

How does the CEDAW address the problem of Culture and Tradition? |
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**HOW DOES THE CONVENTION ON THE ELIMINATION OF
DISCRIMINATION AGAINST WOMEN ADDRESS THE PROBLEM
OF CULTURE AND TRADITION?**

A Feminist Critique of the CEDAW and its Jurisprudence's Approach
Dealing with Customary Discrimination of Women.

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“The third general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women (...)

States parties are therefore obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (Article 5).

Introduction to CEDAW by the Division for the Advancement of Women

I. Introduction

Feminists' struggles of the past century have strengthened the perception of women's human rights. It implies that women are finally considered to be human beings, therefore, anyone claiming and defending the contrary would not be regarded as acceptable.¹ This principle is part of customary international law and one of the pillars of the UN human rights system, yet, gender discrimination remains widespread. Women still suffer from rights violations at the hands of governments and private individuals. Such claims become even more manifest when women's rights conflict with culture. Culture regularly becomes states' justification for harmful cultural practices and wrongful gender stereotyping. As a consequence, the compatibility of women's rights and cultural norms is one of the most enduring and controversial debates in the human rights movement.² Thus far, the main

¹ L. Zerilli; *Feminism and the Abyss of Freedom*. University of Chicago Press, 2005; p. 174

² S. Cusack & L. Pusey; 'Women's Rights and Culture: from Deadlock to Dialogue' (Review of R. Holtmatt & J. Naber; *Women's Rights and Culture: from Deadlock to*

weapon women possess to combat the cultural problem is the Convention on the Elimination of Discrimination Against Women³ (hereinafter: CEDAW), more specifically, article 5. This powerful provision wants states' parties to change their cultural features that clash with women's rights.⁴ It may appear to be a utopian provision, however, CEDAW has already put it in practice in some of its case law.

This paper seeks to determine which feminist approaches are preferred by the CEDAW and what other theories' approaches would be like instead. For this purpose, attention will be paid to the jurisprudence concerning Article 5, since tension is derived from different sorts of feminism with respect to matters of culture. This analysis will assume a feminist perspective due to the fact that it is the most relevant when dealing with women's subordination and rights violations.⁵

The main argument will start in Section II, where I will introduce the theoretical framework of the paper, namely, feminism. I will provide with an extensive definition of the feminist movement in general and then depict those feminist theories, which are in my view, most relevant for the cultural problem. Section III will aim to present the central object of this thesis: the CEDAW. I will mention its founding ideals and its scope and then move on to Section IV, which will include the main issue of the paper that is the cultural problem. In this very section there will be a focus on the several harmful cultural practices and stereotypes of women, which are present in Western and non-Western countries. As it will be stated, they constantly challenge and undermine women's human rights. CEDAW's action against the cultural predicament is found, *inter alia*, in the pivotal provision of Article 5. The CEDAW committee utilizes this Article in several cases, which will be explained. I have selected these cases because they provide important, relevant points, which reflect the differences in the feminist approaches. The last section of this paper will concern the critique, where I

Dialogue. Intersentia 2011); *Human Rights Quarterly*, Volume 34, Number 2, May 2012, pp. 657-667; p. 657

³ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981)

⁴ Article 5 CEDAW

⁵ B. Winter, D. Thompson & S. Jeffreys; 'The UN Approach to Harmful Traditional Practices'; *International Feminist Journal of Politics* 4 (1), 2002; p. 73

will analyse the approach used in the Article 5 case law and discuss which theory is most used by the CEDAW Committee. I will also assess the case law from the other feminists' perspectives with the aim of observing their different standpoint and discovering whether their outcome would be the same.

II. Theoretical Framework: Feminist Perspective

A. Defining Feminism

In order to fully comprehend the definition of feminism, one must first have knowledge of the concept of gender. Gender is a social construction of differences between men and women. Being a feminist essentially means looking at the world through a gender lens.⁶ Feminists believe that the world is organized along gendered lines, which ultimately benefit men and keep patriarchy that is men's dominance over women.⁷ As a result, the system must be changed so as to permit to an empowerment of women as well.⁸ Some feminist scholars give a complete overview of what feminist theory might entail. They stress that it is primarily an interest on gender, which focuses on women as individuals and as a group. It is also a political agenda, a critical standpoint on patriarchy, and an alternative way of reinterpreting the law.⁹

Feminist theory could also be defined as the study of women's experiences from a woman's perspective. This description implies that the movement is fundamentally divided since no single theory can fully explain all women's perspectives or experiences. In fact, it comprises of differing ideals and inconsistencies, especially when considering aspects of theoretical and political spheres. A typical example of theoretical division can be found in the very concept of 'women'. Feminist opinion is often divided whether or not there is a unified category of women. Essentialist

⁶ M. Dembour, 'Critiques' in: D. Moeckli; S. Shah; S. Sivakumaran (Eds.); *International Human Rights Law*. Oxford University Press, 2010; p. 79

⁷ S. Hogson-Wright, 'Early Feminism', in: Gamble (Ed.); *The Routledge Companion to Feminism and Post-Feminism*. Routledge, 2001; p. 3

⁸ Dembour 2010, *Op. Cit.*; p. 79

⁹ H. Charlesworth, C. Chinkin, S. Wright; 'Feminist Approaches to International Law'. *A.J.I.L* 85, 1991; p. 634

feminists would see gender as rooted in biological sex differences, whilst social constructionist feminists would see it as a product of culture.¹⁰ An example of political division instead, could be the type of political method used by the different theories. From the ‘top-down’ liberal feminism with its emphasis on the law and individual rights, to a ‘bottom-up’ radical feminism and its challenge to structural inequalities, colonialism and oppressive politics of family.¹¹ Hence, the interest on gender remains the same for all of the theories, yet, each one focuses on different aspects of feminist issues.

Despite this internal dissent, most feminists would agree that a diversity of voices is not only valuable, but necessary for it recognizes the value of each woman’s perspective.¹² The search for one belief, one single voice is unlikely to reflect the reality of women’s experience of gender inequality¹³

B. Types of Feminist Critiques

As it has been mentioned above, there are many different ways of being a feminist. Feminist theories vary, from the liberal, libertarian, radical, cultural, till the more recent postmodern types. Following a greatly simplified but useful classification, the main different approaches, which in my view are useful in the cultural discussion, are the following¹⁴: the libertarian, the liberal, and the postmodern feminism. I opted for these theories because of their fascinatingly differing views on how to approach the cultural issue.

As I will explain more extensively below, the first two come from the same ‘family’ due to the fact that they have roots in the tradition of classical liberalism. Yet, disagreement among liberals about what ‘freedom’ means, has led to a fragmenting of this tradition. Libertarians believe in

¹⁰ A. Snitow, ‘A Gender Diary’ in: Hirsch M. and Fox Keller E. (Eds.); *Conflicts in Feminism*. Routledge, 1990; p. 16

¹¹ N. Reilly; *Women’s Human Rights*. Polity Press, 2009; p. 67

¹² N. Kim; ‘Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism’; *Colum. Hum. Rts. L. Rev.* 25, 1993-1994; p. 51

¹³ Charlesworth; Chinkin; Wright 1991, *Op. Cit.*; p. 613

¹⁴ I purposely chose to focus only on these three views because I believe they have the most interesting approaches regarding the cultural matters. Other types of feminism could also be discussed yet, for the length of this paper, I would not be able to give it justice.

freedom from coercive interference. Women are adults and if they rationally choose to remain with their violent husband, the state should not interfere and be paternalistic.¹⁵ Instead, although liberals still believe that women should be autonomous, they recognize that freedom requires more than absence of interference, for instance, the provision of information and resources. For this reason, they give the state a positive obligation to remedy women's lack of autonomy.¹⁶ Lastly, postmodern feminists bring the cultural relativist argument within the feminist movement through their deconstructive and anti-essentialist discourses.¹⁷

i. Liberal Feminism

Liberal Feminism is rooted in the classical liberal political thought, which originated from the Enlightenment. Liberalism's core principles are autonomy, universal, equal citizenship and democracy.¹⁸ Moreover, it assumes that all human beings can and should become rational, autonomous individuals. It applies the liberal notion of individualism to women, so that they can reach their full potential without oppressive constraints.¹⁹ They confer to the state a positive obligation, which entails the creation of conditions for the exercise of rights with the aim of resolving the problem of gender injustice.²⁰ In other words, they argue that it is the state's task to remedy the lack of women's autonomy caused by patriarchal institutions.²¹

Liberal feminism has three major themes: equality of opportunity, which is considered to be the main model for gender justice,²² sex stereotyping and gender discrimination.²³ Liberal feminists wish to free women from oppressive gender roles that may prevent women from

¹⁵A. Baehr; "Liberal Feminism", *The Stanford Encyclopaedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (Ed.); available at: <<http://plato.stanford.edu/archives/fall2012/entries/feminism-liberal/>>.

