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### Culture in the state reporting procedure of the UN human rights treaty bodies

*How the HRC, the CESCR and the CEDAWCee use human rights as a sword to protect and promote culture, and as a shield to protect against harmful culture*

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Vincent Willem Vleugel

# Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies

How the HRC, the CESCR and the CEDAWCee use human rights as a sword to protect and promote culture, and as a shield to protect against harmful culture



CULTURE IN THE STATE REPORTING PROCEDURE OF THE  
UN HUMAN RIGHTS TREATY BODIES

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TREATY BODIES

How the HRC, the CESCR and the  
CEDAWCee use human rights as a sword  
to protect and promote culture, and as a  
shield to protect against harmful culture

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## ABBREVIATIONS

AAA	American Anthropological Association
AHRD	ASEAN Human Rights Declaration
AIV	Advisory Council on International Affairs of the Netherlands
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAWCee	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CRTF	Country Report Task Forces
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
FGM	Female Genital Mutilation
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
LGBT+	sexual and gender identities, such as lesbian, gay, bisexual, transgender and intersex persons
LOIPR	List of Issues Prior to Reporting
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaties

## NOTE ON CITATION FORMATS

The primary material on which the dissertation relies is the Committees' concluding observations on State party reviews. Due to the large number of citations referring to concluding observations, a short form of citation to the concluding observations is used in the present work, similar to that used by Freeman, Rudolf and Chinkin in *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, and approved by the Oxford University Press.

## NOTE ON GRAMMAR

Specific Concluding Observations are written with capitals; when referring to concluding observations in general, it is written without capitals. Same for general comments and recommendations, and for summary records.

On sexual orientation and gender identity, the LGBT+ is referred to, except where the Committees are quoted.

# CHAPTER 1

## INTRODUCTION

### 1 INTRODUCTION

Every year from mid-November until 5 December, *Sinterklaas* is celebrated in the Netherlands. He is a figure based on Saint Nicholas, patron saint of children. While there are many legends, very little is known about the historical Saint Nicholas. However, the *Sinterklaas* tradition has a long history.<sup>1</sup> Apparently, it dates back to medieval times, but the ancient celebrations were very different from the ones existing in the present day. The present representation of *Sinterklaas* is believed to have its origin in a book published around 1850.<sup>2</sup> The book introduces a narrative in which *Sinterklaas* comes from Spain and has a servant ('knecht'). The servant is a black character named *Zwarte Piet* ('Black Pete'). The tradition has been subject to much more change since then. As a case in point, *Zwarte Piet* used to be depicted as a devilish figure in charge of punishing naughty children. Nowadays, he is portrayed as witty, acrobatic, and smart.<sup>3</sup>

Should a Dutch person be asked about something typically Dutch, *Sinterklaas* is likely to be mentioned, along with tulips, windmills, weed and cheese. It has become a family tradition, celebrated annually with the giving of gifts on St. Nicholas' Eve (5 December). In 2015, it was included on the country's official cultural heritage list.<sup>4</sup> However, the tradition has become controversial. The figure of *Zwarte Piet* is said to be 'racist' and a symbol of the days of slavery and colonialism. While some criticize and challenge the negative and stereotyping aspects of the tradition, others try to protect and safeguard what they believe to be an indispensable part of a Dutch cultural tradition.

In 2015, the *Sinterklaas* tradition was the subject of discussion before the Committee on the Elimination of Racial Discrimination (CERD)<sup>5</sup>, the expert body of the United

---

<sup>1</sup> The stories most likely concern Nicholas of Myria (15 March 270 – 6 December 342 AD), who was the bishop of Myria in Little Asia (Turkey).

<sup>2</sup> The picture book *Sint Nicolaas en zijn knecht* by Jan Schenkman.

<sup>3</sup> K Lemmens, The dark side of 'Zwarte Piet': A misunderstood tradition or racism in disguise? A legal analysis, *The International Journal of Human Rights*, 21:2, 2017, pp 120–141; A Bijnaar, and C Maris, *Zwart als Roet – Zwarte Piet in de liberale rechtsstaat, Filosofie & Praktijk*, 35:3, 2014, pp 5–22.

<sup>4</sup> Website Kenniscentrum Immaterieel Erfgoed Nederland, <[www.immaterieelerfgoed.nl/nl/sinterklaasfeest](http://www.immaterieelerfgoed.nl/nl/sinterklaasfeest)> accessed 6 August 2019.

<sup>5</sup> The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts which monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its States parties.

Nations tasked with monitoring the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by its States parties. When the CERD received a delegation from the Netherlands to ask questions and request additional information and clarification regarding the State party's efforts to implement the provisions of the Convention<sup>6</sup>, some of the Committee members (independent experts) expressed concern about the Sinterklaas tradition. The minutes ('Summary Records') of the meeting provide an insight in the debate. One Committee member pointed out that:

Netherlands [*sic*] had a significant population of African descent, most of them citizens. He underlined the State party's obligation to avoid discrimination against Afro-descendants and *find a balance between the country's cultural traditions and the human dignity and rights of such persons*. In that context he deplored the Dutch tradition of Black Pete, Saint Nicholas's companion, and *recalled that practices contrary to human rights could not be justified on the grounds that they were cultural traditions*.<sup>7</sup>

Another member compared the tradition to other harmful practices:

Persons of African descent were often the victims of structural racism and discrimination. He was therefore concerned by the Netherlands Christmas tradition of Black Pete, the servant of Saint Nicholas. He recalled the Committee's position that *practices like female genital mutilation, early or forced marriage, or denying women the right to work and placing limits on their freedom were violations of human dignity and could not be excused or tolerated because they were cultural traditions*. (...) Other countries had abandoned traditions of Saint Nicholas having a black companion. *The Netherlands could no longer tolerate such an obviously discriminatory tradition as Black Pete, which was an affront to human dignity and a vestige of the era of slavery*. He (...) called on the State party to *put an end to that hateful practice*.<sup>8</sup>

However, a Committee member from Belgium expressed an opposing view on the matter:

(...) outlining the historical context of the Black Pete tradition, which predated the transatlantic slave trade, [he] expressed the strong view *that the tradition was not racist in origin and that to portray it as such would be damaging to the credibility of the United Nations and its human rights treaty bodies*, engendering more racism and racial discrimination than it would prevent.

---

<sup>6</sup> All treaty bodies have developed the practice of inviting States parties to send a delegation to attend the session at which the treaty body is considering the State report. This allows them to respond to members' questions and provide additional information on their efforts to implement the provisions of the relevant treaty. See chapter 3, section 4, for more information on the working methods of treaty bodies.

<sup>7</sup> CERD, Summary Record of the 2375<sup>th</sup> meeting, CERD/C/SR.2375 (2015), para 13.

<sup>8</sup> Ibid, para 22.

Finally, one Committee member drew the attention to the downside of banning traditions:

(...) if the Black Pete character was really such a deeply rooted tradition, then *insisting on banning it might only serve to foster resentment*.<sup>9</sup>

The Dutch delegation acknowledged the problem, explained the sensitivity of the issue, and stressed the importance of internal dialogue:

The debate about Black Pete had been very emotional. Some felt that the figure perpetuated negative stereotypes of people of African descent, while others saw their fond memories of childhood celebrations suddenly linked to racism. Although stereotypical interpretation of the Black Pete character could certainly lead to discrimination, people who engaged in traditional Saint Nicholas celebrations were not necessarily racists. *A ban on Black Pete would not solve the problem. Instead, the Government sought to facilitate a respectful national dialogue that took account of the diversity of opinions.* Some changes had already occurred, such as the portrayal of a multi-coloured Pete on television and the use of a golden, rather than black, Pete as decoration by a big department store. *Only open dialogue on Black Pete's appearance, and on racism and discrimination, could make the character evolve into something acceptable to all.*<sup>10</sup>

(...) society had an important role to play with regard to the Black Pete tradition. The Government worked to facilitate dialogues on the subject at the local level.<sup>11</sup>

The CERD was thus confronted with a dilemma: On the one hand, the Sinterklaas tradition was national cultural heritage, which is important for maintaining cultural diversity and identity<sup>12</sup>; On the other hand, part of the tradition was considered discriminatory and stereotypical, and potentially a harmful (cultural) practice. In its final assessment of treaty implementation by the Netherlands, its so-called Concluding Observations, the CERD stressed that culture or tradition cannot justify discriminatory practices and stereotypes. The manner in which to eliminate the negative stereotypes was left for the State party to decide:

While the Committee understands that the tradition of *Sinterklaas* and *Zwarte Piet* (Black Pete) is enjoyed by many persons in Dutch society, *it notes with concern that the character of Black Pete is sometimes portrayed in a manner that reflects negative stereotypes of people of African descent and is experienced by many people of African descent as a vestige of slavery, which is injurious to the dignity and self-esteem of children and adults of African descent.*

<sup>9</sup> CERD, Summary Record of the 2376<sup>th</sup> meeting, CERD/C/SR.2376 (2015), para 95.

<sup>10</sup> Ibid, para 18.

<sup>11</sup> Ibid, para 84.

<sup>12</sup> UNESCO: 'While fragile, intangible cultural heritage is an important factor in maintaining cultural diversity in the face of growing globalization. An understanding of the intangible cultural heritage of different communities helps with intercultural dialogue, and encourages mutual respect for other ways of life.' UNESCO, What is Intangible Cultural Heritage?, <<https://ich.unesco.org/en/what-is-intangible-heritage-00003>> accessed 6 August 2019.

The Committee is concerned about the discriminatory effect of such portrayals, which may convey a conception at odds with the Convention. (...) (arts. 2, 5 and 7).

*Considering that even a deeply rooted cultural tradition does not justify discriminatory practices and stereotypes*, the Committee recommends that the State party actively promote the elimination of those features of the character of Black Pete which reflect negative stereotypes and are experienced by many people of African descent as a vestige of slavery. The Committee recommends that the State party find a reasonable balance, such as a different portrayal of Black Pete, and ensure respect for the human dignity and human rights of all inhabitants of the State party.<sup>13</sup>

The example illustrates the complex and dynamic relationship between culture and human rights. The UNESCO Universal Declaration on Cultural Diversity considers *human rights as guarantees of cultural diversity*, and states that the ‘defence of cultural diversity (...) implies a commitment to human rights’.<sup>14</sup> At the same time, ‘no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’.<sup>15</sup> In other words, human rights can be used as a ‘sword’ to promote and safeguard positive aspects of culture and cultural diversity, but human rights can also be used as a ‘shield’ to protect against harmful aspects of culture.

Under the international human rights’ framework, States are allowed to take cultural particularities into account when implementing the treaties.<sup>16</sup> The UN human rights treaty bodies which monitor the implementation of the treaties by States have the task to safeguard the universality of human rights against a background of profound cultural diversity.<sup>17</sup> Little research has been done on how these bodies have dealt with

<sup>13</sup> Concluding Observations The Netherlands, CERD/C/NLD/CO/19–21 (2015), paras 17–18.

<sup>14</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001), art 4.

<sup>15</sup> Ibid.

<sup>16</sup> UN World Conference on Human Rights, Vienna Declaration and Programme of Action (adopted on 25 June 1993) A/CONF.157/23, para 5: ‘While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms (emphasis added, VV).’; See also report of the Advisory Council on International Affairs (AIV) of the Netherlands, *Universality of Human Rights and Cultural Diversity*, Advice No 4, June 1998, p 34: ‘The fact that human rights are universally accepted does not mean that they should always be uniformly applied. They must always be applied in a different cultural and socioeconomic context. *The protection of human rights must primarily be given shape and meaning at national level.* The international supervisory system is complementary, and in a number of cases allows States a certain degree of latitude in implementing human rights norms (emphasis added, VV).’ The AIV is an independent body which advises the Dutch government and parliament on foreign policy.

<sup>17</sup> Advisory Council on International Affairs (AIV) of the Netherlands, *Universality of Human Rights and Cultural Diversity*, Advice No 4, June 1998, p 14: ‘Since abstractly phrased international human rights norms have to be applied in a variety of social, economic and cultural contexts, States have a certain degree of latitude in making policy. *Within the UN system, both supervisory mechanisms laid down in conventions and political ones based on the UN Charter have been set up in order that States may be called to account regarding the way in which they apply human rights* (emphasis added, VV).’; Y Shany, All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee, *Journal of International Dispute Settlement*, vol 9, no 2, May 2018, p 189: ‘Given the large number of States parties to the

this task *in practice*, and in particular the use of their main monitoring tool: the State reporting procedure. How does culture feature in the UN treaty bodies' State reporting procedure? How does culture feature in the dialogue between the treaty bodies and States parties? How do the treaty bodies safeguard (positive aspects of) culture and cultural diversity? How do the treaty bodies balance the universality of rights and their local, culture-specific implementation, especially in relation to 'adverse', 'negative' or 'harmful' aspects of culture? These questions are addressed and analysed throughout this research project.

## 2 PURPOSE AND SIGNIFICANCE OF THE STUDY

In the present research, the chosen definition of 'culture' is the one endorsed by UNESCO, which defines it as a 'set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, not only art and literature, but lifestyles, ways of living together, value systems, traditions and beliefs'.<sup>18</sup> This definition shows that human rights and cultures are intertwined, and that 'human rights cannot be seen in isolation from culture'.<sup>19</sup> Human rights concern norms and values. A society's norms and values are linked to cultural standards in this society. This close interrelation between human rights and culture becomes complex when turning to the issue of their supposed 'universality': can human rights be universal – i.e., the same for everyone, everywhere – considering the wide variety of cultures in the world? This has been discussed extensively in the context of the so-called 'universalism and cultural relativism debate'.

Even though it may sometimes feel like an ancient and outdated debate, the discussion is in fact very topical and alive, as is evidenced by a recent report of the Special Rapporteur in the field of cultural rights on this very issue.<sup>20</sup> She touches on the importance of both universality and cultural diversity:

In today's polarized world, we need a sophisticated multi-directional stance. We must simultaneously *defend the universality of human rights from those seeking to use culture and cultural claims as a weapon against rights and against others*, and at the same time *defend cultural rights and respect for cultural diversity*, in accordance with international standards, when those principles come under attack.<sup>21</sup>

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[ICCPR] (...), and their considerable geographical, political and cultural diversity, it has been asserted that an application of the MoA doctrine in the work of the Committee might have rendered hopeless *its task of developing universally applicable standards*, amenable to meaningful monitoring by centralized bodies (emphasis added, VV).'

<sup>18</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001), preamble.

<sup>19</sup> Advisory Council on International Affairs (AIV) of the Netherlands, *Universality of Human Rights and Cultural Diversity*, Advice No 4, June 1998, p 9. The AIV refers to a different definition of culture.

<sup>20</sup> Report of the Special Rapporteur in the field of cultural rights, *Universality, cultural diversity and cultural rights*, A/73/227, 25 July 2018.

<sup>21</sup> *Ibid*, para 69.

The Special Rapporteur states that ‘cultural relativism has been repudiated by human rights law and should not be tolerated in any setting’, before reaffirming that ‘each cultural practice, norm and tradition must stand the test of universal human rights and show its capacity to build and maintain human dignity to be legitimate’.<sup>22</sup>

The universality of human rights is one of the core principles of international human rights law. Universalism (in its more ‘radical’ form) is based on the assumption that human rights are intrinsic to the human person: they belong to all human beings to the same extent, irrespective of cultural differences between them.<sup>23</sup> Cultural relativism (again, in its more ‘radical’ form) asserts that, since no moral judgement is universally valid (i.e., valid for all cultures), every moral judgement is culturally relative. Hence, there are no cross-cultural universal human values, and no universal legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.<sup>24</sup> Moderate forms of these theories exist in between the two extremes. Increasingly, universalism and cultural diversity are recognised not mutually to exclude each other, and human rights norms may leave room for culture-specific implementation.<sup>25</sup>

The interrelation between human rights and culture was expressed in the Vienna Declaration and Programme of Action, which affirmed the universality of human rights, but qualified this by insisting that ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’.<sup>26</sup> The Dutch Advisory Council on International Affairs, an independent body which advises the Government and Parliament on foreign policy, notes in this regard that ‘universality does not mean uniformity’.<sup>27</sup> Or, in the words of Donders, ‘the universal value and application of human rights does not necessarily imply the uniform implementation of these rights’.<sup>28</sup>

<sup>22</sup> Ibid, para 71.

<sup>23</sup> F Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014, p 4.

<sup>24</sup> Ibid, p 4. See also YM Donders, *Human Rights: eye for cultural diversity* (Oratiereeks), Universiteit van Amsterdam, 2012, p 7–8. Available at <[www.oratiereeks.nl/upload/pdf/PDF-6449weboratie\\_Donders.pdf](http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf)>.

<sup>25</sup> Advisory Council on International Affairs (AIV) of the Netherlands, *Universality of Human Rights. Principles, Practice and Prospects*, Advice No 63, November 2008, p 19; J Donnelly, ‘The Relative Universality of Human Rights’, *Human Rights Quarterly*, vol 29, no 2, 2007, pp 281–306; E Brems, ‘Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam’, *Human Rights Review*, vol 5, no 3, April–June 2004, pp 5–21; AA An-Na’Im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1991, pp 4–5; N Petersen, ‘International Law, Cultural Diversity and Democratic Rule: Beyond the Divide Between Universalism and Relativism’, *Asian Journal of International Law*, vol 1, no 1, 2011, pp 149–163; D Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, in: B Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development – Scholars and Practitioners in Dialogue*, CUP, 2012, pp 50–65.

<sup>26</sup> UN World Conference on Human Rights, Vienna Declaration and Programme of Action (adopted on 25 June 1993) A/CONF.157/23, para 5.

<sup>27</sup> Advisory Council on International Affairs (n 25), p 19.

<sup>28</sup> YM Donders, *Human Rights: eye for cultural diversity* (Oratiereeks), Universiteit van Amsterdam, 2012, p 8; Available at <[www.oratiereeks.nl/upload/pdf/PDF-6449weboratie\\_Donders.pdf](http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf)>.

In this light, how is culture or cultural diversity accommodated in and through international human rights law? Extensive research has been done on the ways in which culture or cultural diversity is accommodated in and through (the implementation of) human rights, often focusing on concrete cases of dispute resolution, such as in the case law of the European Court of Human Rights (ECtHR) and in individual communications before the UN Treaty Bodies. These international tribunals are said to grant a ‘space for manoeuvre’ to national authorities, the so-called ‘margin of appreciation doctrine’.<sup>29</sup> Legg argues that ‘the margin of appreciation doctrine prevents courts from imposing unhelpful uniformity, whilst allowing decisions to be consistent with the universality of human rights’.<sup>30</sup> Shany concludes that ‘MoA or MoA-like doctrines may be inherent to international adjudication’.<sup>31</sup> A number of factors are considered for giving discretion to the State to a greater or lesser extent, such as the availability of adequate procedural safeguards at the domestic level (i.e., democratic legitimacy)<sup>32</sup>, the degree of consensus on the interpretation and application of the right in question (i.e., the common practice of States)<sup>33</sup>, and the expertise or competence which the national authority has as compared with the international tribunals (i.e., better position to evaluate local conditions).<sup>34</sup> Two overarching ‘techniques’ are found to be applied: culture can be ‘borne in mind’ and accommodated in (1) the *interpretation* of the norm<sup>35</sup>; (2) the *application* of the norm.<sup>36</sup> The former implies that the content or scope of human rights may diverge across societies. Does right to private life entail a right to same-sex marriage? Does right to life entail a right to abortion? The latter implies that, while the content or scope of the relevant rights remain constant across societies, discretion is afforded to national authorities regarding the concrete act of balancing between them in their application: interferences which may be seen as ‘necessary’ or ‘justifiable’ in one society may not be so in another.

However, less is known about the ways in which culture and cultural diversity feature in the work of the treaty bodies, especially in the State reporting procedure. The more legal/judicial techniques used in individual communications and other concrete cases of dispute resolution (discussed above) do not *necessarily* apply to the State reporting procedure. As will be shown later<sup>37</sup>, the main theories reflecting on the dichotomy between universalism and cultural relativism more generally (not

<sup>29</sup> Website Council of Europe, The Margin of Appreciation, <[www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)> accessed 7 August 2019.

<sup>30</sup> A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford University Press, 2012.

<sup>31</sup> Y Shany, All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee, *Journal of International Dispute Settlement*, vol 9, no 2, May 2018, p 198.

<sup>32</sup> Shany (n 31), p 183; Legg (n 30), chapters 2 and 4.

<sup>33</sup> Shany (n 31), p 183; Legg (n 30), chapters 2 and 5.

<sup>34</sup> Shany (n 31), p 183; Legg (n 30), chapters 2 and 6.

<sup>35</sup> Shany speaks of ‘norm-balancing in the course of law-interpretation’.

<sup>36</sup> Shany speaks of ‘norm-balancing in law-application’.

<sup>37</sup> See chapter 2, section 4.

necessarily through judicial means), argue that it can be overcome through the application of two basic principles: (1) flexibility in interpretation and implementation; (2) internal debate and cross-cultural dialogue. Arguably, the State reporting procedure of the UN treaty bodies is an interesting mechanism in which to apply these principles. This procedure is not so much focused on finding and addressing violations, but more on assessing the stage of implementation of treaty obligations of a State party.<sup>38</sup> A constructive dialogue takes place between the treaty bodies and their respective States parties, through which Committee members seek to clarify or deepen understanding of issues which have arisen in the periodic reports submitted by States parties, setting out the measures they have adopted to give effect to the rights covered in the treaties. This dialogue, taking place both on paper (through State reports and (replies to) lists of issues and questions) and face-to-face (public dialogue in Geneva, recorded in so-called summary records), could be the platform for cross-cultural dialogue.<sup>39</sup> The concluding observations, which set out the results of the dialogue with the Committee's main concerns and corresponding recommendations for remedial action, are an indication of the treaty bodies' (flexibility in) interpretation of human rights obligations.

Studying the State reporting procedure also offers an opportunity to investigate another gap in existing literature: how treaty bodies deal with positive aspects of culture and cultural diversity. As the above example of the Sinterklaas tradition in the Netherlands has shown, there may be both positive and negative aspects of culture and cultural diversity in relation to States parties' human rights treaty obligations. Human rights may be used to protect and promote culture and cultural diversity, i.e., the Sinterklaas tradition may be protected under the right to participate in cultural life, including access to, and enjoyment of cultural heritage, as laid down in article 15(1)a ICESCR. At the same time, the enjoyment of (other) human rights may be hampered by culture. In those instances, culture is an obstacle or barrier to fulfilling the treaty obligations: the Sinterklaas tradition as a barrier to the equal enjoyment of rights, and the right not to be discriminated. The debate about human rights and culture is often framed in terms of 'universalism versus cultural relativism', and is (consequently) often focused on the negative aspects of culture. As a result, an important piece of the puzzle is missing. This research looks into both positive and negative aspects of culture and their relation to human rights. There is no research to date on how the UN treaty bodies deal with both positive and negative aspects of culture and cultural diversity in the State reporting procedure, including the question as to what extent the practice of treaty bodies corroborates the use of the two principles (*flexibility in interpretation and implementation* and *internal debate and cross-cultural dialogue*) in order to overcome the dichotomy between universalism versus cultural relativism. The present research aims to fill this void.

<sup>38</sup> See chapter 3, section 4.1.

<sup>39</sup> The State reporting procedure is also – in and of itself – a stimulus for States parties to examine its own human rights record, and start an internal debate and consultation with relevant national actors, including civil society.

### 3 RESEARCH OBJECTIVE AND QUESTIONS

The research sets out to investigate the way in which the UN treaty bodies deal with culture and cultural diversity in their State reporting procedure, keeping in mind their mandate to safeguard the universality of human rights and the reality of profound cultural diversity between and within the States parties. Thus, the overarching research objective of this study is *to map and analyse the ways in which culture features in the UN treaty bodies' State reporting procedure.*

The research objective is addressed through a number of more specific questions. As explained, there are both positive and negative aspects of culture in relation to human rights. Human rights obligations may protect and promote culture and cultural diversity – directly or indirectly. At the same time, the fulfilment of/compliance with (other) human rights obligations may be hindered by culture. As a result, the UN treaty bodies have a range of options to strike a balance between protecting and accommodating cultural diversity on the one hand, and safeguarding the universality of human rights on the other. In their concluding observations, the treaty bodies can express concerns and give recommendations to States parties regarding their obligations to respect and foster positive aspects of culture as well as to change, challenge and eradicate negative or harmful aspects of culture. This raises the following questions: (1) *How do the UN treaty bodies use their mandate to protect positive aspects of cultures and promote cultural diversity?;* (2) *How do the UN treaty bodies use their mandate to promote changes in, and elimination of, negative, adverse or harmful aspects of cultures?* The answers to these questions combined also provide insight into the question of how the treaty bodies apply the first principle to balance universality and cultural diversity: flexibility in interpretation and implementation.

Examining the (so-called 'constructive') dialogue between treaty bodies (i.e., their Committee members) and States parties (i.e., their delegations) sheds light on the different kinds of cultural arguments submitted before, and discussed by these bodies, and on the way States parties deal with the questions and opinions of these bodies about these arguments. Cultural arguments can range from 'absolutist', in that the treaty bodies' reading is rejected and the culture is defended categorically, to more moderate forms, which merely demand respect for cultural differences. This results in the following question: (3) *What kind of cultural arguments are invoked by States parties in the dialogue preceding the concluding observations, and how do the treaty bodies deal with these arguments?*

Finally, questions arise in relation to the second principle underlying theories to overcome the dichotomy: internal debate and cross-cultural dialogue. Arguably, the universal legitimacy of human rights can be enhanced by stimulating internal cultural discourse and facilitating or engaging in (external) cross-cultural dialogue, especially in relation to aspects of culture which are considered negative or harmful by some.<sup>40</sup>

<sup>40</sup> Should the premises be accepted that, 'if human rights norms leave room for cultural-specific implementations, cultures and States might be more willing to embrace the universal appeal of the

The following question addresses the extent to which treaty bodies' practice reflects the use of such cross-cultural dialogue and, insofar as it is reflected in practice, examines *how* it is applied: (4) *To what extent does the treaty bodies' practice reflect the use of cross-cultural dialogue to overcome cultural challenges/resistance and enhance the universal legitimacy/acceptance of human rights.*

#### 4 SCOPE OF THE RESEARCH

There are nine core international human rights instruments. As it is beyond the scope of the present research to systematically address all nine of the treaties, the present study is restricted to the monitoring bodies of three of the core international human rights instruments: the Human Rights Committee (HRC), monitoring the International Covenant on Civil and Political Rights (ICCPR); the Committee on Economic, Social and Cultural Rights (CESCR), monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Committee on the Elimination of Discrimination against Women (CEDAWCee), monitoring the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The ICCPR and ICESCR were selected since they, together with the Universal Declaration of Human Rights (UDHR)<sup>41</sup>, represent the International Bill of Rights, and they are the two principal human rights treaties. The CEDAW, also known as 'the International Bill of Rights for women'<sup>42</sup>, was selected because gender equality is among the most culturally sensitive issues<sup>43</sup>, and considering the CEDAW is explicitly concerned with the impact of cultural factors, targeting culture and tradition as influential forces shaping gender roles and family relations. While it is among the most widely ratified UN treaties, it is also subject to many reservations relating to culture and religion at the same time.<sup>44</sup>

The research does not consider the UN Charter-based human rights mechanisms, which are not independent, being more political. The Human Rights Council is

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international human rights framework' (Advisory Council on International Affairs (n 27)), as well as that 'the universal legitimacy of human rights can be enhanced by internal cultural discourse and external cross-cultural dialogue' (An-Na'im (n 25)), it would make sense that the treaty bodies – who want nothing more than for States to accept and embrace the universal appeal/legitimacy of human rights – apply these principles of allowing 'cultural-specific implementations' and facilitating 'cross-cultural dialogue'.

<sup>41</sup> The Universal Declaration of Human Rights (UDHR) is considered a milestone document in the history of human rights. It was adopted by the United Nations General Assembly at its 183<sup>rd</sup> session on 10 December 1948. It set out fundamental human rights to be universally protected for the first time.

<sup>42</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Introduction.

<sup>43</sup> 'Gender' is about expectations regarding attributes and behaviours appropriate to women or men and the relations and role patterns between women and men. Gender identities and gender relations are shaped by culture and critical aspects of culture because they shape the way in which daily life is experienced in the family sphere and in broader society.

<sup>44</sup> YM Donders, *Cultural Pluralism in International Human Rights Law: The Role of Reservations*, in: AF Vrdoljak (ed), *The cultural dimension of human rights*, Oxford University Press, 2013, pp 205–239.

composed of States, and not an expert body. While the interactive dialogue at the Human Rights Council, as part of the Universal Periodic Review procedure, also provides a forum for cross-cultural dialogue between States, and could as such provide very valuable insights into some of the questions addressed here, in the current work, the focus lies on how culture is accommodated in the legal obligations of States parties under the human rights treaties, on the dialogue about cultural issues between State party delegations and treaty body experts, and on the monitoring role of the treaty bodies.

The research also does not consider the regional human rights systems and (the work of) their judicial bodies, first and foremost because they reflect regional values and offer a more particular framework, and less diverse cultural contexts. Moreover, more extensive research in the field of human rights and cultural diversity has already been done for the regional bodies, especially for the ECtHR.<sup>45</sup>

The focus of this research is on the State reporting procedure, while the treaty bodies' general comments or recommendations are used to complement the information. The State reporting procedure is the principal and most developed monitoring mechanism available to treaty bodies.<sup>46</sup> It is particularly interesting due to the elaborate process preceding the ultimate conclusions and recommendations, where the State party is given ample opportunity to explain its views on matters, including cultural issues, and can enter into a dialogue with treaty body experts. Moreover, the outcomes of the State reporting procedure may be more broadly relevant, as it is less about individual specific cases and more about general laws and policies. General comments or recommendations consolidate the practice of the treaty bodies in interpreting specific treaty obligations, and provide guidance, also on cultural issues. Individual communications are not included in the research, because the number of Views adopted is still very limited for two of the three selected treaty bodies. Moreover, they have been the subject of similar and more elaborate research by other scholars.<sup>47</sup>

<sup>45</sup> For example: E Brems, *The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe*, in: DP Forsythe and PC McMahon (eds), *Human Rights and Diversity: Area Studies Revisited*, University of Nebraska Press, 2003, pp 81–110; E Brems (ed), *Diversity and European Human Rights. Rewriting Judgements of the ECHR*, Cambridge University Press, 2013; JA Sweeney, Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era, *The International and Comparative Law Quarterly*, vol 54, no 2, 2005, pp 459–474; A Ostrovsky, What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals, *Hanse Law Review*, vol 1, 2005, pp 47–64; J Gerards, Pluralism, Deference and the Margin of Appreciation Doctrine, *European Law Journal*, vol 17, no 1, 2011, pp 80–120; Council of Europe Research Division, *Cultural rights in the case-law of the European Court of Human Rights*, January 2011 (updated 17 January 2017), <[www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf)> accessed 7 August 2019; K Henrard, The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity, *European Diversity and Autonomy Paper*, No 5, 2004.

<sup>46</sup> The CESCR and the CEDAWCee have only recently been given the mandate to receive and consider complaints from individuals. This means that the case law still needs to develop.

<sup>47</sup> For example, Shany (n 31) and Legg (n 30).

For the mapping of cultural diversity issues in the State reporting procedure, all countries submitting their reports to the three treaty bodies in a specific period were included, between 2010 and 2015.<sup>48</sup> A selection criterion centred around specific countries, e.g. on the basis of size or geography, was decided against.<sup>49</sup>

## 5 STRUCTURE AND METHODOLOGY OF THE RESEARCH

The dissertation consists of seven chapters. Following this introductory chapter, chapter 2 provides the theoretical framework and sets the scene. It introduces the concepts of culture and cultural diversity, sketches the doctrinal debate of universalism versus cultural relativism, describes the different cultural claims and the theories about reconciling or balancing the two extremes. Secondary sources, such as academic books and (journal) articles, were used to reveal the history of the universalism versus cultural relativism debate, and to create an overview of existing studies and research in this field. This literature was selected on the basis of relevance and authority. While the primary discipline is legal, the sources used also originate in other disciplines, such as anthropology<sup>50</sup>, political science, and international relations.<sup>51</sup>

Chapter 3 explains the functions and mandates of the treaty monitoring bodies, i.e., the Committees. It describes the different working methods and procedures, addresses the different legitimacy challenges which the treaty bodies face, and indicates the available approaches and techniques for balancing universality and diversity, as identified by scholars. This part of the research is conducted through desk research of primary sources, such as the texts of the treaties, rules of procedure, resolutions and fact sheets, as well as secondary sources, such as academic books, commentaries and journal articles.

Chapters 4 and 5 show whether and how culture affects the *content* of rights and obligations, and discuss how the treaty monitoring bodies have performed their task of reconciling universality and diversity through (flexibility in) interpretation and implementation. These chapters are based on desk research of primary sources: the ICCPR, ICESCR and CEDAW and the ‘interpretative output’ of their monitoring bodies

<sup>48</sup> This amounts to a full set of State reports, as all countries are required to report once every 4 to 5 years.

<sup>49</sup> Including all the countries in the mapping exercise automatically means that all geographic regions are represented. In relation to size, cultural issues and arguments are not more or less interesting or relevant depending on the size. For a more elaborate explanation of the method used to select cultural diversity issues, see section 5 below.

<sup>50</sup> For example, Renteln and Merry are anthropologists. The heavy emphasis on cultural diversity in this study makes intersection with anthropological sciences inevitable.

<sup>51</sup> For example, Donnelly has looked at the field of human rights and cultural diversity from a political science and international relations’ perspective. Discussions about the need for dialogue, and the consequences of a (lack of) dialogue for (non-)compliance and/or (dis)engagement on the international stage is likely to intersect with these disciplines.

– the concluding observations and general comments or general recommendations. Using quotations and examples from general comments and concluding observations, chapter 4 will illustrate how the different treaty bodies use their mandate to protect and promote positive aspects of culture and cultural diversity (research question 1), and chapter 5 will illustrate how they use their mandate to change, challenge and eradicate negative, adverse or harmful aspects of culture (research question 2). The findings are the result of a comprehensive mapping exercise of the cultural diversity issues identified in all concluding observations adopted by the respective treaty bodies between 2010 and 2015<sup>52</sup>, as well as in relevant general comments or recommendations. Cultural diversity issues were identified by searching for keywords relating to the concept of culture: ‘culture’, ‘cultural’, ‘tradition’, ‘traditional’, ‘custom’, ‘customary’, ‘practices’, ‘tribal’, ‘stereotypes’, ‘stereotyping’, ‘stigma’, ‘stigmatisation’, ‘prejudice’, ‘morals’, ‘morality’, ‘values’, ‘beliefs’, ‘attitudes’, ‘patriarchal’, ‘minority’, ‘indigenous’, ‘language’, ‘linguistic’, ‘religion’, ‘Islam’, ‘sharia’, et cetera. Of course, there is also a learning curve: knowledge on which rights or issues are more likely to touch on culture develops over time.<sup>53</sup> Following the identification of cultural diversity issues, they were analysed and subsequently structured in such a way as to enable drawing conclusions from them about how and to what extent treaty bodies protect and promote cultural diversity and challenge cultural diversity through their interpretation and monitoring of their treaty provisions. Chapter 4 examines the ‘positive’ cultural diversity considerations in the treaties and treaty body output, i.e., the – explicit and implicit – obligations of States parties to respect, protect and promote cultural diversity. A differentiation is made between obligations to protect and promote *cultural exclusivity* and obligations to protect and promote *cultural inclusivity*. Chapter 5 examines how the treaty bodies deal with ‘adverse’, ‘negative’ or ‘harmful’ aspects of culture, resulting in obligations of States parties to change, challenge and eradicate such aspects of culture and cultural diversity.

Chapter 6 discusses whether and how the treaty monitoring bodies have performed their task of reconciling universality and diversity by (engaging in) cross-cultural dialogue, focusing on the process and the actors involved in the process. It explores to what extent the treaty bodies’ practice reflects the use of cross-cultural dialogue to overcome cultural resistance, and to enhance the universal legitimacy of human rights (research question 3). Finally, it provides insights into the types of cultural arguments used by States parties when reporting on their progress in human rights implementation, and in how the treaty bodies deal with these arguments (research question 4). While chapters 4 and 5 are exclusively based on *findings*, i.e., the concerns and recommendations recorded in concluding observations, and on general comments

<sup>52</sup> Only concluding observations published in the English language are included in the research.

