

**ARTICLE 12 OF THE CEDAW ON THE TOUCHSTONE OF FOUR - DIMENSIONAL APPROACH TO SUBSTANTIVE EQUALITY**

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**ABSTRACT**

*This paper will critically examine Article 12 of the CEDAW to determine whether the concept of substantive equality is implemented by the Article, in specificity, on the issue of the Reproductive Rights of Women. In the first part, the paper will discuss two models of Reproductive Rights- the Reproductive model and the Health model. The paper will explore how Article 12 of the CEDAW encompasses both the models of reproductive rights in order to uphold reproductive health as a human right. Firstly, the discussion will be done through the lens of Article 6 and 17 of the ICCPR on the basis that they primarily focus on negative obligation, ignoring the reproductive health dimension. Secondly, through the lens of Article 12 of the ICESCR on the basis that it does not recognize reproductive rights as human rights.*

*Having reviewed Article 12 of the CEDAW, in the second part, the paper will present a critique of Article 12 of the CEDAW. The critique will allude towards the failure of the Article to advocate the concept of substantive equality on the touchstone of 4-dimensional approach, i.e., recognition, redistribution, participation, and transformation, arguing in favor of reorienting Article 12 keeping in mind the four-dimensional approach.*

**Keywords:** – CEDAW, Substantive Equality, Four-Dimensional Approach

**INTRODUCTION**

The reproductive right is the fundamental right of an individual to make reproductive choices without any coercion or duress. It not only empowers an individual to make decisions with regards to number, spacing and timing of children, but it also provides the means to promote their choice by providing

adequate reproductive health services.<sup>1</sup> The conception of reproductive health lies at the heart of reproductive rights. Reproductive health is defined by WHO as-

A condition of complete physical, mental and social prosperity and not just the nonappearance of infection or ailment in all issues identifying with the conceptive framework and to its capacities and procedures.<sup>2</sup>

In order to achieve a state of complete reproductive wellbeing, it is essential that people have adequate access to effective health services such as access to contraception and family planning services.<sup>3</sup> Despite this, the conception of reproductive rights and reproductive health is not codified in an exclusive international covenant. Nonetheless, components of the right are distributed throughout different international covenants such as ICCPR, ICESCR and CEDAW.<sup>4</sup>

Article 12 of The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is formulated on the central theme of promoting the reproductive health rights of women. The Article primarily advocates two objectives- non - discrimination and equality. While the object of non - discrimination is to explicitly prevent any form of differential treatment against women that could impair the exercise of her reproductive rights. The objective of achieving equality is to achieve substantive equality. This requires the state to not only achieve formal equality but also to focus upon the root cause of inequality. As well as provide measures to help women to exercise their reproductive rights to the fullest.<sup>5</sup>

The aforementioned model of substantive equality is a blessing in disguise. The reason for the same is there are various loopholes in the implementation of the ideals of substantive equality and critiques on the conceptualization of the model. This ultimately leads to the question- whether Article 12 of the CEDAW truly purports the concept of substantive equality, in specificity, on the issue of Reproductive Health Rights?

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<sup>1</sup> Center For Reproductive Rights, *Reproductive Rights: A Tool For Monitoring State Obligations*, UNFPA (Oct 9, 2019, 2pm), [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr\\_Monitoring\\_Tool\\_State\\_Obligations.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_Monitoring_Tool_State_Obligations.pdf)

<sup>2</sup> *Reproductive Health*, WORLD HEALTH ORGANIZATION (Oct 9, 2019, 2pm), <https://www.who.int/westernpacific/health-topics/reproductive-health>

<sup>3</sup> *Sexual & Reproductive Health*, UNITED NATIONS POPULATION FUND (Oct 9, 2019, 2pm), <https://www.unfpa.org/sexual-reproductive-health>

<sup>4</sup> Lance Gable, *Reproductive Health as a Human Right*, 60 Case Western Reserve Law Review 957, 974 (2010)