¹⁶ N. Kardam; *Turkey's Engagement With Global Women's Human Rights*. Ashgate, 2005; p. 34

¹⁷ K. Wolff; Postmodern Feminism, in: *Blackwell Encyclopaedia of Sociology*; G. Ritzer (Ed.); 2007; available at: <<http://www.sociologyencyclopedia.com/public/>>

¹⁸ N. Lacey; *Feminist Legal Theory and the Rights of Women*. Yale University, 2003; p. 1 Available at: <<http://www.yale.edu/wff/cbg/pdf/LaceyPaperFeministLegalTheory.pdf>>

¹⁹ Kim 1994, *Op. Cit.*; p. 53

²⁰ Kardam 2005, *Op. Cit.*; p. 34

²¹ Baehr 2012, *Op. Cit.*

²² Kim 1994, *Op. Cit.*; p. 54

²³ S. Acker; 'Feminist Theory and the Study of Gender and Education'. *International review of education* XXXIII (4), Hamburg, Unesco Institute for Education, 1987; p. 423

obtaining positions of power in the public sphere. In fact, they stress that patriarchal society often mixes the biological sex and the socially constructed gender. This action is for instance, the reason why society comes to consider appropriate for women only jobs which are associated with traditional feminine personality.²⁴ Liberal feminism instead, regards men and women as fundamentally similar.²⁵ Consequently, a truly fair society is one that requires a full equality between the sexes.²⁶

The tools used by liberal feminists to achieve equality are principally political struggle and legal reforms. Their energies are mostly concentrated on eliminating discrimination and formal barriers that prevent women from getting access to things such as, better jobs or higher education.²⁷ As it will be explained later on, the CEDAW's general approach follows this theory due the prevalence of non-discrimination provisions in it.²⁸

The problem, as we will see, is that in liberal feminism the goal of autonomy for women is defined through a supposedly neutral standard of justice and equality, and postmodern feminist would rapidly see this standard as male oriented.²⁹ Furthermore, the realm for action is limited by concerns about autonomy and freedom from state intervention. Thus, whilst it is true that liberal feminism criticized the public/ private divide, it never sought to eliminate or transcend it. And while it put certain forms of violence in the public sphere (e.g. domestic violence) it does not radicalize all gender differences in society.³⁰

For these limitations, other feminists attack liberal feminism. It is said to focus only on the most superficial forms of sexism, doing nothing to deconstruct the deeper ideological constructions which subordinate women

²⁴ R. Tong; *Feminist Thought: a more Comprehensive Introduction*. Westview Press, 2008; p. 34

²⁵ Acker 1987, *Op. Cit.*; p. 422

²⁶ Snitow 1990, *Op. Cit.*; p. 17

²⁷ Kim 1994, *Op. Cit.*; p. 53

²⁸ Stinson S.; *We Should Shoot for the Moon with CEDAW, for Even if we Miss, we may Land Among the Stars*. University of Oregon, 2003; p. 24; Available at: <<http://law.uoregon.edu/assets/facultydocs/cforell/shootforthemoon.pdf>>

²⁹ C. Mouffe; *The Return of the Political*. Vero, 2005; p. 3

³⁰ K. Weisberg; *Feminist Legal Theory: Foundations*. Temple University Press, 1993; p. 217

to men.³¹ The promise of equality with men only gives women access to a male-standardized world.³² Yet, we cannot use the male standard in gender specific issues, such as, violence against women- including harmful cultural practices, or when dealing with pregnant women. Thus, for many feminists, the liberal feminist approach of ‘*add women and stir*’ does not give women enough protection and the rights they truly deserve.³³ Nonetheless, we should not disregard that liberal feminism is the main responsible for legal reforms which concretely facilitated the enhancement of women’s welfare.³⁴

ii. Classical Liberal/ Libertarian Feminism

Also this type of feminism has its roots in the liberal political thought. As it will be explained below, contrary to the liberal feminists, libertarians see freedom as detached from political life.³⁵ Furthermore, libertarian feminists overtly reject any kind of paternalistic attitude by the state. A state is considered to be paternalistic whenever it interferes with individuals against their will and limits their freedom and responsibilities. This type of attitude is used mostly because it is thought to eventually benefit the individuals.³⁶ From a libertarian’s point of view, the state’s task is simply to remove laws, which limit women’s liberty and refrain from giving women any special privileges.³⁷

An example of a branch of libertarian feminism could be the one criticized by L. Hirshman. She coined the phrase ‘Choice feminism’ to refer to the widespread belief that women could make whatever choices they wanted since every choice counted as feminist provided that the woman was

³¹ S. Gamble; *The Routledge Companion to Feminism and Post-Feminism*. Routledge, 2001; p. 239

³² H. Charlesworth & C. Chinkin; *The Boundaries of International Law: A Feminist Analysis*. Manchester University Press, 2000; p. 37

³³ E. Brems; ‘Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse’. *Human Rights Quarterly*, 19, 1997; p. 138

³⁴ Gamble 2001, *Op. Cit.*; p. 239

³⁵ M. Ferguson; *Taming the Shrew? Choice Feminism and the Fear of Politics.*; Prepared for the Gender and Sexuality Studies Workshop at the University of Chicago, May 3, 2011; p. 6; Available at: <<http://ptw.uchicago.edu/Ferguson11.pdf>>

³⁶ G. Dworkin; “Paternalism”, *The Stanford Encyclopedia of Philosophy (Summer 2010 Edition)*, E. N. Zalta (ed.), Available at:

<<http://plato.stanford.edu/archives/sum2010/entries/paternalism/>>

³⁷ Baehr 2012, *Op. Cit.*

able to choose.³⁸ I introduced this example to emphasize on the fact that ‘Freedom of choice’ is one of the central tenets of libertarian feminism. It understands freedom as the capacity to make individual choices, whilst considers oppression anything, which might create an inability to choose. In other words, libertarian feminists stress on personal choice without governmental control. Libertarian feminism aims to obtain personal autonomy and individual freedom, therefore, it deems it impossible to reach them if the State takes away women’s right to choose.³⁹

A woman's rights are violated only when she is interfered with coercively with a threat of, loss of freedom, property or life.⁴⁰ Consequently, as long as a woman can say that she has rationally chosen to do something, it must be regarded as an expression of her liberation. Indeed, they believe that it is definitionally impossible for a woman to choose her own oppression. Hence, every kind of choice she makes is an expression of her freedom. In addition, libertarians claim that since the only criterion for evaluating women’s freedom is individual choice, we should always refrain from judging the content of women’s choices.⁴¹

Libertarian or ‘choice’ feminism can also be found back in time. For instance, we could say that John Stuart Mill already defended it by stating that as long as we can say that women have the option to pursue careers, they are liberated. We should not consider them as oppressed and interfere if they decide to devote their lives to only being wives and mothers, since it was their free, rational choice.⁴²

This type of feminism has received countless criticisms by other feminists. They have called it a middle class based, individualistic and ‘diluted’ version of feminism that disregards the limitations present in the family and in the work place, which are continuously faced by women when making a choice.⁴³ Hirshman rightfully asserted that despite libertarian

³⁸ Ferguson 2011, *Op. Cit.*; p. 1

³⁹ L. T. Sargent; *Extremism in America: A Reader*. New York University Press, 1995, p. 251, 252

⁴⁰ Baehr 2012, *Op. Cit.*

⁴¹ Ferguson 2011, *Op. Cit.*; pp. 2,3

⁴², *Ibid.*, pp. 5,6

⁴³M. Messner; *It's All For the Kids: Gender, Families, and Youth Sports*. University of California Press, 2009; p. 237

feminism seemed to have promised liberation, it actually deceived women by leaving traditional gender roles unharmed. Moreover, other feminists see this movement as taking for granted the older generation's achievements for women's liberation and uncritically celebrating all women's choices even when these are oppressive to them.⁴⁴

