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Universality, Diversity, and Legal Certainty: Cultural Diversity in the Dialogue Between the CEDAW and States Parties

YVONNE DONDERS AND VINCENT VLEUGEL

I. INTRODUCTION

IT IS BROADLY accepted that the universal value and application of international human rights norms does not imply a uniform implementation of these rights, thereby leaving room for local and culture specific implementation at the national level. The question remains, however, what the precise scope of that room is or should be. A common criticism of allowing for cultural diversity in the implementation of international human rights law is that it leads to relativism and to a lack of sufficient clarity and predictability of the norms, undermining legal certainty as a constitutive element of the rule of law. It could, however, also be argued that a certain amount of flexibility allowing for cultural diversity is inherent in the international legal human rights system and is not detrimental to legal certainty.

This chapter analyses the room for variation in implementation based on cultural differences, as well as the process of determining this room by states parties and the treaty-monitoring bodies. It analyses the dialogue as regards the elaboration of the normative content of the provisions, and the process of the dialogue itself. Both dimensions of content and process are linked to the principle of legal certainty.

States interpret and implement international human rights treaties in a way that fits their culture, history, and local settings. International monitoring bodies, including UN treaty bodies, are set up to supervise the implementation of these treaties, including determining whether or not states comply with their obligations. Treaty bodies have various mechanisms at their disposal to carry out this task whereby states are involved

to a greater or lesser extent. The periodic state reporting procedure, for instance, includes a dialogue with the states parties before the adoption of Concluding Observations by the Committees. The individual communications procedure involves states as party to the case on which the Committees express their 'Views' or Opinions.

This chapter focuses on the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) and the states parties to the International Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW). The ICEDAW was selected because it is one of the most ratified human rights treaties, while at the same time containing provisions, for instance on equality between men and women in family matters, that have strong cultural connotations. Divergent views on some of the principal matters in the ICEDAW are also reflected in the large number of reservations to this treaty.

Aiming to clarify the implications of the interaction between states and the CEDAW for the development of the international rule of law, the following issues are addressed below: to what extent and how does the dialogue between the CEDAW and states parties enable states to reiterate, revisit, or be challenged on the value of particular cultural norms and practices in relation to universal human rights? How does this dialogue relate to the development of consensus and certainty over the meaning of these rights? How does the interaction between states parties and the CEDAW take place and to what extent can it truly be spoken of as a dialogue? How does this process contribute to the possible conjuncture between legal certainty and (cultural) flexibility?

First, we introduce the concepts of cultural diversity and legal certainty (section II). Then we provide an overview of the substantive issues of cultural diversity that come to the fore in the implementation of the ICEDAW (section III). We then analyse how these issues generate a dialogue in the state reporting procedure and the individual complaints procedure of the CEDAW, and how such a dialogue affects the meaning of conventional rights and the room for the culture-specific implementation (section IV). We end with concluding remarks on the role of dialogue in mediating cultural diversity and legal certainty (section V).

II. TWO CONCEPTUAL ISSUES ON CULTURAL DIVERSITY IN INTERNATIONAL HUMAN RIGHTS LAW

A. Universality and Cultural Diversity

Cultural diversity is defined in Article 2 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as 'the manifold ways in which the cultures of groups and societies find

expression. These expressions are passed on within and among groups and societies'.[1] In this chapter, 'cultural diversity' denotes the factual situation of cultural differences existing between and within states, whereby the term 'cultural' can refer to many things, including ethnicity, history, language, religion, customs, and so forth.[2] Cultural diversity can operate at different levels: *between* states, regions, communities, and individuals, but also *within* states, regions, and communities.

Human rights and cultural diversity have been discussed extensively in the context of universalism and cultural relativism.[3] In an attempt to reconcile universalism and cultural relativism, the predominant view now suggests that respect for cultural diversity can very well be consistent with the notion of the universality of human rights.[4] Cultural relativism and universality do not have to mutually exclude each other if the former is understood as respect for cultural diversity as opposed to a challenge to the legitimacy of international human rights norms. The dichotomy can be overcome, for instance, by making a distinction between the universality of the subjects to whom international human rights apply (beneficiaries) and the universality of the normative content of the rights.

The idea that human rights should be universally enjoyed—by all persons on the basis of equality—is not controversial. In general, the universality of the subjects of human rights is widely accepted, and international human rights instruments clearly endorse this approach. The Universal Declaration of Human Rights (UDHR)[5] as well as international human rights treaties speak of 'everyone' or 'all persons', affirming that *all* human beings have these rights and freedoms, no matter where they were born or to which community they belong.

[1] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the General Conference of UNESCO on 20 Oct 2005, entry into force on 18 March 2007.

[2] UNESCO uses the following definition of 'culture': 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs', Universal Declaration on Cultural Diversity, 2001.

[3] 'Statement on Human Rights' (1947) 49 *American Anthropologist* 539, 542, submitted to the UN Human Rights Commission drafting the Universal Declaration of Human Rights. On universalism and cultural relativism, see *inter alia*, Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, Cornell University Press, 1989) 107–60; Douglas Lee Donoho, 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards' (1991) 27 *Stanford Journal of International Law* 345, 345–91; Fernand de Varennes, 'The Fallacies in the Universalism Versus Cultural Relativism Debate in Human Rights Law' (2006) 7 *Asia-Pacific Journal on Human Rights and the Law* 67, 67–84; Eibe Riedel, 'Universality of Human Rights and Cultural Pluralism' in C Starck (ed), *Constitutionalism, Universalism and Democracy: A Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (Baden-Baden, Nomos, 1999) 25–52; Ann-Belinda S Preis, 'Human Rights as Cultural Practice: An Anthropological Critique' (1996) 18 *Human Rights Quarterly* 286, 286–315.

[4] See ch 10 (Legg) of this volume.

[5] 'Universal Declaration of Human Rights' UN GA Res 217A (III) (10 Dec 1948).

The universality of the normative *content* of human rights at the level of *specific national implementation* is, however, a different matter. It is increasingly agreed that the universal value and application of human rights does not necessarily imply the *uniform implementation* of these rights. In other words, while human rights apply universally to everyone on the basis of their human dignity, the implementation of these rights does not have to be uniform.[6] The UDHR, for instance, was meant to be a common standard of achievement without fully uniform practices.[7] This process has been given various names: the 'universalisation of human rights',[8] the 'relative universality of human rights',[9] or 'inclusive universality'.[10] In other words, universal human rights do not have to be implemented in a uniform way, thereby leaving room for variation at the national level.

B. Legal Certainty

Legal certainty is often considered as one of the central elements of the rule of law, which is mainly developed at the national level.[11] Legal

[6] The European Court of Human Rights has adopted this approach by stating that, while the purpose of the European Convention on Human Rights was to lay down international standards, 'this does not mean that absolute uniformity is required'. See *Sunday Times v United Kingdom* App no 13166/87 (ECtHR, 26 Nov 1991) [61].

[7] Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern University Journal of International Human Rights* 1, 15.

[8] Advisory Council on International Affairs, *Universality of Human Rights. Principles, Practice and Prospects*, Advice no 63 (The Hague, Nov 2008) 19.

[9] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 281, 300. Donnelly argues that 'universal human rights, properly understood, leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity'.

[10] Eva Brems, 'Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam' (2004) 5 *Human Rights Review* 5, 11–12; Eva Brems, 'Reconciling Universality and Diversity in International Human Rights Law' in A Sajó (ed), *Human Rights with Modesty: the Problem of Universalism* (Leiden; Boston, M Nijhoff Publishers, 2004) 213, 223–25. Other authors agree that the international human rights system should be or is flexible enough to integrate cultural differences: Niels Petersen, 'International Law, Cultural Diversity, and Democratic Rule: Beyond the Divide Between Universalism and Relativism' (2011) 1 *Asian Journal of International Law* 149, 149–50; David Kinley, 'Bendable Rules: The Development Implications of Human Rights Pluralism' in BZ Tamanaha, CM Sage and MJV Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge; New York, Cambridge University Press, 2012) 50, 50–65. Other authors, however, also emphasise the need for a flexible and dynamic approach of cultures; see Preis, 'Human Rights as Cultural Practice' (n 3) 296–97; Brems, 'Reconciling Universality and Diversity in International Human Rights Law' (n 10) 226–27.

[11] Jeremy Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15, 17; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315, 316–17; James R Maxeiner, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law' (2008) 31 *Houston Journal of International Law* 27, 28; Ofer Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism' (2010) 19

certainty serves to provide individuals with a predictable environment, which guides them in complying with the law and protects them from arbitrary government action by controlling government power to make and apply the law. Legal certainty concerns how the law is made, how it is interpreted, and how it is applied.[12] According to the European Court of Human Rights, legal certainty, in particular the aspect of foreseeability, 'requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[13] Consequently, laws and decisions must be made public; they must be definite and clear; and the retroactivity of laws and decisions must be strictly limited.[14]

To what extent can the legal certainty principle be transposed to the international level as part of an international rule of law? The precise scope, meaning, and implications of the concept of the rule of law at the international level remain debated.[15] In this chapter, the concept of the rule of law at international level refers to the so-called rule of law 'internationalised', meaning the externalisation and application of rule of law values within the international legal order.[16] The UN also adheres to this meaning of the international rule of law, whereby the principles of the rule of law provide a regulatory framework for international institutions, international normativity, and international adjudication.[17]

Boston University Public interest Law Journal 175, 177–78; Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' UN Doc S/2004/616 (23 Aug 2004) para 6. Also, G8 Foreign Ministers Declaration on the Rule of Law (2007) described the rule of law as including the principles of supremacy of law, equality before the law, accountability to the law, legal certainty, procedural and legal transparency, equal and open access to justice for all, irrespective of gender, race, religion, age, class, creed, or other status, avoidance of arbitrary application of the law, and eradication of corruption.