<sup>53</sup> For example, the current researcher could increasingly trust that, in the concluding observations of the HRC, concerns regarding ‘non-discrimination’, ‘harmful traditional practices’ and ‘violence against women’ were more likely to involve cultural issues, and required closer scrutiny than concerns regarding ‘extrajudicial killings and enforced disappearances’, ‘torture and ill-treatment’ or ‘freedom of opinion expression and association’.

and recommendations, chapter 6 is further based on documentation preceding and following the adoption of concluding observations, i.e., States' (periodic) reports, (replies to) lists of issues and questions, summary records, and follow-ups to the concluding observations. Based on the cultural diversity considerations identified in the concluding observations, the relevant documentation preceding the adoption of the concluding observations is scrutinised, recording the back and forth between States parties and Committee experts, starting from the State's (periodic) report, moving to the (replies to) the list of issues and questions, and finally concluding with the summary records.<sup>54</sup>

Chapter 7 forms the synthesis of the previous chapters. The research questions and analyses are reflected on, conclusions are drawn and recommendations are made. The treaty bodies in particular are advised on how better to handle the cultural diversity issues which they are confronted with. This chapter will also address how the findings of this research contribute to the (broader) universalism versus cultural relativism debate.

Throughout this book, and especially in chapters 4, 5 and 6, cultural diversity considerations have been clustered and categorised in order to help recognize patterns and make sense of the complexity of reality. For methodological clarity, some of the quandaries in doing so have to be explained. It cannot be stressed enough that reducing the variety and complexity of reality to a small set of categories requires a considerable degree of (over)simplification. Moreover, not all situations can be categorised easily: some examples relate to both positive and negative evaluations of culture at the same time. It may also be difficult to determine the exact purpose or aim of a recommended measure. The following example will provide clarification of such difficulties. Consider the situation of discrimination against Roma. A treaty body may recommend that the State party *eradicate stereotyping and discrimination against Roma by conducting public awareness campaigns to promote tolerance and respect for diversity*. The recommendation to *promote tolerance and respect for diversity* could be categorised as promoting and protecting cultural diversity, while the recommendation to *eradicate stereotyping and discrimination against Roma* shifts the aim of the recommendation to eradicating negative or harmful aspects of culture, insofar as this discrimination may be rooted in the dominant culture. The same example could thus be used to show how human rights are used as a sword to protect and promote culture (i.e., to promote tolerance and respect for diversity), and as a shield to protect against negative or harmful culture (i.e., to combat stereotyping and discrimination).

Finally, there are a number of limitations to the research. One limitation of the study necessarily follows from the selected scope. The data was taken from the UN Treaty Body Database, covering the available documentation of the three selected treaty bodies between 1 January 2010 and 31 December 2015.<sup>55</sup> This may result in more limited

<sup>54</sup> When a treaty body convenes, the proceedings do not produce a transcript *ad verbatim*. However, a summary is provided, hence the title 'Summary Record'.

<sup>55</sup> With the exception of documentation relating to individual communications.

results in comparison with earlier or later studies and reports on this topic. To illustrate, a study by Donders provided details on the meaning of the term ‘culturally appropriate’ and ‘culturally sensitive’ based on concluding observations which were adopted in 2008<sup>56</sup>, and it is therefore not included in the present research. Similar details on the meaning of those terms could not be found in the concluding observations covered by this research.<sup>57</sup> Another significant limitation is a consequence of the fact that this research maps the manifestations of culture which are put forward by and before the treaty bodies, and *not the manifestations of culture which are not*. Given that States have primary responsibility for the domestic implementation of international human rights treaties, they are allowed, even required, to tailor implementation measures to their own cultural context. The assumption can be made that as long as the treaty monitoring bodies refrain from criticising and objecting to certain interpretations and/or implementations of States parties, they must fall within a range of acceptable alternatives.

The present research sets out descriptive, providing an overview of the universalism versus cultural relativism debate, and of the working methods of the UN human rights treaty bodies. Chapters 4, 5 and 6 continue descriptively, outlining the treaty bodies’ concerns and recommendations in relation to cultural issues, as well as the debate between these treaty bodies and State party delegations on harmful aspects of culture, followed by an analysis through qualitative methods, i.e., grouping the data into meaningful categories, enabling the author to generate insights and draw conclusions. Chapter 6 has a normative component as well, as it evaluates the manner in which the UN human rights treaty bodies deal with cultural arguments by States parties, and furthermore suggests means to improve this. Throughout the research, it needs to be kept in mind that the author himself has a certain sociocultural background, gender and age, and has certain (related) biases, assumptions and worldviews.

Additional methodological choices have been explained in the introductions to chapters 4 and 5.

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<sup>56</sup> YM Donders, Exploring the cultural dimensions of the right to the highest attainable standard of health, *Potchefstroom Electronic Law Journal*, vol 18, no 2, 2015, p 197. See chapter 4, section 3.2.2, in particular nn 228 and 234.

<sup>57</sup> See chapter 4, section 3.2.2, as well as section 4 (the concluding remarks).



# CHAPTER 2

## HUMAN RIGHTS AND CULTURAL DIVERSITY

### Between and Beyond Universalism and Cultural Relativism

#### 1 INTRODUCTION

Ever since the Universal Declaration of Human Rights (UDHR) was adopted in 1948, the universality of human rights in a world of profound cultural diversity has been the subject of endless controversy. The essence of these debates concerns the tensions inherent in adopting universal standards which can be applied in the different cultural contexts all over the world. How can human rights have universal value, and yet respect and accommodate genuine cultural diversity?

In order to analyse and understand how the UN human rights treaty bodies have dealt with the tensions which occur in the process of monitoring the implementation of what they consider universal human rights across different cultures, it is crucial first to explore the concepts and theories which are the foundation of this research: (1) what is 'culture' or 'cultural diversity'?; (2) why and how do 'culture' and 'cultural diversity' interact – or even collide – with human rights?; (3) what does existing literature say about possible ways to reconcile 'culture' or 'cultural diversity' with human rights?

This chapter briefly introduces the concepts and theories which are important to the present research. First, key in avoiding conceptual confusion is an understanding of concepts as 'culture' and 'cultural diversity' as used in this study. Comprehension of the relation between power and culture is also vital: Culture is open to contestation, and the question of who defines the dominant values of a certain culture should be addressed (section 2.2). The subsequent section provides a brief outline of the diversity of cultures, cultural values and perspectives. It sets out to illustrate the (possible) tensions between the universality of human rights and the diversity of cultural contexts with some (necessarily simplified) observations on the perceived 'Western bias' of human rights, and on the major cultural values and ensuing human rights criticisms from Islamic, Asian and African viewpoints (section 2.3). At first, the debate in scholarship was framed in terms of a dichotomous opposition between the claims of cultural relativism and the claims of universality. The positions of universalists and cultural relativists were

presented as diametrically opposed. Nowadays, scholars look beyond the dichotomy, increasingly arguing that these claims of cultural difference can be addressed and accommodated within the international human rights framework. The ensuing section presents the main authors in this field, and their positions and approaches (section 2.4). The final section provides some concluding remarks, linking the findings to the chapters following (section 2.5).

As mentioned, the present chapter is intended to set the scene. It highlights the issues which are considered important fully to understand the research objective and questions. Therefore, the choice is made merely to sketch and outline the main issues. This chapter neither intends to criticize or comment on the different cultural values and perspectives and the ensuing criticisms of international human rights (law), nor aim to critique the different theories and approaches on how to reconcile international human rights (law) and cultural diversity. The desire to keep this chapter brief, to the point, and limited to the essentials, comes at a cost: a necessary degree of oversimplification. In particular, the depiction of regional cultural values and perspectives (section 3) is overly generalised and lacks nuance, but this is considered justified because authors, scholars and commentators, *also from within those regions*, generally frame the debate in these terms. A simplified and uncomplicated representation of the commonalities and differences within and between these regions helps to clarify and enliven the debate. The overview of the academic debate on reconciling universalism and cultural relativism is restricted to what are considered the main (and most cited) authors on this topic. Since the debate is of a socio-legal nature, it includes academic contributions from various fields, mainly from authors with a legal background, but also from the fields of anthropology and international relations. Language restrictions may give an Anglophone bias to the presented overview.

## 2 CULTURE, CULTURAL DIVERSITY, AND CULTURAL ARGUMENTS

‘Culture’ has a variety of meanings and definitions. In a narrow sense, culture is the process of artistic and scientific creation: works of art, literature, museums, theatres, libraries, cinemas, music, sports, and etc.<sup>58</sup> In a broad sense, however, culture is considered to denote a group’s values, beliefs and practices, i.e., ‘a way of life’.<sup>59</sup> For the purposes of this research, culture is defined as a ‘set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, not only art and literature, but lifestyles, ways of living together, value systems, traditions and beliefs’.<sup>60</sup> This is the definition as formulated by UNESCO, which captures the

<sup>58</sup> For instance, Cambridge Dictionary on ‘culture *noun* (art)’, <<https://dictionary.cambridge.org/dictionary/english/culture>> accessed 7 August 2019.

<sup>59</sup> For instance, Cambridge Dictionary on ‘culture *noun* (way of life)’, <<https://dictionary.cambridge.org/dictionary/english/culture>> accessed 7 August 2019.

<sup>60</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001), preamble.

essence of culture as it is used throughout this book. For many people around the world, religious beliefs are central to their culture and provide the value system by which they live. Religion is thus considered to play a significant role in culture. Religion can be so influential in daily life, that religion and culture become inseparable and indistinguishable.<sup>61</sup> Throughout the book, culture should be understood to include religion. Where relevant, religion is singled out as a specific element of culture deserving separate attention.

The Committee on Economic, Social and Cultural Rights (CESCR) uses an even broader definition, which seems influenced by the UNESCO approach<sup>62</sup>:

The Committee considers that culture (...) encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.<sup>63</sup>

The Human Rights Committee (HRC) did not specify its definition of culture, but elaborated on its manifestations:

[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.<sup>64</sup>

Cultures change continuously as a result of both internal and external pressures and influences. Culture is ‘a living process, historical, dynamic and evolving, with a past, a present and a future’<sup>65</sup>, it is ‘not static, but dynamic; (...) not a product, but a process, (...) and is influenced by internal and external interactions’.<sup>66</sup> Moreover, it is ‘a repertoire of deeply contested symbols, practices, and meanings over which, and

<sup>61</sup> R Holtmaat and J Naber, *Women’s Human Rights and Culture: From Deadlock to Dialogue*, Intersentia, 2011, p 82.

<sup>62</sup> A Yupsanis, The Meaning of “Culture” in Art 15 (1) (a) of the ICESCR – Positive Aspects of CESCR’s General Comment No 21 for the Safeguarding of Minority Cultures, *German Yearbook of International Law*, vol 55, 2012, pp 345–383.

<sup>63</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009, para 13.

<sup>64</sup> UN Human Rights Committee (HRC), General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5, 1994, para 7.

<sup>65</sup> CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009, para 11.

<sup>66</sup> YM Donders, *Human Rights: eye for cultural diversity* (Oratiereeks), Universiteit van Amsterdam, 2012, p 6. Available at <[https://pure.uva.nl/ws/files/837618/113702\\_Inaugural\\_Lecture\\_Yvonne\\_Donders.pdf](https://pure.uva.nl/ws/files/837618/113702_Inaugural_Lecture_Yvonne_Donders.pdf)>.

with which, members of a society constantly struggle'.<sup>67</sup> In the words of Donnelly, '[c]ultural practices (...) outlive their usefulness and new practices and values emerge both through internal dialogue within the cultural group and through cross-cultural influences'.<sup>68</sup>

Culture 'takes diverse forms across time and space'.<sup>69</sup> This diversity is 'embodied in the uniqueness and plurality of the identities of the groups and societies' which make up humanity.<sup>70</sup> UNESCO defines 'cultural diversity' as 'the manifold ways in which the cultures of groups and societies find expression'.<sup>71</sup> It describes the factual situation of cultural differences between and within States.

The fact that culture is subject to contestation and struggle also means that it can become a tool for exclusion and control, and that 'respecting culture' could entail siding with dominant groups at the expense of marginalised groups. Therefore, any appeal to allow cultural difference must be treated with caution. Cultural arguments – i.e., using culture to justify decisions, to resist change and to express identity ('please respect our culture') – can be misused by the privileged – i.e., national and local leaders and elites – to maintain the status quo, making it always necessary to examine such arguments by questioning who gains and who loses from this definition of culture?<sup>72</sup> The argument is made that the interpretation of culture or tradition which State elites present on the international stage is often not representative of popular understanding.<sup>73</sup> In the international arena<sup>74</sup>, the State has the exclusive power to define the cultural values of its people. National elites who participate in international fora tend to 'juxtapose their urban and educated world, in touch with the international community, to that of the apparently ancient and unchanging traditional cultures of the rural areas, riddled with patriarchal culture'.<sup>75</sup> This framing of culture at the international level, where urban elites are portrayed as 'progressive, non-culturally defined groups' as opposed to 'recalcitrant ethnic, religious, lower-caste and rural communities steeped in old cultural practices such as personal laws that they will not willingly abandon' is an important concern.<sup>76</sup> It is important to be cautious when considering the 'cultural legitimacy' of the stance taken by State delegations in international fora.<sup>77</sup> Whether cultural

<sup>67</sup> J Donnelly, *Universal Human Rights in Theory and Practice*, 3d edition, Cornell University Press, 2013, p 110.

<sup>68</sup> Ibid.

<sup>69</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001), art 1.

<sup>70</sup> Ibid.

<sup>71</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005), art 4.

<sup>72</sup> S Harris-Short, *Children's Rights and Cultural Diversity*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007, p 228, 246.

<sup>73</sup> Ibid, p 237–239.

<sup>74</sup> This is especially the case within intergovernmental organizations.

<sup>75</sup> SE Merry, Constructing a Global Law-Violence against Women and the Human Rights System, *Law and Social Inquiry*, vol 28, no 4, 2003, p 962.

<sup>76</sup> Ibid.

<sup>77</sup> S Harris-Short, International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Right of the Child, *Human Rights Quarterly*, vol 25, no 1, 2003, p 171.

arguments are acceptable, should be determined for a large part by the assessment of the degree of involvement of the whole of the society, which should encompass more than just the elite or ruling class.<sup>78</sup> The UN, for example, should ‘demonstrate that it has taken effective steps to listen to those groups that are silenced by the State’, which can be achieved by assigning a greater role to NGOs and representational groups.<sup>79</sup>

While the State elite may speak for a dominant national culture which does not reflect the culture, values and traditions of minorities, minorities in turn may force their culture on individuals who do not wish to take part in them.<sup>80</sup> Cultural arguments subsume these individuals under a cultural framework which may actually be unfavourable to them.<sup>81</sup> Therefore, some authors contend that the culture argument, asking for respect for a certain culture, should always be complemented with an escape clause: those who choose freely to live by and to be treated in accordance with their traditional cultures are welcome to do so, provided that others who wish to be free are not oppressed in the name of a culture they (desire to) renounce.<sup>82</sup> Donnelly, for example, explicitly endorses Howard’s recommendation that individuals should be allowed to ‘opt out’ of traditional practices. Rather than to ban such practices outright, they advocate a ‘guaranteed right’ of individuals to opt out of these practices. In Donnelly’s view, this solution would permit individuals and families, in effect, to ‘choose the terms on which they participate in the cultures that are of value to their

<sup>78</sup> An-Na’im argues that ‘[g]reater emphasis must be placed on the role of grass-roots non-governmental organizations (...) for enhancing the cultural legitimacy of human rights’. AA An-Na’im, *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights*, in: CE Welch and VA Leary (eds), *Asian Perspectives on Human Rights*, Boulder: Westview, 1990, p 80. Likewise, the Advisory Council on International Affairs (AIV) of the Netherlands states that ‘[civil society and grassroots human rights NGOs] can act as persuasive intermediaries between international human rights law and local practices, as they are thoroughly familiar with the grass roots, while often at the same time being part of transnational networks where a universal human rights language is spoken. Such NGOs may tap into the cultural resources of a society where human rights violations are still common, ensure that the international legal formulation is embedded in the vernacular [i.e. native language, VV], and then use this vernacular to effect change and “push the envelope”’. AIV, *Universality of Human Rights: Principles, Practice and Prospects*, Advice No 63, 2008, p 34.

<sup>79</sup> S Harris-Short, Listening to ‘The Other’? The Convention of the Rights of the Child, *Melbourne Journal of International Law*, vol 13, no 2, 2001, p 314.

<sup>80</sup> While a lot more could be said about the potential conflict between individual rights and community or collective rights, this falls outside the scope of this research. Interested readers can look into the following sources: YM Donders, *Foundations of Collective Cultural Rights in International Human Rights Law*, in: A Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill, 2016, p 95; A Eisenberg and J Spinner-Halev (eds), *Minorities within Minorities: Equality, Rights and Diversity*, Cambridge University Press, 2005; Y Tamir, *Against Collective Rights*, in: LH Meyer, SL Paulson and TW Pogge (eds), *Rights, Culture and the Law. Themes from the Legal and Political Philosophy of Joseph Raz*, Oxford University Press, 2013, p 185 and 189; MA Jovanović, *Collective Rights: A Legal Theory*, Cambridge University Press, 2012, p 144.

<sup>81</sup> S Tharoor, Are Human Rights Universal?, *World Policy Journal*, vol XVI, no 4. Available at < <https://worldpolicy.org/2009/11/11/tharoor-are-human-rights-universal-world-policy-journal-world-policy-institute/> > accessed 7 August 2019.

<sup>82</sup> See chapter 6, section 2.3, which shows how the treaty bodies deal with State party argumentation to the effect that people are free to follow their culture/religion if they consent to it, even if it violates their rights under the treaty.

lives'.<sup>83</sup> Likewise, Ignatieff argues that 'groups (...) should respect an individual's right to exit when the constraints of the group becomes unbearable'. According to Ignatieff, individual and group interests inevitably conflict: 'Human rights exist to adjudicate these conflicts, to define the irreducible minimum beyond which group and collective claims must not go in constraining the lives of individuals'.<sup>84</sup> Donders maintains that, while cultural communities may 'put limited pressure on their members to follow the cultural norms of the community', the community should always 'respect the individual's right and freedom to leave the community'.<sup>85</sup>

Consequently, it is important to address two concerns when reference is made to cultural arguments: (1) Who determines 'the culture', which interpretation of 'the culture' should be accepted, and have minorities and (other) vulnerable groups been involved in the definition?; (2) Are individuals permitted to 'opt out' of the culture or cultural practice, if they wish to do so?

### 3 CULTURAL VALUES AND PERSPECTIVES

The tension between international human rights and the diversity of cultural contexts in which they are (to be) applied, is often presented as a conflict between African, Asian, or Islamic values and perspectives and the 'Western bias' of international human rights. Non-Western cultures 'demand that their cultural values and their living circumstances be taken into account in formulating, interpreting, and applying human rights'.<sup>86</sup> However, using terms like 'Western'<sup>87</sup>, 'Non-Western', 'Asian', 'African', and 'Islamic', as if they are homogeneous entities, discounts the diversity of cultures within the West, Asia, Africa, and Islam, and moreover disregards the fact that the Islam is an influential religion in both Asia and Africa (and increasingly in the West), making any distinction artificial. Nevertheless, for the purpose of understanding the main conflicts and issues at play, a brief and necessarily simplified outline of the main values and perspectives on human rights is presented for these cultural traditions.

<sup>83</sup> J Donnelly, *Universal Human Rights in Theory and Practice*, 3d edition, Cornell University Press, 2013, p 115.

<sup>84</sup> M Ignatieff, *The Attack on Human Rights*, *Foreign Affairs*, vol 80, no 6, 2001, pp 109–110.

<sup>85</sup> YM Donders, *Foundations of Collective Cultural Rights in International Human Rights Law*, in: A Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill, 2016, pp 110–111.

<sup>86</sup> E Brems, *The margin of appreciation doctrine in the case-law of the European Court of Human Rights*, in: DP Forsythe and PC McMahon (eds), *Human Rights and Diversity: Area Studies Revisited*, University of Nebraska Press, 2003, p 104–105.

<sup>87</sup> The exact scope of the 'Western world' is unclear, and it is not a homogeneous entity. In the contemporary cultural meaning, the 'Western world' includes Europe, as well as countries of European colonial origin with substantial populations with European ancestry in the Americas and Oceania. Views differ however on the question whether, for example, Turkey, or countries of the former Soviet Republic or Latin America are Western.

### 3.1 ‘WESTERN BIAS’

Human rights are often said to be a ‘Western’ invention.<sup>88</sup> The argument is that the Universal Declaration of Human Rights (UDHR) reflects the philosophical and cultural background of its ‘Western’ drafters, and that the International Bill of Rights – including the ICCPR and ICESCR – consists of rights and freedoms which are (culturally) non-universal, have a distinctively ‘Western’ or ‘Judeo-Christian’ bias, and are therefore ethno-centric.<sup>89</sup>

Western societies consider human rights ‘individualistic, adversarial, justiciable, and inalienable’.<sup>90</sup> Tracing its origins to the Enlightenment, the Western conception of human rights is linked to ‘liberal values like personal autonomy, choice, freedom, secularity, rationality, and a scientific approach’.<sup>91</sup> As such, human rights emphasize ‘individualism, privacy and freedom from State interference’<sup>92</sup>, concepts which are considered alien in many cultures around the world.

Bearing in mind that human rights are thought to be a Western invention, and that it is also the West which tends to focus on their universality<sup>93</sup>, it seems logical that human rights are treated with suspicion. In the words of Ignatieff:

[N]o longer able to dominate the world through direct imperial rule, the West now masks its own will to power in the impartial, universalizing language of human rights and seeks to impose its own narrow agenda on a plethora of world cultures that do not actually share the West’s conception of individuality, selfhood, agency, or freedom.<sup>94</sup>

Some scholars warn that the colonial past demands sensitivity on Westerners part when arguing for the universality of human rights.<sup>95</sup> Cultural relativists have referred to this colonial past to challenge and sometimes reject the international human rights norms as being too Western. They consider the promotion of universal human rights

<sup>88</sup> RP Churchill, *Human Rights and Global Diversity*, Pearson/Prentice Hall, 2006, p 44.

<sup>89</sup> AS Preis, Human Rights as Cultural Practice: An Anthropological Critique, *Human Rights Quarterly*, vol 18, no 2, 1996, p 288; However, De Varennes has challenged this ‘mistaken belief’ that the UDHR reflects Western values, arguing that ‘in reality it is a product from a variety of traditions from around the world’. He maintains that, ‘of the 58 countries participating in its genesis, 20 were from Latin America, 4 African and 14 Asian. Non-European countries were therefore very much a part of this process’. F De Varennes, The Fallacies in the ‘Universalism versus Cultural Relativism’ Debate in Human Rights Law, *Asia-Pacific Journal on Human Rights and the Law*, vol 7, no 1, 2006, p 71.

<sup>90</sup> DL Donoho, Relativism versus Universalism in Human Rights: The Search for Meaningful Standards, *Stanford Journal of International Law*, vol 27, 1991, p 354.

<sup>91</sup> T Zwart, Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach, *Human Rights Quarterly*, vol 34, no 2, 2012, p 551.

<sup>92</sup> S Harris-Short, *Children’s Rights and Cultural Diversity*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007, p 230–231.

<sup>93</sup> B de Sousa Santos, *Toward a multicultural conception of human rights*, in: FG Isa and K de Feyter (eds), *International Human Rights Law in a Global Context*, University of Deusto, 2009, p 104–105.

<sup>94</sup> Ignatieff (n 27), p 105.

<sup>95</sup> J Donnelly, The Relative Universality of Human Rights, *Human Rights Quarterly*, vol 29, no 2, 2007, p 304.

in non-Western societies to be reminiscent of colonialism, once again promoting a ‘homogenizing worldview’.<sup>96</sup> The argument has been made that ‘anything that even hints of imposing Western values is likely to be met with understandable suspicion, even resistance’, and that ‘[h]ow arguments of universalism and relativism are advanced may sometimes be as important as the *substance* of those arguments’.<sup>97</sup> Criticism by outsiders may be ineffective and possibly even backfire if viewed as absolutist and disrespectful. It is more productive to ‘engage in a dialogue with representatives of the societies in which the “harmful practices” exist, and support the proponents of change inside those societies’.<sup>98</sup>

The main regional instruments for the protection of human rights in ‘the West’ are the European Convention on Human Rights for the European continent, and the (Inter-)American Convention on Human Rights for the American continent. The two Conventions do not significantly differ from the ICCPR.<sup>99</sup> In both the European and (Inter-) American systems, economic, social and cultural rights have received (much) less attention.<sup>100</sup>

### 3.2 ARAB/ISLAMIC PERSPECTIVE

Sharia, the moral code and religious law of Islam<sup>101</sup>, is often presented as an alternative human rights model for Muslim countries. It protects some of the same principles as human rights, most notably the inherent dignity of all human beings<sup>102</sup>, but using obligations rather than rights as a starting point.<sup>103</sup> Human rights only exist in relation to human obligations. Individuals have obligations ‘towards God, fellow humans and nature’, defined by Sharia. By meeting these obligations, individuals attain certain rights and freedoms, again as defined by Sharia.<sup>104</sup>

<sup>96</sup> B Ibhawoh, *Colonialism: Legacy for Human Rights*, in: DP Forsythe (ed), *Encyclopedia of Human Rights*, vol 1, Oxford University Press, 2009, p 362.

<sup>97</sup> Donnelly (n 38), p 29.

<sup>98</sup> E Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, 2001, p 513. The importance of dialogue in relation to cultural issues is discussed at length in chapter 6, and in particular in section 3 on ‘Constructive dialogue or destructive contestation?’.

<sup>99</sup> C Tomuschat, *Human Rights: Between Idealism and Realism*, 2<sup>nd</sup> edition, Oxford University Press, 2008, p 79.

<sup>100</sup> In Europe, economic and social rights are covered by the European Social Charter; in the American Convention, article 26 requires States to commit themselves to take measures to progressively realize ‘the rights implicit in the economic, social, educational, scientific and cultural standards’ in the Charter of the Organization of American States (OAS).

<sup>101</sup> Simply put, *Sharia* is Islamic law, while *Fiqh* is Islamic jurisprudence. *Fiqh* can be described as the human understanding of the *Sharia*.

<sup>102</sup> Besides human dignity, it is also considered to protect principles such as the importance of morality in the public sphere, and the values of compassion and social justice.

<sup>103</sup> E Brems, Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam, *Human Rights Review*, vol 5, no 3, 2004, p 9.

<sup>104</sup> Y Khushalani, *Human Rights in Asia and Africa*, in: FE Snyder and S Sathirathai (eds), *Third World Attitudes Toward International Law*, Martinus Nijhoff Publishers, 1987, p 326.

Islamic countries consistently deviate from international human rights standards on three issues: the law of apostasy, the status and rights of non-Muslims, and the status and rights of women.<sup>105</sup> Islam prohibits apostasy: a member of an Islamic denomination is not allowed to embrace another religion. A separate, yet related issue is discrimination of non-Muslims. Sharia classifies people in terms of their religious beliefs and apportions civil and political rights accordingly. Muslims enjoy the full range of rights, unbelievers have no rights, and non-Muslim believers<sup>106</sup> may enjoy security of person and property, and a degree of communal autonomy in matters of personal status in exchange for a special personal tax. Regarding the status and rights of women, Islam takes the complementarity of the sexes, based on biological and sociological differences, as its starting point. While men and women are considered equal, the roles assigned to them are different, and Islamic laws reflect these differences. As a result, women face more limited rights in relation to issues of personal status, including marriage, divorce, child custody, inheritance, testimony, and face restrictions of their freedom of movement and right to work.<sup>107</sup> Finally, Sharia mandates corporal punishment for certain crimes, such as adultery, apostasy, consuming intoxicants or theft. These *hudud* punishments are specified by the Quran or Sunna, and can take the form of a public lashing or flogging, amputation of hands, being stoned to death, or crucifixion.<sup>108</sup>

Obstacles rooted in religion may be more difficult to change from within than obstacles based on other cultural grounds, because religious values and practices derive their authority from the divine, often enshrined in sacred texts. Humans cannot change them.<sup>109</sup> Nevertheless, some authors stress that the flexibility and dynamism in the interpretation and application of Sharia rules can be used to bring them in conformity with human rights standards.<sup>110</sup> Since the legal possibilities are available, it is seen as a matter of political will.<sup>111</sup> Others appear more sceptical, and emphasize the limits of such reform through juristic reasoning (*ijtihad*). It cannot eliminate all discrimination against women and non-Muslims, since its use is not allowed in any matters governed by an explicit and definite text of the Qur'an or Sunna.<sup>112</sup>

<sup>105</sup> E Brems (n 41), pp 230–240; AA An-Na'im (n 21), p 77.

<sup>106</sup> 'People of the Book', an Islamic term referring to Jews, Christians, and Sabians, and sometimes applied to members of other religions, such as Zoroastrians.

<sup>107</sup> E Brems (n 41), p 230–240.

<sup>108</sup> E Okon, *Hudud punishments in Islamic criminal law*, *European Scientific Journal*, vol 10, no 14, 2014.

<sup>109</sup> Holtmaat and Naber (n 4), p 82.

<sup>110</sup> E Brems, *Inclusieve universaliteit. Een theoretisch en methodologisch kader om inzake mensenrechten universaliteit te verzoenen met diversiteit*, *Netherlands Journal of Legal Philosophy*, vol 2, 2003, p 153 and 156.

<sup>111</sup> E Brems (n 41), p 199.

<sup>112</sup> As an example, An-Na'im discusses the amputation of the right hand for theft when committed by a Muslim who does not need to steal in order to survive, and who has been properly tried and convicted by a competent court. He argues that, since this punishment is prescribed by the clear and definite text of verse 5:38 of the Qur'an, internal Islamic reinterpretation is not likely to lead to a total abolition of this punishment as a matter of Islamic law. It is a punishment decreed by God, which will absolve an

In 1990, the Organisation of Islamic Cooperation (OIC) adopted the Cairo Declaration on Human Rights in Islam. Submitted as a contribution to the 1993 Vienna World Conference on Human Rights, this Declaration was welcomed as ‘coming closer to accepting the general and worldwide validity of international human rights’<sup>113</sup>, but it was also criticised as ‘permit[ting] or requir[ing] discrimination against women, and offer[ing] little protection to freedom of religion’.<sup>114</sup> It has been argued that ‘the assumption pervading the Cairo Declaration is that the need to respect Islamic law must trump all competing concerns and that all rights are to be subordinated to requirements of Islamic law’, and that ‘[o]nly where Islam allows human rights, can they be accepted’.<sup>115</sup> Article 24 of the Cairo Declaration states: ‘All the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia’.

In 2004, the Council of the League of Arab States adopted the Arab Charter on Human Rights. In its preamble, the Charter ‘reaffirms’ the principles of the UN Charter and the International Bill of Rights, as well as the Cairo Declaration. Under article 3(3), the Charter asserts that ‘men and women are equal in human dignity, in rights and in duties’, albeit ‘within the framework of the positive discrimination established in favour of women by Islamic Sharia’.<sup>116</sup> While an argument could be made that the Charter thus promotes taking (affirmative) measures in favour of women, it upholds the rules of Sharia law in respect of the status of women in Islamic society. Another feature is the recurring references to ‘the law’ which governs the exercise of rights<sup>117</sup>, and ‘the laws in force’ which, for example, regulate the rights and duties of the man and woman in marriage.<sup>118</sup> Such references may weaken the protection of rights by qualifying it with a – more restrictive – domestic law, leaving the door open for interpreting the rights provided in the Charter in accordance with the Sharia.<sup>119</sup>

### 3.3 ASIAN PERSPECTIVE

Asia is the world’s largest and most populous continent, with over four billion inhabitants following a wide variety of different religions, including Islam, Buddhism,

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offender from (the much harsher) punishment in the next, eternal, life. AA An-Na’im, in: W Twining (ed), *Human Rights, Southern Voices*, Cambridge University Press, 2009, p 61.

<sup>113</sup> E Brems, *Human Rights: Universality and Diversity*, Leuven, 1999, p 9.

<sup>114</sup> M Freeman, *Human rights: an interdisciplinary approach*, 2<sup>nd</sup> edition, Polity Press, 2011, p 130.

<sup>115</sup> AE Mayer, Clashing Human Rights Priorities: How the United States and Muslim Countries Selectively Use Provisions of International Human Rights Law, *Chennai Journal of Intercultural Philosophy*, vol 9, 2006.

<sup>116</sup> Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008). Available at < <https://www.jus.uio.no/english/services/library/treaties/02/2-01/arab-human-rights-revised.xml> >.

<sup>117</sup> See Arab Charter on Human Rights, articles 22 and 25, for examples. The exercise of these rights under both articles is governed by ‘law’, which may have consequences for non-Muslims who are not ‘People of the Book’.

<sup>118</sup> Arab Charter on Human Rights, art 33 (3).

<sup>119</sup> MY Mattar, Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional and International Standards, *Harvard Human Rights Journal*, vol 26, 2013.

Hinduism and Confucianism. Even though Islam is currently the largest religion in Asia, the focus will be on Asian-Confucian values, common to the nations of Southeast and East Asia.

The 'Asian values perspective' can be summarised as having the following major components: an identified correlation between rights and duties; preference for the welfare and collective well-being of the community over individual rights; a strong emphasis on the family as the building block of society; concern with socio-economic well-being instead of civil liberties and human rights; obedience, loyalty and respect towards elders and authority; preference for social harmony and consensus (instead of adversarialism); priority of social order and stability over democracy and individual freedom; emphasis on national sovereignty.<sup>120</sup>

In 1993, 34 Asian States adopted the Bangkok Declaration, considered to be a landmark expression of the Asian values perspective, as a contribution to the UN World Conference on Human Rights in Vienna. In 2012, the ASEAN Human Rights Declaration (AHRD) was adopted<sup>121</sup>, which resembles the Bangkok Declaration to a great extent.

Even though Asian governments reaffirmed their commitment to the principles of the UN Charter and the UDHR, the Bangkok Declaration has been understood to 'defend the existence of a unified Asian perspective on human rights by claiming cultural specificity and regional particularities'.<sup>122</sup> Article 8 of the Declaration reflects this position: 'Recognize that *while* human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds'.<sup>123</sup> The use of the qualifying 'while' was taken to suggest a certain prioritisation of particularity over universality.<sup>124</sup> The Declaration also emphasised 'the principles of respect for national sovereignty (...) as well as non-interference in the internal affairs of States'<sup>125</sup>, and reaffirmed 'the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights'.<sup>126</sup> The position of economic, social and cultural rights before civil and political rights in the

<sup>120</sup> JR Bauer, *The Challenge to International Human Rights*, in: Monshipouri et al (eds), *Constructing Human Rights in the Age of Globalization*, ME Sharpe, 2003; N Hoang, *The "Asian Values" Perspective of Human Rights: A Challenge to Universal Human Rights*, 2009. Available at <<http://ssrn.com/abstract=1405436>> accessed 8 August 2019.

<sup>121</sup> ASEAN Human Rights Declaration (adopted 18 November 2012). Available at <[www.refworld.org/docid/50c9fea82.html](http://www.refworld.org/docid/50c9fea82.html)> accessed 8 August 2019.

<sup>122</sup> FIDH, *Demistifying Human Rights Protection in Asia*, background paper, 2015, p 8. Available at <<https://www.fidh.org/IMG/pdf/asie669anglaisbassdef.pdf>> accessed 8 August 2019.

<sup>123</sup> Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, 'The Bangkok Declaration' (adopted after the regional meeting in Bangkok, March-April 1993), art 8. Available at <https://www.ru.nl/publish/pages/688605/bangkok-eng.pdf>.

<sup>124</sup> The debated issue was the word 'while'. Later, in the Vienna Declaration, the qualifying 'while' was placed in relation to the claim for particularism, rather than the claim for universalism.

<sup>125</sup> Bangkok Declaration (n 66), art 5.

<sup>126</sup> *Ibid*, art 10.

order of the categories of rights has been interpreted as suggesting that the former are given priority.<sup>127</sup>

The AHRD has been criticised for a number of reasons, first and foremost for containing the idea of ‘balancing’ rights with ‘the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives’ (art 6).<sup>128</sup> Article 7 of the Declaration declares that ‘[a]ll human rights are universal, indivisible and interrelated’, and that ‘*at the same time*, the realisation of rights must be considered in the national and regional contexts bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds’ (emphasis added, VV). This could be interpreted as introducing relativism into the Declaration.<sup>129</sup> Another criticism is that the Declaration qualifies some rights by stipulating that national laws may determine the scope and exercise of that right. An

<sup>127</sup> T Inoue, *Liberal Democracy and Asian Orientalism*, in: JR Bauer and DA Bell, *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999, p 34. Inoue writes that the ‘balanced approach’ of the Bangkok Declaration disguises another imbalance:

[I]t gives the right to subsistence priority over other rights. This approach claims to reaffirm ‘the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights’. In fact, however, as this ordering suggests, economic and social rights are given top priority whereas civil and political rights are ranked lowest. The rationale is that ‘economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights’.

