standard setting covers recruitment by state and non-state actors, and has raised the age to eighteen years. The 'vulnerability' and 'protection' approach is considered more important than the concept of children's evolving capacity and participation rights. Rehabilitation and reintegration programmes for child combatants are also not necessarily gender-sensitive. In post armed conflict situations boys may have greater access to education and training because marriage is considered to offer a greater option of personal security for girls. Similarly, the phenomenon of early marriage in

25 *Supra* note 22.

26 Beninger-Budel and Lacroix (1999); Concluding Observations of the CRC Committee, *supra* note 22; Litigating Economic Social and Cultural Rights, *supra* note 17.

27 CRC arts. 38(2), Optional Protocol to CRC on Children in Armed Conflict (2000), State of the World's Children (2006) New York: UNICEF, 14–16, UN Security Council Resolution 1325, (2000), 188 (2009), 1889 (2009); CEDAW General Recommendation No 30 (2013).

conflict and post-conflict societies surfaces because families and communities perceive marriage as personal security for girls. The dimension of de facto discrimination in child marriage through greater exposure to domestic violence, the denial of access to education, participation rights and choice are not addressed when law reform and policy responses are developed.<sup>28</sup> The Malala case highlights the denial of a girl's right to advocate for girls' education,<sup>29</sup> perpetrated by non-state actors such as extremist political groups.

Some countries have addressed issues of participation through career guidance and youth leadership and employment programmes which, according to UNICEF, are also accessed by girls. The Philippines has included Constitutional provisions (1987) and legislation in 1995 to encourage youth participation through support for youth organisation programmes that are integrated into school curricula, thus reaching boys and girls.<sup>30</sup>

The international focus on youth participation in the declaration of the UN International Year of Youth 2010–2011 gave an impetus to the concept of youth participation in social development initially recognised in 1985. This has contributed to various international initiatives, including the establishment of the United Nations Adolescent Girls Task Force in 2007. These initiatives have contributed to countries developing programmes on youth participation through youth parliaments and councils that also have some access to government leaders and bureaucracies that shape policy.<sup>31</sup> The Philippines and South Africa are countries that have had positive experience in this engagement on law reform and policy formulation. There is no gender-disaggregated data to indicate that girls have also been represented as a significant cohort of members of these groups.

The most recent international initiatives to declare 2012 as the International Year of the Girl Child, and focus on campaigns to eliminate child marriage, can be used creatively to focus on the importance of participation rights for girls. Campaigns on child marriage can help to draw attention to the link between the participation rights of girls and their survival, development and protection rights, all of which must be integrated in achieving substantive equality.

## 6.2 Linking the rights of women and girls

It has been pointed out that the CEDAW Committee in its Concluding Observations on country reports, and in its General Recommendations interpreting the Convention, has consistently adopted an intergenerational and life-cycle approach to women's rights. It has therefore addressed specific aspects of discrimination against girls including gender-based violence (Chinkin, 2012, p. 22).<sup>32</sup> Nevertheless, the situation of girl children has yet to be recognised as a necessary dimension and first stage in eliminating discrimination against adult women. The near-universal ratification of the CRC is sometimes referred to by members of the CEDAW Committee in their internal discussions as a reason for not addressing the rights of girl children in the constructive dialogue with States Parties or in Concluding Observations. A feminist approach also tends to see making the linkages as a process for reinforcing the traditional disempowerment women have suffered in many societies, because of women's role and responsibilities regarding child-bearing and -rearing. Programmes and institutional arrangements in some countries, such as Ministries of Women and Children, reinforce this perception by introducing policies that seek to prevent child abuse and neglect by restricting women's livelihood opportunities to work outside the home.

28 The State of the World's Children, *supra* note 27; Child Marriage in South Asia, *supra* note 20 (Sri Lanka).

29 *Supra* note 24.

30 The State of the World's Children, *supra* note 18, pp. 48, 50.

31 *Ibid.*, pp. 66, 70–72, 75.

32 General Recommendations No. 19 (1992) Violence Against Women; No. 24 (1999) art. 12 on Women and Health; No. 27 (2010) Older Women.

Budgetary allocations may also focus on children. Feminists are also divided in their approach to universality, some taking the view that respect for diversity necessarily justifies cultural relativist approaches to local customs and traditions (Goonsekere, 2007, p. 52; Raday, 2007, p. 68; Facio and Morgan, 2008–2009; 2009).<sup>33</sup> This has discouraged consistency in making the link between women's human rights and the rights of girl children as a continuum of discrimination in a life-cycle approach.