<sup>5</sup> Simone Cusack et al Lisa Pusey, *CEDAW And The Rights To Non-Discrimination And Equality*, 14 Melbourne Journal of International Law 1, 11 (2013)

## **REPRODUCTIVE HEALTH RIGHT AND ARTICLE 12 OF THE CEDAW**

Lance Gable (2010), in her piece *reproductive health as a human right*, defines Reproductive health right in terms of the ability and autonomy of a woman to make reproductive choices and decisions.<sup>6</sup> She further explicitly states that the reproductive health right is a conglomeration of the reproductive right model and the right to health model. The reproductive right model is based on the decisional aspects of human rights. The model focuses on upholding women's rights and autonomy to make reproductive decisions without intimidation.<sup>7</sup> On the other hand, the right to health model advocates the foundational aspects of human rights. The model focuses on providing adequate health structures to enhance women's reproductive health conditions for a better realization of reproductive rights.<sup>8</sup> Both these models are exclusively comprehended under Article 12 of the CEDAW.

The Article requires states to fulfill not only the negative obligation to ensure furtherance of reproductive autonomy and reproductive choice of a women but also positive obligation to take concrete steps towards facilitating reproductive recourses to woman without any form of discrimination.<sup>9</sup>

Further, the CEDAW Committee in its General recommendation no. 24 highlighted this dual nature of the obligation.<sup>10</sup> In its analysis of Article 12(1), the committee has emphasized the requirement for submission of state-specific laws and policies that highlight the various reproductive health issues faced by women and the measures taken by means of providing reproductive health services.<sup>11</sup> It also requires the state to highlight all the means implemented to tackle discrimination with regards to access to reproductive health and also imposes the duty to take into account biological, social, economic and psychological barriers and their effect while understanding the reasons for the discrimination.<sup>12</sup> Apart from this, while analyzing Article 12(2), the committee has placed prominence on the specific measures by the state in relation to pregnancy, childbirth, postpartum course, and contraceptive use.<sup>13</sup> The

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<sup>6</sup> Gable, *supra* note 4, at 986

<sup>7</sup> *Id.* at 969

<sup>8</sup> *Id.* at 969

<sup>9</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Oct 9, 2019, 4:45pm) <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

<sup>10</sup> *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW) (Oct 9, 2019, 5:30pm)

<https://www.refworld.org/docid/453882a73.html>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

wording of Article 12 and the aforementioned General Recommendation no. 24 clearly accentuates towards specific measures that endorse the ideals of substantive equality.

### **REPRODUCTIVE HEALTH RIGHT AND SUBSTANTIVE EQUALITY**

Article 12 of the CEDAW is a unique article that adjures the state parties to take a holistic view of gender discrimination against women in the field of reproductive health right and provide means and measures to cater to the same, thereby championing the idea of substantive equality.<sup>14</sup>

The idea of equality is composed of two forms- Formal equality and Substantive equality. While formal equality focuses upon treating people alike, Substantive equality, also known as 'De facto' equality, requires the state to engage in the application of laws and principles after considering the inherent discriminations and stereotypes attached to gender status of men and women. Upon identification of these inherent structures of inequality, it also imposes a positive obligation upon the state to instill measures to address the innate discrimination proactively and uplift the status of the discriminated class with special focus upon the marginalized and disadvantaged<sup>15</sup>

With regard to the progression of reproductive health rights, the ideology fundamental to the concept of substantive equality has an implied application. For a woman to exploit her reproductive rights effectively and assert autonomy while making reproductive decisions, it is essential that her position is not disadvantaged by any form of discrimination, gender roles and social position. Which largely hampers the exercise of reproductive rights, further sabotaging women's position.<sup>16</sup> In the case of *Alyne v. Brazil*<sup>17</sup>, the CEDAW Committee held that it is mandatory that the state policies with regards to reproductive health should be action-oriented and should seek effective results to tackle the root cause for women inequality. Further, it also held that lack of reproductive health measures for women is a violation of women's right to health and life which in turn violates the right to equality and non-discrimination. This makes the need for state intervention in achieving substantive equality in the field of reproductive health right a *sin qua non*.