As I have mentioned above, libertarians are detached from political life. Their approach seems to be 'afraid of politics' due to the fact that it clearly circumvents the need to judge women's choices, which could cause exclusions among women. It also minimizes the feminist challenges of the *status quo*. Lastly, it fails to differentiate between those women who can choose and those who cannot.⁴⁵ This last claim can be easily illustrated in a female genital mutilation example. A woman might be willing to engage in the practice for certain reasons, yet, she has (un)intentionally become a willing victim of patriarchy.⁴⁶ If one is not careful in discerning which decisions are choices and which ones are not, one risks to consider as choices also those influenced by, *inter alia*, religious obligations (veiling), or economic necessity (remaining with a violent husband).⁴⁷ One should especially take into account that very often women make choices because they are influenced by their culture. Scholar Onora O'Neill claims that certain rules and obligations constitute part of our community's identity. When we perform an action, we do not do so according to some arbitrary principle, but one that is constitutive of our culture.⁴⁸

Feminism is fundamentally about transforming patriarchal culture and society. Women should not have to choose between work and motherhood or respect and sexual pleasure. Feminism requires an increasing of the alternatives available to women, so they can be really autonomous, and the whole idea of "choice" of the libertarian feminists obscures that point.⁴⁹

⁴⁴ P. Cohen; 'Today Feminists Hate the Word 'Choice''; New York Times Article, Jan. 15th 2006; Available at: <<http://www.nytimes.com/2006/01/15/weekinreview/15patti.html>>

⁴⁵ Ferguson 2011, *Op. Cit.*; p. 16

⁴⁶ A. Fellmeth; 'Feminism and International Law: Theory, Methodology, and Substantive Reform'; *Human Rights Quarterly* 22 (3), Aug., 2000; p. 698

⁴⁷ R. Snyder-Hall; 'Third Wave Feminism and the Defense of Choice'; *Perspectives on Politics* 8 (1), March 2008; p. 256

⁴⁸ O. O'Neill; *Bounds of Justice*. Cambridge University Press, 2000; p. 20

⁴⁹ Snyder-Hall 2008, *Op. Cit.*; p. 256

To conclude, the dilemma of Choice Feminism is fundamentally whether acts of submission or dependence, which are rational and coherent in a context of power or threat, be regarded as autonomous or not. O’neill undermines libertarian rationale by declaring that: *‘Those who view the self as nothing but a set of mental stages, agency as nothing but the pursuit of preference, freedom as nothing but the absence of constraint, have difficulty at explaining how some acts can be more central than others to the self, freedom, identity or integrity of an agent.’*⁵⁰

iii. Postmodern Feminism

Postmodern feminists believe that there is not one single truth, story, or theory. Postmodernism is a philosophical theory largely influenced by the theories on deconstruction of the French philosopher Jacques Derrida. He claims that if all meaning is indefinite, then all texts are open to a continual reinterpretation. Derrida used his deconstruction theories in order to challenge all of the binary oppositions, which constitute the western culture. These are, *inter alia*, the male- female, nature-culture or western- non-western dichotomies.⁵¹

Among the most renowned postfeminists, we can find Julia Kristeva, Hélène Cixous, Luce Irigaray and Judith Butler, who have principally focused on themes of “deconstruction”, “difference” and “identity”.⁵² The most prominent of them is Judith Butler, who considers any ideological unity as coercive and exclusive.⁵³ Most postmodernists are convinced that the identity of ‘woman’ is simply another way of maintaining the sex/gender oppression, hence, feminists should be suspicious of thinking of women as one single group.⁵⁴ Moreover, Butler thinks that the term ‘woman’ is a mere signifier with no substance. It simply

⁵⁰ O’Neill 2000, *Op. Cit.*; p. 34

⁵¹ D. Qin; ‘Toward a Critical Feminist Perspective of Culture and Self’; *Feminism & Psychology* 14(2), 1999; p. 301

⁵² Gamble 2001, *Op. Cit.*; p. 42

⁵³ R. Snowdon; *Gender Trouble. Coming to Terms With Postmodern Feminist Approaches*. Newcastle University; The School of Historical Studies Postgraduate Forum; E-Journal Edition 7, 2009; p. 4; Available at; <http://www.societies.ncl.ac.uk/shspgf/Ed_6/Snowdon.pdf>

⁵⁴ M. McLaren; *Feminism, Foucault and Embodied Subjectivity*. State University of New York Press, 2002; p. 169

is an indication found in languages but in reality it does not exist except as a discursive construct.⁵⁵ Her inspiration is Simone de Beauvoir, who contends that '*one is not born a woman, but, rather, becomes one*'.⁵⁶ Butler uses this quote in order to support her argument that becoming a woman is not a biological but a cultural coercion.⁵⁷

Postmodern feminism will question and oppose the dichotomies of man and woman which are placed in oppositional categories. It also seeks to destabilise the notion of the autonomous subject, thus making the development of any kind of grand theory impossible.⁵⁸ By undermining the master narratives which were dominated by western, middle class, white men, postmodernism has introduced the new principles of pluralism, nonconformity and diversity.⁵⁹ No theory can reflect the 'truth' about all women existing in this planet, as every truth is incomplete and bound by culture.⁶⁰ This type of theory challenges all of the apparently 'objective truths', which pervade the world. As a result, their discourse is an anti-essentialist one.⁶¹

The new principles have brought postmodern feminists to believe that women's experiences vary across class, racial and most of all, cultural lines.⁶² Because of their cross-cultural focus, they brought back the cultural relativist critique into the human rights debate. They prefer to compare the contrasts rather than universalize with overarching theories. Furthermore, their critique is highly theoretical and historical, meaning that it concentrates on the cultural specificity of societies and periods of time.⁶³

Just like the previous theories, also postmodern feminism has been bitterly criticized by other feminists. There is a widespread condemnation of postmodern feminism because it is considered not to be effective in helping women, since it simply supports cultural relativists' views. Furthermore, it

⁵⁵ Snowdon 2009, *Op. Cit.*; p. 6

⁵⁶ Gamble 2001, *Op. Cit.*; p. 133

⁵⁷ Snowdon 2009, *Op.Cit.*; p. 5

⁵⁸ Gamble 2001, *Op. Cit.*; p. 41

⁵⁹ W. S. Kottiswari, *Postmodern Feminist Writers*. Sarup and Sons, 2008; p. 3

⁶⁰ Qin 1999, *Op. Cit.*; p. 307

⁶¹ Snowdon 2009, *Op. Cit.*; p. 5

⁶² Kim 1994, *Op. Cit.*; p. 53

⁶³ N. Fraser & L. Nicholson; 'An Encounter between Feminism and Postmodernism'; in: S. Seidman (Ed.); *The Postmodern Turn: New Perspectives on Social Theory*. Cambridge University Press, 1994; p. 258

maintains that gender oppression exists but they deny that evidence can prove it. In addition, postmodern feminism has been blamed of endangering feminism itself. In order to work, feminism has to have at least some shared interests.⁶⁴ Postmodern feminism instead, with its denial of any kind of ethical validity and subjectivity, is accused of betraying and rejecting the feminist struggles of the past⁶⁵ for it weakens feminism's emancipatory goals and takes women back to obscurity. Most feminists condemn the postmodern feminist method and ask why after such a struggle to act as subjects, the concept of subjecthood has become problematic again.⁶⁶

It is important to note that postmodernists have firmly counterattacked on these critiques. For instance, in *The Morning After: Sex, Fear and Feminism* (1993), Katie Roiphe alleges that feminists are '*closer to their backlash than they like to think*'. She recalls the image of women as victims in the feminist battles of rape and sexual harassment. Feminists dislike the image of a delicate woman, her passivity, her excessive need for protection. Their action was intended to '*encourage women's strength, but it seems instead to celebrate their vulnerability*'.⁶⁷ Moreover, whenever feminism makes essentialist claims for political purposes, it becomes as wedded to rigid gender categories as the conventionalism it wants to discredit. Consequently, feminism can turn into an accomplice in perpetuating compulsory heterosexuality and its consequences for women.⁶⁸