<sup>128</sup> In her statement to the Bali Democracy Forum on 7 November 2012, the High Commissioner for Human Rights at the time (Navanethem ‘Navi’ Pillay) stated that the balancing of human rights with individual duties [is] not a part of international human rights law, misrepresents the positive dynamic between rights and duties and should not be included in a human rights instrument. (...) advocating a balance between human rights and duties creates much greater scope for Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights. There should be no such provision in a human rights instrument, whose primary purpose is to protect individuals and groups against the misuse and abuse of State power’.

<sup>129</sup> While article 7 of the ASEAN Declaration closely follows the formulation of article 5 of the Vienna Declaration, a small change in the wording has been interpreted as introducing the notion of relativism into the Declaration: where the Vienna Declaration provides that States have a duty to promote and protect human rights *while* national and regional particularities and cultural and religious backgrounds must be borne in mind and *regardless* of their cultural systems, the ASEAN Declaration merely draws attention to the fact that *while* human rights are universal, they must be considered in line with different cultural and religious backgrounds *at the same time*. Renshaw suggests in a blog that this is an argument of ‘critics’ of the Declaration, without a reference to, or mention of who the critics are. She also nuanced the argument herself:

On one reading, the statement that human rights must be realized ‘in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds’ is entirely unremarkable. As long as one accepts that human rights are universal, indicating that there is at some level a common global standard in the way a right is understood, defined and interpreted, then what is the problem in acknowledging that rights will be realized in different regional and national contexts, where different political, economic, legal, social, cultural, historical and religious backgrounds exist? Surely this is just a statement of fact. Indeed, surely the effective realization of rights demands that the different political, economic, legal, social, cultural, historical and religious backgrounds of different societies be considered.

CS Renshaw, *The ASEAN Human Rights Declaration – Cause for Celebration?*, 2013. Available at <<https://asiapacific.anu.edu.au/regarding-rights/2013/01/25/the-asean-human-rights-declaration-cause-for-celebration/>> accessed 8 August 2019.

example is the right of men and women (of full age) ‘to marry on the basis of their free and full consent, to found a family and to dissolve a marriage, *as prescribed by law*’.<sup>130</sup> Such references to national law ‘could be used by Governments as a justification to go below international standards’.<sup>131</sup>

The Asia-Pacific region is the only one without a human rights court or commission, and without a human rights treaty.

### 3.4 AFRICAN PERSPECTIVE

Similar to Asian cultures, African cultures often place communitarian rights over individual rights, and economic, social, and cultural rights over civil and political rights (or at least place these rights at the same level). African values are said to emphasize the group (family, clan, tribe), duties, social cohesion and communal solidarity as opposed to individualism.<sup>132</sup>

In 1981, the Organization of African Unity created a regional human rights system for Africa with the adoption of the African Charter on Human and People’s Rights.<sup>133</sup> While the Charter shares many features with other regional instruments and recognizes most universally accepted rights, the Charter also bears an ‘African cultural fingerprint’, with its emphasis on economic, social and cultural rights, and the inclusion of duties and collective or group rights. In the preamble, parties to the Charter emphasize that they are ‘convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights’. The Charter further provides that ‘[e]very individual shall have duties towards his family and society, the State and other legally recognised communities and the international community’.<sup>134</sup> Individuals have the duty ‘[t]o preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need’<sup>135</sup>; ‘[t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being

<sup>130</sup> ASEAN Human Rights Declaration (n 64), art 19 (emphasis added, VV).

<sup>131</sup> OHCHR website, An Open Letter from the Coordination Committee of the Special Procedures of the Human Rights Council on the draft ASEAN Human Rights Declaration. Available at <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14864&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14864&LangID=E)> accessed 8 August 2019.

<sup>132</sup> B Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, vol 22, no 3, pp 843–844.

<sup>133</sup> African Charter on Human and Peoples’ Rights, ‘Banjul Charter’ (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 Rev 5.

<sup>134</sup> *Ibid*, art 28.

<sup>135</sup> *Ibid*, art 29 (1).

of society'.<sup>136</sup> Peoples' rights are established in articles 19 to 24, including the right of all peoples to equality and rights<sup>137</sup>, the right to self-determination<sup>138</sup>, the right to free disposal of wealth and natural resources<sup>139</sup>, the right to economic, social and cultural development<sup>140</sup>, and the right to a general satisfactory environment favourable to their development.<sup>141</sup>

In preparation for the 1993 Vienna World Conference on Human Rights, African States adopted the Tunis Declaration (1992).<sup>142</sup> Similarities with the Bangkok Declaration are not hard to find. In the Declaration, African States express their commitment to international human rights and their universal nature: 'The universal nature of human rights is beyond question; their protection and promotion are the duty of all States, regardless of their political, economic or cultural systems'.<sup>143</sup> However, while the 'observance and promotion of human rights are undeniably a global concern', the Declaration also stresses that 'no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded'.<sup>144</sup> The Declaration also reaffirms the principle of indivisibility of human rights: '[C]ivil and political rights cannot be dissociated from economic, social and cultural rights. None of these rights takes precedence over the others'.<sup>145</sup> The concern with socio-economic well-being is also evident where the Declaration states that lasting progress towards the implementation of human rights implies progress on the level of development.<sup>146</sup> In addition, the Declaration specifies that 'Africa, which remains committed to respect for individual human rights, also takes this opportunity to reaffirm the importance that it attaches to respect for the collective rights of peoples, particularly the right to determine their own future and to control their own resources'.<sup>147</sup> And finally, it also contains a reference to sovereignty and non-interference, reaffirming 'the right of all peoples to self-determination and free choice of their political and economic systems and institutions, on the basis of respect for national sovereignty and non-interference in the internal affairs of States'.<sup>148</sup>

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<sup>136</sup> Ibid, art 29 (7).

<sup>137</sup> Ibid, art 19.

<sup>138</sup> Ibid, art 20.

<sup>139</sup> Ibid, art 21.

<sup>140</sup> Ibid, art 22.

<sup>141</sup> Ibid, art 24.

<sup>142</sup> Final Declaration of the Regional Meeting for Africa of the World Conference on Human Rights, 'Tunis Declaration' (adopted 24 November 1992).

<sup>143</sup> Ibid, art 2.

<sup>144</sup> Ibid, art 5.

<sup>145</sup> Ibid, art 6.

<sup>146</sup> Ibid, Arts 7–8.

<sup>147</sup> Ibid, art 11.

<sup>148</sup> Ibid, art 11.

## 4 UNIVERSALISM AND CULTURAL RELATIVISM: THE DICHOTOMY AND BEYOND

These cultural values, perspectives and criticisms have been discussed in the context of the universalism and cultural relativism debate, where, essentially, advocates of the universality of human rights have asserted that every human being has certain human rights by virtue of being human, whereas advocates of cultural relativism have emphasised that different cultures embrace different normative standards, traditions and practices, and that values take their meaning primarily from context, so there exist no cross-cultural universal values. Anthropologists were the first to introduce the argument for cultural relativism in the discussion on international human rights. In 1947, the American Anthropological Association (AAA) urged the UN, which was working on a draft of the Universal Declaration of Human Rights at the time, not to adopt a universal bill of rights which did not pay attention to cultural particularities:

Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.<sup>149</sup>

At its extreme, cultural relativism contends that members of one society may not legitimately judge or condemn social practices of other traditions. Such ‘cultural absolutism’<sup>150</sup> is to be distinguished from more moderate forms of cultural relativism, which merely demand respect for cultural differences.<sup>151</sup>

Nowadays, the debate is increasingly considered to create a false dichotomy, offering ‘artificial extremes’.<sup>152</sup> This previously polarised debate has given way to theories which go beyond this dichotomy, and try to reconcile universal human rights and cultural diversity. The shared premise of these reconciling theories is that universalism is not to be confused with the (absolutist and unreasonable) position that the same human rights universally apply in exactly the same way, regardless of other conditions.<sup>153</sup>

Many of these reconciling theories start with a reference to ‘perhaps the most celebrated of the attempts to bridge the divide’<sup>154</sup>, the Vienna Declaration and Programme of Action (1993), which affirmed the universality of human rights, but qualified this by insisting that ‘the significance of national and regional particularities

<sup>149</sup> The Executive Board, American Anthropological Association, *American Anthropologist*, New Series, vol 49, no 4, Part 1 (October-December 1947), p 542.

<sup>150</sup> RE Howard-Hassmann, Cultural Absolutism and the Nostalgia for Community, *Human Rights Quarterly*, vol 15, no 2, 1993, p 315.

<sup>151</sup> Donders (n 9), pp 7–8.

<sup>152</sup> Churchill (n 31), p 51.

<sup>153</sup> Ibid.

<sup>154</sup> D Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, in: B Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development – Scholars and Practitioners in Dialogue*, Cambridge University Press, 2012, p 56.

and various historical, cultural and religious backgrounds must be borne in mind'.<sup>155</sup> While the reaffirmation of the universality of human rights has been considered 'perhaps the most significant success of the World Conference'<sup>156</sup>, it also reflects the particularist concerns expressed at the preparatory regional meetings in Cairo, Bangkok and Tunis.<sup>157</sup> The argument has been made that, while the UDHR is 'relatively West-centric', the Vienna Declaration has largely corrected for this limitation by involving input from the 'diverse religious, cultural and ethical views held by almost all nations composing the international society'.<sup>158</sup> Others have criticised the 'purposefully vague terminology' of the Declaration, which 'allowed both Western universalists and non-Western relativist governments to claim victory even if no one really knows or agrees about its actual meaning'.<sup>159</sup> Either way, it seems to have triggered a more nuanced debate on the claims of relativism in human rights, with more attention for the need to accommodate cultural diversity, and the extent to which cultural differences can, and perhaps even should, legitimately be taken into account by States when fulfilling their obligations under international human rights law. Some of these reconciliatory approaches will be discussed in the following.

Providing an anthropological perspective on the issue, Renteln has attempted to mediate between universalists and relativists with the argument that 'relativism is consistent with the existence of cross-cultural universals'.<sup>160</sup> She contends that empirical research can help find the common values which are shared across all cultures.<sup>161</sup> Thus, relativism does not preclude the possibility of cross-cultural universals. According to Renteln, to assume that human rights are self-evident would be a mistake, and 'the failure to build arguments, attributable possibly to the fear that acknowledging relativism would undermine the entire human rights movement, has wasted valuable time'.<sup>162</sup> She contends that

[t]here is an urgent need to adopt a broader view of human rights which incorporates diverse concepts'.<sup>163</sup> Renteln's approach aims at a discovery of a cross-cultural foundation for human rights, but simultaneously makes clear that 'there is no guarantee (...) that cross-cultural

<sup>155</sup> UN World Conference on Human Rights, Vienna Declaration and Programme of Action (adopted on 25 June 1993) A/CONF.157/23, para 5.

<sup>156</sup> CM Cerna, Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts, *Human Rights Quarterly*, vol 16, no 4, 1994, p 742.

<sup>157</sup> The Declarations prepared in Cairo, Bangkok and Tunis were discussed above, in the sections regarding the Arab, Asian and African perspectives (section 3).

<sup>158</sup> O Yusuaki, *Toward an Intercivilizational Approach to Human Rights*, in JR Bauer and DA Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999, pp 122–123.

<sup>159</sup> DL Donoho, Autonomy, self-governance and the margin of appreciation: developing a jurisprudence of diversity within universal human rights, *Emory International Law Review*, vol 15, no 2, 2001, p 409.

<sup>160</sup> AD Renteln, *International Human Rights: Universalism versus Relativism*, Sage Publications, 1990, p 13.

<sup>161</sup> *Ibid*, p 15.

<sup>162</sup> AD Renteln, The Unanswered Challenge of Relativism and the Consequences for Human Rights, *Human Rights Quarterly*, vol 7, no 4, 1985, p 540.

<sup>163</sup> *Ibid*.

universals will be found to support the international human rights standards (...). For example, there may be no worldwide support for women's rights.<sup>164</sup>

An-Na'im, who has taken a special interest in reconciling Islamic law and human rights, criticizes Renteln for being 'content with the existing least common denominator', a standard An-Na'im finds 'inadequate to assure sufficient human rights throughout the world'.<sup>165</sup> Instead, he advocates for universal cultural legitimacy of human rights through *internal discourse* and *cross-cultural dialogue*. An-Na'im proposes 'to broaden and deepen universal consensus on the formulation and implementation of human rights through internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms'.<sup>166</sup> In other words, An-Na'im defends the need for vague and ambiguous formulations of these standards, leaving the permissible range of how these standards are to be implemented in diverse cultural settings to be worked out through intra and inter-cultural dialogue. An-Na'im also argues for self-critical reflection on both sides: The developed countries of the world should not expect other peoples of the world, including the Muslim peoples, to examine and re-evaluate their cultural traditions in the interest of greater compliance with international standards of human rights *unless* they are willing to examine and re-evaluate their own cultural traditions.<sup>167</sup> While Muslim countries need internal discourse on issues of discrimination against women and non-Muslims, and its restrictions on freedom of religion and belief<sup>168</sup>, 'existing human rights standards and mechanisms for their enforcement must be opened up for new ideas and influences. The process of definition, formulation and implementation of universal human rights must be genuinely universal and not merely Western in orientation and techniques'.<sup>169</sup>

Initially a universalist<sup>170</sup>, Donnelly has since argued for the 'relative universality' of internationally recognised human rights. He contends that 'the universality of human rights is relative to particular contexts'<sup>171</sup>, and emphasizes 'that universal human rights, properly understood, leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity'.<sup>172</sup> Donnelly advocates that human rights are (relatively) universal at the level of the *concept*, but that particular rights concepts have multiple defensible *interpretations*, which in turn have many

<sup>164</sup> Ibid, p 13.

<sup>165</sup> AA An-Na'Im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1991, p 22.

<sup>166</sup> Ibid, p 21.

<sup>167</sup> AA An-Na'im (n 21), p 80.

<sup>168</sup> Ibid 77.

<sup>169</sup> Ibid 80.

<sup>170</sup> J Donnelly, *Human Rights, Individual Rights and Collective Rights*, in: J Berting et al (eds), *Human rights in a pluralist world: individuals and collectivities*, Praeger Publishers, 1990, pp 39–62.

<sup>171</sup> J Donnelly, *International Human Rights: Universal, Relative or Relatively Universal?*, in: Baderin and Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond*, Ashgate, 2010, p 33.

<sup>172</sup> J Donnelly, *The Relative Universality of Human Rights*, *Human Rights Quarterly*, vol 29, no 2, 2007, p 281.

defensible *implementations*<sup>173</sup>: ‘The ways in which these rights are interpreted and implemented, (...) so long as they fall within the range of variation consistent with the overarching concepts, are matters of legitimate variation’.<sup>174</sup> At the level of implementation, he argues that relativity is not only defensible, but even desirable.<sup>175</sup> Finally, he remarks that, while fundamental differences at the level of concepts are relatively rare, they do exist. Such fundamental differences, for instance on issues pertaining to freedom of religion and gender equality, ‘merit intensive discussions both within and between States and civilizations’.<sup>176</sup> According to Donnelly, such ‘dialogue among civilizations’ can take different forms depending on the extent of overlapping consensus on human rights.

I have thus effectively sketched two ends of a continuum of approaches to particular differences connected with internationally recognized human rights. At one end are differences of implementation, (...) where variations are entirely justifiable. Here *dialogue concerning those differences is best seen as a matter of mutual enlightenment*. At the other extreme (...) variations are clearly prohibited. *Dialogue here should be seen as reproof, rejection, and an attempt to change at least behavior, and perhaps even beliefs*.<sup>177</sup>

Like An-Na’im (above) and Brems (below), Donnelly thus seems to advocate for universal cultural legitimacy of human rights through *internal discourse* and *cross-cultural dialogue*.

Mostly in line with Donnelly<sup>178</sup>, Donoho has argued that ‘an international human rights regime could conceivably require universality on the level of agreed basic values, while national governments would be given discretion to decide how to satisfy those general, abstract values in light of local conditions’.<sup>179</sup> However, ‘because the actual significance of any right springs primarily from its specific requirements and interpretation, the international community should strive to limit and control such relativistic variation’.<sup>180</sup> Donoho reasons that human rights are contextual in many

<sup>173</sup> Donnelly uses different terminology in different articles: *substance / interpretations / forms or concept / conceptions / implementations*.

<sup>174</sup> Donnelly (n 26), p 103. For example, Donnelly states, with hesitation, that the prohibition of apostasy is ‘probably’ compatible with the relative universality of article 18 UDHR.

<sup>175</sup> Ibid, p 299; Churchill has described these terms as ‘identifying successively expanding “circles” in which cultural diversity is allowed increased “play”’. Churchill (n 31), p 98.

<sup>176</sup> Donnelly (n 26), p 114.

<sup>177</sup> J Donnelly, *Human Rights and the Dialogue among Civilizations*, unpublished paper, University of Denver, 2000.

<sup>178</sup> Using different terminology, Donnelly and Donoho alike argue that international human rights and culture are not incompatible because of the discretion granted to States to implement human rights policy, and they both consider human rights to be (largely) universal at the level of ‘abstract rights’ or ‘concepts’, and to be more relative when concrete meaning is given to rights through the process of interpretation and application. Donnelly (n 120), p 299; DL Donoho, *Relativism versus Universalism in Human Rights: The Search for Meaningful Standards*, *Stanford Journal of International Law*, vol 27, no 2, 1991, pp 355–356.

<sup>179</sup> Donoho (n 121), p 361.

<sup>180</sup> Ibid, p 347.

respects, varying significantly between different societies and cultures. Accepting and recognising diversity and accommodation of state autonomy and self-governance within the international human rights system', he maintains, seems 'inevitable, necessary, and appropriate'.<sup>181</sup> It is also inherent in the system as it is: '[B]y relying upon the primacy of State implementation and weak mechanisms for international supervision, the international system is already structured to allow for diverse interpretations of the system's generally abstract rights'.<sup>182</sup> According to Donoho, the specific meaning of such abstract rights 'must be developed over time through a process of interpretation and application'.<sup>183</sup> Due to the primacy of State implementation, 'the first layer of interpretation will theoretically be made by national authorities'.<sup>184</sup> The second layer occurs in the work of international human rights institutions which supervise State implementation.<sup>185</sup> Consequently, the main question is the degree of deference to be given to national authorities. The amount of leeway serves 'the critical function of preserving a balance between the need for international supervision, recognition of the individual's needs and respect for self-governance and majoritarian preferences'.<sup>186</sup> Donoho identifies the so-called 'margin of appreciation' doctrine of the European Court of Human Rights, whose work 'has involved dilemmas highly analogous to those raised by the international debate over the universal versus relative nature of human rights'<sup>187</sup>, as a useful doctrine 'worthy of evaluation by international human rights institutions'.<sup>188</sup> Under this doctrine, 'national governments are given a certain degree of discretion regarding the specific manner in which they implement [the] rights'<sup>189</sup>, based on the primacy of State implementation and the notion that 'State authorities are often better situated to judge local conditions'.<sup>190</sup> As long as a State's actions fall within a range of acceptable alternatives, the State's actions are upheld as being within its so-called 'margin of appreciation'.<sup>191</sup> The scope of the margin reserved to State authorities depends on a number of factors, including the degree of (European) consensus on the interpretation and application of the right in question. At the same time, the margin of appreciation goes hand in hand with a European supervision concerning the aim of the measure challenged and its 'necessity'.<sup>192</sup>

Brems, who considers the contemporary human rights framework to be biased towards male and Western human beings, has introduced the concept of 'inclusive universality'. Human rights can be more universal 'by making them more relevant for

<sup>181</sup> Donoho (n 102), p 397.

<sup>182</sup> Ibid, p 397.

<sup>183</sup> Ibid, p 430.

<sup>184</sup> Ibid, p 431.

<sup>185</sup> Ibid, p 432.

<sup>186</sup> Ibid, p 442.

<sup>187</sup> Ibid, p 451.

<sup>188</sup> Ibid, p 442.

<sup>189</sup> Ibid, p 451.

<sup>190</sup> Ibid, p 452.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

more people'.<sup>193</sup> Thus, human rights have to be 'more receptive' to cultural differences.<sup>194</sup> According to Brems, at least part of the non-Western cultural claims and critiques are justified, and 'the universality of human rights can be promoted better by attempting to accommodate some of the claims of non-Western societies in a flexible and dynamic human rights system'.<sup>195</sup> Brems maintains that improving respect for human rights is first and foremost a matter for intra-societal discourse, yet argues further for 'a dialogue among civilizations' in order to strike the 'difficult balance between the necessity to change societies in the name of human rights and the need to change human rights in the name of the diversity of societies'.<sup>196</sup> She argues that flexibility exists at the level of the formulation of standards, and in the interpretation and implementation of standards.<sup>197</sup> In connection to this, Brems identifies two techniques which already exist within international human rights law, and which can be used to accommodate cultural diversity within universal human rights: the principle of 'progressive realization' and the doctrine of the 'margin of appreciation'. The principle of 'progressive realization' reflects a recognition that the realisation of rights can be hampered by contextual factors, and that these rights occasionally can only be achieved over a period of time. While this principle is usually connected to 'lack of resources', Brems argues that this principle can also be applied to other contextual factors, including cultural obstacles.<sup>198</sup> Like Donoho, Brems considers the 'margin of appreciation' to have the potential to reconcile universality and diversity in the interpretation and implementation of rights, if its use be more explicit and the Court or Committee applying it strives to provide a clear explanation for the way it is applied.<sup>199</sup> Therefore, accommodation of cultural claims can be realised by a 'flexibility approach', i.e., a flexible interpretation of existing international human rights standards, or by a 'transformation approach', i.e., through a transformation of the norms and institutions of the international human rights regime. Examples of the latter include the upgrading of economic and social rights, the inclusion of non-Western claims such as the recognition of more collective human rights, and the recognition of human duties in addition to rights.<sup>200</sup> This would require a cross-cultural dialogue or 'dialogue among civilizations'.

According to Merry, from an anthropologist's perspective, universal human rights and cultural diversity can be reconciled through vernacularisation: a process of appropriation and translation. For human rights ideas to be effective, she argues that 'they need to be translated into local terms and situated within local contexts of power

<sup>193</sup> E Brems, *Reconciling Universality and Diversity in International Human Rights Law*, *Human Rights Review*, vol 5, no 3, 2004, p 12.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, p 11.

<sup>196</sup> *Ibid.*, pp 15–16.

<sup>197</sup> *Ibid.*, p 13.

<sup>198</sup> Brems (n 53), pp 157–158.

<sup>199</sup> Brems (n 29), p 105.

<sup>200</sup> E Brems, *Reconciling Universality and Diversity in International Human Rights Law*, in: A Sajó (ed), *Human Rights with Modesty: The Problem of Universalism*, Springer Netherlands, 2004, p 225.

and meaning'.<sup>201</sup> According to Merry, 'translation does not mean transformation'. Despite changes in the cultural phrasing of human rights ideas, the underlying assumptions remain the same. Although human rights are 'repackaged in culturally resonant wrappings', the core values of the human rights system ('individualism, autonomy, choice, bodily integrity, and equality') remain intact.<sup>202</sup> The human rights system 'is based on the assumption that local features of culture, history and context should not override these universal principles'.<sup>203</sup> Cultural differences are to be respected, but only within limits.<sup>204</sup> If there is a conflict, local culture will have to give way to international human rights.<sup>205</sup>

Zwart has proposed an alternative view on safeguarding the universal acceptance of human rights with genuine respect for national and local culture<sup>206</sup>, the so-called 'receptor approach'. He maintains that, under public international law, 'States are bound by the treaty obligations they have accepted, but, so long as they meet the international standards, they may implement them as they see fit'.<sup>207</sup> States are therefore free to choose the means by which they meet their obligations. While 'Western States usually rely on legal means', granting enforceable individual rights, in 'many African and Asian societies, which are communal in nature, substantial cultural texture is provided by non-legal social institutions like community, duties, and religion'.<sup>208</sup> Although States are free to translate human rights obligations into individual rights, they should also be able to 'rely on duties and responsibilities as mirrors of individual rights'.<sup>209</sup> Zwart argues that international human rights obligations do not necessarily require implementation through legal means or enforceable individual rights, they can also be implemented (more fully) through local – non-legal – social institutions and arrangements ('receptors'), such as 'family, kinship, solidarity, education, awareness-raising, and community'.<sup>210</sup> Similar to Merry, the receptor approach is focused on 'how international norms can be translated into the local community, while tying in to local culture'.<sup>211</sup> It also takes a process approach towards reform, more in line with An-Na'im, by relying on existing social institutions.<sup>212</sup>

<sup>201</sup> SE Merry, *Human Rights and Transnational Culture: Regulating Gender Violence through Global Law*, *Osgoode Hall Law Journal*, vol 44, no 1, 2006, p 55.

<sup>202</sup> SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, University Of Chicago Press, 2006, p 221.

<sup>203</sup> Merry (n 144), p 74.

<sup>204</sup> Ibid.

<sup>205</sup> T Zwart, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, *Human Rights Quarterly*, vol 34, no 2, 2012, p 568.

<sup>206</sup> T Zwart, *Safeguarding the Universal Acceptance of Human Rights Through the Receptor Approach*, *Human Rights Quarterly*, vol 36, no 4, 2014, p 898.

<sup>207</sup> Zwart (n 148), p 568.

<sup>208</sup> Zwart (n 148), p 549.

<sup>209</sup> Zwart (n 149), p 902.

<sup>210</sup> Zwart (n 148), p 569.

<sup>211</sup> Ibid, p 568.

<sup>212</sup> Ibid, p 568. In the words of An-Na'im, 'existing human rights standards and mechanisms for their enforcement must be opened up for new ideas and influences'. AA An-Na'im (n 21), p 80. Donders and Vleugel argue that the use of the 'receptor approach' contains the risk of losing sight of the potential

Healy, Bell and Kinley have proposed theories which reconcile universal human rights and cultural diversity through approaches that seem largely similar to the ones discussed above. Healy's 'hermeneutico-dialogical approach' draws heavily on An-Na'im's internal cultural discourse and cross-cultural dialogue, advocating 'a moderate universalism which endorses the universality of the internationally recognized standards and remains committed to their cross-cultural implementation, while defending the legitimacy of interpreting and implementing them in a manner commensurate with culture-specific beliefs, values and practices'.<sup>213</sup> Bell calls for an 'interpretive approach, one that engages with different cultural traditions'.<sup>214</sup> Much like An-Na'im, he contends that any international human rights regime, 'even one that emerges from an inclusive cross-cultural dialogue', needs to be complemented with an internal cultural discourse: 'many rights battles will be fought within societies according to local norms and justifications'.<sup>215</sup> In line with Brems, Kinley argues that human rights are inherently pluralistic, because international human rights laws 'reflect substantial elasticity as regards their statement, interpretation and implementation'.<sup>216</sup> According to Kinley, the application of the subsidiarity principle in international human rights law 'illustrates the capacity of human rights law to accommodate concepts beyond those expressly articulated in human rights instruments'<sup>217</sup>, such as the cultural context in which human rights laws are applied.

In contrast to these authors, Ignatieff argues that, in their desire to find common ground with Islamic and Asian positions<sup>218</sup>, Western defenders of human rights 'risk compromising the very universality they ought to be defending'.<sup>219</sup> He warns against the desire 'to make human rights more palatable to less individualistic cultures in the non-Western world', and stands firm on the individualism of rights: 'Rights are meaningful only if they confer entitlements and immunities on individuals; they are worth having only if they can be enforced against institutions such as the family, the State, and the church. This remains true even when the rights in question are collective or group rights'.<sup>220</sup> Ignatieff denies that human rights force Western culture on other societies, contending that '[f]or all its individualism, human rights rhetoric does not require adherents to jettison their other cultural attachments'. Instead, human rights mandate

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negative aspects of cultural approaches. YM Donders and VW Vleugel, A New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart's Article in HRQ, *Human Rights Quarterly*, vol 36, no 3, 2014, pp 654–662.

<sup>213</sup> P Healy, Human rights and intercultural relations: a hermeneutico-dialogical approach, *Philosophy Social Criticism*, vol 32, no 4, 2006, pp 517–518. In plain English, 'hermeneutics' is the art of text interpretation, and 'dialogical' refers to the mind's ability to imagine the different positions/perspectives of participants in a dialogue.

<sup>214</sup> DA Bell, Which rights are universal?, *Political Theory*, vol 27, no 6, 1999, p 853.

<sup>215</sup> *Ibid*, p 854.

<sup>216</sup> Kinley (n 97), p 50.

<sup>217</sup> *Ibid*, p 53.

<sup>218</sup> Ignatieff identifies only three cultural challenges, Islamic, Asian, and from within (the West); African perspectives are not discussed.

<sup>219</sup> Ignatieff (n 27), p 106.

<sup>220</sup> *Ibid*, p 108.

‘the right to choose, and specifically the right to exit a group when choice is denied’,<sup>221</sup> Therefore, the concern should not be the ‘apologizing for the individualism of Western human rights standards’, but the creation of ‘conditions in which individuals on the bottom are free to avail themselves of such rights’.<sup>222</sup> Ignatieff argues that this ‘depends on close cultural understanding of the frameworks that often constrain choice’.<sup>223</sup> Such sensitivity to the constraints limiting individual freedom in different cultures ‘is not the same thing as deferring to these cultures’, and ‘does not mean abandoning universality’. It means ‘facing up to a demanding intercultural dialogue in which all parties come to the table under common expectations of being treated as moral equals’.<sup>224</sup> Ignatieff contends that traditional society is oppressive for individuals ‘because it does not accord them a right to speak and be heard’.<sup>225</sup> That is what makes human rights universal: ‘[T] heir role is not in defining the content of culture but in trying to enfranchise all agents so that they can freely shape that content’.<sup>226</sup> Human rights ‘empower the powerless, and give voice to the voiceless, so that they get to shape the culture that they are a part of’.<sup>227</sup>

When taking stock of all these theories, the reasoning seems to be that human rights can be made (more) receptive to cultural differences by interpretative reading of existing international standards, while being open to the possibility of revising these standards if necessary. All theories which argue that the dichotomy between universalism and cultural relativism can be overcome by building on two basic principles: (1) flexibility in interpretation and implementation; (2) internal debate and cross-cultural dialogue.

The first principle concerns the *content* of the norms, proclaiming that human rights are (largely) universal at the level of concepts, and they can be made local and culture-specific through (flexibility in) interpretation and implementation. This idea is, for example, evident in Donnelly’s theory of universal concepts and relative interpretations

<sup>221</sup> Ibid, p 111.

<sup>222</sup> Ibid, p 112.

<sup>223</sup> Here, Ignatieff uses the issue of female circumcision as illustration:

What may appear as mutilation in Western eyes is, in some cultures, simply the price of tribal and family belonging for women. Accordingly, if they fail to submit to the ritual, they lose their place in that world. Choosing to exercise their rights, therefore, may result in social ostracism (...). *Human rights advocates should be aware of what it really means for a woman to abandon traditional practices under such circumstances.* And activists have an equal duty to inform women of the medical costs and consequences of these practices and to seek, *as a first step, to make them less dangerous for those who choose to undergo them. As for the final decision, it is for women themselves to decide how to adjudicate between tribal and Western wisdom.* The criteria of informed consent that regulate medical patients’ choices in Western societies are equally applicable in non-Western settings, and *human rights activists must respect the autonomy and dignity of agents.* (...) *In traditional societies, harmful practices can be abandoned only when the whole community decides to do so.* Otherwise, individuals who decide on their own face ostracism and worse. Consent in these cases means collective or group consent. Yet even group consent must be built on consultation with the individuals involved  
Ignatieff (n 27), p 112, emphasis added, VV.

<sup>224</sup> Ignatieff (n 27), p 113.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid, p 111.

and implementations, but it is also reflected in Brems' flexibility approach, Merry's vernacularisation approach, and Zwart's receptor approach. The common underlying premise appears to be that, although human rights should be enjoyed by all persons on the basis of equality, they do not need to be implemented in exactly the same way universally, regardless of other conditions. Donders has clarified this by making a distinction between *formal* universality and *substantive* universality, between universality of *application* and universality of *implementation*, and between universality of the *subjects* (beneficiaries) and universality of the *norms* (content). In general, formal universality, or the universality of the subjects of human rights, is not very controversial. International human rights instruments clearly endorse the universality of the subjects of human rights: [H]uman rights are held equally by all individuals. The universality of the normative content of human rights, and the universality of the implementation of human rights, are subject to more debate.<sup>228</sup> In connection to this, the Advisory Council on International Affairs of the Netherlands stated that 'universality does not mean uniformity'.<sup>229</sup> As Donders put it, '[t]he universal value and application of human rights does not necessarily imply the *uniform implementation* of these rights'.<sup>230</sup>

The second basic principle reflected in these theories is the need for internal discourse and cross-cultural dialogue. This principle concerns the *process* of interpretation and implementation, and the *actors* involved in this process. This principle is evident in An-Na'im's call for 'internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms', and it is also reflected in Renteln's argumentation for adopting 'a broader view of human rights which incorporates diverse concepts', Donnelly's proposition for 'intensive discussions both within and between States and civilizations' regarding 'fundamental differences at the level of concepts', Ignatieff's argument for 'close cultural understanding' with a view to 'facing up to a demanding intercultural dialogue', Zwart's approach to reform by relying on existing social institutions, and Brems' transformation approach, as well as her call for internal debate within societies and dialogue among civilisations.

## 5 CONCLUDING REMARKS

In this book, 'culture' should be understood as having a broad meaning, as a 'set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, not only art and literature, but lifestyles, ways of living together, value systems, traditions and beliefs'.<sup>231</sup> In essence, human rights law is a

<sup>228</sup> Donders (n 9), pp 7–8.

<sup>229</sup> Advisory Council on International Affairs (AIV) of the Netherlands, *Universality of Human Rights. Principles, Practice and Prospects*, Advice No 63, November 2008, p 19. See also chapter 1, section 2.

<sup>230</sup> Donders (n 9), p 8.

<sup>231</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001), preamble.

cultural system in itself<sup>232</sup>, in some ways dictating how people should live together. As such, it is only logical that tensions occur between international human rights and the different cultures in which they are (to be) applied. These tensions are often presented as a conflict between so-called African, Asian, or Islamic values and perspectives and the 'Western bias' of international human rights. Scholars have proposed different theories on how to reconcile the universality of human rights with these cultural values and perspectives. These theories were shown to introduce two main principles to promote this reconciliation: flexibility in interpretation and implementation of rights, focusing on the content; transformation of rights through internal and cross-cultural dialogue, focusing on the process and the actors involved in the process.

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<sup>232</sup> P Alston and R Goodman, *International Human Rights*, Oxford University Press, 2012, p 541; Merry (n 145), p 17.



# CHAPTER 3

## UN TREATY BODIES

### Treaties, Committees, Working Methods

#### 1 INTRODUCTION

The aim of this chapter is to explain the monitoring procedures with which the treaty bodies can oversee implementation of the treaty provisions by States parties: the State reporting procedure, and the adoption of general comments or recommendations. It describes the working methods of the treaty bodies to fulfil their function of monitoring and supervising the implementation of States parties' obligations under the treaties, and clarifies the treaty bodies' role in the interpretation of the scope, content, and application of treaty norms. This is important because these procedures enable the treaty bodies to monitor and evaluate the implementation of human rights obligations by States, and thereby to find a balance between the universality of the rights embodied in their respective treaties and their local and culture-specific implementation. A basic understanding of the composition, working methods and mandates of the treaty bodies is essential for understanding the following chapters, which provide an overview of the obligations of States to respect and foster positive aspects of culture as well as to promote change and elimination of negative or harmful aspects of culture, which come to the fore in the State reporting procedure ('concluding observations'), and in general comments or recommendations.

After a brief introduction of the three treaties and the substantive rights which they cover (section 2), the three monitoring bodies, the Committees, are introduced, with an overview of their composition, meeting schedule and decision-making processes (section 3). In the subsequent section, their working methods are examined (section 4). The final sections deal with the legal status of the treaty bodies' output (section 5), the different legitimacy challenges which the treaty bodies are facing (section 6), and the potential role of treaty bodies in reconciling the universality of human rights with cultural diversity, in particular according to (some of) the authors discussed in chapter 2 (section 7).