[12] Maxeiner, 'Some Realism about Legal Certainty' (n 11) 36, 38; Paul Heinrich Neuhaus, 'Legal Certainty versus Equity in the Conflict of Laws' (1963) 28 *Law and Contemporary Problems* 795, 802–03.

[13] *Korchuganova v Russia* App no 75039/01 (ECtHR, 8 June 2006) [47].

[14] Maxeiner (n 11) 32, 36, 38; Waldron, 'The Rule of International Law' (n 11) 17. Legal certainty is also often linked to criminal punishment, such as is laid down in Art 7 of the ECHR, including the prohibition of being convicted retroactively or increasing the penalty retroactively. A person can only be convicted for an act or omission which constituted a criminal offence under national or international law at the time when it was committed.

[15] See ch 1 (Kanetake) of this volume.

[16] This idea is taken from Stéphane Beaulac, 'Lost in Transition? Domestic Courts, International Law and Rule of Law "À la Carte"' in E Kristjánsdóttir, A Nollkaemper and C Ryngaert (eds), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (Cambridge, Intersentia, 2012) 17, 20. Beaulac distinguishes this from the 'internationalisation' of the rule of law, which refers to the exportation of the rule of law at the national level, via the international plane, to other domestic levels, mainly in relation to conflict, post-conflict situations, and long-term development situations.

[17] Beaulac, ibid; Randall Peerenboom, Michael Zürn and André Nollkaemper, 'Conclusion: From Rule of Law Promotion to Rule of Law Dynamics' in M Zürn, A Nollkaemper and R Peerenboom (eds), *Rule of Law Dynamics: In an Era of International and Transnational*

Legal certainty as part of an international rule of law would imply that treaties and treaty provisions should be sufficiently clear and precise to be predictable and foreseeable. It seems that achieving legal certainty at the international level is more difficult than at the national level.[18] Since international human rights law is primarily formed by states that have different historical, political, and cultural backgrounds and interests, one may question how legal certainty is understood and materialised in the practice of international human rights law. Although applying the rule of law element of legal certainty at the international level should force states to create international human rights law in the clearest and most foreseeable way, it appears that international human rights treaties are, *par excellence*, characterised by the use of broad and vague language and open-ended concepts. Human rights treaties are the products of long negotiations and political compromise among a variety of states; a process that does not do well for clarity and unambiguous language. This vagueness may be problematic for legal certainty. At the same time, it could be argued that the subject matter—human rights—is so multidimensional and complex that it does not lend itself to being reduced to clear and unambiguous language.[19] Moreover, states may keep international human rights law deliberately vague, because it provides them with a framework with certain flexibility to implement and apply human rights at the national level.

Some have called predictability, including clarity and stability, of laws and adjudication 'formal' legal certainty, distinguishing it from 'substantive' legal certainty, which refers to the rational acceptability of laws and adjudication. Acceptability implies that decisions are justified, using arguments that are not only clear, but also persuasive.[20] This distinction draws on the fact that even if laws are sufficiently clear and predictable, fulfilling the criteria of formal legal certainty, their application in concrete situations cannot and perhaps should not be fully predictable. This situation highlights the importance of argumentation and justification by supervisory bodies in order to achieve rational acceptability; in other words, substantive legal certainty.[21] The context sensitivity, flexibility, and thereby possible unpredictability in the application and implementation of norms, as well as the importance of clear and consistent argumentation

Governance (Cambridge, Cambridge University Press, 2012) 305, 314–15; Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, 341, 355–56.

[18] Waldron argues that because of the absence of an overarching sovereign at the international level, the rule of law principles, including legal certainty, are more difficult to realise. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 11) 320.

[19] Raban, 'Fallacy of Legal Certainty' (n 11) 188, 191.

[20] Elina Paunio, 'Beyond Predictability—Reflections on legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 *German Law Journal* 1469, 1484–86. The author follows legal theorists such as Habermas, Aulius Aarnio and Alexander Peczenik in drawing this distinction.

[21] ibid 1473–75.

by international supervisory bodies are highly relevant for international human rights law.

International monitoring bodies[22] provide a procedural safeguard related to formal legal certainty and they play an important role in promoting substantive legal certainty; in other words, the acceptability of the outcome of the procedures, for instance, by providing clear and well-justified arguments.[23] This is all the more necessary in an international context, where language, concepts and principles may differ widely. Indeed, international law is not homogenous in terms of content and application.[24] Treaties often need to balance certainty and reliability against flexibility.[25] Treaty provisions should be, in principle, defined as clearly as possible, but flexibility is needed for the individual application of the treaty provisions. A certain amount of flexibility is not necessarily a weakness; it could also be a strength, because the 'application of the norm occasions, frames and facilitates a certain process of reflection and argumentation', which is an important process.[26]

With regard to UN human rights treaties, not only states but also treaty bodies play an important role in this balancing process. Treaty bodies supervise the application and implementation by states parties and thereby play a crucial role in the interpretation of the scope, content, and application of treaty norms. The outcome of this process in terms of determining the scope and content of international norms, as well as the process itself, could be an important element in creating or improving legal certainty.

III. CULTURAL DIVERSITY IN THE IMPLEMENTATION OF THE ICEDAW

The aforementioned process of balancing between cultural diversity and legal certainty comes to the fore in the implementation of the ICEDAW. This comes as no surprise, because gender-based differentiation is often justified with religious, cultural, and historical arguments.[27] This section

[22] We use the term 'monitoring' or 'supervision', since the procedures of the treaty bodies are quasi-judicial and cannot be truly called 'adjudication'.

[23] Paunio, 'Beyond Predictability' (n 20) 1475–76.

[24] Stephan calls the assumption that international law is homogenous the 'homogeneity fallacy'. Paul B Stephan, 'Rethinking the International Rule of Law: The Homogeneity Fallacy and International Law's Threat to Itself' (2012) 4 *Jerusalem Review of Legal Studies* 19, 19–41.

[25] See Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 842. See also Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 11) 336.

[26] Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (n 11) 336; Neuhaus, 'Legal Certainty versus Equity in the Conflict of Laws' (n 12) 804.

[27] Christine Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in JP Gardner (ed), *Human Rights as General*

focuses on the question how much room and flexibility the Committee leaves to states parties that interpret and apply the treaty provisions in conformity with their cultural background, and the question to what extent the Committee is consistent and clear in its approach towards the cultural diversity argument.

A. Cultural Diversity and Non-Discrimination

The core principle of all human rights treaties, and the ICEDAW in particular, is the obligation of states to ensure equal enjoyment of human rights and to prevent and put an end to all forms of discrimination. This may imply taking special measures to promote and protect inclusion and participation of *all* women, including those from ethnic, racial, and sexual minority groups. Discrimination against women often not only concerns their sex, but also their ethnic or cultural background. Women often suffer from what the Committee calls *intersectional discrimination*, *multiple forms of discrimination*, or *compounded discrimination*, and the state is called upon by the Committee to protect and promote the rights of these groups.[28]

The equality principle, however, also implies the right to be different. The ICEDAW also creates obligations of states to recognise the special situation of certain groups of women and to take special measures to sustain diversity. This follows from the recognition that respect for cultural differences can be fully in line with the principle of equality. Having equal rights is not the same as being treated equally. Indeed, equality and non-discrimination not only imply that equal situations should be treated equally, but also that unequal situations should be treated unequally. At the international level, it is understood that 'the enjoyment of rights and freedoms on an equal footing … does not mean identical treatment

Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions (London, BIICL, 1997) 77; Eric Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36(2) *Journal of Legal Studies* 397, 404.

[28] The Committee's recommendations to states parties may vary from negative obligations ('respect the Bedouin population's right to their ancestral land and their traditional livelihood', Concluding Observations Israel) to positive obligations ('improve access to health services for all women and in particular for the most vulnerable groups of women, such as indigenous, Afro- and Asian-descendant women', Concluding Observations Panama). The recommendations of the Committee tend to be very general, such as its recommendation to 'address the disparities that disadvantaged women face', to 'intensify its efforts to eliminate discrimination against disadvantaged groups of women', to 'adopt proactive measures, including temporary special measures, to eliminate such discrimination', to 'implement effective measures to eliminate discrimination and violence against women belonging to religious minorities', to 'conduct regular and comprehensive studies on discrimination against disadvantaged groups of women', or to 'provide information on specific measures taken by the State party to ensure gender equality for women, who experience intersectional discrimination based on factors such as ethnicity, religion … and sexual orientation, in all areas covered under the Convention'.

in every instance'.[29] Consequently, not all difference in treatment constitutes discrimination, as long as the criteria for differentiation are reasonable and objective and serve a legitimate aim.[30] Difference in treatment may also involve affirmative or positive action to remedy historical injustices, social discrimination or to create diversity and proportional group representation.[31]

Culture may also function as an underlying cause of discrimination against women, or its practices may be considered discriminatory in themselves. Many discriminatory practices are grounded in custom and stereotyping. The ICEDAW combats both these (cultural) practices and the underlying (cultural) beliefs.[32] The Convention requires states parties to abandon the defence of such harmful custom and to promote new attitudes.[33] As the analysis below shows, the Committee actively supervises this requirement without leaving much room, if at all, for the cultural diversity argument.