III. CEDAW: Establishment, Principles and Scope

For centuries, the legal system has been under the hegemony of men. This situation caused the denial of citizenship and personhood to women and the maintenance of patriarchy. At last, after the end of the Second World War, the promotion of universal human rights became one of the key objectives of the newly established United Nations. Despite this was declared in the

⁶⁴ Fellmeth 2000, *Op. Cit.*; p. 691, 692

⁶⁵ Gamble 2001, *Op. Cit.*; p. 37

⁶⁶ N. Hartsock 'Rethinking Modernism: Minority vs. Majority Theories', *Cultural Critique* 7, Fall 1987; p.196

⁶⁷ Gamble 1994, *Op. Cit.*; p. 38

⁶⁸ 'Patriarchy is such a drag: the strategic possibilities of a postmodern account of gender'; *Harvard law review*; vol. 108; no. 8; June 1995; pp. 1973-2008; p. 1974

UN Charter, women still feared that their rights would be neglected once again. For this reason, feminists have lobbied to obtain an *ad hoc* UN body to deal with women's status and adopted the CEDAW also known as 'the Women's Convention'.⁶⁹ This Convention was a gigantic step forward in the promotion of women's rights for it was the very first milestone to correct the gender-blindness that had always characterized international law.⁷⁰

R.J. Cook has described CEDAW as a universal in reach, comprehensive in scope and legally binding in character text.⁷¹ The Women's Convention is based on the Western liberal political thought as its tenets are universalism and the liberal tradition of equality. Moreover, its Committee's jurisprudence is largely based on liberal concepts of rights protection as individual, injury-based causes of action.⁷²

Notwithstanding CEDAW's liberal basis, it must be stated that it contains a small number of provisions, which greatly extend the Convention's involvement beyond what both the classical and modern liberal theories envisage. As Charlesworth and Chinkin assert, with liberalism, women are given protection of rights that are designed to protect males, namely, civil and political rights. The same importance has not been accorded to economic and social rights affecting life in the private sphere, where women most need protection.⁷³ As a consequence CEDAW has extended its scope through Article 1, which declares that discrimination against women shall comprehend any sort of action violating rights in the political, social, economic, cultural, and any '*other field*'.⁷⁴ Through this

⁶⁹ Charlesworth & Chinkin 2000; p. ix

⁷⁰ S. Zwingel; 'From intergovernmental negotiations to (sub)national change', *International Feminist Journal of Politics* 7 (3), 2005; p. 403-404-424

⁷¹ R.J. Cook is a feminist law professor. See: Cook; 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', 30 *Virginia Journal of International Law*, 1990; p. 643-709

⁷² L. Merola; "*Liberalism and Feminism: Theoretical Conflicts within CEDAW*." Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada, Mar 17, 2004; p. 5, 7; Available at: <http://www.allacademic.com/meta/p74016_index.html>

⁷³ H. Charlesworth & C. Chinkin; '*The Gender of Jus Cogens*', 15 *HUM. RTS. Q.*, 1993; pp. 63, 65

⁷⁴ Art. 1 CEDAW

provision, the CEDAW bridges, for the first time, the public *and* the private spheres.⁷⁵

This obligation accepts that women do, of course, suffer serious violations of their rights directly at the hands of the State. However, it gets inspired by the radical feminist phrase '*the personal is political*' and so, realizes that women mostly suffer violations in their homes, by private individuals.⁷⁶ As it will be seen in the subsequent section regarding culture, also Article 5 extends CEDAW's involvement beyond the liberal thought.⁷⁷ Therefore, Article 1 and Article 5 give CEDAW the widest possible applicability as they can be interpreted to refer to nearly any situation that discriminates against women.

Hence, it should be clear by now that CEDAW departs from a western, liberal system of governance but it is also dissimilar from all the other human rights instruments. The focus on the private sphere has been greatly influenced by postmodern feminism. The natural entailment of the recognition that there are no privileged truths and neutral standpoints, leads to the radicalization of the political, to the recognition that any sphere of society is open to hegemony and domination, and therefore ripe for political struggle.⁷⁸ Moreover, they believe that although enlightenment has played an important part in the emergence of democracy, it is now a barrier for the new forms of politics and the new characteristics of our societies which demand to be approached from a non-essentialist perspective.⁷⁹ Hence, as radical feminism, also postmodernism challenges the liberal conventional thinking about politics and advocates for a constant struggle against seemingly neutral social structures, such as, the family or marriage.⁸⁰

To conclude, this section aimed at clarifying that the CEDAW's scope stretches from the public, to the private and the cultural sphere, making CEDAW a unique Convention. The principles that make up the CEDAW

⁷⁵ D. Rosenblum; 'Unsex CEDAW or What's Wrong with Women's Rights'. *Columbia Journal of Gender and Law* 20, July 31, 2011 ; p. 8

⁷⁶ Kim 1994, *Op. Cit.*; p. 67

⁷⁷ Winter, Thompson & Jeffreys 2002, *Op.Cit.*; p. 75

⁷⁸ Mouffe 2005; *Op. Cit*; p. 3

⁷⁹ *Ibid.*; p. 10,11

⁸⁰ I am aware of the fact that no every postmodern feminist would agree with my connection, yet, for the sake of a coherent analysis, I would generally view a similarity between the two types of feminism.

are largely of a liberal nature yet, certain provisions have given it a postmodern/radical inclination as well. Indeed, it is the only human rights instrument in which there is a clear tension between the liberal approach and the advancement of a more radical political agenda.⁸¹

IV. The Cultural Problem

A. Harmful Cultural Practices and Stereotypes in Western and non-Western Countries

Culture is generally identified to be a macro concept, definitive of human society. Most anthropologists broadly use the term culture in order to identify a society, which generally thinks in the same manner.⁸² More specifically, it is '*that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society*'.⁸³ Frequently, culture becomes states' principal justification to keep the *status quo* when it comes to protecting and improving women's rights. Even the United States, which is supposed to be a democratic country, has not ratified the CEDAW because it is deemed to be against their culture.⁸⁴ Feminist scholars contest this usage of culture as a justification for discriminating women and rightfully ask why culture constantly appears to be a defence whenever women's rights are at stake.⁸⁵

The cultural problem is experienced by women through wrongful gender stereotypes and harmful cultural practices.

Harmful cultural practises reflect principles and beliefs which are not questioned and are seen as morally acceptable in the perpetrating society. They are carried out so as to maintain patriarchy and almost always, they persist in environments where women are considered to be inferior to

⁸¹ Merola 2004, *Op. Cit.*; p. 13

⁸² F Raday; 'Culture, Religion and Gender'; *I.CON* 1 (4), 2003; p. 665

⁸³ See E. Tylor 1903 [1871]: 1, cited by Winter B., Thompson D. & Jeffreys S.; 'The UN Approach to Harmful Traditional Practices'; *International Feminist Journal of Politics* 4 (1), 2002; p. 77

⁸⁴ V. M. Moghadam & M. Bagheritari; *Cultures, Convention and the Human Rights of Women*. March 2005; Available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Cultures_Convention_s_HR_Women.pdf>

⁸⁵ G. Binion; 'Human Rights: a Feminist Perspective'; *Human Rights Quarterly* 7, 1995; p. 521

men.⁸⁶ Very few observers in liberal democracies would contend that certain cultural practices are not an obstacle to women's rights. Asked to provide examples, they likely would mention practices such as, female genital mutilation, forced marriage or dowry killings, which are all subject to an international chorus of disapproval. Yet, rarely would the more-difficult-to-discern stereotypes in Western countries be identified as harmful cultural practices that must be changed. Culture is always perceived as a problem of the other, less developed countries.⁸⁷

Nevertheless, the principal obstacle to women's substantive equality in western states is also culture. Legal barriers may have been abolished but cultural barriers continue to impede women's rights advancement.⁸⁸ For instance, until recently, women, who did not dress modestly or who did not fight off the aggressor, were habitually blamed as responsible when raped. (This will be seen in *Vertigo* case). Or a more classical example is when a woman decides to pursue her career instead of taking care of her children. She may be perceived as an egoistic, bad mother.⁸⁹ Indeed, women are usually assigned the role of the homemakers. This stereotype is one of the principal causes of women's economic dependency on their husbands, which can deeply affect a woman's ability to leave a violent family situation. These examples all represent the problem of gender stereotyping. It is a practice that functions consciously and unconsciously and provides a framework for understanding, interpreting and ordering the world. Stereotypes are generated by dominant social and cultural norms and thus embody patriarchal values.⁹⁰