#### 2 THE TREATIES

The Universal Declaration of Human Rights (UDHR) is widely considered to be the foundation of international human rights law, and the source of inspiration for a

rich body of legally binding international human rights treaties. Building on norms in the UDHR, member States of the UN adopted the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two Covenants have developed most of the rights enshrined in the UDHR, making them binding on States which have ratified the treaties.<sup>233</sup> Over time, the body of international human rights law has continued to grow and evolve, and has further elaborated the fundamental rights and freedoms contained in the International Bill of Human Rights (consisting of the UDHR, ICCPR and ICESCR), addressing concerns such as racial discrimination<sup>234</sup>, torture<sup>235</sup>, enforced disappearances<sup>236</sup>, disabilities<sup>237</sup>, and the rights of women<sup>238</sup>, children<sup>239</sup>, and migrant workers.<sup>240</sup> The present research is focused on three of these treaties: the ICCPR, the ICESCR and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

## 2.1 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR was adopted by the UN General Assembly in 1966, and entered into force in 1976.<sup>241</sup> At the time of writing, 173 countries have become States parties to it.<sup>242</sup>

Article 1 recognizes the right of all peoples to self-determination, including the right to ‘freely pursue their economic, social and cultural development’, and ‘freely dispose of their natural wealth and resources’. Article 1.2 establishes a negative right of a people not to be deprived of its own means of subsistence.

<sup>233</sup> The Universal Declaration of Human Rights (UDHR) is often described as part of customary international law, although the application of the traditional tests for custom to human rights (State practice accompanied by *opinio iuris*) is difficult because ‘States do not usually make [human rights] claims on other States or protest violations [of human rights] that do not affect their nationals’. O Schachter, *International Law in Theory and Practice: General Course in Public and International Law*, Martinus Nijhoff, 1982.

<sup>234</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

<sup>235</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

<sup>236</sup> International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPED).

<sup>237</sup> International Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (ICRPD).

<sup>238</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>239</sup> Convention on the Rights of the Child (adopted 20 November 1980, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

<sup>240</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW).

<sup>241</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>242</sup> UN Treaty Collection, < <https://treaties.un.org> > accessed 8 August 2019.

Articles 2 to 5 are provisions of an overarching or structural nature, obliging parties to take legal or other measures, when and as appropriate, ‘to give effect to the rights recognised in the Covenant’, and to ensure an effective legal remedy for any violation of those rights. The rights are to be recognised ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (art 2), and to be enjoyed equally by men and women (art 3). The rights can only be limited ‘in time of public emergency which threatens the life of the nation’ (art 4).

Articles 6 to 27 list the substantive individual rights guaranteed by the treaty: the right to life and freedom from torture and slavery (arts 6–8), freedom from arbitrary arrest and detention and the right to *habeas corpus* (arts 9–11), fair trial and fair hearing rights (arts 14–16), freedom of movement (arts 12–13), freedom of thought, conscience and religion and freedom of speech (arts 18–19), freedom of association and assembly (arts 21–22), family rights and the rights to birth registration and a nationality (arts 23–24), the right to privacy (art 17), prohibition of any propaganda for war as well as any advocacy of national or religious hatred which constitutes incitement to discrimination, hostility or violence (art 20), political participation (art 25), non-discrimination and equality before the law (art 26), and the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language (art 27).

## 2.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The International Covenant on Economic, Social and Cultural Rights was adopted by the General Assembly in 1966 and entered into force in 1976 in accordance with the provisions of its article 27.<sup>243</sup> At present, there are 170 States parties to the Covenant.<sup>244</sup>

The ICESCR is composed of thirty-one articles in a preamble and five parts. Part I is comprised of article 1, which proclaims the right of all peoples to self-determination, including the right freely to pursue their economic, social and cultural development and to freely dispose of their natural wealth and resources. Part II establishes the principle of ‘progressive realization’ (art 2(1)), and requires States to guarantee that these rights will be exercised ‘without discrimination of any kind’ (art 2(2)), as well as to ensure ‘the equal right of men and women to the enjoyment of all (...) rights set forth in the Covenant’ (art 3).

The heart of the Covenant can be found in part III, articles 6 to 15, which outlines the rights to be protected. Included are the right to work (art 6), the right to fair

<sup>243</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 3 (ICESCR). Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with art 27.

<sup>244</sup> UN Treaty Collection, < <https://treaties.un.org> > accessed 8 August 2019.

conditions of employment (art 7), the right to join and form trade unions (art 8), the right to social security (art 9), the right to protection of the family (art 10), the right to an adequate standard of living, including the right to food, clothing, and housing (art 11), the right to health (art 12), the right to education (arts 13–14), and the right to take part in cultural life (art 15).

### 2.3 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women, the only international human rights treaty which is exclusively devoted to gender equality, was adopted by the UN General Assembly in 1979, and entered into force in 1981.<sup>245</sup> It has been described as an ‘international bill of rights for women’<sup>246</sup>, as it comprehensively addresses women’s rights within civil, political, economic, social and cultural life. To date, 189 countries have become States parties.<sup>247</sup>

Articles 1 to 5 set out the purpose of the Convention and the corresponding States parties’ general obligations. The objective of the Convention is the elimination of all forms of discrimination against women on the basis of sex. Women are guaranteed equal recognition, enjoyment and exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, domestic, and all other fields, irrespective of their marital status, and on the basis of equality with men.<sup>248</sup> States parties are required to undertake the necessary policy measures at the national level ‘by all appropriate means and without delay’ (art 2), and ‘shall take (...) all appropriate measures, including legislation, to ensure the full development and advancement of women’ (art 3). CEDAW is not gender-neutral: According to article 4, ‘temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination’. Article 5 addresses the structural nature of discrimination, requiring States parties to tackle the causes of women’s inequality by promoting the modification of 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’.

Articles 6 to 16 cover the specific substantive areas of the Convention. Under article 6, States parties are obliged to take measures to suppress trafficking, and exploitation of prostitution, of women. States parties are further required to take all appropriate measures to eliminate discrimination against women in political

<sup>245</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979; entry into force 3 September 1981, in accordance with art 27(1).

<sup>246</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), Introduction.

<sup>247</sup> UN Treaty Collection, < <https://treaties.un.org> > accessed 8 August 2019.

<sup>248</sup> CEDAW, art 1.

and public life (art 7); to ensure that women, on equal terms with men and without any discrimination, have the opportunity to represent their Government at the international level and to participate in the work of international organisations (art 8); to acquire, change or retain their nationality and transmit it to their children (art 9); education (art 10); employment (art 11); health care (art 12); family benefits, financial credit, and participation in recreational activities, sport, and cultural life (art 13). States parties shall also take measures to eliminate discrimination against women in rural areas (art 14), and shall accord to women equality before the law, legal capacity, and freedom of movement (art 15). Finally, under article 16, States parties shall take measures ‘to eliminate discrimination against women in all matters relating to marriage and family relations’. The Convention contains no explicit reference to violence against women, an omission resolved by the Committee through its General Recommendation No 19, explaining such violence as a form of discrimination under article 1.

## 2.4 RESERVATIONS

A reservation is ‘a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State’.<sup>249</sup> States can make reservations to a treaty when they sign, ratify, accept, approve, or accede to it. By stating a reservation, States may indicate that they do not consider themselves bound by certain aspects or provisions of the treaty, without having to reject the entire treaty.<sup>250</sup> Reservations may have a cultural, often religious, justification: States declare not to be bound to particular provisions which are incompatible with their cultural or religious specificities. Such ‘cultural reservations’ reflect cultural differences between States which they wish to preserve. The many ‘sharia reservations’ are notorious in this respect, which are reservations submitted by Islamic States, declaring that they are willing to comply with the content of the articles on the condition that such compliance does not oppose sharia.<sup>251</sup>

Some have made the argument that reservations ‘are a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity across nations’<sup>252</sup>, while others have expressed concern about reservations, in particular those

<sup>249</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 2 (1) (d).

<sup>250</sup> YM Donders, *Human Rights: eye for cultural diversity* (Oratiereeks), Universiteit van Amsterdam, 2012, p 6. Available at <[www.oratiereeks.nl/upload/pdf/PDF-6449weboratie\\_Donders.pdf](http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf)>.

<sup>251</sup> YM Donders, Cultural Pluralism in International Human Rights Law: The Role of Reservations, in: AF Vrdoljak (ed), *The cultural dimension of human rights*, Oxford University Press, 2013, pp 205–239, section 3.2 (B).

<sup>252</sup> E Neumayer, Qualified Ratification: explaining reservations to international human rights treaties, *The Journal of Legal Studies*, vol 36, no 2, 2007, p 398.

expressing cultural diversity, as they would undermine the universality of human rights.<sup>253</sup>

The general regime of reservations to multilateral treaties is laid down in articles 19 to 21 of the Vienna Convention on the Law of Treaties (VCLT).<sup>254</sup> In accordance with article 19 VCLT, a State may formulate a reservation upon signing, ratifying, accepting, approving or acceding to a treaty, unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; (c) the reservation is not compatible with the object and purpose of the treaty. Whether a reservation is impermissible – i.e., explicitly or implicitly prohibited by the treaty, or contrary to the object and purpose thereof – is a determination to be made by States parties to the treaty. As per article 20, the reservation should be accepted by all parties.<sup>255</sup> An objection by another contracting State to a reservation does not preclude the entry into force of the treaty between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State.<sup>256</sup> If a State objects to a reservation, but not to the entry into force of the treaty between itself and the reserving State, ‘the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation’.<sup>257</sup>

Human rights treaties are different in nature from traditional multilateral treaties, as they focus not on the reciprocal exchange of rights for the mutual benefit of the contracting States, but on the protection of the basic rights of individuals. The treaty obligations are *erga omnes*, rather than with regard to particular States.<sup>258</sup> According to the International Court of Justice (ICJ), such treaties do not maintain a ‘perfect contractual balance between rights and duties’ and States have neither individual advantages or disadvantages nor interest of their own, but merely a common interest.<sup>259</sup> As a result, the general VCLT rules on reservations are not easily applicable.<sup>260</sup>

This has implications for the practice of reservations to human rights treaties in relation to the acceptance or rejection of reservations by other States. The ICJ has taken the view that the effect of a reservation is not subject to the explicit or implicit approval of all contracting parties. Likewise, a reservation is not automatically accepted should

<sup>253</sup> Ibid, p 398; V Pergantis, *Reservations to Human Rights Treaties, Cultural Relativism and the Universal Protection of Human Rights*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007, p 447.

<sup>254</sup> Vienna Convention on the Law of Treaties (n 17).

<sup>255</sup> Vienna Convention on the Law of Treaties (n 17), art 20 (5). Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

<sup>256</sup> Ibid, ART 20 (4) (B).

<sup>257</sup> Ibid, art 21 (3).

<sup>258</sup> M Shaw, *International Law*, 8<sup>th</sup> edition, Cambridge University Press, 2017, p 743.

<sup>259</sup> International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports (1951) 19, 28 May 1951, p 12.

<sup>260</sup> Donders (n 19), pp 209–210.

none of the other States parties have objected to it.<sup>261</sup> In its advisory opinion on the Reservations to the Genocide Convention case, the ICJ concluded that the ‘appraisal of a reservation and the effect of objections (...) depend upon the particular circumstances of each individual case’<sup>262</sup>, and confirmed that, in principle, States as contractors assess the validity of reservations by other States parties.<sup>263</sup> States can object to reservations, for instance, if they are considered to be incompatible with the object and purpose of the treaty.

The International Law Commission (ILC) has established a test for determining the compatibility of a reservation with the object and purpose of human rights treaties:

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.<sup>264</sup>

Even though States parties are considered the principle actors in assessing the permissibility of reservations, international monitoring bodies have increasingly involved themselves in this task.<sup>265</sup> The HRC adopted General Comment No 24 on issues relating to reservations, in which the following is argued:

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty,

<sup>261</sup> International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), ICJ Reports (1951) 19, 28 May 1951, p 13.

<sup>262</sup> Ibid, p 15.

<sup>263</sup> **DONDERS (N 19), P 212.**

<sup>264</sup> International Law Commission, Report on the Work of its Fifty-Ninth Session (7 May to 5 June and 9 July to 10 August 2007), GAOR 62<sup>nd</sup> Session, Supp No 10 (A/62/10), p 65. This has later been codified in the ILC’s Guide to Practice on Reservations to Treaties (2011), guideline 3.1.5 on ‘Incompatibility of a reservation with the object and purpose of the treaty: A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d’être* of the treaty’; guideline 3.1.5.6 on ‘Reservations to treaties containing numerous interdependent rights and obligations: To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty’. ILC, Guide to Practice on Reservations to Treaties, A/66/10, para 75, *Yearbook of the International Law Commission*, 2011, vol II, Part Two.

<sup>265</sup> **DONDERS (N 19), P 212.**

the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.<sup>266</sup>

The CESCR has not adopted any formal position on reservations. The reservations are not considered a major problem, being few in number and generally uncontroversial.<sup>267</sup> The CEDAWCee, while acknowledging that the permissibility of reservations is primarily the responsibility of States, considers that it ‘has an important role to play’ itself<sup>268</sup>, referring to the mandate in the Vienna Declaration and Programme of Action stating that ‘the [CEDAWCee] should continue its review of reservations to the Convention’.<sup>269</sup>

While the competence of human rights treaty bodies to assess the permissibility of reservations is (generally) considered subject to control by the contracting parties in accordance with the VCLT, the ILC accepts that it is part of their functions:

In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, when the issue comes before them in the exercise of their functions, including the compatibility of the reservation with the object and purpose of the treaty. Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction vis-à-vis the States concerned, *whether in their consideration of claims by States or individuals or of periodic reports, or in their exercise of an advisory function*; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.<sup>270</sup>

<sup>266</sup> HRC, General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, 1994, para 18; Inter-Committee Meeting of the human rights treaty bodies, The Practice of Human Rights Treaty Bodies with respect to Reservations to International Human Rights Treaties, HRI/MC/2005/5, 13 June 2005, para 18.

<sup>267</sup> Inter-Committee Meeting of the human rights treaty bodies, The Practice of Human Rights Treaty Bodies with respect to Reservations to International Human Rights Treaties, HRI/MC/2005/5, 13 June 2005, para 20.

<sup>268</sup> Statements on reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women, A/53/38/Rev.1, para 22. Available at <https://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/Reservations-English.pdf>.

<sup>269</sup> UN World Conference on Human Rights, Vienna Declaration and Programme of Action (adopted on 25 June 1993) A/CONF.157/23, para 39.

<sup>270</sup> GAOR, Report of the International Law Commission, Sixty-first session, Supplement No 10 (A/64/10), 2009, section 3.2 (‘Assessment of the permissibility of reservations’), pp 289–290 (emphasis added, VV). Available at <[http://legal.un.org/ilc/documentation/english/reports/a\\_64\\_10.pdf](http://legal.un.org/ilc/documentation/english/reports/a_64_10.pdf)> accessed 8 August 2019. In the adopted Guide to Practice on Reservations to Treaties (2011), guideline 3.2.1 states:

Competence of the treaty monitoring bodies to assess the permissibility of reservations: 1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization. 2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

However, the ILC is also clear about the limits, arguing that ‘in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations’, and that ‘the human rights treaty bodies (...) may not substitute their own judgement for the State’s consent to be bound by the treaty’.<sup>271</sup> More specifically, in its draft guidelines on reservations to treaties, the ILC states:

A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization. *The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.*<sup>272</sup>

As to the legal consequences of a reservation, the argument has been made that ‘there is a trend with regard to human rights treaties to regard impermissible reservations as severing that reservation so that the provision in question applies in full to the reserving State’.<sup>273</sup> As the HRC put it:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.<sup>274</sup>

However, the ILC is critical about this approach, stressing that the reserving State has the responsibility to take action in case of inadmissibility of a reservation, for example by modifying or withdrawing it, or ‘forgoing becoming a party to the treaty’.

The Special Rapporteur on Reservations to Treaties, appointed by the ILC, has pointed out the following:

The reservations regime instituted by the Vienna Conventions does not impose static solutions on contracting States (...); rather, it leaves room for dialogue among the key players, namely, the author of the reservation, on the one hand, and the other contracting States (...) and any monitoring bodies established by the treaty, on the other.<sup>275</sup>

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Guideline 3.2.3 on ‘Consideration of the assessments of treaty monitoring bodies’ provides that ‘States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body’s assessment of the permissibility of the reservations’. ILC, Guide to Practice on Reservations to Treaties (n 32).

<sup>271</sup> Ibid.

<sup>272</sup> Ibid; Draft guidelines on reservations to treaties, section 3.2.1 (‘Competence of the treaty monitoring bodies to assess the permissibility of reservations’), p 296 (emphasis added, VV).

<sup>273</sup> Shaw (n 26), p 699.

<sup>274</sup> HRC, General Comment No 24 (n 34), para 18;

<sup>275</sup> Report of the Special Rapporteur on Reservations to Treaties, Seventeenth report on reservations to treaties, A/CN.4/647 and Add.1, 2011, para 2.

This ‘reservations dialogue’ has been elaborated in an annex to the ILC’s Guide to Practice on Reservations to Treaties. ‘Bearing in mind the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein’, and ‘[r]ecognizing the role that reservations to treaties may play in achieving this balance’, the ILC is ‘[c]oncerned at the number of reservations that appear incompatible with the limits imposed by the law of treaties, in particular article 19 of the Vienna Conventions on the Law of Treaties’. It considers that ‘States (...) should address the concerns and reactions of other States (...) and monitoring bodies and take them into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation’, and that ‘States and (...) monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken’.<sup>276</sup> A central element of the reservations dialogue is that the actor (i.e., State party) explains and clarifies the reasons why the reservation was formulated.<sup>277</sup> The reasons and explanations given for the reservation facilitate the work of the bodies with competence to assess the reservation’s validity, including other concerned States and treaty monitoring bodies.<sup>278</sup>

Cultural reservations are often the object of disagreement. Research has shown that, in general, disagreements over the permissibility of cultural reservations are not so much about the cultural or religious arguments per se, but about the consequences of these reservations for the implementation of the treaty. Merely when cultural or religious arguments undermine the working of the treaty, they are not accepted by other States parties and/or the treaty monitoring bodies.<sup>279</sup>

Unlike the individual complaints procedure<sup>280</sup>, the State reporting procedure is particularly suitable for the purpose of a ‘reservations dialogue’. When examining State reports, the treaty monitoring bodies have the opportunity to enter into a dialogue with the State party, allowing them to ask for explanation and clarification of reservations and to express concern at the entry of reservations or the failure to withdraw or modify them.

Chapter 4<sup>281</sup> and chapter 6<sup>282</sup> include illustrations of the Committees’ approach to such reservations. In general, States parties are recommended to reconsider their

<sup>276</sup> GAOR, Report of the International Law Commission, Sixty-third session, A/66/10/Add.1, Annex Conclusions on the reservations dialogue, 2011. Available at <<http://legal.un.org/ilc/reports/2011/english/addendum.pdf>> accessed 8 August 2019.

<sup>277</sup> Ibid, pp 135–136.

<sup>278</sup> Ibid.

<sup>279</sup> Donders (n 19), p 33.

<sup>280</sup> Treaty bodies may need to assess the validity of reservations when deciding whether or not the claim can be admitted. Although States parties may challenge the admissibility of a complaint, the procedure – with exclusively written explanations or statements – does not provide a good platform for dialogue, ie, the exchange of views on reservations in respect of which concerns have been raised, to explain and clarify the reasons for which the reservation was formulated, and to coordinate the measures to be taken.

<sup>281</sup> Chapter 4, section 2.1.2, on France’s and Turkey’s reservations to art 27 ICCPR.

<sup>282</sup> Chapter 6, section 2.3.1 on ‘sharia reservations’ Mauritania, and section 2.3.3 on ‘sharia reservations’ Bahrain and Algeria.

reservations and to ensure the effective application of the treaty.<sup>283</sup> For example, Tunisia was recommended to ‘ensure equality between women and men in marriage and family relations and to withdraw its reservations to article 16’<sup>284</sup>, while Mauritania was encouraged to ‘ensure that the reference to Islam does not prevent the full application of the Covenant in its legal order and does not serve to justify the State party not implementing its obligations under the Covenant’.<sup>285</sup>

### 3 THE COMMITTEES

The human rights treaty bodies are Committees of independent experts which monitor implementation of the international human rights treaties. The Human Rights Committee (HRC) monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) and its optional protocols. The Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on the Elimination of Discrimination against Women (CEDAWCee) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women and its optional protocol (CEDAW). The treaty bodies meet in Geneva, Switzerland. All three treaty bodies receive secretarial support from the Human Rights Treaties Division of the OHCHR. The secretariat functions provided by the OHCHR allow continuity and organization of the work of the Committees.<sup>286</sup>

#### 3.1 HUMAN RIGHTS COMMITTEE (HRC)

Articles 28 to 45 ICCPR govern the establishment of the Human Rights Committee (HRC) and provide for its functions and procedures.<sup>287</sup> The HRC consists of eighteen members, ‘who shall be of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience’, and who serve in their personal capacity<sup>288</sup> for four-year terms.<sup>289</sup> Each member is nominated by the respective State Party, and he or she is elected by the States Parties in a secret ballot.<sup>290</sup> In the composition of the

<sup>283</sup> This was for example the case in HRC, Concluding Observations France, CCPR/C/FRA/CO/5 (2015), para 5.

<sup>284</sup> CEDAWCee, Concluding Observations Tunisia, CEDAW/C/TUN/CO/6 (2010), para 61.

<sup>285</sup> HRC, Concluding Observations Mauritania, CCPR/C/MRT/CO/1 (2013), para 6.

<sup>286</sup> M Odello and F Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice*, Routledge, 2013, pp 119–120.

<sup>287</sup> OHCHR Fact Sheet No 15 (Rev 1), *Civil and Political Rights: The Human Rights Committee*, 2005, p 9. Available at < <https://www.refworld.org/docid/4794773c0.html>>.

<sup>288</sup> ICCPR (n 9), art 28.

<sup>289</sup> *Ibid*, art 32.

<sup>290</sup> *Ibid*, art 29.

Committee, due consideration shall be given ‘to the usefulness of the participation of some persons having legal experience’<sup>291</sup>, and ‘to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems’.<sup>292</sup>

The HRC convenes in Geneva and normally holds three regular sessions per year<sup>293</sup>, each lasting three to four weeks.<sup>294</sup> A quorum is reached with 12 members<sup>295</sup>, with each member having one vote.<sup>296</sup> Committee members shall attempt to reach decisions by consensus before voting. When consensus cannot be reached, decisions shall be made by a majority of the members present.<sup>297</sup>

### 3.2 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)

Unlike the other human rights treaty bodies, the Committee on Economic, Social and Cultural Rights (CESCR) was not established by its corresponding instrument. Rather, the Economic and Social Council (ECOSOC) established the Committee under Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to it in Part IV of the Covenant.<sup>298</sup> While the CESCR is technically a subsidiary body of the ECOSOC, it has been considered as one of the human rights treaty bodies in practice.

The CESCR consists of eighteen members, ‘who shall be experts with recognized competence in the field of human rights, serving in their personal capacity, due consideration being given to equitable geographical distribution and to the representation of different forms of social and legal systems’<sup>299</sup> and who shall be elected for a term of four years.<sup>300</sup> Members of the Committee are elected by ECOSOC. Elections take place in a secret ballot from a list of nominees proposed by States parties

<sup>291</sup> Ibid, art 28; this selection criterion is not mentioned in the ICESCR and CEDAW.

<sup>292</sup> Ibid, art 31.

<sup>293</sup> HRC, *Rules of procedure of the Human Rights Committee*, CCPR/C/3/Rev.10, 2012, r 2.

<sup>294</sup> Each session of the Committee is usually preceded by a one-week meeting of the Committee’s working group, which typically consists of five members. The functions of the working group have evolved over the years and are currently solely devoted to handling, as an initial chamber, decisions on individual complaints under the Optional Protocol. While it may declare complaints admissible in whole, its decisions on inadmissibility (whether in whole or in part) and on the merits of a complaint proceed to the full Committee for debate and formal plenary decision. HRC Fact Sheet, p 14.

<sup>295</sup> HRC, *Rules of procedure of the Human Rights Committee* (n 61), r 37.

<sup>296</sup> Ibid, r 50.

<sup>297</sup> Ibid, r 51.

<sup>298</sup> OHCHR Fact Sheet No 16 (Rev 1), *The Committee on Economic, Social and Cultural Rights*, 1996, Section 6: Monitoring the implementation of the Covenant: the Committee on Economic, Social and Cultural Rights. Available at <<https://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>> accessed 8 August 2019.

<sup>299</sup> ECOSOC Resolution 1985/17, E/C.12/1990/4/Rev.1., para (a); CESCR, *Rules of Procedure of the Committee*, E/C.12/1990/4/Rev.1, 1993, r 9.

<sup>300</sup> ECOSOC Resolution 1985/17, E/C.12/1990/4/Rev.1., para (c).

to the Covenant.<sup>301</sup> Fifteen seats are equally distributed among the five regional groups, while the additional three seats are allocated ‘in accordance with the increase in the total number of States parties per regional group’.<sup>302</sup> This ensures that the interests of States are represented in a general manner through social and cultural affiliation.<sup>303</sup>

The CESCR meets in Geneva and normally holds two to three sessions per year, usually consisting of a three-week plenary and a one-week pre-sessional working group.<sup>304</sup> Twelve members constitute a quorum.<sup>305</sup> Each member has one vote.<sup>306</sup> Decisions are made by a majority of the members present, although the Committee members ‘shall endeavour to work on the basis of the principle of consensus’.<sup>307</sup>

### 3.3 COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAWCEE)

Articles 17 to 22 deal with the establishment of an independent monitoring mechanism. A Committee on the Elimination of Discrimination against Women (the CEDAWCee) has been established ‘for the purpose of considering the progress made in the implementation of the Convention’ (art 17). The CEDAWCee consists of 23 ‘experts of high moral standing and competence in the field covered by the Convention’<sup>308</sup>, serving in an individual capacity for four-year terms. The experts shall be elected by States parties from among their nationals, with consideration being given to ‘equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems’.<sup>309</sup>

The General Assembly has authorised the CEDAWCee to hold three annual sessions of three weeks each, with a one-week pre-sessional working group for each session.<sup>310</sup> For the (larger) CEDAWCee as well, twelve members constitute a quorum.<sup>311</sup> Each

<sup>301</sup> OHCHR Fact Sheet No 16 (Rev 1) (n 66).

<sup>302</sup> ECOSOC Resolution 1985/17, E/C.12/1990/4/Rev.1., para (a).

<sup>303</sup> Odello and Seatzu (n 54), p 118.

<sup>304</sup> The number of Sessions per year varies for the CESCR. For example, in 2018, two regular sessions and two pre-sessional working groups were held; in 2015, three regular sessions and two pre-sessional working groups were held. See OHCHR website, <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR)> accessed 8 August 2019.

<sup>305</sup> CESCR, *Rules of Procedure of the Committee*, E/C.12/1990/4/Rev.1, 1993, r 32.

<sup>306</sup> *Ibid*, r 45.

<sup>307</sup> *Ibid*, r 46.

<sup>308</sup> CEDAW (n 14), art 17.

<sup>309</sup> *Ibid*.

<sup>310</sup> Resolution adopted by the General Assembly on 22 December 2007, A/RES/62/218, 2008. Available at <https://undocs.org/en/A/RES/62/218>. The rules of procedure do not regulate the number of sessions, but establish that the CEDAWCee ‘shall hold (...) sessions as may be required for the effective performance of its functions’ and ‘shall hold regular sessions each year as shall be authorized by the States parties to the Convention’. CEDAWCee, *Rules of procedure of the Committee on the Elimination of Discrimination Against Women*, HRI/GEN/3/Rev.3, 2008, Chapter IV, rr 1–2.

<sup>311</sup> CEDAWCee, *Rules of procedure of the Committee on the Elimination of Discrimination Against Women*, HRI/GEN/3/Rev.3, 2008, Chapter IV, r 29.

member has one vote.<sup>312</sup> Only ‘if and when all efforts to reach consensus have been exhausted, decisions of the Committee shall be taken by a simple majority of the members present and voting’.<sup>313</sup>

## 4 WORKING METHODS

The HRC, the CESCR and the CEDAWCee share two main functions to monitor, guide and evaluate the implementation of the treaties and to keep track of progress<sup>314</sup>: (1) they receive and review reports submitted periodically by States describing how they are applying the different rights in the treaties at the national level; (2) they issue explanations on the meaning of different rights, known as general comments or general recommendations. Through these functions, the Committees set out to contribute to the realisation of rights: (1) concluding observations assist in promoting changes in national legislations, policies and practices at the national level; (2) general comments and recommendations provide guidance on the meaning of specific human rights to States, Courts and the public at large.<sup>315</sup> Together, they advise on the specific meaning of what the treaties require, clarifying the normative content of broadly phrased human rights. Concluding observations constitute the treaty bodies’ evaluation of the progress towards fulfilling their human rights obligations. They contain recommendations and guidance on laws and policies, and can be used for advocacy purposes by other stakeholders.<sup>316</sup> General comments or recommendations provide guidance based on concrete experience gained in the examination of State reports as well as cases (i.e., individual complaints) under the Optional Protocol.<sup>317</sup> These methods allow the Committees to clarify States parties’ obligations under the treaties.<sup>318</sup> States parties’ responses may generate subsequent State practice for interpretation of the Convention in accordance with VCLT article 31(3)(b).<sup>319</sup> These

<sup>312</sup> Ibid, r 32.

<sup>313</sup> Ibid, r 31.

<sup>314</sup> The individual complaints procedure is not discussed here. See chapter 1, section 4.

<sup>315</sup> OHCHR Fact Sheet, *50<sup>th</sup> anniversary of the Human Rights Covenants. What are the Committees?* Available at <<https://2covenants.ohchr.org/downloads/Fact%20Sheet%20Committees.pdf>> accessed 8 August 2019.

<sup>316</sup> OHCHR Fact Sheet No 15 (Rev 1) (n 55), p 22.

<sup>317</sup> H Keller and L Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in: H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012, pp 129–130.

<sup>318</sup> B Rudolf, MA Freeman and CM Chinkin (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, Oxford University Press, 2012, p 24.

<sup>319</sup> Vienna Convention on the Law of Treaties (n 17), article 31, states that a treaty shall be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.’ Article 31(3)(b) provides for ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ to be taken into account, together with the context.

processes contribute to the required certainty and consistency, while simultaneously allowing for flexibility and progress.<sup>320</sup>

The following discussion on working methods will show that the degree of State party involvement differs for each of the three procedures. States parties are actively involved in the State reporting procedure, and have the opportunity to explain their views, even though the final outcome in the concluding observations is independently adopted by the Committees. The concluding observations are not shared in advance with the States parties and can only be commented upon by the States parties afterwards. States parties play a limited and more indirect role in the adoption of general comments and recommendations. The Committees draft and adopt them by consensus, in the process of which States parties are invited to comment on the draft text.<sup>321</sup>

#### 4.1 STATE REPORTING PROCEDURE

The primary mandate of the Committees is the State reporting procedure. States parties are not only obliged to implement the substantive provisions of the treaties which they have acceded to, by ratifying or acceding to the treaty, they are also under the obligation to submit regular reports to the relevant treaty body on how the rights are being implemented.<sup>322</sup> The reports must set out the legal, administrative and judicial measures taken by the State to give effect to the treaty, and they should also mention any factors or difficulties encountered in implementing the rights.<sup>323</sup> In a fact sheet providing a general introduction to the core international human rights treaties, the purpose of reporting is explained:

States parties are encouraged to see the process of preparing their reports for the treaty bodies not only as the fulfilment of an international obligation, but also as an opportunity to take stock of the state of human rights protection within their jurisdiction for the purpose of policy planning and implementation.<sup>324</sup>

The preparation and submission of reports by States serves to achieve a variety of objectives: It ensures that States parties conduct a comprehensive review with respect to national laws and policies with a view to safeguarding conformity with the treaties, and that they monitor the actual situation with respect to each of the rights on a regular basis; it facilitates public scrutiny of government policies, as the preparation of the report can be a catalyst for a national dialogue; it assists States parties in evaluating the progress made towards the realisation of the obligations contained in the treaties,

<sup>320</sup> Rudolf, Freemand and Chinkin (n 86), p 24.

<sup>321</sup> Keller and Grover (n 85), pp 186–187.

<sup>322</sup> OHCHR Fact Sheet No 30 (Rev 1), *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, 2012, p 21.

<sup>323</sup> *Ibid*, p 22.

<sup>324</sup> *Ibid*, p 24.

and to develop a better understanding of the problems and shortcomings encountered; it helps the treaty monitoring bodies and their States parties to facilitate the exchange of information among States, and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which could be taken to promote effective realisation of each of the rights.<sup>325</sup>

In other words, the State reporting procedure is not so much a mechanism to identify and sanction violations, but more a mechanism to help in assessing the stage of implementation of treaty obligations in a given country systematically and holistically. Moreover, the reporting procedure is just as much about the process as it is about the resulting report. As the OHCHR put it in a fact sheet on the UN treaty body system:

The reporting process should encourage and facilitate, at the national level, public participation, public scrutiny of State policies, laws and programmes, and constructive engagement with civil society in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant treaty.<sup>326</sup>

States parties are required to submit periodic reports on the measures they have adopted which give effect to the rights covered by the respective treaties and on the progress made in the enjoyment of those rights.<sup>327</sup> The reports may or shall indicate ‘factors and difficulties’ affecting ‘the degree of fulfilment of obligations’ under the respective treaties, if any.<sup>328</sup> The treaties themselves provide little guidance as to the specific tasks of the Committees, except to ‘study the reports’<sup>329</sup>, to ‘transmit its reports, and such general comments as it may consider appropriate, to the States parties’<sup>330</sup>, or to ‘make suggestions and general recommendations based on the examination of reports and information received from the States parties’.<sup>331</sup> The current practice is the result of a long evolutionary process<sup>332</sup> developing the State reporting procedure into an adequate procedural mechanism.<sup>333</sup> A procedure was devised, and improved over the years, allowing for discussion between the Committees and governmental representatives,

<sup>325</sup> CESCR, General Comment No 1: Reporting by States parties, E/1989/22, 1989.

<sup>326</sup> OHCHR Fact Sheet No 30 (Rev 1) (n 90), p 24.

<sup>327</sup> ICCPR, art 40; ICESCR, Arts 16 and 17; CEDAW, art 18.

<sup>328</sup> ICCPR, art 40; ICESCR, art 17; CEDAW, art 18. ICCPR, art 40: ‘Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant’; ICESCR, art 17: ‘Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant’; CEDAW, art 18: ‘Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention’.

<sup>329</sup> ICCPR, art 40.

<sup>330</sup> ICCPR, art 40.

<sup>331</sup> CEDAW, art 21.

<sup>332</sup> W Kälin, *Examination of State Reports*, in: H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012, p 20.

<sup>333</sup> C Tomuschat, *Human Rights: Between Idealism and Realism*, 2<sup>nd</sup> edition, Oxford University Press, 2008, p 175.

where arguments and counter-arguments are (or should be in any case) openly put forward in a (constructive) dialogue on the substance of a report.<sup>334</sup>

The *harmonized guidelines on reporting under the international human rights treaties* suggest that reports should consist of two parts, an up-to-date common core document and a treaty-specific document.<sup>335</sup> According to the harmonized guidelines, the *common core document* should contain information of a general and factual nature, which may be of relevance to all or several of the treaty bodies monitoring the implementation of those treaties, and necessary to assist the treaty bodies in understanding the political, legal, social, economic and cultural contexts in which human rights are implemented in the State concerned.<sup>336</sup> It should also contain the general framework for the protection and promotion of human rights, which should include information on the status of all of the main international human rights treaties, as well as the reason why reservations, if any, were considered to be necessary and have been maintained.<sup>337</sup> Furthermore, it should address whether, and if so, which of, the rights referred to in the various human rights instruments are protected in the constitution, a bill of rights, a basic law, or other national legislation.<sup>338</sup> Moreover, the efforts made to promote respect for all human rights in the State should be discussed, such as dissemination of information, education and training, publicity, and allocation of budgetary resources.<sup>339</sup> Finally, the common core document should contain information on non-discrimination and equality<sup>340</sup> and effective remedies.<sup>341</sup>

The treaty-specific document should contain all information relating to States' implementation of each specific treaty which is relevant principally to the Committee charged with monitoring the implementation of that treaty.<sup>342</sup> Every State party submits an *initial report* on the measures adopted which give effect to the rights recognised in the respective treaty and on the progress made in their enjoyment, within one<sup>343</sup> or two<sup>344</sup> years of its entry into force. The content of the treaty-specific document is specified in the respective guidelines on treaty-specific documents. The ICCPR-specific document should provide 'information relating specifically to the implementation of the Covenant and the relevant general comments of the Committee'.<sup>345</sup> The treaty-specific

<sup>334</sup> Ibid, pp 175–189.