B. Cultural Stereotypes, Attitudes, and Practices

The CEDAW has on many occasions expressed its concern about cultural or traditional stereotypes, attitudes, and practices that determine the roles and responsibilities of women and men in the family and society and that

[29] Human Rights Committee, 'General Comment No. 18, Non-Discrimination' (10 Nov 1989) para 8. The European Court of Human Rights has reaffirmed this in many cases, including the following cases: *Thlimmenos v Greece* App no 34369/97 (ECtHR, 6 April 2000) [44]; *DH and others v the Czech Republic* App no 57325/00 (ECtHR, 7 February 2006) [44].

[30] Legal doctrine generally distinguishes between differentiation, distinction, and discrimination. Differentiation is difference in treatment that is lawful; distinction is a neutral term which is used when it has not yet been determined whether difference in treatment is lawful or not; and discrimination is difference in treatment that is arbitrary and unlawful. Consequently, only treatment that results in discrimination is prohibited. See Marc Bossuyt, 'Prevention of Discrimination: The Concept and Practice of Affirmative Action' UN Doc E/CN 4/Sub 2/2002/21 (17 June 2002) para 91 at 20.

[31] See also International Convention on the Elimination of Racial Discrimination, 21 Dec 1965, 660 UNTS 195, Art 1(4): 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'. The Human Rights Committee has further stated that the principle of equality under Art 26 of the International Covenant on Civil and Political Rights (ICCPR) may sometimes require states parties to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR. Human Rights Committee, 'General Comment No. 18, Non-Discrimination' (10 Nov 1989) para 10.

[32] Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford, Oxford University Press, 2012) 156.

[33] ibid 161.

may pose obstacles to the enjoyment of the rights or cause violations of these rights. This concern is linked to Article 5(a) of the ICEDAW, which secures that

> States Parties shall take all appropriate measures … 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.[34]

According to the CEDAW, cultural practices and beliefs under the scope of Article 5 may range from traditional harmful practices and beliefs—such as female genital mutilation, forced and early marriages, levirate, sororate, and polygamy (eg, in Côte d'Ivoire)[35]—to other forms of practices and beliefs, such as machismo culture (eg, in Nicaragua),[36] overemphasis on the traditional roles of women as mothers and spouses (eg, in Belarus),[37] segregation of the labour market and in educational choices (eg, in Brazil),[38] portraying immigrant and migrant women and men as being backward (eg, in The Netherlands),[39] and the stereotyping of women as sex objects and in traditional roles in the media (eg, in Italy).[40] In other words, Article 5 covers practices and beliefs in all possible cultures and contexts.

The Committee discusses the issue of cultural or traditional stereotypes, attitudes, and practices in relation to different topics. The Committee, for instance, critically considers *violence against women* as 'socially legitimized'[41] or being linked to 'the persistence of socio-cultural attitudes condoning such violence'.[42] Such violence may be underreported due to

[34] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13 Art 5(a).

[35] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Cote d'Ivoire' CEDAW/C/CIV/CO/1-3 (8 Nov 2011) para 26.

[36] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Nicaragua' A/56/38 (1 Jan 2001) para 294; although CEDAW no longer uses the word 'machismo'; see Summary Records Bolivia CEDAW/C/SR 811 (20 Feb 2008) para 55.

[37] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Belarus' CEDAW/C/BLR/CO/7 (4 Feb 2011) para 17.

[38] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Brazil' CEDAW/C/BRA/CO/7 (23 March 2012) para 27.

[39] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands' CEDAW/C/NLD/CO/5 (5 Feb 2010) para 24.

[40] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Italy' CEDAW/C/ITA/CO/6 (26 July 2011) paras 24–25.

[41] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Uganda' CEDAW/C/UGA/CO/7 (22 Oct 2010) para 23; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Turkmenistan' CEDAW/C/TKM/CO/3–4 (24 Oct 2012) para 22.

[42] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Italy' CEDAW/C/ITA/CO/6 (26 July 2011) para 26; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Bulgaria' CEDAW/C/BGR/CO/4–7 (27 July 2012) para 25.

'the prevalence of discriminatory social and cultural norms'[43] or 'cultural taboos'.[44] In its General Recommendation on violence against women, the Committee also addresses its cultural dimensions, arguing that 'traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision'.[45]

According to the CEDAW, socio-cultural factors may also prevent women from accessing *healthcare* services.[46] Women may face difficulties in accessing family planning services due to stigmatisation of abortion and contraception.[47] Sometimes women need the consent from their husband or a male guardian to undergo medical treatment.[48] Socio-cultural factors may form obstacles to access by women from minority groups to healthcare services,[49] or there may be discrimination against lesbian, bisexual, transgender, and intersex women in the provision of healthcare services.[50] In its General Recommendation on women and health, the Committee requests that states demonstrate 'that health legislation, plans and policies are based on … assessment of the health status and needs of women in that country and take into account any ethnic, regional or community variations or practices based on religion, tradition or culture'.[51]

The Committee further recognises the cultural dimension in *marriage and family relations*. The dissolution of marriage, inheritance, property rights, custody, and guardianship of children are often subject to customary

[43] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Greece' CEDAW/C/GRC/CO/7 (1 March 2013) para 20; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Jamaica' CEDAW/C/JAM/CO/6–7 (27 July 2012) para 21.

[44] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Chad' CEDAW/C/TCD/CO/1–4 (21 Oct 2011) para 22.

[45] CEDAW, 'General Recommendation No. 19' UN Doc A/47/38 (1992) para 11.

[46] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Angola' CEDAW/C/AGO/CO/6 (27 March 2013) para 31; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Togo' CEDAW/C/TGO/CO/6–7 (8 Nov 2012) para 34.

[47] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Hungary' CEDAW/C/HUN/CO/7–8 (25 March 2013) para 30.

[48] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Indonesia' CEDAW/C/IDN/CO/6–7 (7 Aug 2012) para 41; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kuwait' CEDAW/C/KWT/CO/3–4 (8 Nov 2011) para 42.

[49] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Congo' CEDAW/C/COG/CO/6 (22 March 2012) para 35; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Norway' CEDAW/C/NOR/CO/8 (22 March 2012) para 31.

[50] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Norway' CEDAW/C/NOR/CO/8 (22 March 2012) para 33.

[51] CEDAW, 'General Recommendation No. 24' UN Doc A/54/38/Rev 1 (1999) para 9.

and religious laws and practices. Acknowledging that there are various forms and concepts of the family between and within states, the Committee submits that 'whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people'.[52] The Committee further notes the potential difference between laws and practice: 'while most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention'.[53] The Committee often expresses concerns about the prevalence of traditional stereotypes of women in relation to their role in the family,[54] or discriminatory legal provisions and negative customary practices related to marriage and family relations.[55] In its General Recommendation on equality in marriage and family relations, the Committee, for instance, 'notes with concern that some states parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law'.[56] As regards the division of marital property, the Committee argues that

> any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic.[57]

With regard to *participation in political and public life*, the Committee expressed concerns that systematic barriers, such as negative cultural attitudes, impede women's equal participation in political life.[58] In its General Recommendation on political and public life, the Committee considers that 'in all nations, the most significant factors inhibiting women's ability to participate in public life have been the cultural framework of values and religious beliefs', and that 'in all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public

[52] ibid para 13.
[53] ibid para 15.
[54] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Jamaica' CEDAW/C/JAM/CO/6-7 (7 Aug 2012) para 37.
[55] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Congo' CEDAW/C/COG/CO/6 (22 March 2012) para 43.
[56] CEDAW, 'General Recommendation No. 21: Equality in Marriage and Family Relations' (1994) para 14.
[57] ibid para 28.
[58] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Turkmenistan' CEDAW/C/TKM/CO/3–4 (9 Nov 2012) para 26; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Greece' CEDAW/C/GRC/CO/7 (25 March 2013) para 24; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe' CEDAW/C/ZWE/CO/2–5 (22 March 2012) para 27.

life'.[59] When reporting, states parties are requested to provide details of any restrictions to those rights, 'whether arising from legal provisions or from traditional, religious or cultural practices'.[60]

Access to *education* may also be affected by cultural considerations, according to the Committee. Harmful practices, such as early and forced marriages, are identified as barriers to girls' education,[61] as are negative cultural attitudes and excessive domestic duties.[62] The Committee also regularly expresses concerns regarding stereotyped educational choices[63] and persistent inequalities in the access to education for girls on the basis of race, ethnicity, and socio-economic background.[64] According to the Committee, women's subordinate roles[65] and child-rearing responsibilities[66] within the family contribute to their lower level of education. At the same time, education is often discussed by the Committee as a vehicle or means to change those very same negative cultural practices and attitudes. The Committee, for instance, regularly recommends that states adopt education and information programmes which will help eliminate prejudices and change attitudes concerning the roles and statuses of men and women.[67]

These examples show that, at least when it comes to the implementation of the ICEDAW, culture is not the flexibility tool that it is sometimes held out to be. The Committee is very critical of cultural arguments that undermine the working of the treaty, and broadly prefers universality over flexibility. It should, however, be noted that the analysis above is based on issues that were raised by the Committee. A full insight into the possible flexibility left to states parties could only be gained by also exploring the issues *not* raised by the Committee. For example, why does the Committee decide to express its concerns on discrimination of lesbian, bisexual,

[59] CEDAW, 'General Recommendation No. 23: Political and Public Life' UN Doc A/52/38 (1997) para 10.