This practice can become extremely harmful whenever it operates unjustly by assigning identities in ways that disregard the characteristics and

⁸⁶ S. Jeffreys; 'Prostitution as a Harmful Cultural Practice'. in: C. Stark & R. Whisnant (Eds.); *Not for Sale: Feminists Resisting Prostitution and Pornography*. Spinifex Press, 2004; p. 387

⁸⁷ E. Sepper; 'Confronting the sacred and unchangeable: the obligation to modify cultural patterns under the women's discrimination treaty'; *University of Pennsylvania Journal of International Law* 30 (2), 2008; p. 586

⁸⁸ *Ibid.*; p. 587

⁸⁹ S. Okin; 'Is Multiculturalism Bad for Women?', in: J. Cohen; M. Howard; M. Nussbaum; *Is Multiculturalism Bad for Women ?*. Princeton University Press, 1999; p. 18

⁹⁰ L. Pusey & M. Mollmann; *Consultation on current challenges that impact upon the economic, social and cultural rights of women and how to advance them using the international human rights mechanism*. Presentation 27-28 October 2011, Palais des Nations, Geneva

circumstances of individuals and result in a denial of their rights.⁹¹ Wrongful stereotypes also tend to create gender hierarchies by constructing women as inferior to men, which is the main cause of violence against women.⁹² If women are regarded as subordinate and inferior, this may suggest that men are free to treat them as they please, even in an abusive and violent manner.⁹³ As a result, these harmful stereotypes limit women's rights by portraying gender identities and roles as real, universal, natural, essential and unchangeable.⁹⁴

B. CEDAW's Weapon Against the Cultural Problem: Article 5

The drafters of CEDAW weren't blind to the fact that culture obstructs the achievement of women's full equality.⁹⁵ For this reason, the Convention reaches into aspects of social life that other human rights treaties neglect. As I have already mentioned in section III, the state obligations in CEDAW are found in the public sphere but also in the private sphere and the cultural sphere (see art. 5, art. 2(f) and the Preamble).⁹⁶

The articles dealing with customary discrimination of women in particular are Art. 2(f)⁹⁷ and, most importantly, Art. 5.⁹⁸ With these provisions, CEDAW officially acknowledges that culture and tradition can

⁹¹ R. J. Cook; S. Cusack; *Gender Stereotyping Transnational Legal Perspectives*. Philadelphia, PA: University of Pennsylvania Press, 2010; pp. 59-68

⁹² R. J. Cook; S. Cusack; 'Stereotyping Women in the Health Sector: Lessons from CEDAW'. *Wash. & Lee J. Civ. Rts. & Soc. Just.* 16, 2009; p. 51

⁹³ Cook & Cusack 2010, *Op. Cit.*; p. 167

⁹⁴ S. Cusack & L. Pusey; 'Women's Rights and Culture: from Deadlock to Dialogue' (Review of R. Holtmatt & J. Naber; *Women's Rights and Culture: from Deadlock to Dialogue*. Intersentia 2011); *Human Rights Quarterly* 34 (2), May 2012; p. 664

⁹⁵ Sepper 2008, *Op. Cit.*; p. 592

⁹⁶ Rosenblum 2011; *Op.Cit*; p. 8

⁹⁷ Art. 2 (f) CEDAW: 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:

f. to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women

⁹⁸ Art. 5 CEDAW: States Parties shall take all appropriate measures:

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

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

configure gender roles and have a negative impact on women's rights.⁹⁹ Taken together, the provisions require states to challenge discriminatory customary and/or religious practices. They strengthen even further the commitment to eliminate all forms of discrimination against women due to the fact that many persistent infringements rest not on law but on legally tolerated customs.¹⁰⁰

Article 5 in particular, is divided into two distinct provisions. I will not focus on Article 5 (b), however, it is important to mention that it challenges the most universal traditionalist cultural norm that disadvantages women, which is the stereotypical assignment of responsibility for child care to women.¹⁰¹ Article 5(a) instead, is said to be the most sweeping and drastic of CEDAW's provisions. With this provision, CEDAW recognizes that abuses to women's human rights are largely confined within the private sphere and so states can be made liable if they do not punish the perpetrators or if they promote a culture, which justifies these traditions.¹⁰² Article 5 is most likely considered to be problematic by liberals and cultural relativists for it is in tension with some provisions of the International Covenant on Civil and Political Rights that are seen as important in liberal societies, such as the right to self-determination or the freedom of religion. Moreover, it brings about a conflict with conceptions of the neutrality of the State on controversial questions of the common good.¹⁰³

Thus, article 5(a) is an incredibly divisive provision that requires states to look beyond the law in order to obtain a cultural change. In my view, it shows to be, more than any other article in the CEDAW, the main guarantor of substantive equality for women.¹⁰⁴

⁹⁹ D. Coker Appiah; *The CEDAW Convention and Harmful Practices Against Women: the Work of the CEDAW Committee*. CEDAW; EGM/GPLVAW/2009/EP.05; 11 May 2009; p. 3; Available at:

<http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Dorcas%20Coker-Appiah_.pdf >

¹⁰⁰ R. J. Cook; 'States' Responsibility for Violation of Women's Rights'. *Harv. Hum. Rts. J.* 7, 1994; p. 167

¹⁰¹ F. Raday; Culture, Religion and CEDAW's Article 5 (a). in: H. B. Schopp- Schilling & C. Flinterman (Eds.); *Circle of Empowerment: Twenty five year of UN Committee on the Elimination of Discrimination Against Women*. New York: Feminist Press, 2007; p. 74

¹⁰² Winter, Thompson & Jeffreys 2002; p. 75

¹⁰³ Roth 2002, *Op. Cit.*; p. 48

¹⁰⁴ Sepper 2008, *Op. Cit.*; p. 597

V. Committee Jurisprudence Dealing with Customary Discrimination

A. The OP-CEDAW Procedures

Before dealing with the Article 5 case law in particular, it is important to briefly introduce the Optional Protocol of the CEDAW (hereinafter: OP-CEDAW) and the tasks it assigns to the CEDAW Committee in order to cope with, *inter alia*, the cultural problem.

The OP-CEDAW provides with the possibility of a communication procedure and an inquiry procedure. The former allows individuals to lodge complaints regarding states' violations of their rights.¹⁰⁵ The latter instead, allows the CEDAW Committee to initiate and conduct investigations on large-scale or/and pervasive violations of women's rights occurring within the jurisdiction of a States party. The only case that is part of the inquiry procedure is the *Ciudad Juárez* case.¹⁰⁶

Like the decisions of other treaty monitoring bodies, the decisions of the CEDAW Committee are not legally binding. However, the international Committee can rule whether, in its view, the rights have been violated or not and give recommendations to the State Party. These procedures can put a heavy political pressure on the states.¹⁰⁷

B. The Case Law

The case law that will be described in this section has the commonality of dealing with, *inter alia*, article 5, thus, the cultural problem. I have especially focused on these cases because they all seem to introduce concepts which best outline the differences of the feminist theories I chose.¹⁰⁸ In the following sections I will firstly present the facts of the case

¹⁰⁵ Art. 2 OP-CEDAW

¹⁰⁶ Art. 8 OP-CEDAW

¹⁰⁷ Z. Johnston; *Decisions of the CEDAW Committee: lack of consistency in admissibility decisions*. University of Toronto, 6 March 2009; p. 2; Available at: <http://www.law-lib.utoronto.ca/diana/2009_symposium_papers/johnston_paper.pdf>

¹⁰⁸ There are a few more cases regarding article 5 yet, they were either repeating the same concept or not extremely relevant for my analysis, hence, they were not included in the paper.

and then focus on parts of the Committee's decisions on the merits, which are valuable for the analysis.