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<sup>14</sup> Anu Saksena, *CEDAW: Mandate for Substantive Equality*, 14 INDIAN JOURNAL OF GENDER STUDIES 481, 483 (2007)

<sup>15</sup> *Substantive Equality and Reproductive Rights*, CENTER FOR REPRODUCTIVE RIGHTS 1, 7 (2014)

<sup>16</sup> *Id.* at 4

<sup>17</sup> *Alyne v. Brazil*, CEDAW/C/49/D/17/2008 (2008)

## **SUBSTANTIVE EQUALITY AND THE FOUR - DIMENSIONAL APPROACH TO ARTICLE 12**

Sandra Fredman in the Article *substantive equality revisited* disfavors contemplating substantive equality as a lone principle instead she ruminates' the perception of substantive equality from 4 dimensions particularly<sup>18</sup>-

“Redistribution, Recognition, Participation and Transformation”<sup>19</sup>

Article 12 of the CEDAW restricts discrimination between men and women in the field of reproductive health care. It requires the states to look at the pre-existing diminishing factors attached to women's position instead of considering the existing discriminations in a vacuum.<sup>20</sup>

This part of the Article bespeaks of the redistributive and the recognition dimension proposed by Sandra Fredman. In the first dimension, she pins importance upon the existing classification and disadvantages that a person encounters and thereby accentuates upon the need to ameliorate these limitations through positive actions.<sup>21</sup>

Women in the reproductive health rights paradigm are at a position that is inherently handicapped. Men and women are biologically classified as different on the basis of sex, wherein women are regarded at odds with men on the basis of their reproductive ability of bearing a child and becoming pregnant. Her reproductive ability is used as a means to drag her to a position where she is seen as physically weak and dependent upon man, further reinstating inequality and the common understanding of a woman as a creator and a caretaker of the family.<sup>22</sup> This is the current epoch and has an unequivocal effect upon women's sexual and reproductive preference, which in turn is exaggerated due to gaps in access to health facilities.<sup>23</sup> However, if the states grasp these disadvantages from the redistributive dimension, they will not only acknowledge these differences but also conceive the fact that the reproductive health needs of a woman differ from that of a man. This would reinforce state affirmative action through legal instruments to provide for women-specific reproductive health care services that are in specificity only required by

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<sup>18</sup> Sandra Fredman, *Substantive equality revisited*, 14 ICON 712, 727 (2016)

<sup>19</sup> *Id.*

<sup>20</sup> *supra* note 8

<sup>21</sup> Fredman, *supra* note 16, at 728-729

<sup>22</sup> *supra* note 13, at 14

<sup>23</sup> *Sexual and reproductive health and rights – the key to gender equality and women's empowerment*, IPPF (Oct 19, 2019, 4:45pm) [https://www.ippf.org/sites/default/files/2020\\_gender\\_equality\\_report\\_web.pdf](https://www.ippf.org/sites/default/files/2020_gender_equality_report_web.pdf)

women.<sup>24</sup> This would also help advance women's autonomy and would ensure that the reproductive health care needs of women are not accustomed to her in comparison to male standards.<sup>25</sup>

In the second dimension proposed by Sandra Fredman and reflected in Article 12 of the CEDAW refers to the recognition dimension. Under this dimension, Fredman argues that the means for achieving dignity is through recognizing the stereotypes, prejudice and the stigma that are attached to a person who is at a disadvantaged stratum in society.<sup>26</sup> Administering this exemplar within the ambit of Article 12 of the CEDAW requires states to see the antecedent gender-based stereotypes and stigmas attached to a women's reproductive health.