[60] ibid para 48(b).

[61] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Togo' CEDAW/C/TGO/CO/6–7 (8 Nov 2012) para 30; 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe' CEDAW/C/ZWE/CO/2–5 (22 March 2012) para 29.

[62] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Turkmenistan' CEDAW/C/TKM/CO/3–4 (9 Nov 2012) para 31.

[63] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Turkey' CEDAW/C/TUR/CO/6 (16 Aug 2010) para 30.

[64] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Brazil' CEDAW/C/BRA/CO/7 (22 March 2012) para 24.

[65] CEDAW, 'General Recommendation No. 19: Violence against Women' (1992) para 11.

[66] CEDAW, 'General Recommendation No. 21: Equality in Marriage and Family Relations' UN Doc A/49/38 (1994) para 21.

[67] CEDAW, 'General Recommendation No. 3: Education and Public Information Campaigns' UN Doc A/42/38 (1987); CEDAW, 'General Recommendation No. 19: Violence against Women' (1992) para 24(t)(ii).

transgender, and intersex women in Norway,[68] while it is silent on the issue in Uganda,[69] a country where, at the time, an 'anti-homosexuality bill' was pending,[70] with life imprisonment as the minimum punishment for anyone convicted of having gay sex.[71] Is this a sign of cultural sensitivity? Or a sign of double standards? Or are there too many other, more pressing issues that need to be raised? In other words, determining the room for cultural diversity is a very complex process involving many factors. While it is important to keep this complexity in mind, the aforementioned examples lead us to conclude that the Committee leaves states parties little to no room for cultural variation in the implementation of the Convention.

IV. THE PROCESSES OF DIALOGUE BETWEEN THE COMMITTEE AND STATES PARTIES

Having established that the Committee is very critical and restrictive when it comes to accepting cultural variation in the implementation of the Convention, the question arises to what extent states parties still engage in a dialogue with the Committee. This section analyses the processes of dialogue between the Committee and states parties on issues of cultural diversity. It considers procedures through which the Committee and states interact, the extent to which states accept the critical and restrictive stance of the Committee, and whether and how states use the opportunity to explain their views on specific cultural norms and practices. This also leads us to the question of how 'constructive' the dialogue is in practice.

A. Fora for Interaction Between the Committee and States Parties

The Committee monitors compliance by states with their obligations under the ICEDAW. The procedures at its disposal—the periodic state reporting procedure and the individual communications procedure—have different levels of state involvement and thereby of interaction or dialogue between

[68] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Norway' CEDAW/C/NOR/CO/8 (22 March 2012) para 33.

[69] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Uganda' CEDAW/C/UGA/CO/7 (4 Nov 2010).

[70] The Bill can be read in full, available at: www.scribd.com/doc/208846690/The-Anti-Homosexuality-Bill-2009-in-full.

[71] Xan Rice, 'Uganda considers death sentence for gay sex in bill before parliament' (*The Guardian*, 29 Nov 2009) available at: www.theguardian.com/world/2009/nov/29/uganda-death-sentence-gay-sex; on 24 Feb 2014, a revised version of the law was signed by Ugandan President Museveni. See, eg, Faith Karimi and Nick Thompson, 'Uganda's President Museveni Signs Controversial Anti-Gay Bill into Law' (*CNN International Edition*, 25 Feb 2014) available at: http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill/.

the Committee and states. With regard to the state reporting procedure, *initial reports* should 'outline any distinctions, exclusions or restrictions made on the basis of sex and gender … imposed by law, practice or tradition, or in any other manner on women's enjoyment of each provision of the Convention'.[72] Subsequent *periodic reports* should contain information on the implementation of recommendations (Concluding Observations) to the previous report and explanations for the non-implementation or difficulties encountered as well as information on any remaining or emerging obstacles to the exercise and enjoyment by women of their human rights, and on measures envisaged to overcome these obstacles.[73]

A pre-session working group of the Committee then drafts a short *list of issues and questions*, indicating the main points it wants to discuss with the state. Then a 'constructive dialogue' takes place. The Committee takes two (open) meetings each of three hours for consideration of initial and periodic reports. Representatives of the state party may make introductory comments for a maximum of 30 minutes, followed by several rounds of questions and answers, until all articles have been covered.[74] The minutes of the meeting are laid down in an official document, called *Summary Records*. The dialogue leads to the adoption of *Concluding Observations* by the Committee, which include only issues and concerns raised during the constructive dialogue.[75] In other words, states are actively involved in this process and can take the opportunity to explain their views, even though the Concluding Observations are adopted by the Committee as an independent supervisor. The Concluding Observations are not shared in advance with the state party and only afterwards can be commented upon by the state party. At the same time, the observations are meant as recommendations or practical advice for improving implementation of treaty rights, and do not have legally binding force.[76] Even though the Committee strives 'to formulate detailed Concluding Observations, with concrete, achievable, but non-prescriptive recommendations',[77] in reality, the Concluding Observations generally concern broad recommendations about legislative and other measures states parties should take. Rather than making recommendations on an article-by-article basis, the

[72] Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, HRI/GEN/2/Rev 5 (29 May 2008) ch V, para D.3

[73] ibid ch V.

[74] ibid paras 11–12.

[75] ibid para 18.

[76] Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford, Oxford University Press, 2010) 407.

[77] Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, HRI/GEN/2/Rev 5 (29 May 2008) ch V, para 21.

Concluding Observations use subject headings, which are used flexibly.[78] No explicit reference is made to the articles of the Convention. The Concluding Observations consequently provide limited insight into the scope and normative content of specific Convention articles.

While the reporting procedure is compulsory for each state party, the individual communications procedure needs to be specifically accepted by states, via an Optional Protocol.[79] The cases are initiated and brought by individuals after national remedies are exhausted.[80] After a communication has been received, the Committee brings it confidentially to the attention of the state party, with a request to submit, within six months, a written reply concerning the admissibility of the communication and its merits.[81] The Committee then transmits to each party the submissions made by the other party and affords them an opportunity to comment.[82] The whole procedure is written and confidential; no oral hearings take place. The Committee finally presents its Views on the case, concluding whether or not a violation of the treaty provision has taken place.[83] Although a simple majority is sufficient,[84] Committees generally adopt their views by consensus. Occasionally, individual members of the Committee attach separate (and dissenting) opinions. In case of a violation, the Committee may suggest remedies or compensation to the state party. The Views are not legally binding.[85] The state party is involved in the communication procedure, but more as respondent and less as active participant, as with the reporting procedure.

After the Committee has adopted its Views, the state party is requested to submit, within six months, a written response including information on the action taken following the Committee's recommendations. One member of the Committee is appointed as rapporteur for follow-up on the Views. The Committee periodically decides whether further action is required and until the case is closed, it reports to the General Assembly that 'the dialogue is on-going'.[86] Although the meetings that rapporteurs

[78] Overview of the working methods of the Committee on the Elimination of Discrimination against Women in relation to the reporting process, CEDAW/C/2009/II/4, para 21.

[79] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 Oct 1999, 2131 UNTS 83.

[80] ibid Art 4.

[81] ibid Art 6.

[82] Rules of Procedure for the Optional Protocol to CEDAW, A/56/38, r 69(9).

[83] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (n 79) Art 7.

[84] Rules of Procedure for the Optional Protocol to CEDAW, A/56/38, r 72(5).

[85] Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (n 76) 412–13.

[86] CEDAW, Annual Report to GA, UN Doc A/64/38 (2009) at 111; Rules of Procedure of the CEDAW (UN Doc A/56/38 (SUPP), as amended by UN Doc A/62/38 (SUPP) ch V) r 73 on 'Follow-up to the views of the Committee'.

on follow-up have with states parties are considered as some form of continuing dialogue between the Committee and the state party, it should be noted that this dialogue takes place only *after* the View has been adopted. This means that the treaty norm interpretation (and thus the development of the general jurisprudence) has already been shaped.

The practice and experience of the Committee is laid down in General Recommendations, in which it comments on specific treaty provisions or elaborates on the relationship between the Convention and specific themes or issues.[87] States parties play a limited and more indirect role in the adoption of these Recommendations. They are drafted and adopted by consensus by the Committee, whereby states parties are invited to comment on the draft texts.[88]

B. State Reporting Procedure: Three Modes of (Non-)Engagement

In order to unveil the practice of dialogue between the Committee and states parties regarding the room for cultural diversity, we have analysed the state reporting procedure of 30 states which took place between January 2010 and July 2013, including state periodic reports, (replies to) lists of issues, and Concluding Observations. We selected the states on the basis of their geographic spread.[89] The analysis of the state reporting procedure is necessarily an intricate one, because states parties and the Committee categorise their reports differently.