i. A. T. v. Hungary

In *A. T. v. Hungary*,¹⁰⁹ the author claimed to have been a victim of systematic domestic violence at the hand of her husband. Despite this, the author has not left the family house because no shelter in the country was well equipped to host a fully disabled child along with his mother and sister. The man eventually moved out the family apartment but he did not pay child support. The author alleges that he has used this financial abuse as a violent tactic. She initiated civil proceedings regarding access to residence and division of property. The domestic Court held that there was lack of proof that the man regularly battered the author and that his right of property could not be restricted. There have also been two criminal proceedings but nothing was done by the authorities. Moreover, she could not ask for a restraint order due to the fact that the country did not dispose of this option.¹¹⁰

The Committee held that the State party had committed violations of Arts. 2 (a) (b) (e), 5 (a) and 16 of the CEDAW.¹¹¹ It reminded the State that women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. Furthermore, domestic violence cases do not enjoy a high priority in court proceedings, no adequate shelters are accessible for women like A.T. and no protection order is available. As a consequence of all this, the state resulted in violating art 2 (a) (b) (e).¹¹² The Committee also condemned the widespread gender stereotyping in Hungary that had the effect of positioning women as subordinate to men. This traditional stereotype was linked to the violence experienced by A.T. and so, Hungary was found to have failed to take effective steps to put an end to it. Based on its findings, the Committee concluded that Hungary had violated its

¹⁰⁹ *A.T. v. Hungary*, Comm. 2/2003, U.N. Doc. A/60/38, at 27 (2005).

¹¹⁰ *Ibid.*, para. 2.1-2.7

¹¹¹ *Ibid.*, para. 9.6

¹¹² *Ibid.*, para. 9.3

obligations under article 5(a) of CEDAW, read in conjunction with article 16 on marriage and family relations.¹¹³

ii. *Goekce v. Austria*

In *Goekce v. Austria*,¹¹⁴ Sahide Goekce was victim of domestic violence by her own husband. The police issued an expulsion and prohibition to return order against the husband. According to the Penal Code, a close member of the household must consent to proceed to the criminal prosecution, yet, the woman did not authorize it. Consequently, he was simply charged for causing bodily harm. The domestic violence continued, therefore, the Public Prosecutor asked to detain the man two more times. However, the request was denied because of lack of evidence. Sahide's relatives also contacted the police more than one time but no action was taken because it was not considered seriously. Furthermore, the Court stopped the prosecution for bodily harm due to the lack of evidence. The man eventually shot Sahide. Despite she had called the police a few hours before the killing, no police officer was sent to the scene of crime.¹¹⁵

The Committee found a violation of art. 1, 2 (a) (c) (f), 3, 5 of the CEDAW.¹¹⁶ Regarding the violation of art. 2 (c) (d) (f) and 3, the Committee reminded the state that it was liable for private acts if those failed to act with due diligence. It recognized that the state had worked significantly in order to establish a comprehensive model to address domestic violence but these efforts must be supported by state actors as well. The calls to the police were several, even a few hours before the crime, and yet no patrol car was sent. The police did not act with due diligence. Furthermore, the right of freedom and fair trial of the man did not supersede the woman's right to life and integrity.¹¹⁷ With regard to art. 1 and 5, the authors had stated that women are more affected than men by the failure of public prosecutors to take domestic violence seriously as a matter of

¹¹³ *Ibid.*, para. 9.4

¹¹⁴ *Goekce v. Austria*, Comm. 5/2005, U.N. Doc. A/62/38, at 432 (2007)

¹¹⁵ *Ibid.*, para. 2.1-2.2

¹¹⁶ *Ibid.*, para. 12.3

¹¹⁷ *Ibid.*, para. 12.1.1- 12. 1.5

principle.¹¹⁸ The Committee did not go into depth in this matter but recognized that there is a relationship between the traditional stereotype of women as subordinate beings and violence against them.¹¹⁹

iii. Vertido v. The Philippines

In *Vertido v. The Philippines*,¹²⁰ the author claims to have been raped by her former boss. The accused was a 60 year old man, who offered to take the author home, but instead he brought her to a motel garage. The author felt something in the accused's pocket and she thought it was a gun. She initially refused to leave the car but the accused dragged her to a room. The author locked herself in the bathroom. Then, thinking he was gone, she went outside but the accused was still in the room and he raped her. The woman pleaded the man to let her go but she could hardly breathe due to his weight. She lost consciousness and when she woke up, she begged him to stop and finally she pulled his hair and freed herself. The man offered himself to take the author home and she agreed.¹²¹

Eighty days later, the man was arrested. At the trial, an expert testified that the author was suffering a post traumatic stress disorder because of the rape. Nevertheless, the Court declared itself dubious regarding the reason why the author had not run away when she seemed to have had so many chances to do so. Furthermore, they believed that she should have fought off the accused when he was raping her. By doing so, the accused, who is an elderly man, would not have been able to proceed to the point of ejaculation. The judge acquitted the man because of three main principles obtained from judicial precedent. Firstly, that it is always easier to accuse of rape rather than to negate it. Secondly, the testimony of the complainant must be examined with extreme caution since in rape cases there are usually only the two parties. Thirdly, evidence for prosecution must be strong on its own so that it does not draw strength from the weakness of the defence.¹²²

¹¹⁸ *Ibid.*, para. 3.3

¹¹⁹ *Ibid.*, para. 12.2

¹²⁰ *Vertido v The Philippines*, UN Doc CEDAW/C/46/D/18/2008 (1 September 2010)

¹²¹ *Ibid.*, para. 2.1-2.2

¹²² *Ibid.*, para. 2.9

The committee found a violation of arts. 2 (c) (f), 5(a) read in conjunction with art.1 and general recommendation n. 19.¹²³ It held the state accountable for gender stereotyping. A crucial sexual stereotype in this case was that women should physically resist a sexual assault at every occasion.¹²⁴ There have been also stereotypes about female and male sexuality whereby women are considered to be intrinsically deceptive and thus expected to invent allegations of rape. The Court was also found to be persuaded by gender-based myths and misconceptions such as older men lack of sexual proficiency and that the relationship between the perpetrator and the victim is proof of the victim's consent. All of these stereotypes and myths were more supportive for the credibility of the man than the author.¹²⁵

iv. L.C. v. Peru

In *L.C. v. Peru*,¹²⁶ a 13 year old girl named L.C. was pregnant because she had been sexually abused. After learning that she was pregnant, she became depressed and she attempted to commit suicide by jumping from a building. She survived the fall, yet her condition was highly critical. The doctors determined that she was at risk of disability and so she required an urgent surgery. Despite the emergency, the doctors delayed the surgery because she was pregnant. The girl requested the termination of her pregnancy, which was legal in case of a serious danger for the mother's life. The hospital medical board delayed the decision for 42 days and then denied it because they did not consider her life to be in jeopardy. The author waited 20 days further after the request for reconsideration but she miscarried spontaneously. At this point, the doctors performed the surgery but it was too late for she became paraplegic.¹²⁷

The Committee determined that Peru, through the medical staff's actions at the public hospital, had violated articles 2(c), 2(f), 3, 5 and 12 of CEDAW, read in conjunction with article 1 (par 9).¹²⁸ The Committee recognized that the girl could not access to the medical services she needed,

¹²³ *Ibid.*, para. 8.9

¹²⁴ *Ibid.*, para. 8.5

¹²⁵ *Ibid.*, para. 8.6

¹²⁶ *L.C. v. Peru*, UN Doc. CEDAW/C/50/D/22/2009 (4 November 2011)

¹²⁷ *Ibid.*, para. 2.1-2.5

¹²⁸ *Ibid.*, para. 9

namely, the therapeutic abortion and the spinal surgery. Hence, it declared that Peru had violated art. 12 due to its inability to ensure adequate access to health services.¹²⁹ Moreover, the Committee held that Peru had engaged in wrongful gender stereotyping, in violation of article 5 of CEDAW. In the Committee's expert view, the decision of medical staff to delay the spinal surgery was based on the discriminatory treatment based on the prescriptive sex-role stereotype that women should be mothers. The Committee reasoned that by relying to such a harmful traditional stereotype, the doctors had come to prioritise the protection of the foetus and the reproductive function of the girl over her life, health and dignity. As a result, the stereotyping contributed to her becoming a paraplegic.¹³⁰

v. Ciudad Juárez Investigation

The *Ciudad Juárez*¹³¹ case regarded the investigation of the CEDAW committee into the systemic violence against women in Ciudad Juárez. For over a decade, circa 400 women have been systematically abducted and eventually murdered in the Mexican town. It has been estimated that a minority of them have also been sexually assaulted and raped. Others have simply "disappeared".¹³² The police and criminal justice system's responses have been inadequate. Most of the times, they failed to investigate or punish the perpetrators. As a consequence, these crimes against women took place in an environment of impunity, which encouraged the violations.¹³³ Whenever investigations took place, they resulted in being badly managed, and at times, the local police was even accused of corruption. It has been suggested that the main causes for these crimes are drug and sex trafficking, prostitution and production of violent videos.¹³⁴

The committee held that there have been serious lapses concerning articles 1, 2, 3, 5, 6 and 15 CEDAW.¹³⁵ This situation of gender based violence and the impunity of its perpetrators resulted in a clear violation of

¹²⁹ *Ibid.*, para. 8.15

¹³⁰ *Ibid.*, para. 8.5

¹³¹ U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005).