There have been some attempts to link the agendas on the rights of girl children and women. The 1999 World Summit Declaration and Plan of Action on Children linked women and girls in calling for the elimination of gender-based discrimination in realising a range of children's rights. The Vienna Declaration and Programme of Action states that the 'Human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights' (paragraphs 18 and 21, 48, 49). This approach is also followed in the Beijing Platform for Action (BPFA), which identifies girl children's issues as one of the 'Critical Areas of Concern' for action to achieve gender equality.<sup>34</sup> The Commission on the Status of Women that monitors the BPFA has kept issues of girl children in the forefront of their discussions.<sup>35</sup> After the adoption of the CRC in 1989, the year 1990 was declared the year of the girl child, and 1991–2000 the Decade of the Girl Child, in South Asia. Campaigns on gender-based violence have drawn attention to the exploitation of women and girls in prostitution and trafficking and domestic violence, promoting law reform and policies that address the exploitation of both women and girls because of their sex.

Yet the current international and regional focus on increasing women's participation in politics and decision-making has not led to an appreciation of the importance of participation rights of girls and their agency. When extremist fundamentalist religious movements that seek to deny women's rights also perpetrate violence against girls who claim education rights, or impose dress codes that can limit access to education, they also deny girls agency and capacity to claim public space through career development (Banda, 2012, p. 273; Goonsekere, 2011, pp. 49–50).<sup>36</sup>

The CRC Committee and the CEDAW Committee have not yet worked together to help integrate a substantive equality perspective in national initiatives on girl children. It has been noted that the Committee on the Rights of the Child often adopts gender-neutral approaches, and addresses issues of discrimination against girls in an ad hoc manner. A General Comment on the Girl Child focusing on Article 2 has yet to be adopted. The CEDAW and CRC Committee are for the first time working on a joint Recommendation, but on the single issue of Harmful Traditional Practices rather than the Girl Child. UNICEF has organised some joint initiatives on girl child issues and linkages between the committees. These have not promoted the idea of a common standard of substantive equality for both women and girls, though the two Conventions have been ratified by almost all states. The Universal Periodic Reporting to the Human Rights Council has also not focused on the need for States Parties to report on the Concluding Observations of CRC and CEDAW in a manner that reinforces commitments under both Conventions, to achieve gender equality for both women and girl children.

The absence of a clear normative framework, such as the lens of substantive equality in the context of both agendas, seems to have encouraged ad hoc rather than consistent and holistic approaches to law reform, policy and programming. There is a failure to appreciate the reality that

33 Personal experience of author as member of UN CEDAW Committee of Experts 1999–2002.

34 Beijing Declaration and Platform For Action (1996), New York United Nations, paras. 44, 145.

35 Document E/CN.6/1998/12 p. 31; Expert Group Meeting, Elimination of All Forms of Discrimination against the Girl Child, Division For the Advancement of Women and UNICEF Innocent Research Centre, Florence, Italy 25–28 September 2006; 2005 World Summit Outcome Document UN 60th Session 20 September 2005, A/60/150.

36 Banda (2012), note 146, cites references on the headscarf debate and its impact on girls.

discrimination against women cannot be eliminated, particularly in developing countries with a large girl child population, unless a proactive approach is adopted to realising the rights of girl children. A clear normative framework on substantive equality can reinforce girls' and women's socio-economic rights and responses to gender-based violence, and promote gender-sensitive rather than conflicting approaches. Substantive equality can also be a tool in resolving issues of conflict of law when there is legal pluralism and a diversity of legal systems.<sup>37</sup>

### 6.3 Economic transformation and new development agendas

Economic transformation and globalisation have had many negative impacts on women which have been identified particularly in areas such as employment and livelihood opportunities, though prostitution and trafficking, sexual exploitation and pornography have emerged as areas of concern. The environment of deregulation, and exploitative pursuit of economic gain and profit undermines laws and standards on employment, increasing exploitation in the unregulated informal sector.<sup>38</sup> Information Technology misused to promote the commodification of women as sex symbols, combined with the misuse of communication technology, has contributed to sexual violence and harassment, spreading macho values and attitudes, even as international and national norms emphasise the importance of gender equality. The public receives a barrage of 'double messages' on women and gender relations. These contradictions are not addressed by States Parties, despite the CEDAW commitment to change attitudes, as set out especially in Article 5 of this Convention.

Economic transformation and globalisation have also contributed to a dilution of the human rights agenda, and a redefinition of priorities in order to achieve the Millennium Development Goals (MDGs). Goal 3 refers to the specific target of 'Women's Empowerment'. Some international agencies have worked towards linking gender equality into all the MDG Goals. It is sometimes argued that human rights commitments are integrated in the MDG agenda. However, the goals are minimalist (e.g. primary school education and equal rights in the formal sector employment for women).<sup>39</sup> The focus on achieving MDGs has given legitimacy to states' prioritising these goals rather than the broader commitments of the CRC and CEDAW. Development agencies and financial institutions sometimes work on assumptions of 'equity' and 'growth with equity' rather than the achievement of a standard of substantive equity.<sup>40</sup>

A human rights based approach to development is required to make commitments undertaken by CEDAW and CRC ratification regarding women and girls central to economic development. Labour law protections and regulations are vital for both women and girls in developing countries, since both may be exploited in casual or home-based work, domestic service and industry. Sustaining commitments on giving girls access to secondary and tertiary education is critical for giving equal

37 In *Natalie Abeysundera v. Christopher Abeysundere & Another* 1998 1 Sri LR 185 SC (Sri Lanka) and *Mudgal v. Union of India* 1995 3 SCC 653, the concept of gender equality was not referred to or discussed, but the Court's decisions were based on the denial of the marital rights of the first wife, when a convert to Islam contracted a polygamous second marriage under Muslim personal law.