<sup>335</sup> *Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Targeted Documents*, HRI/MC/2005/3, 2005, para 26.

<sup>336</sup> Ibid, para 36.

<sup>337</sup> *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.6, 2009, Ch I, para 40.

<sup>338</sup> Ibid, Ch I, para 42.

<sup>339</sup> Ibid, Ch I, para 43.

<sup>340</sup> Ibid, Ch I, paras 50–58.

<sup>341</sup> Ibid, Ch I, para 59.

<sup>342</sup> Ibid, Ch I, para 60.

<sup>343</sup> ICCPR, art 40; CEDAW, art 18.

<sup>344</sup> CESCR, *Rules of Procedure of the Committee* (n 73), r 58.

<sup>345</sup> HRC, *Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights*, CCPR/C/2009/1, 4 October 2010, para 7.

document submitted to the CESCR ‘should contain specific information relating to the implementation, in law and in fact, of articles 1 to 15 of the Covenant, taking into account the general comments of the Committee, as well as information on recent developments in law and practice affecting the full realization of the rights recognized in the Covenant’.<sup>346</sup> The CEDAWCee requests provision of ‘information specific to the implementation of the Convention and the relevant general recommendations of the Committee, as well as information of a more analytical nature on the impact of laws (...) on women’, and ‘[a]nalytical information (...) on the progress made in ensuring enjoyment of the provisions of the Convention by all groups of women throughout their lifecycle within the territory or jurisdiction of the State party’.<sup>347</sup> It should also ‘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’.<sup>348</sup> In general, the treaty-specific reports submitted to the monitoring bodies should provide information on the national framework of law, policies and strategies for the implementation of each right; information on mechanisms in place to monitor progress towards the full realisation of each right; sufficient disaggregated data and statistics to enable the monitoring bodies to assess this progress.<sup>349</sup> Legal norms should be described, but description alone is not sufficient: The factual situation and the practical availability, effect and implementation of remedies for violation of each right should be explained.<sup>350</sup> Treaty-specific documents should indicate the factors and difficulties (or ‘structural or other significant obstacles’) affecting the implementation of the treaty, and provide explanations regarding the nature, extent of, and reasons for every such factor. Finally, recommendations should be provided for the steps to be taken to overcome them.<sup>351</sup>

Once the initial report has been submitted, States parties are required to submit further reports periodically, in accordance with the provisions of each treaty, on the

<sup>346</sup> ECOSOC, *Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2008/2, 24 March 2009, Annex, para 2.

<sup>347</sup> CEDAWCee, *Reporting guidelines of the Committee on the Elimination of Discrimination against Women*, Annex I, para A.4.2. Available at <<https://www2.ohchr.org/english/bodies/cedaw/docs/AnnexI.pdf>>.

<sup>348</sup> *Ibid.*, para D.3.

<sup>349</sup> *Guidelines for the treaty-specific document to be submitted by States parties under art 40 of the [ICCPR]* (n 113), paras 25–26; *Guidelines on treaty-specific documents to be submitted by States parties under Arts 16 and 17 of the [ICESCR]* (n 114), Annex, para 3; *Reporting guidelines of the [CEDAW]* (n 115), Annex I, paras C.5, D.2.

<sup>350</sup> *Guidelines for the treaty-specific document to be submitted by States parties under art 40 of the [ICCPR]* (n 113), paras 25–26; *Guidelines on treaty-specific documents to be submitted by States parties under Arts 16 and 17 of the [ICESCR]* (n 114), Annex, para 3; *Reporting guidelines of the [CEDAW]* (n 115), Annex I, paras C.5, D.2.

<sup>351</sup> *Guidelines for the treaty-specific document to be submitted by States parties under art 40 of the [ICCPR]* (n 113), para 22; *Guidelines on treaty-specific documents to be submitted by States parties under Arts 16 and 17 of the [ICESCR]* (n 114), Annex, para 3(f); *Reporting guidelines of the [CEDAW]* (n 115), Annex I, para C.4.

progress made during the reporting period.<sup>352</sup> Under the ICCPR, periodic reports are to be submitted ‘whenever the Committee so requests’.<sup>353</sup> The HRC has adopted the practice of stating a date at the end of its concluding observations by which the following periodic report should be submitted.<sup>354</sup> Under the ICESCR, the cycle of periodic reports used to be five years, but nowadays the deadline of the next periodic report is also provided in the concluding observations.<sup>355</sup> For both the HRC and the CESCR, this is usually four years after the presentation of the previous report, but the Committees have discretion and may call for an earlier or later report, depending on the level of compliance with the Covenant or the quality of the information supplied and/or the constructive dialogue.<sup>356</sup> The CEDAWCee requests periodic reports ‘at least every four years and further whenever the Committee so requests’.<sup>357</sup> The periodic reports should take as their starting points: (1) the *Concluding Observations* of the previous report, in particular the ‘concerns’ and ‘recommendations’; (2) the *Summary Records* of the deliberations during the previous reporting cycle; (3) an examination of the progress made towards the (full) enjoyment of the rights.<sup>358</sup> Periodic reports should contain information on the implementation of 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 of rights, and on measures envisaged to overcome these obstacles.<sup>359</sup>

All Committees prepare *lists of issues and questions* for States parties whose reports are due to be considered. Lists of issues provide States parties with an opportunity to supplement and update the information provided in their periodic reports, and indicate the line of questioning they can expect during the public constructive dialogue, when their report is formally considered.<sup>360</sup> The idea is to give States the chance to prepare answers in advance, and thereby facilitate dialogue with the Committees.<sup>361</sup> The HRC appoints so-called Country Report Task Forces (CRTF) of between four and six Committee members to pre-examine each report, and draft the list of issues.<sup>362</sup> The

<sup>352</sup> *Compilation of guidelines on the form and content of reports to be submitted by States parties to the international human rights treaties* (n 105), Ch I, para 16.

<sup>353</sup> Pursuant to ICCPR, art 40 (1).

<sup>354</sup> *Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the [ICCPR]* (n 113), para 12.

<sup>355</sup> Article 17 ICESCR does not establish a reporting periodicity, but gives ECOSOC discretion to establish its own reporting schedule.

<sup>356</sup> Odello and Seatzu (n 54), p 159.

<sup>357</sup> *Reporting guidelines of the [CEDAW]* (n 115), Annex I, para B.1.

<sup>358</sup> *Guidelines for the treaty-specific document to be submitted by States parties under art 40 of the [ICCPR]* (n 113), para 19.

<sup>359</sup> *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties* (n 105), Ch V; ECOSOC, *Guidelines on treaty-specific documents to be submitted by States parties under Arts 16 and 17 of the [ICESCR]* (n 114), para 2.

<sup>360</sup> *Report on the working methods of the human rights treaty bodies relating to the State reporting process*, HRI/MC/2009/4, 24 June 2009, para 35.

<sup>361</sup> CESCR, *Report on the forty-eighth and forty-ninth sessions*, Ch II, Overview of the present working methods of the Committee, E/C.12/2010/3, 2012, paras 26–31.

<sup>362</sup> OHCHR Fact Sheet No 15 (Rev 1) (n 55), p 18.

CESCR and the CEDAWCee each appoint five-person pre-sessional working groups for this purpose.<sup>363</sup> In the composition of the CRTF and pre-sessional working groups, the desirability of a balanced geographical distribution is taken into account.<sup>364</sup> All three Committees appoint one member to be ‘country rapporteur’, whose main responsibility it is to follow a report through the Committee’s processes.<sup>365</sup> In preparation for the CRTF and pre-sessional working groups, the Secretariat provides members with a country file.<sup>366</sup> In order to improve the dialogue sought by the Committees, States parties are urged to provide their replies to the list of issues in writing.<sup>367</sup> The constructive dialogue in Geneva is conducted on the basis of the State party’s report and the written replies to the list of issues.

In 2009, the HRC decided to adopt a new reporting procedure during which it would send States parties a list of issues, a so-called *list of issues prior to reporting* (LOIPR), and consider their written replies as a replacement for a periodic report, a so-called *focused report based on replies to a list of issues*.<sup>368</sup> The LOIPR procedure is supposed to relieve the reporting burden on States. The lists of issues provides detailed guidance on the expected content of the report, thereby facilitating the drafting process. In addition, States are no longer requested to submit both a report and written replies to a list of issues.<sup>369</sup> The LOIPR should include two sections. A first section should provide ‘general information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant’.

<sup>363</sup> Report on the working methods of the human rights treaty bodies relating to the State reporting process (n 128), para 38; OHCHR Fact Sheet No 16 (Rev 1) (n 66); Fact Sheet No 22, *Discrimination against Women: The Convention and the Committee*, 1995.

<sup>364</sup> OHCHR website, HRC, working methods, <[www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx](http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx)> accessed 8 August 2019; CESCR, working methods, <[www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx](http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx)> accessed 8 August 2019; CEDAW, *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 7. Available at <[www2.ohchr.org/english/bodies/cedaw/docs/Working\\_methods\\_CEDAW\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/Working_methods_CEDAW_en.pdf)> accessed 9 August 2019.

<sup>365</sup> Report on the working methods of the human rights treaty bodies relating to the State reporting process (n 128), para 61. Country rapporteurs undertake a thorough study of the report and assume the task of drafting lists of issues and questions. They may also take the lead in posing questions to the State party’s delegation during the constructive dialogue and summarizing after the discussion. They have primary responsibility for drafting the Committee’s concluding observations on the State party’s report.

<sup>366</sup> A country file includes the following documentation: the previous report of the State party to the Committee, the common core document, the Constitution of the State party, previous concluding observations, summary records of consideration of last report, follow-up information and assessment by the Committee of this information, Views under the Optional Protocol and information on follow-up, concluding observations of other treaty bodies, reports of special procedures, UPR documents, documents from regional organizations, United Nations/Office of the United Nations High Commissioner for Human Rights information, reports from national human rights institutions (NHRIs) and non-governmental organizations (NGOs), and any other document as deemed relevant by the Committee.

<sup>367</sup> CESCR, *Report on the forty-eighth and forty-ninth sessions*, Ch II, Overview of the present working methods of the Committee (n 129), para 27.

<sup>368</sup> HRC, *Focused Reports Based on Replies to Lists of Issues Prior to Reporting (LOIPR): Implementation of the New Optional Reporting Procedure (LOIPR Procedure)*, CCPR/C/99/4 (29 September 2010), para 1.

<sup>369</sup> *Ibid.*, para 2.

[In the second section,] questions are organized according to clusters of provisions as in the standard list of issues, highlighting specific issues depending on the situation of the concerned State party and the information available to the Committee, in particular, the recommendations included in the last concluding observations addressed to the State party as well as any follow-up information provided by the State.<sup>370</sup>

The procedure is not to be applied to initial reports of States parties<sup>371</sup>, and remains optional. States parties may decide to continue to submit their reports under the standard procedure<sup>372</sup>, or the Committee may decide not to apply the LOIPR procedure ‘when it deems that particular circumstances warrant a full report’.<sup>373</sup> In 2018, the CEDAWCee also decided to make the simplified reporting procedure available to States parties.<sup>374</sup> The simplified reporting procedure is only offered to States parties which wish to avail themselves of this procedure, provided that the States parties concerned have submitted (1) an initial report which was considered under the regular procedure, and (2) an updated common core document<sup>375</sup>, which dates back no more than five years. The CESCR offers the simplified reporting procedure on a pilot basis.<sup>376</sup>

Although not envisaged in the treaties, all human rights treaty bodies have adopted the practice of considering States parties’ reports in the presence of representatives from the reporting State party. The consideration of the country report by the treaty body in a public session provides an opportunity for a ‘constructive dialogue’<sup>377</sup> between the experts of the treaty body and the government delegation.<sup>378</sup> The HRC and the CESCR convene for three meetings of three hours each to discuss initial reports. For periodic reports, they schedule two such meetings, in other words, one working day per dialogue.<sup>379</sup> The CEDAWCee plans two meetings of each three hours for consideration

<sup>370</sup> Ibid, para 11.

<sup>371</sup> Ibid, para 8.

<sup>372</sup> Ibid, para 9.

<sup>373</sup> Ibid, para 10.

<sup>374</sup> OHCHR website, CEDAW, Simplified reporting procedure, <[www.ohchr.org/EN/HRBodies/CEDAW/Pages/ReportingProcedures.aspx](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ReportingProcedures.aspx)> accessed 8 August 2019. In March 2018, the CEDAWCee decided to ‘reinstate’ the simplified reporting procedure. In 2014, the CEDAWCee decided to offer the simplified reporting procedure on a pilot basis (Decision 58/II, see A/70/38, Part One). In 2016, the procedure was suspended (Decision 65/V, A/72/38, Part Two).

<sup>375</sup> In accordance with the *harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents* (n 103).

<sup>376</sup> OHCHR website, CESCR, *Information Note for civil society and national human rights institutions*, <[www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx](http://www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx)> accessed 9 August 2019. See also Report of the Secretary-General, *Status of the human rights treaty body system*, A/73/309 Annexes, 6 August 2018, Annex XVIII: Simplified reporting procedure.

<sup>377</sup> The terminology ‘constructive dialogue’ has been adopted by all the treaty bodies in order to underline the non-judgmental nature of the process. International Service for Human Rights (ISHR), *A Simple Guide to the UN Treaty Bodies*, p 20. Available at <<https://ilga.org/wp-content/uploads/2016/02/The-Simple-Guide-to-Treaty-Bodies.pdf>> accessed 9 August 2019.

<sup>378</sup> Such a delegation usually consists of the State party’s ambassador to the UN Office at Geneva and other members of diplomatic staff, as well as representatives from government departments with expertise in matters dealt with in the Covenant.

<sup>379</sup> OHCHR Fact Sheet No 15 (Rev 1) (n 55), pp 18–19; CESCR, working methods (n 129), para 32.

of both initial and periodic reports.<sup>380</sup> The structure of the constructive dialogue is based on the individual practices of each of the treaty bodies. All three Committees start the dialogue with a general introduction by the head of delegation.<sup>381</sup> Subsequently, the HRC invites delegations to respond to the first half of the list of issues covering the first half of the ICCPR, after which Committee members, with the members of the CRTF having priority, will pose their questions to be answered by the State delegation. Through their questions, Committee members generally seek to clarify or deepen understanding of issues arising concerning the implementation and enjoyment of Covenant rights in the State party. After the delegation has answered these questions, it continues with a summary of its replies to the next set of questions, covering the remaining part of the ICCPR, again followed by comments and questions by the CRTF and other Committee members. Once the delegation has provided answers to the second round of questions, the dialogue concludes with remarks by the State's head of delegation and the Committee's chairperson.<sup>382</sup> The CESCR and the CEDAWCee ask delegations to respond to questions based on (usually four) clusters of articles under their respective treaties<sup>383</sup>, and the delegation must provide answers to each cluster before moving to the next.<sup>384</sup> Unlike the HRC and the CESCR, the CEDAWCee makes use of a speech timer, allowing Committee members to speak for a maximum of five minutes, with the possibility to allow an extra two minutes for follow-up questions. The minutes of the meeting are laid down in an official document, called *Summary Record*.<sup>385</sup> They provide an official record of the dialogue.

The Committees end their examination of the reports with the drafting and adoption of the so-called *concluding observations*. Once the dialogue has been concluded, the Committee meets in private to discuss the concluding observations drafted by the country rapporteur (together with the Secretariat), and with a view to adopt it by consensus.<sup>386</sup> The concluding observations set out the results of the dialogue

<sup>380</sup> CEDAW, *Overview of the working methods of the [CEDAWCee] in relation to the reporting process* (n 132), paras 10–12.

<sup>381</sup> OHCHR website, CEDAW, Working Methods, <[www.ohchr.org/EN/HRBodies/CEDAW/Pages/WorkingMethods.aspx#ftn10](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/WorkingMethods.aspx#ftn10)> accessed 9 August 2019; HRC, Working Methods (n 132); CESCR, Working Methods (n 132).

<sup>382</sup> OHCHR Fact Sheet No 15 (Rev 1) (n 55), p 19.

<sup>383</sup> The CESCR generally examines reports in terms of the following clusters of issues: articles 1 to 5 (domestic application, self-determination, non-discrimination and gender equality), articles 6 to 9 (economic or labour rights), articles 10 to 12 (subsistence or social rights), and articles 13 to 15 (education, cultural rights). The CEDAWCee generally examines reports in terms of the following clusters of issues: Part I (arts 1–6) focuses on non-discrimination, sex stereotypes, and sex trafficking; Part II (arts 7–9) focuses on women's rights in the public sphere and rights to nationality; Part III (arts 10–14) focuses on economic and social rights, particularly education, employment and health; Part IV (arts 15 and 16) focuses on women's right to equality in marriage and family life along with the right to equality before the law.

<sup>384</sup> ISHR, *A Simple Guide to the UN Treaty Bodies* (n 145), p 21.

<sup>385</sup> These records are publicly available. HRC, *Rules of procedure of the Human Rights Committee* (n 621), r 36.

<sup>386</sup> HRC, *Rules of procedure of the Human Rights Committee* (n 61), r 71(3); *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, 2008, Ch I, para 10.

with the Committee's main concerns and correspondent recommendations. The agreed structure of the concluding observations, applied by the HRC, the CESCR and the CEDAWCee alike, is as follows: introduction, positive aspects, and principal subjects/matters/areas of concern and recommendations.<sup>387</sup> A major part of the concluding observations is devoted to the latter section, where the Committee's concerns are paired with recommendations for remedial action. Generally, they are rather broad recommendations about legislative and other measures States parties should take, although the specificity of recommendations is improving.<sup>388</sup> Having reviewed its practices in 2008, the CEDAWCee has decided that it will strive 'to formulate detailed Concluding Observations, with concrete, achievable, but non-prescriptive recommendations'.<sup>389</sup> The HRC and the CESCR are very systematic in linking their concerns to specific articles in the Covenant, at the end of each paragraph listing concerns.<sup>390</sup> The CEDAWCee refrains from doing so.<sup>391</sup>

In addition, the three treaty bodies have developed a follow-up procedure. The HRC applies a follow-up procedure in which it identifies two to four specific recommendations in its concluding observations which require immediate attention and can be implemented within a year.<sup>392</sup> The State party should provide relevant information on its implementation of these specified topics within a year. A *Special Rapporteur for Follow-up on Concluding Observations* examines the information received from the State party, and subsequently communicates the findings to the HRC.<sup>393</sup> The States parties' replies are assessed according to a grading system<sup>394</sup>, with 'A' meaning that the 'response is largely satisfactory', 'B1' meaning that substantive action has been taken, but that additional

<sup>387</sup> OHCHR website, HRC, working methods (n 132); CESCR, working methods (n 132); CEDAW, *Overview of the working methods of the [CEDAWCee] in relation to the reporting process* (n 132), para 19.

<sup>388</sup> Kálin (n 100). Kálin writes among others that '[b]oth clear and useful recommendations but also very general ones can be found. In the case of the Human Rights Committee, one can, however, detect an overall improvement over time.'

<sup>389</sup> Ibid, p 49.

<sup>390</sup> Ibid. This is key to ensure that these monitoring bodies do not overstep their competence to monitor the implementation of their respective treaties. There is reason to believe that the concluding observations of the HRC provide better insight into the scope and normative content of specific treaty provisions than the concluding observations of the CEDAWCee, where concerns and guarantees are not explicitly linked.

<sup>391</sup> Consequently, concluding observations can be argued to provide less clear insight into the scope and normative content of specific treaty provisions.

<sup>392</sup> HRC, *Rules of procedure of the Human Rights Committee* (n 61), r 71(5). See also OHCHR website, human rights bodies, follow up procedure, <[www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx](http://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx)> accessed 9 August 2019.

<sup>393</sup> This procedure for follow-up on concluding observations has been set out pursuant to Rules 71(5) and 72 of the *Rules of procedure of the Human Rights Committee* (n 61), and refined by a Decision adopted by the HRC, UN doc A/57/40, 21 March 2002, Annex III, p 153. See also HRC, *Note by the Human Rights Committee on the procedure for follow-up to COs*, CCPR/C/108/2, 21 October 2013.

<sup>394</sup> Assessment of replies: A – response largely satisfactory; B1 – substantive action taken, but additional information required; B2 – initial action taken, but additional information and measures required; C1 – response received, but actions taken do not implement the recommendation; C2 – response received but not relevant to the recommendation; D1 – no response received within the deadline, or no reply to a specific question in the report; D2 – no response received after reminder(s); E – the response indicates that the measures taken are contrary to the Committee's recommendations.

information is required, et cetera. The purpose of this follow-up procedure is ‘to establish, maintain or restore a dialogue with the State party’.<sup>395</sup> The CESCR entrusts its country rapporteurs with the task of following up on the countries for which they served as rapporteur until the next time they appear before the CESCR. Unlike the HRC, they do not have a special rapporteur for follow-up.<sup>396</sup> The CEDAWCee introduced a follow-up procedure as well, requesting States parties to provide information on steps taken to implement specific recommendations contained in those concluding observations within two years.<sup>397</sup> The CEDAWCee appoints a rapporteur and a substitute for follow-up, who are responsible for assessing the follow-up reports.<sup>398</sup> The follow-up reports are assessed to determine whether or not the issues designated for follow-up by the Committee have been adequately addressed by the State party concerned and/or whether further information is required based on the following categories: ‘Implemented’; ‘Partially Implemented’; ‘Not Implemented’; ‘Lack of sufficient information received to make an assessment’.<sup>399</sup> In its annual report to the General Assembly of 2012, the CEDAWCee evaluated the follow-up procedure to concluding observations:

[T]he information contained in the reports submitted suggests 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. This procedure is therefore proving to be an effective reporting procedure under article 18 of the Convention that enables the Committee to monitor progress achieved between reporting cycles.<sup>400</sup>

## 4.2 GENERAL COMMENTS AND RECOMMENDATIONS

Another monitoring practice of the treaty bodies is the issue of general comments, or, in the case of the CEDAWCee, general recommendations, which serves the purpose of making their experience – gained through the examination of State reports and individual communications – available to the benefit of all States parties in order to assist and promote their further implementation of the treaty. General comments and

<sup>395</sup> OHCHR website, HRC, working methods (n 132).

<sup>396</sup> RKM Smith, *Text and Materials on International Human Rights*, Routledge, 2013, p 330.

<sup>397</sup> Ibid, para 23. The criterion for the selection of recommendations as follow-up items is as follows: The issues selected for short-term action constitute a major obstacle to women’s enjoyment of their human rights, and would therefore constitute a major obstacle for the implementation of the Convention as a whole.

<sup>398</sup> Note by the Secretariat, *Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process*, HRI/MC/2013/3, 22 April 2013, para 5. Available at <[www.ohchr.org/Documents/HRBodies/TB/HRI.MC.2013.3\\_en.doc](http://www.ohchr.org/Documents/HRBodies/TB/HRI.MC.2013.3_en.doc)> accessed 9 August 2019.

<sup>399</sup> CEDAW, *Assessment of the follow-up procedure*, adopted on 11 November 2016, p 2. Available at <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_FGD\\_8161\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_FGD_8161_E.pdf)> accessed 9 August 2019. The follow-up report is assessed by the Rapporteur on follow-up, together with the alternate Rapporteur as well as the respective country rapporteur or other members of the Committee, and with the support of the secretariat.

<sup>400</sup> GAOR, 67<sup>th</sup> session, *Report of the Committee on the Elimination of Discrimination against Women on the forty-ninth, fiftieth and fifty-first session, 2011–2012*, A/67/38, paras 18–19.

general recommendations also draw the States parties' attention to insufficiencies revealed in a large number of reports, suggest improvements to the reporting procedures, and stimulate the activities of the States parties, international organisations and the specialised agencies concerned with progressively and effectively achieving the full realisation of the rights recognised in the Covenant.<sup>401</sup>

General comments or general recommendations are another tool by which the Committees carry out their function of interpreting the treaty.<sup>402</sup> Through the development and adoption of general comments and recommendations, the Committees clarify their view on the scope and meaning of specific treaty rights, or a broader range of rights under a specific theme or a crossover issue, providing (authoritative) guidance on the normative substance or content of States parties' obligations. They consolidate the practice and experience of the Committee in interpreting specific treaty provisions or the relationship between the articles of the Convention or Covenant and specific themes or issues, and they are designed to provide guidance to States parties in discharging their reporting obligations under the treaty.<sup>403</sup> The building blocks of these general comments and recommendations are the country-specific concluding observations and the Committees' decisions (or 'views') on individual communications.<sup>404</sup> Over time, general comments and recommendations have become authoritative guidelines for the interpretation and application of the treaty provisions.<sup>405</sup> They have been called 'a valuable jurisprudential resource'<sup>406</sup>, and 'a new species of soft law'.<sup>407</sup>

At any time, members of a treaty body may propose that a general comment be prepared relating to a specific article, provision or theme. The drafting of a general comment/recommendation is a participatory process which usually involves three stages, although this varies from Committee to Committee. First, a treaty body

<sup>401</sup> Note by the Secretariat, *Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process* (n 166), para 14. See also Report by the UN High Commissioner for Human Rights, *Strengthening the United Nations human rights treaty body system*, June 2012, p 82. Available at <<https://www2.ohchr.org/english/bodies/HRTD/docs/HCRReportTBStrengthening.pdf>> accessed 9 August 2019.

<sup>402</sup> The HRC derives its authority for the issuance of general comments from article 40(4) ICCPR, the ICESCR from article 18 ICESCR, and the CEDAWCee from article 21 CEDAW.

<sup>403</sup> CESCR, *Rules of Procedure of the Committee* (n 73), r 65.

<sup>404</sup> Keller and Grover (n 85), p 117.

<sup>405</sup> FAO information paper, IGWG RTFG INF/1 (February 2004), <[www.fao.org/3/y8803e/y8803e.htm](http://www.fao.org/3/y8803e/y8803e.htm)> accessed 15 September 2019; A Kiss, *International Human Rights Treaties: A Special Category of International Treaty?*, in: *The Status of International Treaties on Human Rights*, Council of Europe Publishing, 2006, p 22. There is, however, disagreement as to who is the 'pre-eminent interpreter of the Covenant'. See, eg, G Citroni, *The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties*, EJIL: Talk!, <[www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties/](http://www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties/)> accessed 15 September 2019.

<sup>406</sup> S Joseph and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 2013, p 17.

<sup>407</sup> M Schmidt, *Chapter 18: United Nations*, in: D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2010, p 409.

extensively consults with Specialized Agencies, NGOs, academics, and other human rights treaty bodies. Subsequently, one or more designated members of the Committee compile a draft text on the basis of the consultation process, which is intended for further discussion by the Committee and interested parties. Finally, the revised draft of the general comment/recommendation is formally adopted in plenary session.<sup>408</sup> Treaty bodies regularly seek expert advice beyond the Committee. To this end, Committees designate days for general discussions or informal meetings to which States, in most cases, are invited as observers. Some treaty bodies request that draft general comments and recommendations be posted on the OHCHR website to allow for more (varied) input.<sup>409</sup> Hence, while States parties do have an opportunity to provide input to general comments and recommendations, their involvement and influence is rather limited, and there is certainly no dialogue involved between Committees and States parties.

#### 4.3 STRENGTHENING AND ENHANCING THE EFFECTIVE FUNCTIONING OF THE TREATY BODY SYSTEM

In 2009, the then High Commissioner for Human Rights, Navi Pillay, initiated a process of reflection on how to strengthen the treaty body system.<sup>410</sup> This process concluded with a Resolution of the General Assembly in 2014.<sup>411</sup> The Resolution ‘encourages’ treaty bodies and States parties to work with the simplified reporting procedure.<sup>412</sup> Furthermore, treaty bodies are encouraged to ‘collaborate towards the elaboration of an aligned methodology for their constructive dialogue with the States parties, (...) with the aim of making the dialogue more effective, maximizing the use of the time available and allowing for a more interactive and productive dialogue with States parties<sup>413</sup>, to ‘adopt short, focused and concrete concluding observations, including the recommendations therein, that reflect the dialogue with the relevant State party<sup>414</sup>, and to ‘develop an aligned consultation process for the elaboration of general comments that provides for consultation with States parties in particular and bears in mind the

<sup>408</sup> Note by the Secretariat, *Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process* (n 166), para 15.

<sup>409</sup> *Ibid.*, para 17. In her report on the Treaty Body Strengthening Process, the then High Commissioner Navi Pillay, recommended that the treaty bodies make stakeholder involvement more structural: [They should] adopt an aligned process of interaction with stakeholders during the consultative phase of the elaboration of general comments, allowing inputs in writing from States parties, United Nations entities, national human rights institutions and civil society organizations, which would be placed on the website of the respective treaty body elaborating a general comment/general recommendation. N Pillay, *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights*, June 2012, p 82.

<sup>410</sup> Earlier, former UN High Commissioner for Human Rights Mary Robinson had focused on unifying the Treaty Body System.

<sup>411</sup> General Assembly Resolution 68/268, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, A/RES/68/268, 21 April 2014.

<sup>412</sup> *Ibid.*, paras 1–2.

<sup>413</sup> *Ibid.*, para 5.

<sup>414</sup> *Ibid.*, para 6.

views of other stakeholders during the elaboration of new general comments'.<sup>415</sup> Finally, the General Assembly 'decided' on word limits for documents prepared by treaty bodies (10,700 words for each document) and States parties (31,800 words for initial reports, 21,200 words for subsequent periodic reports, and 42,400 words for common core documents)<sup>416</sup>, and to provide additional meeting time to the treaty bodies on the basis of the number of reports and individual communications received, to be reviewed biennially on the basis of actual reporting during the previous four years.<sup>417</sup>

## 5 LEGAL STATUS TREATY BODY OUTPUT

The treaties are legally binding under international law. Once States have become parties to the treaties, they assume obligations to respect, protect and fulfil the respective human rights. However, the treaty bodies' interpretative output and findings (general comments or recommendations; concluding observations) are formally non-binding at the international level.<sup>418</sup>

Although concluding observations are not legally binding instruments under general international law, the International Court of Justice (ICJ) has explicitly acknowledged the weight which the interpretative output of treaty bodies carries with regard to the interpretation of treaties:

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that *it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty*. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.<sup>419</sup>

However, the non-legal bindingness is not without problems. To illustrate, in relation to the Committee against Torture (CAT), Lord Bingham of the House of Lords has stressed that 'the Committee is not an exclusively legal and not an adjudicative body; its power (...) is to make general comments', and he further argued that the Committee's

<sup>415</sup> Ibid, para 14.

<sup>416</sup> Ibid, paras 15–16.

<sup>417</sup> Ibid, paras 26–27.

<sup>418</sup> M Kanetake, UN Human Rights Treaty Monitoring Bodies Before Domestic Courts, *International and Comparative Law Quarterly*, vol 67, no 1, 2018, pp 201–232.

<sup>419</sup> ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgement of 30 November 2010, I.C.J. Reports 2010, p 639, para 66. While the ICJ's position is specifically on the HRC's role in interpreting the ICCPR, the same must hold true for the interpretations of the CESCR vis-à-vis the ICESCR and for the interpretations of the CEDAW vis-à-vis the CEDAW.

recommendation in a periodic report is ‘no more than a recommendation’.<sup>420</sup> Observing that the Committee had not advanced any analysis or interpretation of the particular article of the Convention, he concluded that ‘[w]hatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight’.<sup>421</sup> In the same judgement, Lord Hoffman considered the Committee’s recommendation ‘as having no value’ as an interpretation of the particular article or as a statement of international law, since no reasoning was provided.<sup>422</sup> The Supreme Court of Canada, also in relation to the CAT, subscribed this opinion:

[W]hile the Committee’s comments may be helpful for purposes of interpretation (...), they do not overrule adjudicative interpretations of the articles in the CAT (...). At best, *they form part of a dialogue within the international community* where no consensus has yet developed on an interpretation of [the article].<sup>423</sup>

The status of general comments and recommendations as a source of human rights law is uncertain. They are called ‘soft law’, a generic term for ‘normative provisions contained in non-binding texts’.<sup>424</sup> Any assertion of legally binding effect must depend on States’ consent to their terms.<sup>425</sup> The argument is made that, ‘[w]here a general comment clarifies treaty provisions it might be seen as a form of secondary treaty law, deriving its authority from the binding nature of the treaty and the implied consent of States to it’. However, ‘the treaty bodies have not been bestowed with law-making competence’. When States consider a particular treaty body to have overstepped its competence, it is ‘doubtful whether any such consent can be assumed’.<sup>426</sup> Arguably, as general comments and recommendations are increasingly being cited by domestic courts and regional human rights organs, they are changing into a less ‘soft’ form of law: The legal opinion of a treaty body can be validated by courts, lending legitimacy to existing and future treaty body opinions.<sup>427</sup>

<sup>420</sup> *Jones v Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, para 23.

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*, para 57.

<sup>423</sup> Canadian Supreme Court, *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62, para 148. (emphasis added, VV).

<sup>424</sup> Oxford Bibliographies, <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml>> accessed 9 August 2019.

<sup>425</sup> C Chinkin, *Chapter 5: Sources*, in: D Moeckli, S Shah and S Sivakumaran (n 175), p 109.

<sup>426</sup> *Ibid.* Chinkin gives two examples: In its General Recommendation No 19, the CEDAWCee asserted that the Convention prohibits gender-based violence against women, even though it has no article in the Convention directly addressing gender-based violence against women as a violation of women’s human rights. States responded positively, however, engaging in dialogue with the Committee on the issue. As such, it would seem that they have consented to an interpretation of the CEDAW which includes violence against women. This is in contrast with the general comment of the HRC on treaty reservations. The HRC’s assertion that it ‘necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the [ICCPR]’, has been challenged, in particular by the USA, UK and France. State consent is thus lacking, at least in the case of the latter States.

<sup>427</sup> KL McCall-Smith, *Chapter 2: Interpreting International Human Rights Standard. Treaty Body General Comments as a Chisel or a Hammer*, in: S Lagoutte, T Gammeltoft-Hansen and J Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, 2016, pp 33–34.

## 6 LEGITIMACY CHALLENGES

The legitimacy of the UN treaty bodies, i.e., the public's acceptance and recognition of their authority<sup>428</sup>, has been questioned in terms of composition, substantive decisions, effectiveness, accountability, and procedures.<sup>429</sup>

In terms of composition, the legitimacy of the UN treaty bodies is highly influenced by the independence and professional qualifications of their members. States' willingness to implement the findings of the treaty bodies is likely to increase with recognised independence and expertise. In that respect, it is important that treaty body members represent different regions and cultures of the world, as they deal with culturally and politically sensitive issues.<sup>430</sup> The treaty body members are not under employ, and work on a part-time basis, which may have implications for the composition: There is a risk of 'membership comprising more professors, and even government officials, at the expense of national judges'.<sup>431</sup> Treaty body members need to be competent to exercise differing functions, including examination of State reports, drafting and adopting general comments and dealing with individual complaints. While a diverse membership with different professional backgrounds is useful<sup>432</sup>, it is crucial that the membership includes 'enough competent lawyers to ensure the treaty bodies' credibility in terms of sound legal reasoning'.<sup>433</sup>

The treaty bodies have been criticised for 'too expansive and dynamic interpretations' of the substantive provisions and obligations.<sup>434</sup> While such flexibility in interpretation is perfectly legal in principle<sup>435</sup>, States may argue that the treaty

<sup>428</sup> TR Tyler, Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement, *Psychology, Public Policy, and Law*, vol 20, 2013, pp 78–95.

<sup>429</sup> G Ulfstein, *The Human Rights Treaty Bodies and Legitimacy Challenges*, in: N Grossman, H Cohen, A Follesdal and G Ulfstein (eds), *Legitimacy and International Courts*, Cambridge University Press, 2018, pp 284–304. Subsequent footnotes refer to page numbers of electronic copy at SSRN: <<https://ssrn.com/abstract=2808013>>. Ulfstein also discussed accountability as a legitimacy challenge. According to him, treaty bodies' legitimacy may be influenced by its accountability to international and national organs. Internationally, the treaty bodies are controlled by the General Assembly, which receives annual reports and approves amendments to the treaties, and by the 'Meetings of States parties to the Convention', the representative organ of States parties to the relevant treaties. The treaty bodies are also controlled nationally by the individual States parties, which may comment on the treaty bodies' interpretation and application of the human rights conventions as elaborated in general comments and recommendations, and on treaty bodies' observations and recommendations following their examination of the State party's periodic report.

<sup>430</sup> *Ibid*, p 4.

<sup>431</sup> Ulfstein (n 197), p 4. Membership of government officials may compromise the independence of the treaty bodies, which should be avoided.