¹³² *Ibid.*, para. 38

¹³³ *Ibid.*, para. 26

¹³⁴ *Ibid.*, para. 39

¹³⁵ *Ibid.*, para. 50

the provisions of the Convention.¹³⁶ Article 2 was violated due to the ineffective measures taken by the authorities.¹³⁷ Referring to Article 5, the committee held that it was violated for its numerous cases of violence, which represented a structural situation rooted in customs and mindsets. The culture of violence and discrimination was based on women's alleged inferiority. The State responded that Mexican culture was founded on the basis of a female/male relationship which attributed roles, stereotypes and customs that had always promoted the subordination of women in society.¹³⁸ The Committee also recognized that there has been a social change in women's roles but the traditional patriarchal attitudes were not modified. Thus the stereotyped view of men's and women's social roles has continued.¹³⁹ In addition, Mexico did not fulfil its duties, because even the campaigns that aimed at preventing violence in Ciudad Juárez have focused not on promoting social responsibility or change in social and cultural patterns of conduct, but on making potential victims responsible for their own protection by maintaining traditional cultural stereotypes."¹⁴⁰

VI. Analysis on the CEDAW and its Jurisprudence

A. What Kind of Feminist Approach Does CEDAW Use?

This analysis will be an attempt to match the CEDAW case law approach with the feminist theories. I am aware of the fact that feminism is not an exact science and it has many nuances in it.¹⁴¹ Also the CEDAW, which is the offspring of the feminist movement, cannot be considered to be purely using a particular approach.¹⁴² However, for the sake of this paper, I will attempt to frame the cultural problem and identify a general pattern in the CEDAW's approach.

In the cases presented in the previous section, CEDAW's approach seemed to be largely liberal feminist and to a less extent, postmodern

¹³⁶ *Ibid.*, para. 53

¹³⁷ *Ibid.*, para. 55

¹³⁸ *Ibid.*, part 2, para. 2

¹³⁹ *Ibid.*, para. 25

¹⁴⁰ *Ibid.*, para. 57

¹⁴¹ Kim 1994, *Op. Cit.*; p. 51

¹⁴² Stinson 2003, *Op. Cit.*; p. 23-26

feminist. The characteristics of liberal feminism which have been present in the case law are mainly the use of the rights discourse; its focus on gender discrimination and substantive equality between men and women; its use of tools such as political struggle and legal reform in order to combat the patriarchal system¹⁴³; its aversion against prejudice and sex stereotyping¹⁴⁴; and its reliance on state intervention on behalf of civil and political rights.¹⁴⁵

Yet, as I have mentioned in section III, article 5 should be envisaged as closer to the postmodern approach than the liberal approach. Thus, although the Committee's liberal attitude is central, it must be acknowledged that there is a postmodern feminist influence for its demand for multiple truths, which leads to state action and responsibility not solely in the public but in the private and the cultural sphere as well.¹⁴⁶

One of the most significant features of liberal feminism is the aversion against sex stereotyping.¹⁴⁷ This attitude, coupled with the postmodern feminist need for state intervention in the private and cultural sphere¹⁴⁸ was evident in the CEDAW Committee's attitude when deciding the case law that included wrongful gender stereotyping situations. The most common wrongful stereotypes identified by the Committee were those of viewing women as subordinates and inferior to men. This was observed in cases such as, *AT v. Hungary*, *Goekce v. Austria* cases and the *Ciudad Juarez* investigation. As it was evident in these three cases, the direct consequence of such harmful stereotypes can be violence against women. Women's alleged inferiority to the sex stereotype that women are subordinate beings, suggests that men are superior and so, they can treat women as they like, including subjecting them to violence and often even death.¹⁴⁹ The view of women as subordinates of men can also induce to women being economically dependent, and this can be a significant factor when deciding whether to remain and suffer in the violent household or

¹⁴³ Kim 1994, *Op. Cit.*; p. 53

¹⁴⁴ Kardam 2005, *Op. Cit.*; p. 34

¹⁴⁵ Kardam 2005, *Op. Cit.*; p. 34

¹⁴⁶ Mouffe 2005; p. 10,11

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ Cook & Cusack 2010, *Op. Cit.*; p. 167

not.¹⁵⁰ Other kinds of stereotypes, which could be noted in the case law, were those of seeing women primarily as ‘reproducing machines’. This stereotype was highlighted in the *L.C. v. Peru* case, where the girl’s right to health, life and integrity had been deemed inferior to her role as a mother. The consequence of this wrongful stereotype was that the girl became a paraplegic.¹⁵¹ Hence, once more a stereotype rooted in culture was the cause for a woman’s violation of her most essential human rights.¹⁵² In the last case of *Vertido*, the wrongful stereotypes were those concerning rape. This time, the Committee was very precise in listing all of them. These included, *inter alia*, the stereotype of women, who are inherently untruthful and thus likely to fabricate allegations of rape and that women should always physically resist sexual assault. Such stereotypes were held to be violating the woman’s right to a fair trial.¹⁵³

Another liberal feminist characteristic is the reliance on legislative change and political pressure.¹⁵⁴ As I have mentioned above, the Committee’s decisions are not legally binding. Nevertheless, the recommendations issued to the state party apply a considerable political pressure that the State Party cannot ignore.¹⁵⁵ However, these recommendations include changes in the legislation *and* in society. Hence, the reliance on the state to obtain full equality with men and the use of political and legal tools are typically liberal feminist¹⁵⁶, whilst the need to do so in the cultural sphere as well is postmodern.¹⁵⁷

A last liberal feminist important feature is the reliance on the State for the creation of conditions in order to remove the problem of gender discrimination.¹⁵⁸ In all of these cases, the CEDAW Committee has held states responsible due to either an inefficient judiciary, healthcare system or their criminal law system. Yet, all the cases violations have occurred not only in the public sphere of courts, police stations and public hospitals, but

¹⁵⁰ Snyder-Hall 2008, *Op. Cit.*; p. 256

¹⁵¹ *L.C. v. Peru*, *Op. Cit.*; para. 8.5

¹⁵² Cook & Cusack, *Op. Cit.*; pp. 59-68

¹⁵³ *Vertido v The Philippines*, *Op. Cit.*; para. 8.6

¹⁵⁴ Kim 1994, *Op. Cit.*; p. 53

¹⁵⁵ Johnston 2009, *Op. Cit.*; p. 2

¹⁵⁶ Kardam 2005, *Op. Cit.*; p. 34

¹⁵⁷ Mouffe 2005, *Op. Cit.* p. 10, 11

¹⁵⁸ Kardam 2005, *Op. Cit.*; p. 34

also in the private/cultural sphere. As a consequence, a liberal feminist approach has been applied in the domain wanted by postmodern feminists.¹⁵⁹

To recapitulate, CEDAW's approach can be largely regarded as liberal feminist for its rights discourse, its use of legal tools and also the fact that it is not completely deconstructive as a postmodern approach would be (this approach will be seen more accurately below). However, it has a postmodern influence as well, due to the fact that CEDAW's action is not limited in the public sphere as liberalism would envisage, but includes the private and the cultural spheres.