38 Gender Equality and Development (2011) The World Bank, *supra* note 11; Combating Trafficking of Women and Children in South Asia (2003) Manila Philippines: Asian Development Bank; Ghosh Jayathi, Economic Growth and Women's Health (2011) UCL Lancet Lecture, 20 November 2011; Migration and Gender Empowerment: Recent Trends, Munich Personal RE PEC Archives, 11 December 2009, online <<http://mpa.ub.uni-muenchen.de/19181>>.

39 Johnson (2010, pp. 194–195); The State of the World's Children, *supra* note 18; The State of The World's Children (2012) New York: UNICEF; Delivering on the Policy of Equality (2007) New York: UNFPA.

40 Delivering on the Policy of Equality, *supra* note 39, 28 (glossary of terms) defines 'Gender Equity' as affirmative action; Wang (2011, p. 1); Sustainability and Equity; A Better Future For All (2011) Human Development Report, New York UNDP; cf. Gender Equality and Development (2011) World Bank, *supra* note 11.

opportunities to employment and livelihoods without gender-based discrimination; similarly, the need for providing access to health, including reproductive health and protection from gender-based violence, on the basis that these are rights rather than welfare measures. Both Conventions consider parenting and family care a joint and shared responsibility. Maternity leave legislation in developing countries in Asia has been introduced on the basis that this leave is a dimension of a right to health of the mother and the child. Gender advocates have been lobbying for expanded parental leave so as to change norms on care to harmonise with the CRC and CEDAW (Goonesekere, 2011, pp. 72–73).<sup>41</sup> When women in developing countries are denied this type of leave, and maternity leave regulations are flouted in the interests of corporate efficiency and economic productivity, the responsibilities of childcare falls on older girls in the family, disrupting their opportunities for education. Regulation in the workplace according to a normative framework of substantive equality can thus become a key strategy to prevent dilution of the social and economic rights of women and girls. Integrating a human rights analysis into resource allocation and budgets can help to ensure that issues of gender equality are not ignored in economic decision-making and policy-formulation (Balakrishna and Elson, 2011).

## VII. Conclusion

The international human rights project has strengthened local initiatives to work towards gender equality and the rights of girl children in many developing countries in Asia, the Pacific and Africa. The contribution of women scholars and activists has helped to engender human rights standards in many areas, and when integrated into the work of treaty bodies like CEDAW, expanded our understanding of what must be done to achieve that elusive goal of equality. The concept of a human rights based approach to development and development co-operation, advocated in the late 1990s and the early 2000s by the United Nations, and the focus on gender mainstreaming, helped to strengthen national laws, policies and programmes and respond to issues of women's human rights. The internationalisation of the approach was also reinforced at the regional level in Africa, with the adoption of the African Protocol on Women's Rights, in Latin America, and to a lesser extent in Asia, due to the absence of a regional human rights instrument.<sup>42</sup> When an issue such as gender-based violence attracted concerted attention, local interventions benefited from the sharing of regional experience, and led to both travelling jurisprudence and collective wisdom in drafting legislation and strengthening law enforcement through policy reforms and institutional arrangements (Jaisingh, 2011; Chinkin, 2012, pp. 443, 435, 474). These positive gains have also impacted on girls' rights, but are being undermined or not pursued with consistency to achieve greater progress.

Substantive equality encourages a new, holistic and consistent model of law and policy reform, programmatic interventions and resource allocation at the national level and in development co-operation. Though there have been gains in taking forward the gender equality agenda through initiatives that reflect a commitment to some of the distinct dimensions of substantive equality, a consistent normative framework and approach has not been maintained, making the achievement of this standard an elusive goal. The contrary pressures of cultural and religious dogmas, economic transformation and globalisation, and the continued failure to link the rights of women and girls in an intergenerational approach to achieving substantive equality, may undermine even

41 Health Sector Responses to Gender Based Violence in The Asia Pacific Region, *supra* note 20; Women of the World: Laws and Policies Affecting their Reproductive Rights South Asia (2004), New York: Centre For Reproductive Rights.

42 Protocol on the Rights of Women in Africa (2003), American Convention on Human Rights (1969); Protecting the World's Children, *supra* note 16.



the gains already achieved. It is critically important that state obligations in international human rights law, and commitments including substantive equality, are integrated in relation to both democratic governance and economic growth. The work of the CEDAW and CRC treaty bodies and the Universal Periodic Review human rights monitoring process should be synergised to reinforce commitments on the respect, protection and fulfilment of the human rights of women and girls to non-discrimination and equality, in their communities and countries.

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