Rebecca J Cook highlights the pre-existing gender stereotypes and prejudices elaborately in her Article *Gender, Health and Human Rights*, wherein she addresses the fact that men are regarded as superordinate to women. Women are prone to stereotypes based on their gender and their role in society. Women are perceived and confined to the role of a mother and a caretaker of the family, completely dependent upon men for protection and sustenance.<sup>27</sup> In *I.V. v Bolivia*,<sup>28</sup> The court analysed gender stereotypes pertaining to women's autonomy to give consent for sterilization procedures. Here the court highlighted the fact that a woman is denied access to information on the basis that she is susceptible in nature and her decisions are unreliable. Further, the common perception of women in a society is as someone who is impulsive and in need of help, in making the reproductive choice, from men who are regarded as stable. This discernment based on gender takes a toll upon women's reproductive agency.

Further, in *L.C. v Peru*<sup>29</sup>, a 13-year-old pregnant girl was denied medical facility for her spinal injury that posed a risk for the foetus based on the gender stereotype that mother's health is secondary to foetus protection and survival. Such stigmas tend to push women's reproductive authority further down, creating a chasm in access to reproductive health services and perpetuating reproductive uncertainty and leading to reproductive outcomes that are undesirable.<sup>30</sup> Therefore it is only after removing these pre-

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<sup>24</sup> *supra* note 13, at 14

<sup>25</sup> *Case study on Equality*, SESSION 5 SUBSTANTIVE EQUALITY (Oct 19, 2019, 5:45pm) <http://www.law.hku.hk/hrportal/wp-content/uploads/file/Session5.pdf>

<sup>26</sup> Fredman, *supra* note 16, at 731

<sup>27</sup> Rebecca J. Cook, *Gender, Health and Human Rights*, 4 HEALTH AND HUMAN RIGHTS 350, 354 (1995)

<sup>28</sup> *I.V. v. Bolivia*, Judgment, Int-Am Ct HR (ser C): No. 329(2016)

<sup>29</sup> *L.C. v. Peru*, CEDAW Committee, Commc'n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (2011)

<sup>30</sup> *Beijing Declaration and the Platform for Action*, UN WOMEN (Oct 19, 2019, 5:45 pm)

<https://www.icsspe.org/system/files/Beijing%20Declaration%20and%20Platform%20for%20Action.pdf>

attachment disfigurements that a woman can truly achieve equality and dignity and, in turn, reinforce reproductive domination.

Further, the redistributive and recognition dimension sheds a significant spotlight on the participatory dimension. As proposed by Sandra Fredman, this dimension focuses on state duty to focus upon the political and community-based participation of the disadvantaged group and, in turn, improve participative justice by providing a platform for the disadvantaged to raise their voice and needs.<sup>31</sup>

As discussed in the 2 dimensions above, sex-based classification and gender stereotypes are part and parcel of a women's life. The stereotype based on gender, which discerns women as caretakers and reproductive labor, undermines her ability to move beyond the domestic circumference to the community outside and, in turn, make a significant change through participation in decision making.<sup>32</sup> Further shackles imposed by the society or the woman's family upon her reproductive choice also cramp up her ability to plan participation in the political and community arena primarily due to the constant juggle between domestic responsibility and community participation.<sup>33</sup>

Studies have indicated a unite between reproductive autonomy and women's participation outside the domestic sphere. Greater participation, which helps in losing strings of stereotype and stigmas attached to women's gender role, thereby promoting women's education and leadership, which would help women advocate her reproductive needs efficiently.<sup>34</sup> Therefore, it is required that the state strengthens women's participation by providing leadership and training program, by disabling any form of discrimination based on gender or sex and by accepting women's decision-making ability.<sup>35</sup> The state's obligation of this nature is not mentioned or adhered to under Article 12 of the CEDAW. Under the Article, the states are not under a duty to provide for the advancement of reproductive autonomy from the dimension of participative justice.