B. The Other Approaches

The remaining approaches are the libertarian and the postmodern feminist. Their methods differ greatly from that of liberal feminists and CEDAW. Most probably, since the violations found by the CEDAW are extremely detrimental to women, they would both agree that there is a blatant infringement of women's human rights. However, their reasoning and approach is rather different.

i. The Libertarian Feminist Approach

The libertarian feminists' discourse would be largely based on consent. Their approach would be extremely different from the one taken by the postmodern feminists. As I have explained above, consent feminists conceive freedom simply as freedom from coercive interference. They hold that women, as well as men, have a right to such freedom due to their status as self-owners and responsible adults. Coercive state power is justified only to the extent necessary to protect the right to freedom from coercive interference.¹⁶⁰

In the *L.C. v. Peru* case, stereotyping women as mothers would not be a libertarian feminist's focus. They would concentrate on whether the doctors had given the woman the option to choose whether to undergo the surgery or abort. In this case, the girl clearly wanted to abort. However, they

¹⁵⁹ Mouffe 2005, *Op. Cit.*; p. 10,11

¹⁶⁰ Baehr 2012, *Op. Cit.*

refused to allow her because they did not consider her life to be in danger. As the author of the case rightfully declares, the interference of the doctors in L.C.'s decision to terminate her pregnancy shattered her life prospects. This would surely be considered as a violation for libertarians since they interfered in the girl's freedom of choice.

In cases such as the *Goekce v. Austria* and *A.T. v. Hungary*, the libertarians would have a say in the matter. In these cases regarding domestic violence, they would not focus on the stereotypes but on the possibility of women to complain to the police or to ask for a protection order. They would observe whether the state obstructed them from doing so, and in case the victims would choose not to complain, the state would not be at fault. However, in *Goekce*, the police was contacted, yet, it did not act properly, whilst in *A.T.*, a protection order could not be asked because it was unavailable.¹⁶¹ Thus, I believe that even 'choice' feminists would consider this a violation.

Their conclusion would most likely be that traditional gender stereotypes in themselves are not a bad thing for women, for they do not directly affect women's consent. As I have stated above, what really matters for a libertarian feminist is freedom from direct coercive interference.¹⁶² If women have chosen to undergo to a harmful cultural practice or to remain with their violent husband, the state should not force them to do otherwise.¹⁶³ It should not be paternalistic for women are not to be treated as children. Once the state has given women the option to make a choice, its obligations terminate.¹⁶⁴

ii. The Postmodern Feminist Approach

As explained above, postmodern feminism would require state intervention not only in the public but also in the private and the cultural spheres.¹⁶⁵ Yet, contrary to a liberal feminist approach, the postmodern feminists' method would be highly theoretical and deconstructive. I would dare to oversimplify

¹⁶¹ *A.T. v. Hungary*, *Op.Cit.*; para. 9.3; *Goekce v. Austria*, *Op.Cit.*; para. 12.1.1- 12.1.5

¹⁶² *Ibid.*

¹⁶³ Ferguson 2011, *Op.Cit.*; p. 2,3

¹⁶⁴ Sargent 1995, *Op. Cit.*; p. 251, 252

¹⁶⁵ Mouffe 2005, *Op. Cit.*; p. 10,11

this theory as an anti-essentialist discourse.¹⁶⁶ It would start from the view that little, if nothing, is determinate and static, hence, having theorizing or all-encompassing solutions have little utility.¹⁶⁷

The *LC v. Peru* case is most interesting for a postmodern feminist. They most probably would focus on the essentialist nature of the woman-mother traditional stereotype. In this particular case, women are given the 'natural' sex role stereotype of mothers.¹⁶⁸ *Yet, what about those women who do not have a maternal instinct?* This could be one typical question of a postmodern feminist. Gender stereotyping is seen as causing harm to women indifferently whether it is a good or a bad one. In my view, stereotyping is somehow giving an essence to a particular category of persons and this is what postmodern feminists most abhor due to their deep scepticism for essentialism.¹⁶⁹ Also in *Vertido*, the judge assumed determinate actions the author should have done and certain characteristics women have.¹⁷⁰ As postmodern feminists assert, all categories are socially constructed and we must be wary of declaring a tendency natural or fixed. There are multiple truths and so, there should be multiple reactions to circumstances.¹⁷¹

In addition, a postmodern feminist would not only criticize stereotypes in general but also the CEDAW's liberal feminist response to them. They believe that CEDAW's method is detrimental for women due to its use of essentialist assumptions. In the cases of *A.T. v. Hungary*, *Goekce v. Austria* and the *Ciudad Juarez* investigation, the discourse of the CEDAW Committee puts them in a position of vulnerability. Through their demand for state action, they indirectly describe all women as weak human beings in need of protection.¹⁷² Postmodern feminists would not see this approach as benefiting anyone.¹⁷³

¹⁶⁶ Snowdon 2009, *Op. Cit.*; p. 5

¹⁶⁷ Qin 1999, *Op. Cit.*; p. 307

¹⁶⁸ *L.C. v. Peru*, *Op.Cit.*; para. 8.5

¹⁶⁹ Snowdon 2009, *Op. Cit.*; p. 5

¹⁷⁰ *Vertido v. The Philippines*, *Op. Cit.*; para. 8.5

¹⁷¹ A. Orenstein; 'Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where you Would Least Expect it'; *Southwestern Law Review* 28, 1999; p. 228

¹⁷² *A.T. v. Hungary*, *Op.Cit.*; para. 9.4; *Goekce v. Austria*, *Op. Cit.*; para. 12.2 ; *Ciudad Juarez*, *Op. Cit.*; para. 25

¹⁷³ Gamble 1994, *Op. Cit.*; p. 38

In my view, most postmodern feminists would see stereotypes deriving from culture as an assumption of an essence which is automatically transferred to an individual just because of her sex. Their challenge to the women category would also be useful to abandon these wrongful gender stereotypes because without a category of women in the first place, there cannot be stereotypes against them.

VII. Conclusion

The main objective of this paper was to give an overview of one of CEDAW's biggest challenges: the 'cultural issue'. I chose to have a feminist perspective for it is applicable whenever women are subordinated to men and are denied a human status of their own. Unfortunately, there is no culture where this is not the case, thus, the feminist standpoint is most useful when dealing with the cultural problem.

I started this essay by describing the feminist movement in general and then the different types of feminist perspective that in my view are most important and interesting in the cultural problem. I opted to describe the liberal, the libertarian and lastly, the postmodern feminist theories for they differ greatly when confronted with culture. A Liberal feminist would see a patriarchal society that does not allow women to be treated equally with men. Thus, it is the state's task to remedy this through the enactment of laws. Its action is confined in the public sphere. A libertarian would simply want freedom from limitations on women's autonomy. A postmodern feminist would extend the scope in every sphere, for there are 'many truths'. Yet, its discourse is theoretical since it rejects any form of essentialism and introduces the cultural relativist theory in feminism.

Next, the CEDAW section aimed at highlighting its scope and ideological position. It was stated that despite its liberal basis, the CEDAW has a unique radical feminist influence which is in contrast with it. Following the brief section regarding the CEDAW, I moved on to explaining the main concern of the paper: the cultural issue. In this section, I attempted to explain both the harmful practices against women and wrongful gender stereotyping, which are often the principal causes of

violence and discrimination against women. Both practices are entwined and they are products of customs and mindsets of society. After a comprehensive explanation of what these two practices might entail, I introduced CEDAW's backlash to the cultural problem, namely, Article 5. This provision is considered to be the most drastic due to the fact that it expressly demands states to change their culture whenever it conflicts with women's human rights.

The following section concerned the CEDAW Committee's case law regarding, *inter alia*, article 5. I described the facts of the cases and highlighted the most important parts of the Committee decisions. Lastly, I attempted to make a feminist analysis of the CEDAW and its article 5 jurisprudence. I described CEDAW's approach which can be conceived as largely liberal feminist for its methods but it is also influenced by postmodern feminism due to its demand for State action in the private and cultural sphere. Finally, I showed how the remaining two feminist theories would have approached the jurisprudence.

As it could be noted, the CEDAW Committee has to struggle more than any other UN body due to the fact that women's rights are still regarded to be inferior when confronted with culture. Its jurisprudence has just started to develop, yet, its feminist influence is already apparent. Its blend of feminist theories will be extremely helpful for the advancement of women's rights. Perhaps in a decade, perhaps in a century, I am confident that women will be able to eradicate the cultural obstacle.

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