<sup>432</sup> C Flinterman, *The United Nations Human Rights Committee. Some Reflections of a Former Member*, *Netherlands Quarterly of Human Rights*, vol 33, no 1, 2015, pp 4–8.

<sup>433</sup> Ulfstein (n 197), p 5.

<sup>434</sup> *Ibid*, p 6.

<sup>435</sup> Article 31 VCLT is considered to provide for a dynamic and evolutive interpretation, based on article 31 (1) on interpreting a treaty in the light of its object and purpose, and on article 31 (3) (c) on interpreting a treaty in the light of the changing applicable rules of international law. J Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and*

bodies ‘engage in law-making beyond their mandate’, which may affect States parties’ willingness to implement the findings as well as their (political; financial) support for the system.<sup>436</sup> Moreover, opinions vary on the question whether treaty bodies should allow States a margin of discretion/appreciation in their implementation of treaty obligations. The global diversity in cultural, religious and political conditions between States can be an argument both in favour of and against the use of a margin of appreciation. Good reasons exist to allow a certain margin of appreciation at the global level with its wide diversity. Allowing a margin of appreciation may improve States’ compliance with treaty bodies’ findings, and foster continued support for the supervisory system.<sup>437</sup> In contrast, the use of a margin of appreciation may have the negative effect of diluting human rights obligations, and it should be ‘tempered by the presence of several undemocratic States in the world’.<sup>438</sup>

The legitimacy of treaty bodies furthermore depends on their effectiveness, which is their ability to ensure human rights protection. This ability is hampered by the present overload of the system, with the consequent delays in handling State reports.<sup>439</sup> Planned budgetary reductions and subsequent cutbacks in the number of hearings are likely to aggravate this situation, and threaten the continuity of treaty bodies’ ability to hold States accountable and monitor compliance with international human rights commitments.<sup>440</sup> The effectiveness of the system ultimately depends on the implementation of the treaties and the recommendations of the treaty bodies in domestic legal systems. Practice suggests that States do not respect the treaty bodies’ findings.<sup>441</sup> Treaty bodies have tried to improve enforcement by adopting follow-up measures, putting pressure on the States to implement findings by identifying a limited number of recommendations in its concluding observations which should be implemented within a period of 1 to 2 years.<sup>442</sup> The possibility to empower treaty bodies to make binding decisions is the subject of extensive debate. This could increase the weight of treaty body decisions in domestic legal systems, but it would require a

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their Diverse Consequences, *The Law and Practice of International Courts and Tribunals*, vol 9, 2010, pp 445–446.

<sup>436</sup> Ulfstein (n 197), p 7.

<sup>437</sup> *Ibid*, pp 6–8. A wide margin of appreciation/discretion also gives room for culturally sensitive application or implementation of human rights, and reduces the likelihood that human rights are perceived as externally imposed. This will improve their *cultural* legitimacy, ie, support for human rights standards and their implementation in the local culture.

<sup>438</sup> Ulfstein (n 197), pp 7–8.

<sup>439</sup> Ulfstein argues that the UN treaty bodies could learn from the ECtHR in this regard, for example by looking at the procedure with single judges to declare cases inadmissible if such a decision ‘can be taken without further examination’, and the procedure with three judges which may – by unanimous vote – render judgements if the case can be decided on the basis of ‘well-established case-law of the Court’. Ulfstein (n 197).

<sup>440</sup> New York Times, *Budget Cuts May Undercut the U.N.’s Human Rights Committees*, <<https://www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>> accessed 8 August 2019.

<sup>441</sup> G Ulfstein, *Individual complaints*, in: H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012.

<sup>442</sup> China and Russia have criticized the follow-up procedure as ‘not covered by international treaties’.

more court-like procedure. Moreover, a number of States parties would presumably withdraw from the treaties and/or their optional protocols if the findings became binding.<sup>443</sup>

Finally, the legitimacy of the UN treaty bodies may depend on the (perceived) legitimacy of their procedures. Universal human rights are more likely to be accepted and complied with, when the authorities overseeing them, and their procedures, are perceived as legitimate. When decision-making is perceived as fair and just ('procedural justice'), the public is more willing to accept the outcomes. Procedural justice concerns the perception parties have of the way they are treated by the legal authorities, 'encourages decision acceptance and leads to positive views about the legal system'.<sup>444</sup> Procedural justice is evaluated according to four criteria: representation, neutrality, respect, and trustworthiness. Representation refers to the need of parties to express their views to the legal authority before a decision is taken in their case.<sup>445</sup> This is important irrespective of whether or not their views will influence the outcome. However, it should not be pro forma; The applicants' views should be taken seriously and the judge should genuinely listen to them.<sup>446</sup> This criterion can be met by the treaty bodies through accurately representing the arguments of the parties in the decision or judgement and carefully examining the merits of each of the arguments.<sup>447</sup> The second criterion, neutrality, requires treaty body members to be impartial, independent and unbiased. Decisions should be taken on the basis of objective assessment of facts and the rules instead of personal opinions.<sup>448</sup> Likewise, respect is important. The case and the parties to the case need to be taken seriously. Finally, the trustworthiness of the legal authorities is essential. This involves an assessment of the motivation of the authorities. The parties must trust that the authority sincerely considered their arguments, even if they were rejected. They are concerned about the motivation underlying the decisions. A key antecedent of trust is justification. The authorities need to make clear that they have listened to, and considered the arguments made. This can be accommodated through accounting for their decisions by clearly stating the arguments made by the parties. Furthermore, they should also explain how those arguments have been considered, and why they have been accepted or rejected.<sup>449</sup>

<sup>443</sup> Ulfstein (n 197), p 14.

<sup>444</sup> TR Tyler, Procedural Justice and the Courts, *Court Review*, vol 44, nos 1–2, 2008, p 27.

<sup>445</sup> *Ibid*, p 30.

<sup>446</sup> TR Tyler, Social Justice: Outcome and Procedure, *International Journal of Psychology*, vol 35, no 2, 2000, p 122.

<sup>447</sup> E Brems and L Lavrysen, Procedural Justice in Human Rights Adjudication: The European Court of Human Rights, *Human Rights Quarterly*, vol 35, no 1, 2013, p 186. Although Brems and Lavrysen make this point in relation to the European Court of Human Rights, arguably the same can be concluded for the treaty bodies.

<sup>448</sup> Tyler (n 212), p 30.

<sup>449</sup> Tyler (n 214), p 122.

## 7 TREATY BODIES' ROLES IN RECONCILING UNIVERSALITY AND DIVERSITY

Some of the scholars whose theories on reconciling universal human rights and cultural diversity were discussed in the previous chapter (section 2.4), explicitly discussed the potential role of UN human rights treaty bodies in this regard. The theories were shown to build on two main principles: flexibility in interpretation and implementation of rights, focusing on the content; transformation of rights through internal and cross-cultural dialogue, focusing on the process and the actors involved in the process. Donoho and Brems have both recognised the potential of the UN treaty bodies to accommodate diversity through flexibility in interpretation and implementation of rights. Harris-Short has suggested that UN treaty bodies may have a role to play in stimulating transformation of rights through internal and cross-cultural dialogue.<sup>450</sup>

Donoho has identified the activities of the UN human rights treaty bodies as providing 'promising opportunities to mediate the tension between universality and diversity'.<sup>451</sup> He discusses the potential of each of the three working methods (see section 3.4) of the UN treaty bodies in this regard. He argues that the review of State reports 'should provide a forum for the expression and consideration of diversity in the development of universal rights'.<sup>452</sup> General comments 'also have some potential for mediating between the competing goals of universality and diversity'.<sup>453</sup> However, this potential is limited by the abstract nature of general comments, since 'by definition[,] "General" Comments would normally not address the contextual "particularities" presented by various diverse States'.<sup>454</sup> Donoho concludes that the State reporting process and general comments 'allow the expression of various interpretations of rights that may slowly inch the international community toward some common understandings'. Thus, they serve an important promotional function, while 'the potential that such mechanisms will generate significant interpretive work designed to accommodate concerns for diversity and autonomy appears limited'.<sup>455</sup> Donoho considers the individual complaints procedure 'the most significant opportunity to mediate the competing claims of universality and diversity in the meaning of rights'.<sup>456</sup> As mentioned in chapter 2 (section 2.4 in particular), Donoho identifies the margin of appreciation utilised by the ECtHR as a 'potentially useful doctrine worthy of

<sup>450</sup> S Harris-Short, *Children's Rights and Cultural Diversity*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007.

<sup>451</sup> DL Donoho, Autonomy, self-governance and the margin of appreciation: developing a jurisprudence of diversity within universal human rights, *Emory International Law Review*, vol 15, no 2, 2001, p 435, 438.

<sup>452</sup> *Ibid.*, p 436.

<sup>453</sup> *Ibid.*, p 437.

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid.*, p 438.

<sup>456</sup> *Ibid.*, pp 438–440: 'The concreteness of the dispute allows interpretive opportunities that are far more significant to the development of rights than those available through the other, more general, supervisory and monitoring functions of international organizations'.

evaluation by international human rights institutions'.<sup>457</sup> He warns, however, that a lack of democracy (at the global level) may require 'greater scrutiny of government's cultural justifications and little deference'.<sup>458</sup>

Brems has also explicitly linked her theories on reconciling universal human rights and cultural diversity with the practice of the UN treaty bodies. It may be recalled that she has suggested two approaches: a 'flexibility approach' and a 'transformation approach'. She identifies one potential 'flexibility technique' under the State reporting procedure which UN treaty bodies (could) use to accommodate cultural diversity in the interpretation and application of human rights: the concept of progressive realisation. This technique is generally used to take contextual factors of an economic nature into account. Brems argues that this concept can be used beyond economic and financial constraints, and also include cultural constraints:

Progressive realization to accommodate cultural diversity would allow the reality that cultural change is usually slow to be taken into account. It would adapt the legal standard to that reality, by holding States immediately accountable for the realization of their core obligations and for taking deliberate, concrete and targeted steps to overcome the cultural obstacles to full realization.<sup>459</sup>

Brems argues that making human rights obligations more realistic, reduces the risk of States rejecting or ignoring them altogether as well. Important change 'cannot be expected to take place overnight', and 'it makes no sense to change the laws if these changes are not supported by a change in the minds of the people'.<sup>460</sup> Therefore, 'human rights obligations that require profound societal changes should be realized progressively within a reasonable timeframe'.<sup>461</sup> Brems identifies the margin of appreciation as a potential flexibility technique to balance universality and diversity in the context of the treaty bodies' individual complaints procedures.<sup>462</sup> She further

<sup>457</sup> Ibid, p 442.

<sup>458</sup> Ibid, p 458.

<sup>459</sup> E Brems, *Accommodating Diversity in International Human Rights*, in: P Meerts (ed), *Culture and International Law*, Hague Academic Press, 2008, pp 75–76.

<sup>460</sup> E Brems, *Reconciling Universality and Diversity in International Human Rights Law*, *Human Rights Review*, vol 5, no 3, 2004, p 18.

<sup>461</sup> Ibid.

<sup>462</sup> E Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, 2001, p 357; E Brems, *The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe*, in: DP Forsythe and PC McMahon (eds), *Human Rights and Diversity: Area Studies Revisited*, University of Nebraska Press, 2003, pp 105–106. However, Brems warns that 'if the margin is to be used as a neutral tool to reconcile universality and diversity on the universal level, its doctrine needs to be made more explicit'. Observing that even at the EctHR, the manner in which the margin operates still needs unravelling, and that it should explain its reasons, the criteria broadening or restricting the margin, and the weight of the margin of appreciation in the outcome, she contends that 'if the margin analysis is to be used on the universal level, for example by supervising committees under UN human rights treaties, it should be similarly explained, not only when it is applied to a particular case but also in general, for example in a General Comment'. Brems argues that especially the 'better placed' argument and 'consensus' argument pose more serious risks when applied at the

argues for a ‘transformation approach’ through internal debate within societies as well as dialogue between civilisations. Brems identifies one ‘technique’ to acknowledge contextual diversity which is arguably already being used by UN treaty bodies with a view to facilitating a (cross-cultural) dialogue: the inclusion of certain ‘factors and difficulties impeding the implementation of the Convention (or the Covenant)’ in human rights reports and subsequent concluding observations.<sup>463</sup> Traditional practices, customs and attitudes can be mentioned as obstacles to human rights implementation.<sup>464</sup> The ‘technique’ is thus openly to name and discuss the cultural obstacles.

Harris-Short, who stressed that ‘the purpose behind the State reporting system is not for the Committee to issue legally binding judgments as to whether or not a particular State is in breach of its Convention obligations’, but rather to provide ‘a public forum for the exchange of information and ideas’, recognizes the potential of the State reporting process for accommodation of diversity, and wonders whether this is ‘the kind of forum (...) in which An-Na’im’s call for constructive cross-cultural dialogue at the international level can be realized’.<sup>465</sup>

## 8 CONCLUDING REMARKS

The three Committees have largely similar functions and mandates. All three have the same working methods at their disposal for supervising the application and implementation of their respective treaties by States parties. Due to the ‘strengthening process’, the working methods of the treaty bodies are likely to be increasingly harmonised. Treaty bodies are often criticised for their lack of effectiveness, although many of the deficiencies are beyond their control, due to the limited mandate, legal powers, and human and financial resources. Despite their limitations, some authors argue that they may have a role to play in reconciling the universality of the rights covered in the treaties with cultural diversity between and within their member States. They have recognised the potential of the UN treaty bodies to accommodate diversity through flexibility in interpretation and implementation of rights, and to transform

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world level, as the assumption of good faith and commitment to human rights can (in many cases) be doubted.

<sup>463</sup> E Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, 2001, p 346..

<sup>464</sup> Ibid, p 348. However, Brems notes that ‘the committees do not examine to what extent the contextual factors are to be taken into account as a justification of human rights violations’, and instead ‘look for means to overcome these obstacles, sometimes suggesting specific measures’. *ibid*, p 351.

<sup>465</sup> S Harris-Short, *Children’s Rights and Cultural Diversity*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007. An-Na’im proposes ‘to broaden and deepen universal consensus on the formulation and implementation of human rights through internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms’. AA An-Na’Im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1991, p 21. See also chapter 2, section 4.

human rights and increase their cultural legitimacy through internal and cross-cultural dialogue.

Chapters 2 and 3 presented the conclusions that the main theories on how to reconcile the universality of human rights with cultural diversity build on these two principles – (1) flexibility in interpretation and implementation, and (2) internal and cross-cultural dialogue –, and that the UN treaty bodies have the potential and perhaps even the means to accommodate this. The following chapters (4 and 5) will examine how the treaty bodies have applied the first principle: does the practice of the treaty bodies corroborate that ‘universal human rights (...) leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity’<sup>466</sup>, and that ‘the international system is already structured to allow for diverse interpretations of the system’s generally abstract rights’?<sup>467</sup> Chapter 6 will discuss how the treaty bodies applied the second principle: the ‘constructive dialogue’ as a platform for reconciling universal rights with cultural differences.

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<sup>466</sup> See chapter 2, section 4.

<sup>467</sup> See chapter 2, section 4.



# CHAPTER 4

## HUMAN RIGHTS AS A SWORD

### To Protect and Promote Cultural Diversity

#### 1 INTRODUCTION

The present and subsequent chapter aim to provide a comprehensive overview of the various cultural diversity considerations in the treaties and the treaty bodies' concluding observations.<sup>468</sup>

The present chapter examines the 'positive' manifestations of cultures and cultural diversity in the treaties, general comments and recommendations and concluding observations, i.e., the – explicit and implicit – obligations of States parties to respect, protect and promote cultural diversity.<sup>469</sup> Several treaty provisions explicitly protect and promote cultural diversity. These provisions contain explicit cultural rights, which are concerned with the right to preserve, develop and have access to culture and cultural identity.<sup>470</sup> One example is the right of members of minorities to enjoy their own culture, practice their own religion and speak their own language, as laid down in article 27 ICCPR. Another example is the right of everyone to participate in cultural life, as laid down in article 15 ICESCR. Essentially, these cultural rights aim to sustain the distinctiveness, uniqueness and exclusivity of a community's way of life, beliefs and traditions, i.e., to protect and promote *cultural exclusivity*. Accommodating and preserving cultural differences as an end in itself.

Cultural diversity is also protected through the overarching equality and non-discrimination principle. The principle of equality and non-discrimination is not only an essential component of all human rights, but is also of crucial importance to culturally diverse communities, and especially minorities and indigenous peoples. It has even been called the *conditio sine qua non* for minority protection<sup>471</sup>, and hence

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<sup>468</sup> Chapters 4 and 5 will discuss how the treaty bodies applied the first principle: accommodating cultural diversity through (flexibility in) interpretation and implementation. Chapter 6 will discuss how the treaty bodies applied the second principle: the 'constructive dialogue' as a platform for reconciling universal rights with cultural differences.

<sup>469</sup> Chapter 5 examines 'negative' culture in the treaties and treaty body outputs, ie, culture as an obstacle to fulfilling treaty obligations.

<sup>470</sup> F Francioni and M Scheinin (eds), *Cultural Human Rights*, International Studies in Human Rights, vol 95, Martinus Nijhoff Publishers, 2008, p 319.

<sup>471</sup> K Henrard, The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies, *International Journal on Minority and Group Rights*, vol 14, nos 2–3, 2007, p 143.

for the protection and promotion of culture and cultural diversity.<sup>472</sup> Guarantees of non-discrimination and equality in international human rights treaties mandate both *de jure* and *de facto* equality. It is not enough for States to ensure that there is no discrimination in their laws. States parties also have an obligation to improve the *de facto* situation through concrete and effective policies and programmes. To get there, two distinct types of obligations can be identified. On the one hand, the principle requires redressing the inequality suffered by members of (ethnic, linguistic, religious, indigenous or otherwise) minorities, which is often the consequence of historical and persistent prejudice. Such inequality needs to be corrected through *temporary* special (affirmative action) measures aimed at accelerating *de facto* equality. As a matter of course, systemic discrimination of members of a community negatively affects the sustainability and survival of that community's culture.<sup>473</sup>

On the other hand, the equality and non-discrimination principle may require States to respect diversity within the equality principle. It imposes an obligation on States parties to accommodate relevant cultural differences, where necessary through the adoption of permanent – not remedial – special measures. For example, States may be required to facilitate education in minority languages, or to respect indigenous health approaches and practices. Accommodating and preserving such cultural differences are not an end in and of themselves, they are a means to ensuring the equal enjoyment of the right to education and the right to the highest attainable standard of health.

While these (temporary and permanent) special measures do not have the protection of culture as an aim, they do affect the enjoyment of cultural identity of these communities. Whether redressing inequalities or accommodating cultural interests, the aim is to include everyone, regardless of culture, ethnicity, race, religion, gender, sexual preference or language proficiency, i.e., to protect and promote *cultural inclusivity*.

The findings presented in this chapter are the result of a comprehensive mapping exercise of issues linked to the protection and promotion of cultures and cultural diversity identified in concluding observations adopted by the respective treaty bodies between 2010 and 2015 as well as in relevant general comments and recommendations.<sup>474</sup> Relevant issues were identified by searching for keywords relating to the concept of culture, and subsequently analysed and categorised to facilitate drawing conclusions about how and to what extent treaty bodies use their mandate to protect and promote cultures and cultural diversity. As explained

<sup>472</sup> The non-discrimination grounds of special importance to minorities concern 'minority identity' features like language, religion, ethnicity and race, features that are closely related to culture and cultural diversity.

<sup>473</sup> The right to equality and non-discrimination offers dual protection: 'On the one hand, it focuses on the conditions inherently required to maintain [communities', VV] way of life and, on the other, it focuses on attitudes and behaviour that exclude or marginalize [these communities, VV] from the wider society'. OHCHR, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, 2013, p 10. Available at <[www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIIs.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIIs.pdf)> accessed 10 August 2019.

<sup>474</sup> For a more elaborate discussion of methodology, see chapter 1, section 5.

before<sup>475</sup>, categorizing the issues is not always straightforward. For example: there may be different motivations behind the recommendation *to accommodate minority languages*. Sometimes the aim of the measure is specifically to preserve the minority language itself. In that case, the purpose is clearly to protect cultural distinctiveness and exclusivity (see section 2). But the recommendation to accommodate minority languages may also be aimed at inclusivity, for example in order to ensure equal access by speakers of minority languages to public institutions and to facilitate their communication with public authorities (see section 3).<sup>476</sup> Consequently, (somewhat) similar examples may appear in both categories.

The structure of the chapter is as follows. Section 2 explores the States parties' obligations to protect and promote cultural exclusivity, i.e., the obligations of States to respect, foster, accommodate and preserve cultural differences as an end in itself, while section 3 examines the States parties' obligations to protect and promote cultural inclusivity, i.e., the obligations of States to protect cultural diversity through the overarching equality and non-discrimination principle. This section is subdivided into smaller sections, having attention to some preliminary notions of discrimination (section 3.1), before looking into permanent special measures to ensure equality by allowing diversity (section 3.2) and temporary special measures to ensure equality by eliminating diversity (section 3.3). Section 5 will briefly summarize the conclusions.

## 2 CULTURAL EXCLUSIVITY: PROTECTING AND PROMOTING CULTURAL DISTINCTIVENESS AND EXCLUSIVITY

Cultural rights emphasise the value of different cultures, endorse specificities, and draw special attention to the cultures of individuals and communities. This group of explicit cultural rights contains rights which explicitly refer to culture such as the right to enjoy culture for members of minorities (art 27 ICCPR), the right to participate in cultural life (art 15 ICESCR), and women's equal right to participate in all aspects of cultural life (art 13 (c) CEDAW). The right of self-determination (art 1 ICCPR/ICESCR) can also be considered a cultural right. This right has a special link with the protection of cultural diversity and is the only collective right in the International Bill of Human Rights. The right of self-determination has two components: external and internal self-determination. The internal aspects of the right of self-determination are directly linked with cultural diversity, for example in the form of determining cultural development or

<sup>475</sup> See chapter 1, section 5.

<sup>476</sup> In general, the related treaty provision provides an indication: when article 27 ICCPR is mentioned, it is likely that the measure is aimed at protecting cultural distinctiveness and exclusivity. When the issue is linked to articles 2 and 26 ICCPR, the aim is cultural inclusivity more likely. When the issue is linked to articles 2, 26 and 27, the aim remains ambiguous. In the case of the CEDAWCee, the concluding observations do not link the concerns to specific treaty provisions at all.

granting cultural autonomy.<sup>477</sup> The right to freedom of thought, conscience and religion (art 18 ICCPR) also deserves discussion here.<sup>478</sup>

## 2.1 HRC

The ICCPR contains two rights which are directly relevant for the accommodation and preservation of the distinctive characteristics of (minority) cultures: articles 1 and 27. According to article 1 ‘all peoples have the right of self-determination’, and ‘by virtue of that right they (...) freely pursue their economic, social and cultural development’. The right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art 1, para 2). Under article 27, persons belonging to ethnic, religious or linguistic minorities are expressly allowed to enjoy their own culture, profess and practice their own religion, or use their own language. Noting that these two rights are occasionally confused<sup>479</sup>, the HRC explains that, while the right to self-determination ‘is expressed to be a right belonging to peoples’, article 27 ‘relates to rights conferred on individuals as such’.<sup>480</sup> While the HRC rejects group claims under article 1, it may accept the same claim based on article 27 as long as it is framed as an individual right.<sup>481</sup> While it is argued that minorities can form a ‘people’ for the purposes of the right of self-determination, the exercise by a minority of their right of self-determination ‘may be limited to *internal* self-determination, in that minority groups would usually seek to exercise their right by enabling some degree of autonomy over matters of relevance to their culture, language, religion, or ethnic identity’.<sup>482</sup> Since religious beliefs are central to many people’s culture and value system, and religious and cultural beliefs are often indistinguishable<sup>483</sup>, the right to freedom of thought, conscience and religion as protected in article 18 ICCPR can also be considered to contain obligations for States parties to accommodate and preserve distinctive characteristics of (religious) cultures.

### 2.1.1 *Right to self-determination*

In General Comment 12, the HRC stresses that ‘[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective

<sup>477</sup> YM Donders, Do cultural diversity and human rights make a good match?, *International Social Science Journal*, vol 61, no 199, 2010, p 19.

<sup>478</sup> As discussed in chapter 2, section 2, ‘culture’ should be understood to include religion.

<sup>479</sup> HRC, General Comment No 23: Art 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5, 1994, para 2.  
<sup>480</sup> *Ibid*, para 3.1.

<sup>481</sup> HRC, *Chief Bernard Ominayak and Lubicon Lake Band v Canada*, Communication No 167/1984, CCPR/C/38/D/167/1984, 26 March 1990, para 32.2: ‘Although initially couched in terms of alleged breaches of the provisions of art 1 of the Covenant, there is no doubt that many of the claims presented raise issues under art 27.’

<sup>482</sup> D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2010, p 386.

<sup>483</sup> See chapter 2, section 2.

guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.<sup>484</sup> Since peoples may not be deprived of their own means of subsistence<sup>485</sup>, States parties should 'indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources (...) and to what extent that affects the enjoyment of other rights set forth in the Covenant'.<sup>486</sup>

The HRC has not often addressed (internal) self-determination in the sense of allowing peoples autonomy over matters of relevance to their culture. This leaves very few examples. The HRC has addressed acts undermining the right to self-determination of Palestinians in the occupied Palestinian Territories (OPT).<sup>487</sup> It expressed concern about the confiscation and expropriation of Palestinian land and restrictions on access of Palestinians in the OPT to natural resources, and urged the Israeli authorities to 'ensure that Palestinians have full access to their lands and livelihood'.<sup>488</sup> It is questionable whether the HRC is addressing self-determination in the form of cultural development or autonomy here. Unlike other occasions, the HRC does not speak of *traditional* livelihood here, which may imply that 'livelihood' has a pure economic meaning in this context. This would also explain that the HRC does not refer to article 27 in relation to this concern.

In fact, the internal aspects of self-determination, those aspects of self-determination which are interesting from a cultural diversity perspective, seem to have been (largely) subsumed or incorporated by article 27. On one occasion, the HRC explicitly referred to self-determination, but also linked the concern to article 27. In its Concluding Observations on Ethiopia, the HRC noted 'the recognition of the rights of ethnic and linguistic communities to self-determination at the level of the regional State according to the "ethnic federalism" established by the Constitution', but was concerned about 'the lack of recognition and participation in public life of the ethnic and linguistic minorities living outside their designated "ethnic regions"'.<sup>489</sup> Ethiopia was recommended to 'recognize the existence of the various ethnic and linguistic minorities in each regional State and ensure their adequate political representation and participation at regional State and federal levels'.<sup>490</sup> On three occasions, the HRC connected its concerns in relation to preserving cultural diversity to both articles 1 and 27, but did not mention 'self-determination' explicitly, seemingly approaching the concern from an 'article 27-angle'. This is the case with the HRC's concerns about the rights of indigenous peoples in Venezuela<sup>491</sup>, the rights of the Sami people in Finland<sup>492</sup>,

<sup>484</sup> HRC, General Comment No 12: Art 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984.

<sup>485</sup> ICCPR, art 1 (2).

<sup>486</sup> *Ibid.*, para 5.

<sup>487</sup> HRC, Concluding Observations (CO) Israel, CCPR/C/ISR/CO/4 (2014), para 17.

<sup>488</sup> *Ibid.*

<sup>489</sup> HRC, CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 26.

<sup>490</sup> *Ibid.*

<sup>491</sup> HRC, CO Venezuela, CCPR/C/VEN/CO/4 (2015), para 21.

<sup>492</sup> HRC, CO Finland, CCPR/C/FIN/CO/6 (2013), para 16.

and the rights of minorities and indigenous peoples in Crimea<sup>493</sup>, which will be further discussed below (in relation to art 27).

### 2.1.2 *Right of members of minorities to enjoy their own culture*

Article 27 ‘establishes and recognizes a right which is *conferred on individuals belonging to minority groups* and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant’.<sup>494</sup> As such, this article accords persons belonging to (ethnic, religious or linguistic) minorities certain special rights, a special treatment with a view to ‘ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole’.<sup>495</sup> Article 27 is a cultural right *par excellence*.

The persons protected by article 27 are ‘those who belong to a group and who share in common a culture, a religion and/or a language’.<sup>496</sup> The enjoyment of this right should not be limited to nationals or citizens. It also applies to migrant workers and visitors constituting such minorities.<sup>497</sup> The existence of an ethnic, religious or linguistic minority in a given State party ‘does not depend upon a decision by that State party but requires to be established by objective criteria’.<sup>498</sup>

Although article 27 is expressed in negative terms, requiring States parties *not to deny* minorities *the right* to enjoy their own culture, recognizing the existence of a ‘right’ implies that States parties must take positive measures of protection<sup>499</sup>, ‘not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party’.<sup>500</sup> Stressing the collective dimension of the right in question, the HRC contends that ‘[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion’, and that ‘[a]ccordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, *in community with the other members of the group*’.<sup>501</sup> In this respect, the HRC explains that ‘such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population’. However, ‘as long as those measures

<sup>493</sup> HRC, CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 23.

<sup>494</sup> HRC, General Comment No 23 (n 12), para 1 (emphasis added, VV).

<sup>495</sup> *Ibid*, para 9.

<sup>496</sup> *Ibid*, para 5.1.

<sup>497</sup> *Ibid*, paras 5.1–5.2.

<sup>498</sup> *Ibid*, para 5.2.

<sup>499</sup> Positive measures may imply legislation and procedures to avoid violations.

<sup>500</sup> HRC, General Comment No 23 (n 12), para 6.1.

<sup>501</sup> *Ibid*, para 6.2. (emphasis added, VV).

are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria'.<sup>502</sup>

In its General Comment on article 27, the HRC does not provide a clear-cut definition of 'culture'<sup>503</sup>, but observes that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples', and that this right 'may include such traditional activities as fishing or hunting and the right to live in reserves protected by law'.<sup>504</sup> This shows that the HRC considers there to be a strong link between land and economic activities on the one hand, and culture and way of life on the other. States may be required to take 'positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.<sup>505</sup> The HRC also briefly referred to article 27 in its General Comment No 28 on the equality of rights between men and women. Addressing the regulation of clothing to be worn by women in public, the HRC stresses that 'such regulations may involve a violation of a number of rights guaranteed by the Covenant, such as: (...) article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim'.<sup>506</sup>

In its Concluding Observations, the HRC has expressed regrets about France's 'restrictive interpretation given (...) to article 27 of the Covenant in the light of the principles of indivisibility, equality and unity of the Republic'. France should reconsider its reservation and ensure the effective application of the Covenant.<sup>507</sup> Turkey's reservation to article 27 is explicitly linked to concerns about 'the discrimination and the restrictions suffered by members of minorities, such as the Kurds and the Roma, affecting their right to enjoy their own culture and use their own language'. The HRC recommended:

The State party should ensure that all persons belonging to ethnic, religious or linguistic minorities are effectively protected against any form of discrimination, and can fully enjoy their rights. To this regard, *the State party should consider withdrawing its reservation with respect to article 27 of the Covenant*.<sup>508</sup>

The main concerns of the HRC under article 27 are (1) the lack of recognition of minorities; (2) restrictions and conditions on the enjoyment of cultural, linguistic and

<sup>502</sup> Ibid, para 6.2.

<sup>503</sup> Unlike CESCR, which adopted a definition of culture in its General Comment No 21, see also section 2.2 on CESCR below. CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009, para 12.

<sup>504</sup> HRC, General Comment No 23 (n 12), para 7.

<sup>505</sup> Ibid.

<sup>506</sup> HRC, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, 2000, para 13. However, the issue of clothing regulations (in relation to art 27) is not recorded in any of the concluding observations in the researched period (2010–2015).

<sup>507</sup> HRC, CO France, CCPR/C/FRA/CO/5 (2015), para 5.

<sup>508</sup> HRC, CO Turkey, CCPR/C/TUR/CO/1 (2012), para 9. (emphasis added, VV).

religious freedoms of minorities, including the lack of opportunities for minorities to use their own (minority) languages; (3) the rights of these groups to their traditional land and resources. The Concluding Observations on Japan provide an example:

While welcoming the recognition of the Ainu as an indigenous group, the Committee reiterates its concern regarding *the lack of recognition* of the Ryukyu and Okinawa as well as *of the rights of these groups to their traditional land and resources or the right of their children to be educated in their language* (art.27)

The State party should take further steps to revise its legislation and fully guarantee the rights of Ainu, Ryukyu and Okinawa communities to their traditional land and natural resources, ensuring respect for the right to engage in free, prior and informed participation in policies that affect them and facilitate, to the extent possible, education for their children in their own language.<sup>509</sup>

As mentioned, a frequent concern under article 27 which relates to the accommodation and preservation of cultural differences, is the lack of recognition of (indigenous, ethnic) minorities within States parties and the right of individuals to freely self-identify (the so-called principle of self-identification).<sup>510</sup> States parties who have not yet officially recognised ethnic, religious or linguistic minorities and indigenous peoples as such, are recommended to do so, by taking the necessary steps, including legislative ones, to guarantee their (equal) recognition.<sup>511</sup>

Another recurring concern relates to a number of restrictions and conditions on the enjoyment of cultural, linguistic and religious freedoms of minorities, most notably the lack of opportunities for minorities to use their own (minority) languages<sup>512</sup>, to receive instruction or education in their own (minority) languages<sup>513</sup>, and to have media, journals and newspapers in their own (minority) languages.<sup>514</sup> Also of concern are situations where schools' religious curricula do not accommodate minority faith

<sup>509</sup> HRC, CO Japan, CCPR/C/JPN/CO/6 (2014), para 26. (emphasis added, VV).

<sup>510</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 43; CO France, CCPR/C/FRA/CO/5 (2015), para 6; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 24; CO Ireland, CCPR/C/IRL/CO/4 (2014), para 23; CO Japan, CCPR/C/JPN/CO/6 (2014), para 26; CO Togo, CCPR/C/TGO/CO/4 (2011), para 21; CO Hungary, CCPR/C/HUN/CO/5 (2010), para 22. HRC says in its General Comment No 23 that the existence of an ethnic, religious or linguistic minority in a given State party 'does not depend upon a decision by that State party but requires to be established by objective criteria'. HRC, General Comment No 23 (n 12), para 5.2. Apparently the HRC does not wish to leave this up to the State party, despite lack of an internationally agreed definition.

<sup>511</sup> HRC, CO Kuwait, CCPR/C/KWT/CO/2 (2011), para 31; CO Togo, CCPR/C/TGO/CO/4 (2011), para 21; CO France, CCPR/C/FRA/CO/5 (2015), para 6.

<sup>512</sup> HRC, CO Croatia, CCPR/C/HRV/CO/3 (2015), para 21.

<sup>513</sup> HRC, CO Croatia, CCPR/C/HRV/CO/3 (2015), para 21; CO Japan, CCPR/C/JPN/CO/6 (2014), para 26; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27; CO Bosnia & Herzegovina, CCPR/C/BIH/CO/2 (2012), para 21; CO Iran (Islamic Republic of), CCPR/C/IRN/CO/3 (2011), para 30; CO Mongolia, CCPR/C/MNG/CO/5 (2011), para 27.

<sup>514</sup> HRC, CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27; CO Iran (Islamic Republic of), CCPR/C/IRN/CO/3 (2011), para 30.

or non-faith children.<sup>515</sup> States parties should facilitate education (or promote access to education) in minority languages<sup>516</sup>, ‘in their mother tongue’<sup>517</sup>, or ‘in their own language’<sup>518</sup>, for all persons, especially children, belonging to minority ethnic groups; consider the possibility of allowing the use of minority languages at the level of local government and administration<sup>519</sup>; and promote the use of minority languages in the media.<sup>520</sup> An example can be found in the Concluding Observations on Latvia, where the HRC expressed concern ‘at the prevailing negative effects on minorities of the transition to Latvian as the language of instruction, (...) and the gradual decrease of measures in support of teaching minority languages and cultures in minority schools’.<sup>521</sup> The Latvian authorities were encouraged to ‘intensify measures to prevent the negative effects on minorities of the transition to Latvian as the language of instruction’, to remedy ‘the lack of quality of materials and training in the Latvian language for non-Latvian teachers’, and ‘to take further steps in support of the teaching of minority languages and cultures in minority schools’.<sup>522</sup> Finally, States should also ensure that students have the freedom to participate or not to participate in religious education in school, and that students of different religious convictions have access to alternative religious education on a voluntary basis.<sup>523</sup>

The strong link of land and economic activities with culture and way of life – as emphasised in the General Comment on article 27 – is reflected in several concluding observations. The Concluding Observations on Kenya provide a typical example:

The Committee is concerned at reports of forced evictions, interference and dispossession of ancestral land by the Government from minority communities such as the Ogiek and Endorois communities who depend on it for economic livelihood and to practice their cultures. (...).