Since June 2008, the Committee includes subject headings—such as *stereotypes and harmful practices*, *violence against women*, *health*, or *education*—in its Concluding Observations, which are to be used 'flexibly and as appropriate for the State party concerned'.[90] By contrast, states parties usually categorise their reports according to the provisions of the Convention. This makes it methodologically difficult to identify which part of the Committee's observations addresses which part of the state's report. For

[87] Report on the Working Methods of the Human Rights Treaty Bodies relating to the State Party Reporting Process, UN Doc HRI/MC/2005/4 (25 May 2005) 28, para 105.

[88] Nisuke Ando, 'General Comments/Recommendations' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2008), online edn, available at: www.mpepil.com.

[89] Selection criteria: 6 countries from each of the 5 regions as identified by the UN: Africa Region; Americas Region; Asia Pacific Region; Europe, North America and Central Asia Region; Middle East and North Africa Region, available at: www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx.

[90] 'Overview of the working methods of the Committee on the Elimination of Discrimination against Women in relation to the reporting process', CEDAW/C/2009/II/4, para 21.

example, the subject of *violence against women* has been linked to Articles 2, 3, 5, 6, 10, 11, 12, 14, and 16 of the Convention.[91] At the same time, the practice of early marriage has not only been discussed under this subject, but also under *legislative framework*, *stereotypes and harmful practices*, *education*, *health*, and *marriage and family life*, linking it to many different articles of the Convention. It is not uncommon that one issue is discussed under different articles or subjects throughout one reporting cycle. For example, in the reporting procedure of Bangladesh, the Committee requested information about early marriages under *stereotypes and harmful traditional practices*[92] and *health*[93] in its list of issues and questions, while it addressed early marriages in its Concluding Observations under *education*[94] and *marriage and family relations*.[95] The Committee does this consciously, for reasons of flexibility, but it complicates the analysis of a dialogue on any one particular topic.

Among a wide range of issues on cultural diversity, we focused specifically on the practice of dialogue concerning Articles 5 (stereotyping and prejudice),[96] 12 (the right to health), and 16 (rights related to marriage and family relations) of the Convention. The most intensive discussion between the Committee and states parties took place on these rights, including on the (in)compatibility of certain (traditional) cultural practices and beliefs with the implementation of the Convention. Not coincidentally, these include provisions of the Convention with a large number of reservations by states.[97]

States responses to the Committee's interpretations of cultural diversity issues can broadly be categorised into three groups. First, states may *accept* the Committee's interpretations and recommendations (section i, below). Second, states may also *reject* the Committee's interpretations and recommendations, and put their own interpretation forward (section ii). The state justifies its actions in an attempt to convince the Committee. Finally, states may *ignore* their non-compliance and avoid a dialogue on the issue (section iii); namely, the state rejects the Committee's interpretations and recommendations, but does not (consider it necessary to) defend its actions or policies.

[91] CEDAW, 'General Recommendation No. 19: Violence against Women' (1992) paras 10–23.

[92] CEDAW, 'List of issues and questions: Bangladesh' CEDAW/C/BGD/Q/7 (6 Sept 2010) para 8.

[93] CEDAW, 'List of issues and questions: Bangladesh' CEDAW/C/BGD/Q/7 (6 Sept 2010) para 18.

[94] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Bangladesh' CEDAW/C/BGD/CO/7 (21 March 2011) para 27.

[95] ibid paras 39–40.

[96] See (n 34) above.

[97] On reservations and cultural diversity, see further Yvonne Donders, 'Cultural Pluralism in International Human Rights Law: The Role of Reservations' in A Vrdoljak (ed), *The Cultural Dimension of Human Rights* (Oxford, Oxford University Press, 2013) 205.

i. Accepting the Committee's Interpretation and Recommendations

States parties may accommodate the Committee's critical remarks. For instance, when considering the combined fifth and sixth periodic report of Kenya (2007), the Committee commented on 'the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life'.[98] It considered the cultural norms, practices, and traditions obstacles to implementation of the Convention, and requested that the state party 'view its cultures as dynamic aspects of the country's life and social fabric and as subject, therefore, to change'.[99] In response, in its seventh periodic report, Kenya conceded that

> one of the biggest challenges to women's equality with men on matters concerning marriage and the family is cultural construction of women's roles vis-à-vis that of men, cultural attitudes and belief about women and their traditional roles, which lead to women's subjugation and, in many cases, retrogressive cultural practices[100]

and submitted that measures were being taken for modification of social and cultural patterns of conduct.[101] In the subsequent Concluding Observations, the Committee, 'while noting some efforts made by the state party', reiterated its concerns.[102]

Likewise, in the dialogue with Bangladesh, the Committee expressed concern that 'strong stereotypical attitudes persist with respect to the roles and responsibilities of women in the family and society, negatively affecting women's enjoyment of their rights and impeding the full implementation of the Convention'.[103] Bangladesh responded to the Committee by observing that the country had been implementing 'programs that include awareness raising activities to change stereotype attitude and norms about the roles and responsibilities of women and men in the family and society'[104] and carried out 'activities as measures to address sex roles and stereotyping towards eliminating prejudices and biases'.[105] In the Concluding Observations, the Committee recognised Bangladesh's efforts to

[98] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kenya' CEDAW/C/KEN/CO/6 (15 Aug 2007) para 21.
[99] ibid para 22.
[100] CEDAW, 'Seventh periodic report of Kenya' CEDAW/C/KEN/7 (24 March 2010) para 265.
[101] ibid paras 74–96.
[102] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kenya' CEDAW/C/KEN/CO/7 (5 April 2011) para 17.
[103] CEDAW, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Bangladesh' A/59/38 Part II (23 July 2004) para 246.
[104] CEDAW, 'Combined sixth and seventh periodic report of Bangladesh' CEDAW/C/BGD/6-7 (24 March 2010) para 110.
[105] ibid para 232.

promote changes in the stereotypical roles of women, albeit still expressing its remaining concern.[106]

In these situations where the state party agrees and accepts (or at least pays lip service to) the Committee's recommendations, the 'interaction' usually follows some general format of pre-established lines. The Committee's recommendations to the state party are quite broad and vague: the Committee 'urges' or 'calls upon' the state party to 'strengthen its efforts', or to 'accelerate efforts', or to 'put in place a comprehensive strategy' to modify or eliminate harmful practices and stereotypes that discriminate against women. The Committee does not specify these strategies, efforts, or measures; it merely stipulates what they should accomplish.

In several cases, the state party accepted the Committee's concerns, but argued that it faced obstacles or resistance in addressing these concerns. For example, in the dialogue with Indonesia, the Committee expressed concerns about the persistence of entrenched patriarchal attitudes and stereotypes about the roles and responsibilities of women and men in the family and society. Indonesia, although sharing these concerns, argued that 'values and cultural practices, especially when framed in a justification stemming from narrow religious interpretations, are difficult to address', and observed that a common understanding, also among policy-makers, is often difficult to achieve.[107] An example is the practice of female genital mutilation (FGM). The Committee was concerned about the incidence of FGM in Indonesia, the reported medicalisation of FGM, and the lack of legislation prohibiting or penalising it.[108] Indonesia replied that 'efforts to eradicate female circumcision constitute an uphill challenge as the custom is still practiced widely and reinforced by entrenched beliefs and religious interpretations',[109] while stressing that it 'continuously supports the efforts to combat violence against women in all forms, including FGM'.[110] In 2008, the influential Indonesian Ulema Council issued a fatwa to the effect that the abolition of female circumcision was against sharia provisions. In light of that development, the state party issued a new regulation providing a set of safeguards for medical personnel in performing female circumcision. The state stressed, however, that 'this regulation should not in any way be construed as encouraging or promoting the practice of

[106] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Bangladesh' CEDAW/C/BGD/CO/7 (21 March 2011) para 17.

[107] CEDAW, 'Combined sixth and seventh periodic reports of the Republic of Indonesia' CEDAW/C/IDN/6–7 (7 Jan 2011) para 31.

[108] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Indonesia' CEDAW/C/IDN/CO/5 (15 Aug 2007) para 20.

[109] CEDAW, 'Combined sixth and seventh periodic reports of the Republic of Indonesia' CEDAW/C/IDN/6–7 (7 Jan 2011) para 131.

[110] CEDAW, 'Responses to the list of issues and questions: Indonesia' CEDAW/C/IDN/Q/6-7/Add 1 (19 Jan 2012) para 35.

female circumcision'.[111] Indonesia justified its policy by referring to 'the dynamic of the implementation of rights and freedoms of its citizens, particularly with regards to the freedom to practice their religion and beliefs in a democratic society'.[112] Nevertheless, the Committee expressed its concern about the serious regression with regard to FGM, and, in particular, the state party's authorisation of certain medical practitioners to conduct it. It urged Indonesia to withdraw the regulation authorising female circumcision when performed by medical practitioners, to restore the ban on the practice of female circumcision, and to adopt robust legislation criminalizing the practice.[113]

ii. Justifying Different Interpretation and Implementation

States do not always respond to the Committee in an accommodating manner. The Committee may also be confronted with a state party rejecting its interpretations, while explaining and justifying its own interpretation of certain provisions.