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<sup>31</sup> Fredman, *supra* note 16, at 732

<sup>32</sup> Joanna Hoare and Fiona Gell, *Women's Leadership and Participation*, OXFAM GB (Oct 19, 2019, 6:15 pm) <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/115530/bk-womens-leadership-091109-en.pdf?sequence=5&isAllowed=y>

<sup>33</sup> *supra* note 20

<sup>34</sup> Kirsten Stoebenau and Anju Malhotra, *Does Access to Contraception Empower Women?*, ICRW (Oct 20, 2019, 1:15 pm) <https://www.icrw.org/news/commentary-does-access-to-contraception-empower-women/>

<sup>35</sup> Tatiana DiLanzo, *Strengthen Girls' and Women's Political Participation and Decision-Making Power*, DELIVER FOR GOOD (Oct 20, 2019, 2:15 pm) [https://womendeliver.org/wp-content/uploads/2016/09/Deliver\\_For\\_Good\\_Brief\\_8\\_04.10.18-Political-participation.pdf](https://womendeliver.org/wp-content/uploads/2016/09/Deliver_For_Good_Brief_8_04.10.18-Political-participation.pdf)

Lastly, all three dimensions lead to the final aspect of the 4-dimension approach, the Transformative dimension, which acts as a guardian angel that caters to all the problems advanced through the dimensions stated above. As proposed by Sandra Fredman, the transformative dimension aims at dismantling the existing structures that tend to advance biological or social barriers and stereotypes. The aim is to provide for a space that domiciles and celebrates inherent differences.<sup>36</sup>

This dimension is not encapsulated within Article 12 of the CEDAW, which merely requires the states to recognize the hurdles in the exercise of reproductive autonomy by a woman and provide for policies to curb the same.<sup>37</sup> Transformation requires the states to take one step forward and widen the reproductive health right prism. In order to distend the prism, state should implement family programs that promote equal division of parental and household responsibility. This will ensure the division of workload and allow women to break free from the static role of a mother and caregiver.<sup>38</sup> Further, it will also empower woman and enhance her decision-making capabilities, which positively impacts her reproductive agency.

States can also intervene and implement measures that raise awareness regarding gender norms and stereotypes. For instance, in Africa, workshops were conducted for discussion about gender norms and their impact on reproductive health and managing household resources.<sup>39</sup> Lastly, in lieu of Article 12, the transformation dimension could also clinch upon the goal to achieve reproductive health on the basis of a women's personal need and not on the basis of male health preference. This could be achieved by transforming the current need for equality on the scale of comparison between men and women and recognizing and providing for reproductive needs that are exclusive to women.<sup>40</sup> Through these means and interventions, states can question and transform the gender structures that hinder the full realization of reproductive autonomy and thereby stifle access to reproductive health facilities for women.

### **CONCLUSION- THE FOUR-DIMENSIONAL MODEL OF ARTICLE 12 AS A SAVIOR**

The 4-dimensional model of Article 12 of the CEDAW truly purports the “ideal substantive equality” from 4 different directions. These directions cater to the need for reproductive health rights holistically

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<sup>36</sup> Fredman, *supra* note 16, at 733-734

<sup>37</sup> *supra* note 8

<sup>38</sup> *Men can transform gender stereotypes and inequality*, UN WOMEN (Oct 20, 2019, 3:15 pm)

<https://www.unwomen.org/en/news/stories/2014/11/ed-speech-at-menengage-global-symposium-india>

<sup>39</sup> *Transforming Gender Norms, Roles, and Power Dynamics for Better Health*, HEALTH POLICY PROJECT (ct 20, 2019, 3:20 pm)

[https://www.healthpolicyproject.com/pubs/381\\_GPMIndiaSummaryReport.pdf](https://www.healthpolicyproject.com/pubs/381_GPMIndiaSummaryReport.pdf)

<sup>40</sup> *supra* note 13, at 14

and thereby alleviate the drawbacks of the current reproductive health rights envisaged under the ICCPR, ICESCR and the CEDAW model.