The Committee recommends that, in planning its development and natural resource conservation projects, the State party respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected. In this regard, the State party should ensure (...) that decisions be based on free and informed consent by this community.<sup>524</sup>

<sup>515</sup> HRC, CO Ireland, CCPR/C/IRL/CO/4 (2014), para 21; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 19.

<sup>516</sup> HRC, CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27.

<sup>517</sup> HRC, CO Croatia, CCPR/C/HRV/CO/3 (2015), para 21; CO Bosnia and Herzegovina, CCPR/C/BIH/CO/2 (2012), para 21.

<sup>518</sup> HRC, CO Japan, CCPR/C/JPN/CO/6 (2014), para 26; CO Finland, CCPR/C/FIN/CO/6 (2013), para 16; CO Iran (Islamic Republic of), CCPR/C/IRN/CO/3 (2011), para 30; CO Mongolia, CCPR/C/MNG/CO/5 (2011), para 27.

<sup>519</sup> HRC, CO Georgia, CCPR/C/GEO/CO/4 (2014), para 19.

<sup>520</sup> HRC, CO Latvia, CCPR/C/LVA/CO/3 (2014), para 20; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27.

<sup>521</sup> HRC, CO Latvia, CCPR/C/LVA/CO/3 (2014), para 20.

<sup>522</sup> Ibid.

<sup>523</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 19.

<sup>524</sup> HRC, CO Kenya, CCPR/C/KEN/CO/3 (2012), para 24.

Another example can be found in the Concluding Observations on Peru:

The Committee (...) is concerned that legislation in force does not provide for free, prior and informed consent of indigenous communities concerning all measures which substantially compromise or interfere with their culturally significant economic activities (art 27).

The State party should ensure that the existing legal framework providing for informed prior consultations with indigenous communities for decisions relating to projects that affect their rights is implemented in a manner compliant with article 27 of the Covenant, including by ensuring that all affected indigenous communities are involved in the relevant consultation processes and that their views are duly taken into account. The State party should also ensure that free, prior and informed consent of indigenous communities is obtained before adopting measures which substantially compromise or interfere with their *culturally significant economic activities*.<sup>525</sup>

A particularly illustrative example can also be found in the Concluding Observations on Finland:

[T]he Committee remains concerned that the Sami people lack participation and decision-making powers over matters of fundamental importance to their culture and way of life, including rights to land and resources. The Committee also notes that there may be insufficient understanding or accommodation of the Sami lifestyle by public authorities and that there is a lack of legal clarity on the use of land in areas traditionally inhabited by the Sami people.

The State party should advance the implementation of the rights of the Sami by strengthening the decision-making powers of Sami representative institutions, such as the Sami parliament. The State party should increase its efforts to revise its legislation to fully guarantee the rights of the Sami people in their traditional land, ensuring respect for the right of Sami communities to engage in free, prior and informed participation in policy and development processes that affect them.<sup>526</sup>

These examples also illustrate the importance the HRC attaches to the right of indigenous and tribal peoples to participation and decision-making powers over matters of fundamental importance to their culture and way of life, including their rights to (traditional) land and resources.<sup>527</sup> Indigenous peoples have the right to be consulted in decision-making processes with respect to matters of interest to their communities. In this respect, the granting of concessions and licenses on the land they claim ('their territories') for extractive use, including mining operations, the execution of large-scale development projects, and the sale of (ancestral indigenous) lands to private companies, require the free, prior and informed consent of indigenous communities.<sup>528</sup>

<sup>525</sup> HRC, CO Peru, CCPR/C/PER/CO/5 (2013), para 24. (emphasis added, VV).

<sup>526</sup> HRC, CO Finland, CCPR/C/FIN/CO/6 (2013), para 16.

<sup>527</sup> HRC, CO Finland, CCPR/C/FIN/CO/6 (2013), para 16; CO Japan, CCPR/C/JPN/CO/6 (2014), para 26.

<sup>528</sup> HRC, CO Suriname, CCPR/C/SUR/CO/3 (2015), para 47; CO Canada, CCPR/C/CAN/CO/6 (2015), para 16; CO Venezuela, CCPR/C/VEN/CO/4 (2015), para 21; CO Russian Federation, CCPR/C/RUS/

This is illustrated by the following example from the Concluding Observations on Russia:

[The Committee] notes with concern (...) that indigenous peoples' sacred areas are largely unprotected from desecration, contamination and destruction by extractive, development and related activities, that consultation with indigenous peoples on matters of interest to their communities is insufficiently enforced in practice and that access to effective remedies remains a challenge.

The State party should (...) adopt measures to effectively protect [indigenous peoples'] sacred areas and ensure that consultations are held with the indigenous communities that might be adversely affected by the State party's development projects and extractive industries operations, with a view to obtaining their free, prior and informed consent for all proposed project activities. It should also ensure access to effective remedies for all members of indigenous groups for any violations of their rights.

The HRC has identified a number of State obligations, first and foremost ensuring effective legal protection for indigenous peoples' rights to their lands and natural resources, and taking all measures necessary to ensure effective and meaningful consultation with indigenous and tribal peoples to obtain their free, prior and informed consent before any (legislative or other) measure is adopted or implemented which may substantially jeopardize, compromise or interfere with their way of life and culture (including culturally significant economic activities).<sup>529</sup> Indigenous peoples should be actively involved in developing regulations on prior and informed consultation<sup>530</sup>, and their views should be duly taken into account.<sup>531</sup> States parties should respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood, which is inextricably linked to their land, is fully respected.<sup>532</sup>

States parties are also called upon to ensure that any (proposed) legislation takes due account of the specific needs or traditional way of life of minority groups. For example, Ireland was recommended to amend its Housing Act in order 'to meet the specific accommodation requirements of Traveller families'.<sup>533</sup> New Zealand was recommended to pay special attention 'to the cultural and religious significance of access to the foreshore and seabed for the Māori'.<sup>534</sup>

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CO/7 (2015), para 24; CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 25; CO Paraguay, CCPR/C/PRY/CO/3 (2013), para 27.

<sup>529</sup> HRC, CO Venezuela, CCPR/C/VEN/CO/4 (2015), para 21; CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 25; CO Peru, CCPR/C/PER/CO/5 (2013), para 24.

<sup>530</sup> HRC, CO Venezuela, CCPR/C/VEN/CO/4 (2015), para 21; CO Peru, CCPR/C/PER/CO/5 (2013), para 24.

<sup>531</sup> HRC, CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 25; CO Paraguay, CCPR/C/PRY/CO/3 (2013), para 27; CO Peru, CCPR/C/PER/CO/5 (2013), para 24; CO Guatemala, CCPR/C/GTM/CO/3 (2012), para 27; CO New Zealand, CCPR/C/NZL/CO/5 (2010), para 20.

<sup>532</sup> HRC, CO Kenya, CCPR/C/KEN/CO/3 (2012), para 24.

<sup>533</sup> HRC, CO Ireland, CCPR/C/IRL/CO/4 (2014), para 23.

<sup>534</sup> HRC, CO New Zealand, CCPR/C/NZL/CO/5 (2010), para 19.

### 2.1.3 Right to freedom of religion

Under article 18 '[e]veryone shall have the right to freedom of thought, conscience and religion', including 'freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. In its General Comment, the HRC explained the wide range of activities covered by the right to manifest religion, thereby also clearly establishing the cultural aspects of this right:

The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to *ritual and ceremonial acts giving direct expression to belief*, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also *such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings<sup>535</sup>, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group*. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.<sup>536</sup>

At first sight, it seems that the right to freedom of thought, conscience and religion is concerned with protecting the right to culture and cultural identity, and aims to sustain the distinctiveness, uniqueness and exclusivity of a community's beliefs and traditions.

The HRC has protected the right to conscientious objection to military service, as such a duty may conflict with individuals' conscience due to religious beliefs. This may be considered a cultural right, as it protects a community's (pacifist) beliefs and way of life. While these individuals may have to perform alternative national service, their beliefs give them a certain 'privilege', a right to be treated differently. The HRC submitted its views on conscientious objection in its General Comment on article 18:

Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid

<sup>535</sup> The HRC later addressed the right to wear distinctive clothing or headcoverings in its General Comment No 28 on the equality of rights between men and women. More particularly, the HRC addressed State (-condoned) regulation of clothing to be worn by women in public. The HRC stresses that 'such regulations may involve a violation of a number of rights guaranteed by the Covenant, such as: (...) articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression'. HRC, General Comment No 28 (n 39), para 13.

<sup>536</sup> HRC, General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 1993, para 4. (emphasis added, VV).

the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that *such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.*<sup>537</sup>

On a closer look, however, the HRC's concluding observations on the right to freedom of thought, conscience and religion appear not concerned with the right of religious people and communities to maintain their cultural exclusivity, but more with the right of these people and communities to enjoy their rights equally. The HRC is more concerned about religion as a ground for discrimination, than with protecting any particular religious way of life. Most concerns relating to freedom of religion are about cultural inclusivity, to be discussed in section 3.

To sum up, when it comes to protecting cultural differences, the HRC does not often make reference to article 1; recommendations which aim to protect or promote cultural differences generally refer to article 27, and relate to the official recognition of minorities and to meaningful consultation of these minorities, especially indigenous peoples. States must take positive action to facilitate the enjoyment of these rights. The right to freedom of religion has certain characteristics of an explicit cultural right which protects *cultural exclusivity*, but in the concerns and recommendations expressed by the HRC in concluding observations, it is mostly treated as an issue of *cultural inclusivity* (see section 3).

## 2.2 CESCO

The ICESCO contains two rights which are directly relevant to protect and preserve cultural differences: articles 1 and 15. Article 1 ICESCO covers the right of self-determination, and is identical to article 1 ICCPR. Article 15 recognizes the right of everyone 'to take part in cultural life' and is often compared (but is not identical) to article 27 ICCPR. According to the CESCO, '[t]he right to take part in cultural life is interdependent on (...) the right of all peoples to self-determination (art. 1)'.<sup>538</sup>

### 2.2.1 Right to self-determination

Although it addresses the issue substantively, the CESCO has not often explicitly referred to (internal) self-determination in relation to protecting and preserving cultural differences. In its Concluding Observations on Morocco, the CESCO expressed concerns regarding the right to self-determination of the Non-Self-Governing Territory of Western Sahara, as well as about the rights of the Sahraouis to participate in the

<sup>537</sup> Ibid, para 11. (emphasis added, VV).

<sup>538</sup> CESCO, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009, para 2.

use and exploitation of natural resources.<sup>539</sup> The State party was recommended ‘to find a solution to the issue of the right to self-determination for Western Sahara’, and to ‘guarantee respect for the principle of the prior, free and informed consent of the Sahraouis, and thus that they are able to exercise their right to enjoy and utilize fully and freely their natural wealth and resources’.<sup>540</sup> Like in the case of the occupied Palestinian Territories discussed above, it is questionable whether the CESCR is addressing self-determination in the form of cultural development or cultural autonomy here, since the use and exploitation of natural resources is not explicitly linked to a *traditional* livelihood or way of life.

Occasionally, the CESCR has addressed concerns under article 1 (alone), without (explicitly) speaking of ‘self-determination’. These concerns show a large resemblance to the ones addressed by the HRC under article 27 ICCPR, and include the lack of recognition of indigenous peoples and the inadequate definition of indigenous peoples in the Constitution<sup>541</sup>, the lack of (legal) recognition of community ownership of lands by indigenous peoples, their customary systems of land tenure, their right to use or access their ancestral lands and/or to dispose freely of their natural wealth and resources<sup>542</sup>, and the lack of recognition of their right ‘to use their land and to pursue their traditional livelihoods’.<sup>543</sup> In the Concluding Observations on Uganda, the CESCR expressed concern ‘that many indigenous peoples (...) are denied access to their ancestral lands and are prevented from preserving their traditional way of living’.<sup>544</sup> Not surprisingly, a recurring concern is the lack of free, prior and informed consent or prior and meaningful consultation of affected (indigenous) communities in decision-making processes concerning the exploitation of natural resources (such as mining and logging activities) in traditional territories.<sup>545</sup> The Concluding Observations on Nepal are exemplary:

Notwithstanding the progress made by the State party in recognizing indigenous peoples, the Committee notes that the process of consideration of the claims for recognition by some indigenous peoples has not yet been completed. The Committee is also concerned at information that indigenous peoples have been deprived of their traditionally owned lands, territories and resources due to development projects carried out by the State party without seeking their free, prior and informed consent. The Committee is further concerned that (...) there is no legal provision that recognizes community ownership of lands by indigenous peoples (art. 1).

<sup>539</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 5.

<sup>540</sup> Ibid, para 6.

<sup>541</sup> CESCR, CO Thailand, E/C.12/THA/CO/1-2 (2015), para 9; CO Uganda, E/C.12/UGA/CO/1 (2015), para 13.

<sup>542</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 9; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 14; CO Thailand, E/C.12/THA/CO/1-2 (2015), para 10; CO Uganda, E/C.12/UGA/CO/1 (2015), para 13; CO Paraguay, E/C.12/PRY/CO/4 (2015), para 6.

<sup>543</sup> CESCR, CO Finland, E/C.12/FIN/CO/6 (2014), para 9.

<sup>544</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 13.

<sup>545</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 9; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 14-17; CO Thailand, E/C.12/THA/CO/1-2 (2015), para 10; CO Paraguay, E/C.12/PRY/CO/4 (2015), para 6; CO Gabon, para 6; CO Ecuador, para 9; CO Colombia, para 9.

The Committee recommends that the State party:

- (a) Complete, as soon as possible, the process of recognition of indigenous peoples whose claims are under consideration;
- (b) Ensure that indigenous peoples are represented through their own chosen representatives in the work of the Constituent Assembly and in the decision-making process on all issues that affect them;
- (c) Guarantee the right of indigenous peoples to own, use and develop their ancestral lands, territories and resources, so as to enable them to fully enjoy their economic, social and cultural rights;
- (d) Seek their free, prior and informed consent before launching any development project;
- (e) Continuously monitor the projects being developed so as to take corrective measures, if necessary;
- (f) Provide displaced families and groups with fair and adequate compensation; (...)

The CESCR has generally advised States parties to give legal and political recognition to its indigenous peoples based on self-identification, or include recognition of indigenous peoples in the Constitution (in line with the UN Declaration on the Rights of Indigenous Peoples).<sup>546</sup> If necessary, States should adopt legislative and administrative measures to recognise and guarantee indigenous peoples' rights to own, use, control and develop their ancestral lands and territories, and to freely dispose of their natural wealth and resources, so as to enable them to fully enjoy their economic, social and cultural rights.<sup>547</sup> They should also take the legislative and administrative measures needed to ensure that free, prior and informed consent is obtained from indigenous peoples. This requires the effective and systematic application of the principle of prior consultation in discussions with the concerned communities, often indigenous peoples, providing the time and space necessary for reflection and decision-making, as well as for the implementation of cultural safeguards, and allowing free expression, as well as respecting their consent to the realisation of a project.<sup>548</sup> States need to engage in prior and meaningful consultations with these communities before granting concessions or licences to private companies for the economic exploitations of the lands and territories traditionally occupied or used by these communities, and enable them to give their free, prior and informed consent regarding development activities which have an impact on access to their lands, and in relation to decisions which may directly affect the exercise of their economic, social and cultural rights.<sup>549</sup> Finally, States must guarantee that such (economic) exploitation will not violate the rights recognised in the Covenant and that

<sup>546</sup> CESCR, CO Thailand, E/C.12/THA/CO/1-2 (2015), para 9; CO Uganda, E/C.12/UGA/CO/1 (2015), para 13.

<sup>547</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 9; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 15; CO Thailand, E/C.12/THA/CO/1-2 (2015), para 9; CO Uganda, E/C.12/UGA/CO/1 (2015), para 13; CO Paraguay, E/C.12/PRY/CO/4 (2015), para 6; CO Finland, E/C.12/FIN/CO/6 (2014), para 9.

<sup>548</sup> CESCR, CO Gabon, E/C.12/GAB/CO/1 (2013), para 6; CO Ecuador, E/C.12/EQU/CO/3 (2012), para 9.

<sup>549</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 9; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 14, 16; CO Uruguay, E/C.12/URY/CO/3-4 (2010), para 14; CO Paraguay, E/C.12/PRY/CO/4 (2015), para 6; CO Gabon, E/C.12/GAB/CO/1 (2013), para 6; CO Ecuador, E/C.12/EQU/CO/3 (2012), para 9; CO Colombia, E/C.12/COL/CO/5 (2010), para 9.

just and fair compensation is granted to affected communities.<sup>550</sup> An example can be found in the Concluding Observations on Ecuador, where the CESCR was concerned about ‘the failure to undertake consultations as a basis for obtaining the prior, freely given and informed consent of indigenous peoples and nationalities for natural resource development projects that affect them’ and about the State party’s failure ‘to engender an intercultural dialogue that would serve as a basis for obtaining the consent of indigenous peoples and nationalities and respecting their right to be consulted’.<sup>551</sup> The State party was urged ‘to engage in consultations regarding (...) resource exploration and development that allow the peoples and nationalities concerned to freely decide whether or not to give their consent for a given project and that provide sufficient opportunities and time for deliberation and decision-making, as well as for the implementation of *cultural safeguards* and compensatory remedies’.<sup>552</sup>

With reference to both articles 1 and 15, the CESCR has addressed the denial of the ‘traditional rights’ of ethnic minorities to their ancestral lands and natural resources<sup>553</sup>, the adverse effects of economic activities connected with the exploitation of natural resources on the enjoyment of economic, social and cultural rights by people living in the areas concerned and the lack of participatory mechanisms and consultations, as well as limited access to information for affected individuals and communities<sup>554</sup>, the lack of legal recognition to indigenous peoples in the Constitution<sup>555</sup>, the lack of effective legal mechanisms for recognizing the rights of indigenous peoples as such to obtain collective land titles<sup>556</sup>, and the fact that the indigenous peoples are still not effectively consulted, nor is their free, prior and informed consent obtained in the decision-making process concerning the exploitation of the natural resources within their traditional or ancestral lands.<sup>557</sup> Connecting articles 1 and 15 with article 11 (adequate standard of living) and article 12 (health), the CESCR also expressed concern about ‘cases in which the increased use of chemical pesticides and transgenic soya seeds in regions traditionally inhabited or used by indigenous communities have negatively affected these communities’, as ‘these communities find it increasingly difficult to apply their traditional farming methods’. The CESCR is worried this may become an important obstacle to the access to safe, adequate and affordable food.<sup>558</sup> Under articles 1 and 11 the CESCR expressed concern about the resettlement of nomadic herdsmen in ‘new

<sup>550</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 14; CO Finland, E/C.12/FIN/CO/6 (2014), para 9; CO Nepal, E/C.12/NPL/CO/3 (2014), para 9; CO Thailand, E/C.12/THA/CO/1-2 (2015), para 10.

<sup>551</sup> CESCR, CO Ecuador, E/C.12/ECU/CO/3 (2012), para 9.

<sup>552</sup> Ibid. (emphasis added, VV).

<sup>553</sup> CESCR, CO Thailand, E/C.12/THA/CO/1-2 (2015), para 10.

<sup>554</sup> CESCR, CO Thailand, E/C.12/THA/CO/1-2 (2015), para 10.

<sup>555</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 6.

<sup>556</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 6; CO El Salvador, E/C.12/SLV/CO/3-5 (2014), para 27; CO Argentina, E/C.12/ARG/CO/3 (2011), para 8.

<sup>557</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 7; CO El Salvador, E/C.12/SLV/CO/3-5 (2014), para 27; CO New Zealand, E/C.12/NZL/CO/3 (2012), para 11.

<sup>558</sup> CESCR, CO Argentina, E/C.12/ARG/CO/3 (2011), para 10.

socialist villages' without proper consultation and (in most cases) without free, prior and informed consent.<sup>559</sup>

### 2.2.2 *Right to take part in cultural life*

While the CESCR did not elaborate on the content of the right of self-determination (art 1) in any general comment, it did all the more so regarding the content of the right of everyone to take part in cultural life (art 15, para 1 (a)), a right which has often been highlighted in connection with the cultural dimension of the right to self-determination.<sup>560</sup>

Unlike article 27 ICCPR, article 15(1)(a) ICESCR is a right enjoyed by 'everyone', and does not explicitly refer to minority culture(s). Initially, article 15(1)(a) was interpreted to favour cultural homogeneity over cultural diversity, as the right to take part in cultural life was interpreted as the right to have access and to take part in the cultural life of the dominant group only<sup>561</sup>, or in other words: as the right to *a* culture instead of the right to one's *own* culture.<sup>562</sup> It is with the adoption of General Comment No 21, where the CESCR endorsed 'culture' (or 'cultural life') in its broader meaning<sup>563</sup>, that the CESCR formally adopted an approach to the concept of culture resembling – and even more comprehensive than – that of the HRC:

The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, *while preserving their specificities* and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.<sup>564</sup>

The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces

<sup>559</sup> CESCR, CO China, E/C.12/CHN/CO/2 (2014), para 31.

<sup>560</sup> Francioni and Scheinin (n 3), p 57.

<sup>561</sup> A Yupsanis, The Meaning of 'Culture' in Article 15 (1)(a) of the ICESCR – Positive Aspects of CESCR's General Comment No. 21 for the Safeguarding of Minority Cultures, *German Yearbook of International Law*, vol 55, 2012, p 358.

<sup>562</sup> The right to take part in cultural life has initially been strictly limited to participation in the 'national culture' by the individual rights holder (in line with the intended meaning of article 27 UDHR). A recommendation by UNESCO to include the additional wording: 'to take part in the cultural life of the communities to which he belongs', was dropped from the final text. Focus remained on participation in the national culture.

<sup>563</sup> CESCR, General Comment No 21 (n 71), paras 10–13.

<sup>564</sup> *Ibid*, para 13.

affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.<sup>565</sup>

The difference with article 27 ICCPR lies thus in the fact that the interpretive approach of the CESCR is more generally applicable than the particular case of minorities. Of course this is a logical consequence of the scope of the underlying provisions.

The right to take part in cultural life has inherent collective elements.<sup>566</sup> The CESCR clarifies in its General Comment No 21 that ‘the term “everyone” in the first line of article 15 (1) of the ICESCR may denote the individual *or the collective*’.<sup>567</sup> According to the CESCR, ‘cultural rights may be exercised by a person a) as an individual, b) in association with others, or c) *within a community or group, as such*’.<sup>568</sup> In its General Comment, the CESCR contends that ‘[t]he full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world’. The right of everyone to take part in cultural life is ‘intrinsicly linked to the right to education (arts. 13 and 14), through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values’, as well as ‘interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1) and the right to an adequate standard of living (art. 11)’.<sup>569</sup>

It further explains the necessary conditions for the full realisation of the right of everyone to take part in cultural life on the basis of equality and non-discrimination. They include availability, accessibility, acceptability, adaptability and appropriateness. *Availability* is ‘the presence of cultural goods and services that are open for everyone to enjoy and benefit from’. This includes ‘intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities’.<sup>570</sup> *Appropriateness* refers to ‘the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and

<sup>565</sup> Ibid. (emphasis added, VV).

<sup>566</sup> YM Donders, *Foundations of Collective Cultural Rights in International Human Rights Law*, in: A Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill, 2016, p 104. ‘Most cultural rights in international human rights instruments, just like other rights, are defined as individual rights. These rights are, however, for the most part enjoyed in connection with other individuals or within the context of communities. Article 27 ICCPR, which guarantees the right of members of minorities to enjoy their culture, explicitly includes that persons can do so ‘in community with other members of their group’. Other cultural rights, such as the individual right to take part in cultural life, do not contain a reference to their shared enjoyment, but it is clear that these rights are generally enjoyed together with other members of a cultural community.’

<sup>567</sup> CESCR, General Comment No 21 (n 71), para 9. (emphasis added, VV).

<sup>568</sup> Ibid. (emphasis added, VV).

<sup>569</sup> Ibid, para 2.

<sup>570</sup> Ibid, para 16.

indigenous peoples'.<sup>571</sup> The CESCR recapitulates its previous references to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education, and adds that 'the way in which rights are implemented may also have an impact on cultural life and cultural diversity'. The CESCR stresses in this regard 'the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed'.<sup>572</sup> The Committee emphasizes that 'a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories'.<sup>573</sup>

The CESCR establishes core obligations – applicable with immediate effect – of States parties under article 15, paragraph 1 (a), of the Covenant: States have 'at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of *their choice*'.<sup>574</sup> It follows that States should, at a minimum:

- (a) (...) take legislative and any other necessary steps *to guarantee nondiscrimination and gender equality* in the enjoyment of the right of everyone to take part in cultural life;
- (b) (...) respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;
- (c) (...) respect and protect the right of everyone *to engage in their own cultural practices, while respecting human rights* which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right *to use the language of his or her choice*; freedom of association and peaceful assembly; freedom to choose and set up educational establishments;
- (d) (...) eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind;
- (e) (...) allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.<sup>575</sup>

When the CESCR identifies several persons and communities requiring special protection<sup>576</sup>, it also clearly distinguishes between positive and negative elements of culture. Regarding women, the CESCR refers to 'negative practices, including those

<sup>571</sup> Ibid, para 16.

<sup>572</sup> Ibid, para 16.

<sup>573</sup> Ibid, para 23.

<sup>574</sup> Ibid, para 55. (emphasis added, VV).

<sup>575</sup> Ibid. (emphasis added, VV).

<sup>576</sup> Ibid, paras 25–39.

attributed to customs and traditions' (to be further discussed in chapter 5), while it notes positive cultural elements, such as respect for cultural specificities and preserving the distinctive character of minority cultures, regarding other vulnerable groups, including minorities, migrants and indigenous peoples. Minorities, and persons belonging to minorities, have the right to take part in the cultural life of society, and also to 'conserve, promote and develop their own culture'.<sup>577</sup> The corresponding obligation on States parties is 'to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves'.<sup>578</sup> Minorities thus have 'the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership'.<sup>579</sup> Stressing both the collective and the individual elements of the right to take part in cultural life, the CESCR explains:

Minorities, as well as persons belonging to minorities, have the right not only to their own identity but also to development in all areas of cultural life. Any programme intended to promote the constructive integration of minorities and persons belonging to minorities into the society of a State party should thus be based on inclusion, participation and non-discrimination, *with a view to preserving the distinctive character of minority cultures*.<sup>580</sup>

The cultural identities of migrants should also be protected. This includes 'their language, religion and folklore', as well as 'their right to hold cultural, artistic and intercultural events'. States parties 'should not prevent migrants from maintaining cultural links with their countries of origin'.<sup>581</sup> The CESCR notes that 'the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' and that '[i]ndigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity'.<sup>582</sup> Indigenous peoples have the 'right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions', as well as its manifestations, such as medicines. 'States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights'.<sup>583</sup>

<sup>577</sup> Ibid, para 32.

<sup>578</sup> Ibid.

<sup>579</sup> Ibid.

<sup>580</sup> Ibid, para 33. (emphasis added, VV).

<sup>581</sup> Ibid, para 34.

<sup>582</sup> Ibid, para 36.

<sup>583</sup> Ibid, para 37.

General comments are generally based on practice, as established in views and concluding observations. Some of this practice, as established in concluding observations, is highlighted next.

Regarding the right to take part in cultural life, the CESCR has four major concerns: (1) the lack of (official) recognition of minorities and indigenous peoples; (2) hindrances to the full enjoyment of cultural life; (3) the decreasing use of minority and indigenous languages; (4) threats to the traditional means of livelihood of indigenous peoples, including intellectual property and the lack of effective consultation and prior informed consent of indigenous peoples.

The CESCR has repeatedly expressed concern about the lack of recognition of indigenous peoples and (other) minorities.<sup>584</sup> This may have a negative impact on their enjoyment of cultural rights. One example can be found in the Concluding Observations on Moldova:

The Committee is concerned that State party legislation does not adequately address the ethnic minorities and groups within its territory, and that these groups lack recognition which would allow them to exercise their rights and express their identity and culture (art. 15).

The Committee recommends that the State party adopt concrete and effective measures of a legislative and other nature, such as public policies to guarantee the recognition of the rights of ethnic minorities to express their own culture and identity. The Committee also urges the State party to adopt specific programmes and plans in the field of culture to contribute to inter-ethnic dialogue, mutual tolerance and social cohesion.<sup>585</sup>

The Concluding Observations on Kuwait provide another example:

In light of the cultural diversity in the State party, the Committee is concerned about the lack of recognition of the right of minorities, minority communities and groups to express their cultural identity (art. 15).

The Committee recommends that the State party develop a legislative framework which defines and recognizes that minorities, minority communities and groups, among others, have: (a) the right to freely choose their own cultural identity and to belong or not to a community and have their choice respected; (b) the right to conserve, promote and develop their own culture; (c) the right to cultural diversity, traditions, customs, religion, languages and other manifestations of cultural identity and membership. The Committee refers the State party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life.<sup>586</sup>

<sup>584</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 29; CO Bulgaria, E/C.12/BGR/CO/4–5 (2012), para 23; CO Denmark, E/C.12/DNK/CO/5 (2013), para 21; CO Moldova, E/C.12/MDA/CO/2 (2011), para 30; CO Ireland, E/C.12/IRL/CO/3 (2015), para 33.

<sup>585</sup> CESCR, CO Moldova, E/C.12/MDA/CO/2 (2011), para 30.

<sup>586</sup> CESCR, CO Kuwait, E/C.12/KWT/CO/2 (2013), para 30.

A major set of concerns is about barriers to the full enjoyment of cultural life generally. The CESCR has addressed the limited scope for the exercise of cultural rights by indigenous peoples and ethnic minorities<sup>587</sup>, the lack of policies regarding the promotion and protection of the culture and way of life of such communities<sup>588</sup>, the lack of full enjoyment and protection of minority rights or cultural rights of minorities<sup>589</sup>, the severe restrictions which ethnic minorities face in the realisation of their right to take part in cultural life<sup>590</sup>, or hindrances to the full enjoyment of cultural life.<sup>591</sup>

An example can be found in the Concluding Observations on Switzerland:

The Committee notes with concern the lack of a coherent and comprehensive policy in the State party regarding the promotion and protection of the culture and way of life of the Roma, Sinti and Yeniche. The Committee is also concerned that the provision of long-term and short-term caravan sites for travellers continues to be an unresolved problem (art. 15).

The Committee recommends that the State party take concrete measures to promote the culture and way of life of the Roma, Sinti and Yeniche and to encourage the cantons to establish an adequate number of long-term and short-term caravan sites. The Committee draws the attention of the State party to its general comments No. 20 (2009) on non-discrimination and No. 21 (2009) on the right of everyone to take part in cultural life.<sup>592</sup>

The Concluding Observations on Serbia provide another illustrative example:

The Committee is concerned that the cultural rights guaranteed under the Covenant are not accessible to all persons, in particular in rural areas. While noting the measures taken for the equal enjoyment of cultural rights by all groups, (...) the Committee is concerned that *Bosniacs* have not benefited from the full enjoyment and protection of minority rights.

The Committee recommends that the State party adopt a comprehensive cultural strategy, with a coordination mechanism, for the promotion, protection and enjoyment of cultural rights by all individuals and groups in the entire territory of the State party, while preserving cultural diversity. The Committee encourages the State party to take further measures so that all communities with specific identities, including *Bosniacs*, can benefit from the enjoyment and protection of minority rights. (...).<sup>593</sup>

While most concerns relate to the failure of States parties to take (sufficient) action, sometimes the CESCR expresses concerns about State policies which actively restrict or infringe on the right to take part in cultural life. Consider this example from the Concluding Observations on Vietnam:

<sup>587</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 37.

<sup>588</sup> CESCR, CO Switzerland, E/C.12/CHE/CO/2-3 (2010), para 23.

<sup>589</sup> CESCR, CO Lithuania, E/C.12/LTU/CO/2 (2014), para 24; CO Serbia, E/C.12/SRB/CO/2 (2014), para 36; CO Ukraine, E/C.12/UKR/CO/6 (2014), para 27.

<sup>590</sup> CESCR, CO China, E/C.12/CHN/CO/2 (2014), para 36.

<sup>591</sup> CESCR, CO Egypt, para 23.

<sup>592</sup> CESCR, CO Switzerland, E/C.12/CHE/CO/2-3 (2010), para 23.

<sup>593</sup> CESCR, CO Serbia, E/C.12/SRB/CO/2 (2014), para 36.

The Committee expresses concern at the State party's policy of phasing out certain traditional cultural values of ethnic minorities which it considers 'obsolete', and attempting to replace them with new cultural policies premised on objectives of socio-economic stability and development. Moreover, the Committee is concerned at the adverse impact of commercial tourism on the cultural activities of ethnic minorities, such as the Bay Nui bull race and the Dragon Boat race (art. 15).

The Committee urges the State party to refrain from submitting cultural policies to development objectives and to fully respect the right of ethnic minorities to take part in their cultural activities and to conserve, promote and develop their own culture. *Limitations to this right should be restricted to negative practices which infringe upon other human rights.* Moreover, the Committee recommends that the State party ensure that ethnic minorities are fully involved in decision-making processes regarding the economic exploitation of their cultural heritage and that they obtain tangible benefits from these activities. (...).<sup>594</sup>

The Concluding Observations on China provide another interesting example:

The Committee is concerned that ethnic minorities continue to face severe restrictions in the realization of their right to take part in cultural life, including the right to use and teach minority languages, history and culture, as well as to practice their religion freely. Despite the measures adopted by the State party, the Committee is concerned about the restrictions faced by *Tibetans* and *Uighurs*, in particular regarding the restriction of education in the *Tibetan* and *Uighur* languages (art. 15).

The Committee recommends that the State party take all necessary measures to ensure the full and unrestricted enjoyment by minorities, including *Tibetans*, *Uighurs* and *Inner Mongolians*, of their right to enjoy fully their own cultural identity and take part in cultural life, and to ensure the use and practice of their language and culture. The Committee also recommends that the State party take adequate measures to protect cultural diversity and promote awareness of the cultural heritage of ethnic, religious and linguistic minorities.<sup>595</sup>

One such barrier to the full enjoyment of cultural life is often addressed separately: the decreasing use of minority and indigenous languages, which are sometimes even at risk of disappearance. The CESCR has paid attention to the measures taken to protect linguistic diversity or to promote the preservation of these languages<sup>596</sup>, and to their limited and decreasing use in education, media, cultural life or daily life.<sup>597</sup>

In the Concluding Observations on Peru, the CESCR writes:

<sup>594</sup> CESCR, CO Vietnam, E/C.12/VNM/CO/2-4 (2014), para 34. (emphasis added, VV).

<sup>595</sup> CESCR, CO China, E/C.12/CHN/CO/2 (2014), para 36.

<sup>596</sup> CESCR, CO Afghanistan, E/C.12/AFG/CO/2-4 (2010), para 44; CO Paraguay, E/C.12/PRY/CO/4 (2015), para 31.

<sup>597</sup> CESCR, CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 27; CO Romania, E/C.12/ROU/CO/3-5 (2014), para 24; CO Djibouti, E/C.12/DJI/CO/1-2 (2013), para 37; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 30; CO Ukraine, E/C.12/UKR/CO/6 (2014), para 27.

The Committee is concerned that the use of indigenous languages is gradually declining (art. 15).

The Committee urges the State party to take urgent steps to preserve and promote the use of indigenous languages.<sup>598</sup>

This is a very plain example. In the Concluding Observations on Kyrgyzstan, the CESCR was (somewhat) more elaborate and specific:

The Committee is concerned about the limited and decreasing use of minority languages, particularly Uzbek, in education, the media and cultural life (art. 15).

The Committee recommends that the State party allocate specific budgetary resources to promoting the cultural diversity of ethnic minorities, allow mother tongue education and minority language press, and enable all groups to express and develop their culture, language, traditions and customs.<sup>599</sup>

In its Concluding Observations on Iran, the CESCR hints at the importance of minority language media for enjoying the right to take part in cultural life:

The Committee is concerned that ethnic minorities, including Kurds, Arabs, Azeris and Baluch, do not fully enjoy their right to take part in cultural life, including as a consequence of closures of publications and newspapers in minority languages (art. 15).