In the dialogue with South Africa, for instance, the Committee was concerned about the continuing recognition of customary and religious laws,[114] and recommended that the state prepare a uniform family code in conformity with the Convention, with the aim of abolishing (among others) polygamy.[115] In its periodic report, South Africa replied that it would retain a combination of marital regimes, including civil, customary, and religious laws.[116] It explained that the Constitution recognises the protection of customary laws and institutions, which 'automatically allows for polygamy because it is a customary practice'.[117] Accordingly, the Recognition of Customary Marriages Act recognises customary marriages, including polygamy, as 'inspired by the dignity and equality rights entrenched in the Constitution and normative value system it establishes and necessitated by the country's international treaty obligations'.[118] South Africa considers the proprietary rights of women in customary marriages sufficiently protected, since the Act provides that a husband in a customary

[111] CEDAW, 'Responses to the list of issues and questions: Indonesia' CEDAW/C/IDN/Q/6-7/Add 1 (19 Jan 2012) para 36.
[112] ibid para 37.
[113] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Indonesia' CEDAW/C/IDN/CO/6–7 (7 Aug 2012) para 22.
[114] CEDAW, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: South Africa' A/53/38/Rev 1 (SUPP) (1 Jan 1998) para 117.
[115] ibid para 118.
[116] CEDAW, 'Combined second, third and fourth periodic report of South Africa' CEDAW/C/ZAF/2–4 (24 March 2010) para 16.1.
[117] CEDAW, 'Responses to the list of issues and questions: South Africa' CEDAW/C/ZAF/Q/4/Add.1 (10 Jan 2011) paras 36–37.
[118] ibid para 49.

marriage, who wants to marry a second or subsequent wife, must apply to the High Court for the division of the estate and submit a contract that will govern the new proprietary regime.[119] The state party further stated in its periodic report that for women (already) living in polygamous marriages, 'their livelihood would be threatened if polygamy was not recognized'.[120] Nevertheless, in its Concluding Observations, the Committee remained concerned that the state party upheld customary and religious laws and civil, customary, and religious marital regimes that discriminate against women in the field of marriage and family relations, including polygamy[121] and—again—urged South Africa to adopt a unified family law in conformity with the Convention, with the aim of abolishing (among others) polygamy.[122]

In the dialogue with Tunisia, the Committee asked to provide information on steps taken to ensure equality between women and men in matters of personal status; among others, regarding dowry (Article 16 of the Convention).[123] Tunisia explained that in the case of dowries, Article 3 of the Personal Status Code states that 'marriage shall be constituted only with the consent of both spouses. The presence of two reputable witnesses and the payment of a dowry for the bride are also conditions for the validity of the marriage'. 'The dowry in this context has been reduced to a symbolic sum of one dinar (approximately 0.7 US dollars), and is therefore not discriminatory'.[124] In its Concluding Observations, the Committee did not accommodate such a 'symbolic dowry': 'While noting the efforts of the State party to reduce the value of the dowry to one dinar, the Committee is concerned that it remains a condition for the validity of the marriage'.[125] The Committee urged Tunisia to amend without delay discriminatory provisions or regulations relating to dowry.[126]

The dialogue between the United Arab Emirates (UAE) and the Committee addressed equality between women and men in respect to inheritance. The UAE submitted in their report to the CEDAW that

> the Personal Status Act includes provisions governing questions of … inheritance. The sharia is the basic source for the provisions of the Act, inasmuch as it

[119] CEDAW, 'Combined second, third and fourth periodic report of South Africa', CEDAW/C/ZAF/2–4 (24 March 2010) para 16.7.

[120] ibid para 16.8 (textbox 31: *Polygamy and Women's Rights*).

[121] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa' CEDAW/C/ZAF/CO/4 (5 April 2011) para 41.

[122] ibid para 42.

[123] CEDAW, 'List of issues and questions: Tunisia' CEDAW/C/TUN/Q/6 (29 March 2010) para 31.

[124] CEDAW, 'Responses to the list of issues and questions: Tunisia' CEDAW/C/TUN/Q/6/Add 1 (18 Aug 2010) para 366.

[125] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Tunisia' CEDAW/C/TUN/CO/6 (4 Nov 2010) para 60.

[126] ibid para 61.

> relates to matters clearly spelled out by the religion concerning which no debate is permissible.[127]

It explained that the provisions of the Islamic sharia are the principal reference with regard to the distribution of inheritance.[128] Acknowledging that different shares are allocated to male and female inheritors, it argued that gender was not the dictating factor, but the financial burden which, in accordance with the sharia, is placed on the inheritor to fulfil the responsibilities towards others.[129] The UAE further defended this practice, arguing that the differentiation does not lead to any wrong or unfairness towards the female, as follows:

> it is a man's responsibility to support the female, his wife and his children, whereas a female inheritor has in her brother someone who must support her and her children, she receives less than her brother, who receives twice as much as she does, but is more fortunate in respect of the inheritance because she is not obliged to support anyone else: that money is hers alone and is intended to provide a form of insurance for her.[130]

In the Concluding Observations, the Committee nevertheless noted with concern that the legal provisions relating to personal status, including inheritance, in particular under the Personal Status Act, do not provide for equal rights of women and men. It called upon the UAE to introduce legislative reforms to provide women with equal rights in the field of inheritance.[131]

iii. Rejecting the Committee's Interpretation and Recommendations

Some states parties expressly avoid a dialogue on a particular subject by ignoring the Committee's questions or recommendations on a certain subject. It thereby implicitly rejects the Committee's interpretation of certain provisions. This 'tactic' can be recognised, for example, in situations where the state party's underlying 'worldview' is fundamentally different from that of the Committee, and the state party apparently does not believe that a dialogue can bridge this.

An example of this can be found in the dialogue between the Committee and Kuwait concerning the minimum age of marriage. After the Committee urged Kuwait to raise the minimum age of marriage for women and

[127] CEDAW, 'Initial periodic report of United Arab Emirates' CEDAW/C/ARE/1 (17 Sept 2008) 58.

[128] CEDAW, 'Responses to the list of issues and questions: United Arab Emirates' CEDAW/C/ARE/Q/1/Add.1 (19 October 2009) answer to question no 29.

[129] ibid.

[130] ibid.

[131] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Arab Emirates' CEDAW/C/ARE/CO/1 (5 Feb 2010) para 48.

men to 18 years,[132] it replied that 'the official registration or certification of a marriage is prohibited if the girl is under 15 years of age and the young man is under 17 years of age at the time of registration',[133] thus ignoring the Committee's recommendation, and maintaining its own position. In the list of issues and questions in another round of reporting, the Committee asked Kuwait whether it was taking steps to bring discriminatory provisions contained in its Personal Status Act into conformity with the Convention,[134] including the raising of the minimum age of marriage for women and men from 15 and 17 years to 18 years, 'as recommended by the Committee'.[135] Kuwait's short reply was that 'matters relating to personal status, marriage, divorce and inheritance are governed by Islamic law, as clarified in the combined third and fourth report of the State of Kuwait'.[136] The Committee, absent any explanation or justification by the state party, again expressed its concern about the absence of information on any steps taken by the state party to raise the minimum age of marriage for women and men to 18[137] and reiterated its previous recommendations.[138]

The Committee has occasionally tried to resolve such a deadlock, in particular regarding countries with an Islamic background, by pointing at countries with a similar background. For example, in the Concluding Observations on Kuwait, the Committee urged the state party to adopt specific legislation, 'seeking inspiration from other countries with similar cultural specificities which have taken steps in this regard',[139] however, without specifying which countries could serve this purpose.

The recommendations in the state reporting procedure, unlike those in the individual communications procedure, do not deal with specific provisions and do not conclude violations. Consequently, Concluding Observations are vaguer with regard to the content of the norms.

C. Individual Communications Procedure ('Views')

In the individual communications procedure, the Committee, through concrete dispute resolution, gives abstract rights a concrete meaning,

[132] CEDAW, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Kuwait' A/59/38 Part I (18 March 2004) para 67.

[133] CEDAW, 'Combined third and fourth periodic report of Kuwait' CEDAW/C/KWT/3–4 (12 Aug 2010) para 110.

[134] CEDAW, 'List of issues and questions: Kuwait' CEDAW/C/KWT/Q/3–4 (8 March 2011) para 29.

[135] ibid para 31.

[136] CEDAW, 'Responses to the list of issues and questions: Kuwait' CEDAW/C/KWT/Q/3–4/Add.1 (9 May 2011) para 82.

[137] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kuwait' CEDAW/C/KWT/CO/3–4 (8 Nov 2011) para 50.

[138] ibid para 51.