Under the International Covenant on Civil and Political Rights (ICCPR), reproductive rights are encompassed within Article 6 and 17.<sup>41</sup> Both these Articles tend to impose a positive and negative obligation upon the government to respect reproductive autonomy and, at the same time, provide for reproductive measures.<sup>42</sup> Nevertheless, the prime facie focus is always upon the negative rights approach. The positive obligation is at a bare minimum as there are no guidelines that are formulated to determine the implementation of state measures of reproductive health.<sup>43</sup> Further, the convention considers the state as the ultimate guarantor ignoring the influence and the need for reformation of other social structures such as race, religion and society.<sup>44</sup>

In a similar fashion, the International Covenant on Economic, Social and Cultural Rights (ICESCR) upholds the ideology of right to health in specificity to Article 12 which has wide amplitude to include sexual and reproductive health of a woman within its scope and thereby require the states to conceive policies that provide for improvement of reproductive health.<sup>45</sup> Despite this, there are prevalent errors, such as the Article's disregard towards the idea of reproductive health as an exclusive human right itself. This subverts the autonomy of women to make reproductive decisions.<sup>46</sup> Further, the rights under the Article are not even binding per se and are merely general obligations that are not defensible in nature.<sup>47</sup>

Lastly, the present articulation of Article 12 of the CEDAW also pockets active criticism in its framework and implementation of substantive equality. Firstly, the Article uses the words "equality of man and women" this shows that inequality is catered through the "Male standard" that requires equality to be achieved in accordance to the position of a man.<sup>48</sup> This further undermines the position of the

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<sup>41</sup> *CCPR General Comment No. 6: Article 6 (Right to Life & CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women))*, UN HUMAN RIGHTS COMMITTEE (Oct 9, 2019, 2:30pm) <https://www.refworld.org/docid/45388400a.html> & <https://www.refworld.org/docid/45139c9b4.html>

<sup>42</sup> *Id.*

<sup>43</sup> Dina Bogecho, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*, WARWICK (Oct 9, 2019, 2:45 pm) [https://warwick.ac.uk/fac/soc/law/elj/lgd/2004\\_1/bogecho/#a2](https://warwick.ac.uk/fac/soc/law/elj/lgd/2004_1/bogecho/#a2)

<sup>44</sup> Shelly Wright, *Economic Rights And Social Justice: A Feminist Analysis Of Some International Human Rights Conventions*, AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 241, 248

<sup>45</sup> *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Oct 9, 2019, 3:40 pm) <https://www.refworld.org/pdfid/4538838d0.pdf>

<sup>46</sup> Gable, *supra* note 4, at 984

<sup>47</sup> Wright, *supra* note 42, at 246

<sup>48</sup> Fredman, *supra* note 16, at 719

women as a separate individual, making a man's right universal and a women's right subordinate to it.<sup>49</sup> Secondly, the Article also asserts disproportionate responsibility upon the state to eradicate discrimination and provide for the promotion of women's reproductive rights, ignoring the non-state actors who not only assert a major influence in furthering reproductive health but also engage in violation of the same rights.<sup>50</sup>

These drawbacks pertaining to reproductive health rights under the three covenants are cemented by the 4-dimensional model of Article 12 of the CEDAW. The model not only recognizes the social structures and other barriers attached to reproductive autonomy but also puts forth an obligation upon the states to address these structures and transform them effectively to advance reproductive autonomy and reproductive health access. This transformation requires the state and the non-state actors to contribute towards expediting reproductive health rights by exclusively giving recognition to these rights. Further, the redistributive and transformative dimension also models down the requirement of comparison of female reproductive health and right based on male standards and thereby recognizes reproductive rights and health aspects as exclusive to women. This strongly reinstates the positive obligation of the state to provide for women exclusive reproductive health services.<sup>51</sup> Lastly, the participative dimension also promotes awareness and provides for increasing participation of women in society, which in turn helps them better articulate their reproductive needs.<sup>52</sup> Therefore, this leads to the conclusion that the remodeling of Article 12 of the CEDAW on the touchstone of the 4-dimensional approaches is the true triumph of the ideal of substantive equality in the field of reproductive health rights.

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<sup>49</sup> Rachael Lorna Johnstone, *Feminist Influences on the United Nations Human Rights Treaty Bodies*, 28 HUMAN RIGHTS QUARTERLY 148, 150

<sup>50</sup> *Id.* at 152

<sup>51</sup> *supra* note 8

<sup>52</sup> *supra* note 20