[139] ibid para 31. The Committee does not specify which other countries.

while striking a balance between the universal application of human rights and the reality of their implementation in diverse cultural contexts. This section discusses several individual complaints—in terms of content and process—where cultural diversity played a role in order to show what role the individual communications procedure plays in the interaction between the CEDAW and the state party. From the Committee jurisprudence,[140] the cases selected for review are those where culture functioned as an underlying cause of discrimination, or was considered discriminatory in itself.[141]

In all selected cases, Article 5, containing the elimination of prejudices, stereotypes, and traditional attitudes that are discriminatory towards women, was invoked.[142] The cases concern diverse contexts. For example, in a rape case against the Philippines, the domestic court's decision was found to be grounded in gender-based myths and misconceptions about rape and rape victims in violation of Article 5. The Committee in its Views stressed that 'stereotyping affects women's right to a fair and just trial'.[143] The Committee came to similar conclusions in a domestic violence case against Bulgaria, where it not only stressed that stereotyping affects women's right to a fair trial, but also stated that 'traditional attitudes by which women are regarded as subordinate to men contribute to violence against them'.[144] It considered that the (domestic) courts interpreted domestic violence in a too stereotyped and overly narrow way.[145] In another domestic violence case against Hungary, the Committee noted that the facts of the communication reflected earlier observations in the state party's periodic report about attitudes towards women in the country as a whole. Recalling that at that time it was concerned about the 'persistence of entrenched

[140] OHCHR website, available at: www2.ohchr.org/english/law/jurisprudence.htm.

[141] Thus, not discussed are the two cases of *intersectional discrimination*, where discrimination against women is linked with other (cultural) factors that affect (inclusion and participation of) women, such as race, ethnicity, religion or belief, sexual orientation, etc. In *Cecilia Kell v Canada* (Comm no 19/2008), the Committee found that the author was a victim of intersectional discrimination based on her status as 'an aboriginal woman victim of domestic violence' (para 10.2). The Committee recommended that Canada compensate the author, and recommended recruiting and training more aboriginal women to provide legal aid to women from their communities, and reviewing the legal aid system to ensure aboriginal women who are victims of domestic violence have effective access to justice. In *Maria de Lourdes da Silva Pimentel v Brazil* (Comm no 17/2008), the Committee concluded that the author was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background. The Committee recommended to provide 'appropriate reparation', to the author, and to 'ensure women's right to safe motherhood and affordable access for *all* women to adequate emergency obstetric care' (para 8).

[142] For an analysis of Art 5 of the ICEDAW, see Rikki Holtmaat, 'Article 5' in Freeman, Chinkin and Rudolf (n 32) 141, 141–67.

[143] *Karen Tayag Vertido v Philippines* (Comm no 18/2008) para 8.4.

[144] *Ms VK v Bulgaria* (Comm no 20/2008) para 9.11.

[145] ibid para 9.12.

traditional stereotypes regarding the role and responsibilities of women and men in the family',[146] the Committee concluded a violation, and recommended the state party to 'implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls'.[147]

As in the cases of state reporting procedures, states responded differently to the allegations concerning prejudices, stereotypes, and traditional attitudes. Hungary, for instance, admitted that it had failed to comply with its obligations.[148] Bulgaria and the Philippines, however, ignored[149] and Turkey denied[150] a link between the facts and the existence of certain stereotypes or cultural patterns. In all these cases, the Committee found that the state party had failed to fulfil its obligations under Article 5. Its recommendations to the state party always included specific measures concerning the author of the communication, usually in the form of appropriate reparation, including adequate compensation.[151] The Committee also added recommendations on measures of a more general character, which in the case of Article 5 violations, are measures to modify cultural patterns and stereotypes, such as providing regular, appropriate, and mandatory training on the Convention, its Optional Protocol, and its

[146] *Ms AT v Hungary* (Comm no 2/2003) para 9.4.

[147] ibid para 9.6.

[148] ibid para 5.7: 'Having realized that the system of remedies against domestic violence is incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient, the State party states that it has instituted a comprehensive action programme against domestic violence in 2003. … These actions include: … requesting the judiciary to organize training for judges and to find a way to ensure that cases relating to violence within the family are given priority; and *launching a nationwide campaign to address indifference to violence within the family and the perception of domestic violence as a private matter and to raise awareness of State, municipal and social organs and journalists*'; paras 7.3–7.4: 'The State party admits that the experience of the Office and the information it has shows that domestic violence cases as such do not enjoy high priority in court proceedings. … *it is conceded that the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence*' (emphasis added by authors).

[149] *Ms VK v Bulgaria*; *Karen Tayag Vertido v Philippines*. Although in the latter case, the state party noted that 'it would consider developing trainings on gender responsiveness for the judiciary' (Comm no 18/2008, para. 7.2).

[150] *RKB v Turkey*, para 4.3: 'The State party also submits that the claim of a violation of article 5, paragraph (a), of the Convention is incompatible with the provisions of the Convention, manifestly ill-founded and not sufficiently substantiated, as *the author does not refer to any social and cultural pattern that the State party would have failed to take appropriate measures to modify*. Therefore, there is *no clear link between the author's dismissal and a social and cultural pattern*'; para 6.8: 'Likewise, it would not be possible to link the fact that access to a therapeutic abortion was denied to the *alleged existence of a certain stereotype* against women' (emphasis added by authors).

[151] *Ms AT v Hungary*, para 9.6; *Ms VK v Bulgaria*, para 9.16(a); *Karen Tayag Vertido v Philippines*, para 8.9(a); *RKB v Turkey*, para 8.10(a).

general recommendations for judges, lawyers, law enforcement personnel, and medical personnel in a gender-sensitive manner.[152]

The above shows that in these cases, cultural (diversity) arguments are not accepted by the Committee as a justification for perpetuating inequality and the infringement of women's human rights. In fact, it is the other way around: the Committee considers cultures as dynamic and subject to change. Actors (judges, lawyers, law enforcement personnel, medical personnel, and so on) should be informed and trained by the state in order to ensure that their decision-making is in line with universal norms.

D. Constructive Dialogue?

In the introductory paragraphs of its Concluding Observations, the Committee usually notes that it appreciates the 'constructive dialogue' that took place between the delegation and the members of the Committee.[153] How constructive are these dialogues between Committee and states parties really? Arguably, the interaction between Committee and states parties falls short of deserving the label 'constructive dialogue'. To call it a 'dialogue', there should be more *exchange* of ideas or opinions. To call it 'constructive', there needs to be more *argumentation* and *motivation*.

Taking a closer look at the reporting procedure reveals that the interaction does not really go both ways. The state, in its periodic report, in its written replies to the list of issues and questions, and during the open sessions, is afforded considerable opportunity to explain its (culture-specific) views on the implementation of the Convention. Nevertheless, what seems to be missing is *discussion*. The Committee sometimes 'notes'

[152] Specifically, the Committee made (among others) the following recommendations to the state parties: 'Provide for appropriate and regular training on the Convention, its Optional Protocol and its general recommendations for judges, lawyers and law enforcement personnel in a gender-sensitive manner, so as to ensure that stereotypical prejudices and values do not affect decision-making' (*RKB v Turkey*, para 8.10(b)(ii)); 'Provide mandatory training for judges, lawyers and law enforcement personnel on the application of the Law on Protection against Domestic Violence, including on the definition of domestic violence and on gender stereotypes, as well as appropriate training on the Convention, its Optional Protocol and the Committee's general recommendations, in particular general recommendation No. 19' (*Ms VK v Bulgaria*, para 9.16(b)(iv)); 'Ensure that all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. … Concrete measures include: … Appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making' (*Karen Tayag Vertido v Philippines*, para 8.9(b)).

[153] The CEDAW uses this term mainly in direct relation to the meeting with the state party in Geneva. For this chapter, however, we consider the whole process of state reporting, including the submission of state periodic reports, the preparation by the Committee of lists of issues and questions, the written replies by states parties, and the meeting between the Committee and states parties, as being part of the constructive dialogue.

or 'welcomes' measures taken by the state, but other than that, the Committee does not show much responsiveness to the explanations or input from the state. The Committee, time and again, reiterates its concerns and recommendations, no matter what efforts or measures the state party has employed. There is not much motivation or reasoning behind the Committee's observations and recommendations to the state party, or at least these are not explicitly mentioned. For example, in the discussed example of 'symbolic dowry' in the dialogue with Tunisia, the Committee only observed, very briefly: 'while noting the efforts of the State party to reduce the value of the dowry to one dinar, the Committee is concerned that it remains a condition for the validity of the marriage'.[154]

Presumably, the Committee is of the opinion that even a purely symbolic dowry condones the underlying cultural beliefs and attitudes, but it does not say so. In a *constructive* dialogue, should the Committee not explicitly substantiate its decision and explain its reasoning and motivation to the state party? It may be self-evident to the Committee, but the state party may genuinely believe that lowering the amount of the dowry (and thus the barrier to equality) while maintaining the dowry as a tradition or folklore is the optimal implementation of its international obligations, bearing in mind the (local) circumstances.

Another case in point is the example of FGM in Indonesia, discussed above. The Committee urged the state party to withdraw the regulation and restore the circular letter, thereby ignoring explanations of the state party that it supports efforts to combat FGM, and that the regulation was adopted in light of the fatwa, with a view to preventing parents from opting for illegal and often more harmful FGM by traditional medical practitioners. The Committee could be more constructive in this situation. It is understandable that the Committee does not accept a deviation from the state's international obligations; in fact, it is a clear violation of the Convention. But the Committee could enhance the acceptability of its decision by responding to the state party's struggles and explanations. It could well be that following up on the Committee's recommendations may lead to a rise in female circumcisions by (non-medical) traditional practitioners, performing more harmful forms of circumcision. Bearing in mind these considerations and (local) circumstances, is withdrawing the regulation and restoring the circular letter still in the best interests of women? The Committee could be more responsive towards states argumentation and more constructive through sharing its motivations and reasoning in greater detail.

Another point is that the Committee is not very specific in its recommendations. Recommendations such as 'to put in place a comprehensive

[154] CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Tunisia' CEDAW/C/TUN/CO/6 (4 Nov 2010) para 60.

strategy',[155] 'to educate and raise awareness',[156] or 'to address' certain practices[157] are rather broad and vague. Such measures lack clear indicators and benchmarks. In fact, the Committee leaves the formulation of indicators and benchmarks to the state, making recommendations such as to 'undertake an assessment of the impact of those measures in order to identify shortcomings, and improve them accordingly in a clear timeframe'.[158] Even though the Committee has a subsidiary role, leaving the final choice of measures of implementation to the states parties, it could aim for more concrete and measurable recommendations. This would allow the Committee to monitor progress between reporting cycles and it would also contribute to a better understanding and thereby acceptability of the recommendations.

Often it is just as important to read what is *not* incorporated in the Concluding Observations. What does it mean when previous recommendations are not 'reiterated' in the new Concluding Observations? One can assume that these recommendations have been sufficiently implemented. One can also conclude that the issue is no longer 'requiring the priority attention of the state party'. Again, this indicates a point for improvement in argumentation and reasoning on behalf of the Committee. In this regard, the relatively new[159] follow-up mechanism is a significant step forward. Under the follow-up mechanism, the Committee requests the state party to provide, usually within two years, further information regarding some

[155] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Congo' CEDAW/C/COG/CO/6 (22 March 2012) para 22(a); CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa' CEDAW/C/ZAF/CO/4 (5 April 2011) para 21(a); CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Mexico' CEDAW/C/MEX/CO/7–8 (7 August 2012) para 35(c); CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Egypt' CEDAW/C/EGY/CO/7 (3 February 2010) para 22.

[156] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Congo' CEDAW/C/COG/CO/6 (22 March 2012) para 22(a); CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Kenya' CEDAW/C/KEN/CO/7 (5 April 2011) para 18(a); CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Singapore' CEDAW/C/SGP/CO/4/Rev 1 (10 Aug 2011) para 22(a); CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Côte d'Ivoire' CEDAW/C/CIV/CO/1–3 (8 Nov 2011) para 27(a).

[157] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Mexico' CEDAW/C/MEX/CO/7–8 (7 Aug 2012) para 35(b), CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: The Netherlands' CEDAW/C/NLD/CO/5 (5 Feb 2010) para 11; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Jamaica' CEDAW/C/JAM/CO/6–7 (7 Aug 2012) para 20; CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Norway' CEDAW/C/NOR/CO/8 (22 March 2012) para 36(d).

[158] See, eg, CEDAW, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Congo' CEDAW/C/COG/CO/6 (22 March 2012) para 22(c).

[159] Implemented since 2010.

specific recommendations or 'areas of concern' identified by the Committee. In a letter by the Rapporteur for Follow-up on Concluding Observations, progress on each of these recommendations is examined and the Committee adopts an assessment on each one of them. A recommendation can be considered '(fully) implemented', 'partially implemented', or 'not implemented'. In its annual report to the General Assembly, the CEDAW reported that 'the follow-up procedure is achieving its stated goal of acting as a tool of implementation of the Convention and more specifically the recommendations set out in selected concluding observations'. Moreover, 'this procedure … enables the Committee to monitor progress achieved between reporting cycles'.[160] Although probably not feasible in terms of (financial) resources, it would be a considerable improvement if it were applied, not only to one or two selected 'areas of concern', but to *all* recommendations by the Committee.

V. CONCLUDING REMARKS: ROLE OF DIALOGUE IN MEDIATING CULTURAL DIVERSITY AND LEGAL CERTAINTY

The ICEDAW is no exception to the fact that international human rights provisions are often formulated in rather broad and ambiguous language. This makes it possible for universal principles to be applied in diverse cultural contexts. At the same time, the vagueness of treaty terms increases the importance of the processes of interpreting treaty provisions for determining their scope and normative content. Such processes involve dialogues between states and the treaty bodies.

This chapter aimed to illustrate to what extent the dialogue between states parties to the ICEDAW and its monitoring committee enable states parties to reiterate, revisit, or be challenged on the value of particular cultural norms and practices in relation to the implementation of the ICEDAW, and how this dialogue informs the development of consensus and certainty over the meaning of the norms in the Convention. This chapter also addressed the question as to what extent this dialogue between the CEDAW and the states parties strengthens legal certainty in formal and substantive terms; in other words, in terms of clarity and predictability of the norms and procedures, and in terms of acceptability of these norms and procedures.

Our starting point was that legal certainty serves a purpose in relation to international human rights law. Clarity and determinacy provide states with a clear framework for action, and individuals and communities with insight on their rights and the rights of others. At the same time, legal certainty should not be reduced to predictability alone.

[160] CEDAW Annual Report to GA, A/67/38 (2012), 43.

Flexibility is needed to be able to apply the norm in different specific contexts. Universal human rights norms should be flexible enough to be implementable in a large variety of situations without losing their universal validity. Treaty bodies have an important role in advancing legal certainty, both from a formal perspective (predictability) and a substantive perspective (acceptability).[161] This implies balancing predictability of the norms (through clear formulation, consistency, and unity) with a certain flexibility to implement the norms in different contexts and to argue as clearly and consistently as possible in order to be acceptable.

The analysis of the dialogue on cultural diversity issues between the CEDAW and states parties shows that the Committee does not, generally speaking, leave much room for cultural diversity in the implementation of the treaty provisions. The Committee seems not very open or receptive to states cultural (diversity) arguments concerning the implementation of the Convention. On the contrary, the Committee considers cultures as 'dynamic' and therefore, 'subject to change'. It is the culture that should change; not the interpretation of the (scope of the) norms or obligations of states parties.

In the determination of the room for cultural diversity, the Committee mainly relies on its own understanding of the specific content of the norms, in which states parties play a very limited role. Others have already observed that the dialogue between treaty bodies and states parties often reflects the Committee's understanding of the specific content of rights whereby states are pressed to explain practices.[162] The present analysis, especially in the context of the state reporting procedure,[163] supports this observation. It shows that the Committee's interpretation of the content of the rights hardly depends on an understanding resulting from the dialogue with states parties. The Committee rather follows its own, independent, understanding.

In the practice of the CEDAW, limited constructive interaction with the states parties takes place. Other than (sometimes) 'noting' or 'welcoming' some efforts by the state party, the Committee and the state party do not fully engage in a two-way dialogue; the Committee, for instance, neither gives reasons for its observations nor shares its reasoning. Arguably, this has implications for the acceptability of the procedure and its outcome, or what was called substantive legal certainty. While the Committee, to some extent, succeeds in contributing to formal legal certainty by creating predictability and commonality in its interpretation of treaty norms, the

[161] For the definition of formal and substantive legal certainty, see section II(B) above.

[162] Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights' (2001) 15 *Emory International Law Review* 391, 436.

[163] But also in the individual communications procedure, the Committee opted for its own interpretation of Art 5 and the obligations it imposes on states.

lack of a real dialogue implies that the interpretation of treaty norms by the Committee may not always be acceptable to states. It seems that the Committee mainly promotes formal legal certainty, even to the extent that it may be at the expense of substantive legal certainty. States that demonstrate a willing and constructive attitude in the reporting procedure, and use the opportunity to explain their cultural beliefs and practices in relation to the CEDAW norms, may become frustrated by the lack of motivation on the side of the Committee. This could eventually cause states to refuse to engage in a dialogue.

In order to promote the acceptability of its work, the CEDAW should not only be more clear in its argumentation and open to dialogue, but it should also better align the different mechanisms—state reports and individual communications. References to other cases or Concluding Observations could enhance consistency and show the commonality in the application of the norms. The CEDAW does this regularly,[164] but not consistently. Likewise, the Committee could work on improving coherence and consistency between its own reporting format, based on a thematic categorisation, and the one used by states parties, who categorise their obligations and implementation measures along the articles of the Convention. At the same time, alignment is no guarantee of acceptability and convincingness. It is therefore important to improve the dialogue—in particular its constructiveness—between the Committee and the states parties. This would, in turn, contribute to a better balance between universality, diversity, and legal certainty.

[164] Occasionally, the Committee refers in its individual communications to concerns expressed earlier in the Concluding Observations as part of the state's periodic reporting process. Eg, as discussed above in *AT v Hungary*, para 9.4. Sometimes, the Committee refers to the periodic reporting procedure in general, such as in the case of *Karen Tayag Vertido v Philippines*, para 8.7. While the Committee in individual communications regularly refers to the state reporting procedure, the other way around is rare. In the selected case law, one example was found. In the Concluding Observations of Norway, the Committee urged the state party to 'adopt a legal definition of rape in the Penal Code … in line with the Committee's general recommendation No. 19, and the *Vertido case*' (*Karen Tayag Vertido v Philippines*, para 24).