The Committee recommends that the State party take steps to ensure the full and unrestricted enjoyment by ethnic minorities, including Kurds, Arabs, Azeris and Baluch, to their right to take part in cultural life, including through the protection of publications and newspapers in minority languages from imposed closure. The Committee also recommends that the State party take measures to protect cultural diversity, promote awareness of the cultural heritage of national and ethnic minorities, and ensure favourable conditions for members of those minorities to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs in line with the Committee's general comment No. 21 (2009) on the right of everyone to take part in cultural life.<sup>600</sup>

Finally, a number of concerns relate to indigenous peoples and their natural wealth and resources. In this respect, the CESCR has expressed concerns about a lack of adequate legal protection of indigenous peoples' rights to their ancestral lands and to the traditional use of their natural resources<sup>601</sup>, measures which do not sufficiently guarantee the right of indigenous peoples to enjoy their traditional means of

<sup>598</sup> CESCR, CO Peru, E/C.12/PER/CO/2-4 (2012), para 27.

<sup>599</sup> CESCR, CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 27.

<sup>600</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 30.

<sup>601</sup> CESCR, CO Russian Federation, E/C.12/RUS/CO/5 (2011), para 34.

livelihood<sup>602</sup>, insufficient mechanisms for consensus-building around natural-resource development activities which would provide a way of reconciling them with the world view of indigenous peoples and nationalities<sup>603</sup>, and the lack of effective consultation and prior informed consent of indigenous peoples in decision-making processes relating to the exploitation of natural resources in their traditional territories.<sup>604</sup>

The Concluding Observations on Tanzania provide a good example:

The Committee is concerned that restrictions to land and resources, threats to livelihoods and reduced access to decision-making processes by vulnerable communities, such as pastoralist and hunter-gatherer communities, pose a threat to the realization of their right to cultural life (art. 15).

The Committee recommends that the State party take legislative and other measures to protect, preserve and promote the cultural heritage and traditional ways of life of vulnerable communities, such as hunter-gatherer and pastoralist communities. It recommends that it ensure their meaningful participation in the debates related to nature conservation, commercial hunting, tourism and other uses of the land, based on free, prior and informed consent.<sup>605</sup>

In its Concluding Observations on Cameroon, the CESCR writes:

The Committee is concerned that, despite its legal recognition of the cultural rights of indigenous peoples living on its territory, the State party has moved some communities, such as the *Baka Pygmy* community and the *Mbororo* community, away from their ancestral lands, which have been opened to third parties for logging, thereby forcing those communities to adapt to other dominant cultures in the country (art. 15).

The Committee recommends that the State party take effective measures to protect the right of each group of indigenous people to its ancestral lands and the natural resources found there, and to ensure that national development programmes comply with the principle of participation and the protection of the distinctive cultural identity of each of these groups.<sup>606</sup>

In the Concluding Observations on Russia, the CESCR expressed concerns about the inadequate protection of indigenous intellectual property<sup>607</sup>:

The Committee is (...) concerned about the lack of adequate protection in the legal system of the State party of the right of indigenous peoples in the north, Siberia and the far east, to

<sup>602</sup> CESCR, CO Norway, E/C.12/NOR/CO/5 (2013), para 26.

<sup>603</sup> CESCR, CO Ecuador, E/C.12/ECU/CO/3 (2012), para 10.

<sup>604</sup> CESCR, CO Peru, E/C.12/PER/CO/2-4 (2012), para 23.

<sup>605</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1-3 (2012), para 29.

<sup>606</sup> CESCR, CO Cameroon, E/C.12/CMR/CO/2-3 (2011), para 33.

<sup>607</sup> Nation States across the world have experienced difficulties reconciling local indigenous laws and cultural norms with a predominantly western legal system, in many cases leaving indigenous peoples' individual and communal intellectual property rights largely unprotected.

their ancestral lands and to the traditional use of their natural resources. It is also concerned about *the lack of adequate protection of their intellectual property rights* and of information on intellectual property rights (art. 15).

(...) The Committee (...) recommends that the State party include in the new drafts of law being developed clear and precise norms for the effective protection of the right of indigenous peoples in the north, Siberia and the far east, to their ancestral lands, natural resources and cultural heritage, *including protection of their intellectual property rights to their works which are an expression of their traditional culture and knowledge*.<sup>608</sup>

As the examples have shown, States parties are generally recommended to address the lack of (official) recognition of minorities and indigenous peoples by giving (legal/political) recognition to those peoples based on self-identification<sup>609</sup>, and/or by guaranteeing the recognition of the rights of ethnic minorities to express their own culture and identity<sup>610</sup>, and by respecting the right of everyone to freely choose their own cultural identity, including the right to identify as belonging to an indigenous people.<sup>611</sup> The decreasing use of minority and indigenous languages should be addressed by pursuing efforts aimed at the preservation of endangered (indigenous) languages, including by promoting their use and by documenting them.<sup>612</sup> Other hindrances to the full enjoyment of cultural life are to be addressed by taking measures to protect cultural diversity, encourage knowledge of the history, traditions and culture of various groups living in the State party and promote awareness of the cultural heritage of national, ethnic, religious or linguistic minorities, and by ensuring favourable conditions to enable these minorities to express and develop their culture, traditions and customs in their own language.<sup>613</sup> Finally, the CESCR contends that States parties should address threats to the traditional means of livelihood of indigenous peoples by taking legislative and other measures to protect, preserve and promote the traditional means of livelihood of indigenous peoples (such as reindeer-grazing and fishing for the Sami)<sup>614</sup>, as well as the cultural heritage and traditional ways of life of vulnerable communities, such as hunter-gatherer and pastoralist communities.<sup>615</sup> States parties should also acknowledge and protect the traditional knowledge and cultural heritage of

<sup>608</sup> CESCR, CO Russian Federation, E/C.12/RUS/CO/5 (2011), para 34. (emphasis added, VV).

<sup>609</sup> CESCR, CO Thailand, E/C.12/THA/CO/1-2 (2015), para 9; CO Uganda, E/C.12/UGA/CO/1 (2015), para 13.

<sup>610</sup> CESCR, CO Moldova, E/C.12/MDA/CO/2 (2011), para 30; CO Kuwait, E/C.12/KWT/CO/2 (2013), para 30.

<sup>611</sup> CESCR, CO Vietnam, E/C.12/VNM/CO/2-4 (2014); para 33; CO Kuwait, E/C.12/KWT/CO/2 (2013), para 30.

<sup>612</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 40; CO Paraguay, E/C.12/PRY/CO/4 (2015), para 31.

<sup>613</sup> CESCR, CO Romania, E/C.12/ROU/CO/3-5 (2014), para 24; CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 27; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 30; CO China, E/C.12/CHN/CO/2 (2014), para 36.

<sup>614</sup> CESCR, CO Norway, E/C.12/NOR/CO/5 (2013), para 26.

<sup>615</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1-3 (2012), para 29.

indigenous peoples, including their ancestral lands<sup>616</sup>, and ensure effective consultation and prior informed consent of indigenous peoples relating to the exploitation of natural resources in their traditional territories.<sup>617</sup>

On the whole there is significant overlap between articles 1 and 15. Both articles have been mentioned when addressing issues like the recognition of indigenous peoples, and threats to their traditional lands and livelihoods. Article 15 is used to address a wider variety of issues, also covering protection of language, for example. It seems that, compared to the HRC, the CESCR gives more recognition to the (internal) cultural dimension of the right to self-determination. Where the HRC has clearly chosen to use its article 27 (and not article 1) for the protection and promotion of cultural diversity, the CESCR seems to use both articles 1 and 15 for this purpose, without any clear differentiation between the two articles. It is also interesting to note that, even though article 27 ICCPR is exclusively aimed at members of minorities and article 15 ICESCR is a right for everyone, in practice it seems that also article 15 is largely applied in relation to minorities and indigenous peoples.<sup>618</sup> States must take positive action to facilitate and guarantee the enjoyment of these rights.

### 2.3 CEDAWCEE

Article 13 (c) CEDAW entails ‘the [equal] right to participate in recreational activities, sports and all aspects of cultural life’. At first sight, this article resembles the rights in article 27 ICCPR and, especially, article 15 ICESCR, i.e., the rights which are explicitly concerned with the right to preserve, develop and have access to culture and cultural identity. A close examination of the concluding observations shows, however, that the CEDAWCee does in practice not use its article 13 (c) in relation to ‘culture as a way of life’, but in relation to economic empowerment of women, i.e., access to credit, financial assets, bank accounts, pensions, social protection schemes, and occasionally in relation to access to recreational activities, sports, and cultural institutions. It is interesting to see that the CEDAWCee nevertheless, albeit rarely, addresses concerns which relate to protecting ‘culture as a way of life’, in particular threats to the traditional means of livelihood of indigenous women.<sup>619</sup> When addressing indigenous women, the CEDAWCee, like the HRC and the CESCR, pays attention to their special connection with ancestral lands and territories.

<sup>616</sup> CESCR, CO Argentina, E/C.12/ARG/CO/3 (2011), para 25.

<sup>617</sup> CESCR, CO Peru, E/C.12/PER/CO/2–4 (2012), para 23.

<sup>618</sup> The reason for this may be a practical rather than a principled one: this is probably where the issues arise.

<sup>619</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 39; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 42; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 36; CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 34; CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 38. These concerns were discussed in relation to ‘stereotypes’ (art 5) or ‘disadvantaged groups of women’ (art 14).

The CEDAWCee has expressed concerns about the situation of indigenous women and girls and the obstacles they face to living in their ancestral lands and their access to traditional lands and livelihoods.<sup>620</sup>

A good example may be found in the Concluding Observations on the Russian Federation, under the heading:

The Committee is concerned about the situation of indigenous women and girls, in particular the restrictions that indigenous women face with regard to their access to traditional lands and livelihoods, food, water and health, as well as at their limited representation on local, regional and federal decision-making bodies (...).

The Committee recommends that the State party:

- (a) Ensure that indigenous women are represented in decision-making bodies at local, regional and federal levels, and adopt measures to ensure the full and effective participation of indigenous women in all decision-making processes that may affect their rights;
- (b) Guarantee indigenous women's full and unrestricted access to their traditional lands and resources on which they depend for food, water, health and *to maintain and develop their distinct cultures and identities as peoples*; (...).<sup>621</sup>

States parties should adopt measures to ensure the full and effective participation of indigenous women in all decision-making processes which may affect their rights<sup>622</sup>, implement adequate consultation processes and systematically consult indigenous women to seek their free prior and informed consent in decision-making processes relating to large-scale projects for the exploitation of natural resources which have an impact on their rights and legitimate interests<sup>623</sup>, and guarantee the right of indigenous women to (access to) their traditional, ancestral and/or community lands and ensure that they can secure a traditional livelihood for themselves.<sup>624</sup> Finally, States parties should take measures to ensure that companies executing projects for the exploitation of natural resources adequately compensate women living in territories and areas affected by such projects.<sup>625</sup>

In conclusion, the CEDAWCee does address cultural rights<sup>626</sup>, albeit on very few occasions and limited to the rights to traditional lands and livelihoods of indigenous

<sup>620</sup> CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 42; CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 39; CO Bolivia, CEDAW/C/BOL/CO/5-6 (2015), para 34.

<sup>621</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8, para 39-40. (emphasis added, VV).

<sup>622</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8, para 40.

<sup>623</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5-6 (2015), para 35; CO Ecuador, CEDAW/C/ECU/CO/8-9 (2015), para 39.

<sup>624</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4-5 (2014), para 35; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 43; CO Russian Federation, CEDAW/C/RUS/CO/8, para 40.

<sup>625</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5-6 (2015), para 35.

<sup>626</sup> The CEDAWCee does not explicitly link its concerns and recommendations to specific treaty provisions. The rights of indigenous women are discussed under headings such as 'disadvantaged

women and girls. States must take positive action to facilitate the enjoyment of these rights.

### 3 CULTURAL INCLUSIVITY: PROTECTING CULTURAL DIVERSITY THROUGH NON-DISCRIMINATION AND EQUALITY PROVISIONS

Cultural diversity is also protected through the overarching equality and non-discrimination principle. States parties do not only have obligations to preserve cultural diversity as an end in itself, they are also obliged to ensure the inclusion and participation of persons and groups from varied cultural backgrounds: cultural inclusivity. This starts with ensuring that there is no discrimination (inter alia on grounds of ‘cultural traits’) in their laws. In addition, States parties are obliged to improve the *de facto* situation through concrete and effective policies and programmes. Two distinct types of obligations can be identified here: (1) obligations to ensure equality by *accommodating* differences in treatment; (2) obligations to ensure equality by *eliminating* differences in treatment. The first type of obligations consists of *permanent* special measures (section 3.2). Their aim is not to protect and promote cultural exclusivity, but to ensure the inclusion and participation of persons and groups from varied cultural backgrounds by means of allowing them – on a permanent basis – their cultural specificities. The second type of obligations consists of adopting or amending legislation in combination with *temporary* special measures (section 3.3). Their aim is to redress inequalities by ensuring the inclusion and participation of persons and groups from varied cultural backgrounds through both legislation and affirmative action eliminating discrimination against them.

Before elaborating on this distinction and its implications, first some preliminary notions and terminology with regard to non-discrimination and equality are explained with a view to establishing the differences and similarities between the concepts used by the Committees. These have to be taken into account when studying the treaty bodies’ interpretative output.

#### 3.1 NON-DISCRIMINATION AND THE ENJOYMENT OF EQUALITY: SOME PRELIMINARY NOTIONS

The purpose of this section is to introduce several important notions with regard to non-discrimination and equality, as used by the different treaty monitoring bodies. Focus is on general non-discrimination and equality provisions, not those regarding

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groups of women’, ‘Indigenous and rural women’, ‘Indigenous and Afro-Bolivian women’, ‘Indigenous, Afro-Ecuadorian and Montubio women’, etc. All seemingly in relation to article 14.

discrimination on grounds of sex and gender. The latter are discussed in chapter 5, as gender discrimination falls under ‘negative or harmful aspects of culture’.

The ICCPR includes two general non-discrimination clauses: article 2 guarantees to all individuals, within a State party’s territory and subject to its jurisdiction, that the rights enshrined in the ICCPR will be respected and ensured ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’; article 26 guarantees that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.<sup>627</sup> In 1989 the HRC issued General Comment No 18, in which it details its interpretation of articles 2 and 26 as well as other references to equality and non-discrimination in the ICCPR. The HRC explains that differentiation of treatment does *not* constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>628</sup> The term ‘discrimination’ as used in the Covenant ‘should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’.<sup>629</sup> According to the HRC, ‘States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons’.

While acknowledging that such information is useful, the HRC especially wishes to know if there remain any problems of discrimination *in fact*, which may be practised either by public authorities, by the community, or by private persons or bodies.<sup>630</sup> The HRC subsequently addresses the issue of ‘affirmative action’:

The Committee also wishes to point out that the principle of equality sometimes requires States parties to take *affirmative action* in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take *specific action to correct those conditions*. Such action may involve granting for a time to the part of the population concerned certain *preferential treatment* in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>631</sup>

<sup>627</sup> Article 3 ICCPR stresses the principle of equality between men and women. Article 3 ICCPR is not discussed here, because discrimination against women relates to negative aspects of culture; to be discussed in chapter 5, section 2.1.1.

<sup>628</sup> HRC, General Comment No. 18: Non-discrimination, 10 November 1989, para 13.

<sup>629</sup> *Ibid*, para 6–7; the HRC drew on the definitions provided in the ICERD and the CEDAW.

<sup>630</sup> *Ibid*, para 9; here the HRC makes a distinction between *de jure* and *de facto* discrimination, without using this specific terminology. In concluding observations, the HRC does use these specific terms explicitly.

<sup>631</sup> *Ibid*, para 10.

Article 26 is not a copy of article 2. It provides in itself an autonomous right. The content of State party legislation must comply with the requirement of article 26 that it does not discriminate. This applies to *all* legislation, and is not limited to the rights in the Covenant.<sup>632</sup>

The general non-discrimination clause of article 2 ‘has immediate effect for all States parties’.<sup>633</sup> A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.<sup>634</sup>

Article 2 (2) of the ICESCR requires States parties to ‘guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. In its General Comment No 20 on non-discrimination in economic, social and cultural rights, the CESCR explains that non-discrimination is an immediate and cross-cutting obligation in the Covenant, which only applies in conjunction with the (other) economic, social and cultural rights enshrined in the Covenant.<sup>635</sup> Discrimination must be eliminated both formally and substantively, in law and in practice.<sup>636</sup> According to the CESCR, the latter ‘requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice’. States parties must therefore adopt the necessary measures ‘to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination’.<sup>637</sup> States parties may be obliged ‘to adopt special measures to attenuate or suppress conditions that perpetuate discrimination’. Such measures ‘are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved’. Though in principle of a temporary nature, ‘such positive measures may exceptionally (...) need to be of a permanent nature, such as interpretation services for linguistic minorities (...)’.<sup>638</sup> Discrimination against some groups is ‘pervasive and persistent and deeply entrenched in social behaviour and organization’. Such systemic discrimination can be understood as ‘legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups’.<sup>639</sup> According to the CESCR, States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of Covenant rights. States

<sup>632</sup> Ibid, para 12.

<sup>633</sup> HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para 5.

<sup>634</sup> Ibid, para 14.

<sup>635</sup> CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para 7.

<sup>636</sup> Ibid, para 8.

<sup>637</sup> Ibid, para 8.

<sup>638</sup> Ibid, para 9.

<sup>639</sup> Ibid, para 12.

parties are encouraged to conduct human rights education and training programmes: ‘Teaching on the principles of equality and non-discrimination should be integrated in (...) inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society’.<sup>640</sup>

States parties may also need to protect positive aspects of culture (i.e., cultural inclusivity<sup>641</sup>) when sex discrimination intersects with discrimination on grounds of ‘cultural traits’, for example in the case of indigenous women.<sup>642</sup> In its General Comment No 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, the CESCR implicitly acknowledged the concept of multiple or intersectional discrimination when it pointed out that ‘many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage’.<sup>643</sup> In the views of the CESCR, this means that, for substantive equality to be achieved, laws, policies and practices should take account of existing economic, *social and cultural inequalities*, particularly those experienced by women.<sup>644</sup>

Article 2 CEDAW requires States parties to ‘condemn discrimination against women in all its forms’. When discrimination on grounds of sex and gender<sup>645</sup> intersects with discrimination on grounds of ‘cultural traits’ (such as minority status, race, language or religion), the CEDAWCee may have to protect cultural inclusivity.<sup>646</sup> In its General Recommendation No 28, the CEDAWCee explains the concept of ‘intersectionality’, and its importance for understanding the scope of the general obligations of States parties contained in article 2:

The discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such *intersecting forms of discrimination and their compounded negative impact* on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences,

<sup>640</sup> Ibid, para 38.

<sup>641</sup> Ie, ensure the inclusion and participation of persons and groups from varied cultural backgrounds.

<sup>642</sup> Discrimination on grounds of being a woman intersects with discrimination on grounds of being a member of an indigenous minority. Gender discrimination (art 3) is a negative manifestation of culture; to be discussed in chapter 5, section 2.2.1.

<sup>643</sup> CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), E/C.12/2005/4, 11 August 2005, para 5.

<sup>644</sup> Ibid, para 8.

<sup>645</sup> Elaborately discussed in chapter 5, section 2.3.1.

<sup>646</sup> Ie, ensure the inclusion and participation of persons and groups from varied cultural backgrounds, for example by taking account of existing cultural inequalities (experienced by women) in laws, policies and practices.

including, where appropriate, *temporary special measures* in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.<sup>647</sup>

To achieve the aims of CEDAW, eliminating discrimination and achieving gender equality requires an appreciation of the unique and multiple forms of discrimination (including on grounds of ‘cultural traits’) which result in the disadvantaged treatment.

In conclusion, the three Committees have adopted similar interpretations of non-discrimination. All three Committees have emphasised that the principles of equality and non-discrimination are to be realised immediately, independently of available resources. All Committees clearly distinguish between *de jure* and *de facto* discrimination and equality, and all Committees implicitly or explicitly acknowledge the concepts of direct and indirect discrimination.<sup>648</sup> Unlike the CESCR and – especially – the CEDAWCee, the HRC has generally refrained from referring to double or multiple discrimination.<sup>649</sup> Differences exist between the treaty bodies when it comes to invoking systemic inequality, sometimes called social, societal or structural discrimination. The HRC does not speak of systemic discrimination, the CESCR does. The CEDAWCee, the Committee which seems most preoccupied with systemic or structural inequality, has not adopted a specific term for it, but speaks of ‘structural and historical patterns of discrimination’<sup>650</sup>, ‘the underlying causes of discrimination against women, and of their inequality’<sup>651</sup>, and of ‘the causes and consequences of their *de facto* or substantive inequality’.<sup>652</sup>

Finally, all Committees have acknowledged (in their general comments and recommendations) that the principle of equality sometimes requires ‘affirmative action’ or ‘preferential treatment’ in order to ‘diminish or eliminate conditions which cause or help to perpetuate discrimination’ (HRC), ‘positive measures’ to ‘prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de*

<sup>647</sup> CEDAWCee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para 18; Likewise in CEDAWCee, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 18 August 2004, para 12, the CEDAWCee writes that ‘[c]ertain groups of women not only suffer from discrimination directed against them as women, but from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination ‘may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific *temporary special measures* to eliminate such multiple forms of discrimination against women and its compounded negative impact on them’.

<sup>648</sup> HRC implicitly acknowledges these concepts in its General Comment No 18 (n 161), para 6–7; CESCR mentions these concepts explicitly in its General Comment No 20 (n 168), para 7 and 10; and CEDAWCee mentions these concepts explicitly in its General Recommendation No 25 (n 180), para 7.

<sup>649</sup> HRC has not mentioned these terms in its general comments; it has occasionally – but very exceptionally – mentioned these terms in the State reporting procedure. See, eg, HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 6.

<sup>650</sup> CEDAWCee, General Recommendation No 28 (n 180), para 16.

<sup>651</sup> CEDAWCee, General Recommendation No 25 (n 180), para 10.

<sup>652</sup> *Ibid*, para 14.

*facto* discrimination’ (CESCR), or ‘temporary special measures’ and ‘measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’ (CEDAWCee).<sup>653</sup>

### 3.2 RIGHT TO BE DIFFERENT: PERMANENT MEASURES TO ENSURE EQUALITY BY ACCOMMODATING DIFFERENCES IN TREATMENT

As explained, effective non-discriminatory enjoyment of rights may impose an obligation on States parties to accommodate relevant differences, where necessary through the adoption of special measures. To experience real or substantively equal treatment in comparison with the rest of the population, (members of) cultural communities want some differential treatment or special measures (related to their specific characteristics and needs). But there is a limit to such a ‘right to be different’: to the extent that reaching substantive equal treatment might necessitate differential treatment or special measures, these should not go beyond what is necessary to obtain genuine equal treatment. As such, and unlike the obligations discussed under cultural exclusivity, they are not ‘privileges’.<sup>654</sup>

Permanent special measures to ensure equality by allowing diversity (i.e., differences in treatment) are thus to be distinguished from temporary special measures which ensure equality by eliminating diversity (i.e., differences in treatment).<sup>655</sup> It will be shown below that the HRC does not use permanent special measures under ‘regular’ individual rights to accommodate cultural differences; there is always a link to article 27 (thus an explicit cultural right). The CESCR uses permanent special measures in areas of education, health and adequate standard of living. The CEDAWCee uses permanent special measures for indigenous groups and women migrant workers, as well as in the areas of education, health and access to justice.

#### 3.2.1 HRC

The HRC does not often require States parties to adopt special measures with a view to accommodating cultural differences within the equality principle, with the exception

<sup>653</sup> Vandenhoe, however, argued that ‘recommendations on affirmative action measures in order to redress gender inequality have revealed an interpretational gap between the CEDAW Committee on the one hand, and the HRC and CESCR Committee on the other hand’. W Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, 2005, p 290.

<sup>654</sup> K Henrard (n 4), p 145.

<sup>655</sup> For example, measures that allow the use of (certain) indigenous forms of health care ensure equality in access to health care by *accommodating* differences in treatment. This is to be distinguished from measures that aim to eliminate discrimination faced by indigenous people. Such measures try to ensure equality in access to health care by *eliminating* differences in treatment.

of the right to freedom of religion (art 18 ICCPR) and the right to equality before the courts and tribunals (art 14 ICCPR).

### 3.2.1.1 Freedom of religion

The HRC has required States parties to ensure equal access to public services and institutions and the equal enjoyment of rights by allowing religious diversity, notably in the form of wearing religious symbols or clothing.

In its Concluding Observations on France<sup>656</sup>, the HRC considered this issue in connection with both articles 18 (freedom of religion) and 26 (non-discrimination), expressing concern about the fact that the wearing of religious symbols considered ‘conspicuous’ in public schools is regulated and that face coverings are banned in public places. According to the HRC ‘these laws infringe the freedom to express one’s religion or belief, and (...) have a disproportionate impact on members of specific religions and on girls’. The HRC is further concerned ‘that the effect of these laws on certain groups’ feeling of exclusion and marginalization could run counter to the intended goals’. The State party is recommended to review its regulations ‘in the light of its obligations under the Covenant, in particular article 18 on freedom of conscience and religion and the principle of equality set out in article 26’.<sup>657</sup>

### 3.2.1.2 Fair trial

Only one other example of special measures was found in the concluding observations of the HRC. It is connected to article 14, under which ‘all persons shall be equal before the courts and tribunals’, and ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. Article 14 also entitles everyone, as a minimum guarantee, ‘to be informed promptly and in detail *in a language which he understands* of the nature and cause of the charge against him’, and ‘to have the free assistance of *an interpreter if he cannot understand or speak the language used in court*’.

The example is taken from the Concluding Observations on Guatemala:

The Committee is concerned at the existing limitations on access to justice owing to (...) *the prevalence of a monocultural vision* within that system. The Committee also regrets the lack of interpreters *to meet the needs of indigenous persons* (arts. 14 and 27).

<sup>656</sup> The HRC also dealt with individual complaints on this issue: the HRC considered the expulsion from a public school for wearing a keski (HRC, *Bikramjit Singh v France*, Communication No 1852/2008, CCPR/C/106/D/1852/2008, 4 February 2013), the exclusion from a University for wearing a headscarf (HRC, *Hudoyberganova v Ukraine*, Communication No 931/2000, CCPR/C/82/D/931/2000, 5 November 2004), and the prohibition to wear a turban on identity photographs (HRC, *Mann Singh v France*, Communication No 1928/2010, CCPR/C/108/D/1928/2010, 26 September 2013; HRC, *Ranjit Singh v France*, Communication No 1876/2000, CCPR/C/102/D/1876/2009, 27 September 2011), to be a violation of the individuals’ freedom to manifest their religion (art 18).

<sup>657</sup> HRC, CO France, CCPR/C/FRA/CO/5 (2015), para 22.

The State party should take the necessary measures to *facilitate the access of all persons to justice in their own language* by adopting effective policies to *recruit bilingual officials*, creating the necessary number of interpreter posts, [and] providing adequate training to professionals so that they can discharge their functions (...). In addition, the State party should *implement specific training programmes for legal officials responsible for representing the judiciary in indigenous areas*.<sup>658</sup>

It seems that the HRC aims to accommodate an indigenous vision on the justice system, among others by facilitating access in indigenous languages and training the judiciary in indigenous areas. However, it is telling that the HRC also referred to article 27 here. In general, it seems safe to say that the HRC does not use other human rights provisions to accommodate and preserve cultural differences and diversity; there is always a link to article 27.

### 3.2.2 CESCR

Unlike the HRC, the CESCR does regularly require States parties to adopt special measures with a view to accommodating cultural differences. Such special measures are requested in the areas of education (art 13), health (art 12), adequate standard of living (art 11), and social security (art 9).

#### 3.2.2.1 Education

Under article 13, States Parties ‘recognize the right of everyone to education’. States parties further ‘agree that education shall enable all persons to participate effectively in a free society’, and ‘promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups’. Article 13 (3) establishes that States parties ‘undertake to have respect for the liberty of parents (...) to ensure the religious and moral education of their children in conformity with their own convictions’.

In the introduction of its General Comment No 21 on the right to take part in cultural life, the Committee emphasizes that ‘the right of everyone to take part in cultural life is (...) intrinsically linked to the right to education (arts. 13 and 14), through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values’.<sup>659</sup> The CESCR notes that ‘education must be *culturally appropriate*, (...) enable children to develop their (...) cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies’<sup>660</sup>, and recalls that ‘educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples,

<sup>658</sup> HRC, CO Guatemala, CCPR/C/GTM/CO/3 (2012), para 26. (emphasis added, VV).

<sup>659</sup> CESCR, General Comment No 21 (n 71), para 2.

<sup>660</sup> Ibid, para 26. (emphasis added, VV).

and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations'.<sup>661</sup> According to the CESCR, '[s]uch programmes should be included in school curricula for all, not only for minorities and indigenous peoples', and States parties should ensure 'that educational programmes for minorities and indigenous groups are conducted on or in their own language (...)'.<sup>662</sup> In its General Comment No 13 on the right to education (art 13), the CESCR also demonstrates a particular attention for the accommodation and preservation of cultural diversity. It explains that 'while the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party', education should be available, accessible, acceptable and adaptable. Acceptability requires that the form and substance of education, including curricula and teaching methods, have to be acceptable, which also means *culturally appropriate*<sup>663</sup>, while adaptability requires education 'to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings'. Primary education must be universal, and 'take into account the culture, needs and opportunities of the community'<sup>664</sup>, while 'secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings'.<sup>665</sup> States parties should adopt 'varied and innovative approaches to the delivery of secondary education in different social and cultural contexts'.<sup>666</sup> Technical and vocational education (art 13 (2) (b)) should 'take account of the educational, cultural and social background of the population concerned' (para. 16 (b)). Regarding article 13 (2) (c), the CESCR considers that if higher education 'is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning'.<sup>667</sup> Illustrating States' obligations to respect, protect and fulfil each of the 'essential features' (availability, accessibility, acceptability, adaptability) of the right to education, the CESCR points out that 'a State must (...) fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is *culturally appropriate* for minorities and indigenous peoples, and of good quality for all'.<sup>668</sup>

The CESCR does not elaborate in its General Comment on what is or is not 'culturally appropriate', nor does it explain the meaning in its concluding observations. In its Concluding Observations on Indonesia, for example, the CESCR 'urges the State party to ensure (...) *culturally adequate* education, especially in remote areas'<sup>669</sup>,

<sup>661</sup> Ibid, para 27.

<sup>662</sup> Ibid.

<sup>663</sup> CESCR, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para 6.

<sup>664</sup> Ibid, para 9.

<sup>665</sup> Ibid, para 12.

<sup>666</sup> Ibid, para 13.

<sup>667</sup> Ibid, para 18.

<sup>668</sup> Ibid, para 50. (emphasis added, VV).

<sup>669</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 36. (emphasis added, VV).

without explaining what this means. Likewise, its recommendations to State authorities on guaranteeing indigenous peoples' access to intercultural education do not go beyond ensuring 'it is *adapted to their specific needs*'<sup>670</sup> or 'that it *meets the specific needs of those peoples*'.<sup>671</sup> Its recommendation to Thailand is limited to facilitating 'community-based education programmes *in line with the cultures of ethnic groups*'.<sup>672</sup> In all these instances, the CESCR calls for a certain cultural adaptation of education programmes, without explaining how this should be done or even what it entails.

Interestingly, in recommendations which could be interpreted as calling for 'culturally appropriate' or 'culturally adequate' education, the CESCR did not make any reference to that terminology. For example, in order to address the very high levels of absenteeism of Roma children, the CESCR recommended one State party to 'ensure that all Roma children attend compulsory education, *including through making it more accessible for those who travel for a part of the year*'.<sup>673</sup> Along the same lines, it recommended another States party to 'ensure that all children of nomadic communities have access to primary education, *including through the establishment of mobile schools*'.<sup>674</sup> The CESCR is asking States parties to accommodate – what seem to be cultural – differences through the adoption of (more permanent) special measures. While these recommendations are aimed at cultural inclusivity, these measures are not temporary or remedial in the sense that they can be stopped once equal enjoyment of and access to the right to education has been achieved for these travelling or nomadic communities. These measures are of a more permanent nature, accommodating the travelling or nomadic way of life in the educational system.

Another cultural dimension can be found in language barriers to education for certain local communities, such as ethnic groups and indigenous communities. In General Comment 21, the CESCR explains that 'States parties should adopt measures and spare no effort to ensure that educational programmes for minorities and indigenous groups are conducted on or in their own language'.<sup>675</sup> The CESCR has frequently addressed restrictions on the use of minority or indigenous languages in education. Consider the following example, from the Concluding Observations on Iran:

The Committee is concerned that ethnic minorities face severe restrictions in practice with regard to education in their mother tongue, including Azeri, Kurdish, and Arabic, despite policies protecting the use of non-Persian languages (arts. 13 and 14).

The Committee recommends that the State party take steps to ensure that ethnic minorities have the opportunity to receive education in their mother tongue, in addition to Farsi.<sup>676</sup>

<sup>670</sup> CESCR, CO Argentina, E/C.12/ARG/CO/3 (2011), para 24; CO Guatemala, E/C.12/GTM/CO/3 (2014), para 26.

<sup>671</sup> CESCR, CO El Salvador, E/C.12/SLV/CO/3–5 (2014), para 26. (emphasis added, VV).

<sup>672</sup> CESCR, CO Thailand, E/C.12/THA/CO/1–2 (2015), para 33. (emphasis added, VV).

<sup>673</sup> CESCR, CO Norway, E/C.12/NOR/CO/5 (2013), para 24. (emphasis added, VV).

<sup>674</sup> CESCR, Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 28. (emphasis added, VV).

<sup>675</sup> CESCR, General Comment No 21 (n 71), para 27.

<sup>676</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 29.

Or this example, from the Concluding Observations on Tajikistan:

The Committee is concerned at the decreasing number of classes provided in the languages of ethnic minorities and of students attending schools where the teaching is given in the languages of ethnic minorities, owing to the insufficient number of teachers, the lack of retraining programmes for teachers and a shortage of textbooks in minority languages (art. 13).

The Committee recommends that the State party take the necessary steps to improve education in ethnic languages, and consider adopting multilingual education programmes in the education system.<sup>677</sup>

Other, rather similar, concerns include ‘restrictions on the use of national minority languages in State-funded national minority schools and in the State examination’<sup>678</sup>, the fact that ‘indigenous communities do not always enjoy the right to intercultural bilingual education’<sup>679</sup> or that ‘indigenous peoples do not always enjoy the right to be educated in indigenous languages’<sup>680</sup>, the limited possibilities ‘for ethnic minorities, (notably Kazakh, Uzbek, Armenian and Russian,) to study in their mother tongue’<sup>681</sup>, or that ‘access to bi-lingual education for ethnic groups remains limited in the State party’.<sup>682</sup> The CESCR has generally recommended or encouraged States parties to do the obvious, which is to provide, introduce, facilitate or guarantee access of indigenous peoples or ethnic groups to (intercultural) education in their own/local languages or multilingual/bilingual education. By way of illustration, the CESCR recommended States parties to ‘provide mother tongue-based multilingual education (...) especially for schools with linguistically diverse populations’<sup>683</sup>, to ‘introduce, in consultation with local communities, education in local languages where appropriate’<sup>684</sup>, to ‘guarantee the access to intercultural education of indigenous peoples’<sup>685</sup>, ‘to guarantee the access of indigenous peoples to intercultural education in their own languages’<sup>686</sup>, to ‘facilitate access to (Kazakh, Uzbek, Armenian and Russian) language classes and schools for children of ethnic minorities’<sup>687</sup>, or to ‘provide bi-lingual education from the early years and continue to facilitate (...) community-based education programmes in line with the cultures of ethnic groups’.<sup>688</sup>

<sup>677</sup> CESCR, CO Tajikistan, E/C.12/TJK/CO/2–3 (2015), para 37.

<sup>678</sup> CESCR, CO Lithuania, E/C.12/LTU/CO/2 (2014), para 23.

<sup>679</sup> CESCR, CO Argentina, E/C.12/ARG/CO/3 (2011), para 24.

<sup>680</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 26; CO El Salvador, E/C.12/SLV/CO/3–5 (2014), para 26.

<sup>681</sup> CESCR, CO Turkmenistan, E/C.12/TKM/CO/1 (2011), para 26.

<sup>682</sup> CESCR, CO Thailand, E/C.12/THA/CO/1–2 (2015), para 33.

<sup>683</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 28.

<sup>684</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 36.

<sup>685</sup> CESCR, CO Argentina, E/C.12/ARG/CO/3 (2011), para 24.

<sup>686</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 26; CO El Salvador, E/C.12/SLV/CO/3–5 (2014), para 26.

<sup>687</sup> CESCR, CO Turkmenistan, E/C.12/TKM/CO/1 (2011), para 26.

<sup>688</sup> CESCR, CO Thailand, E/C.12/THA/CO/1–2 (2015), para 33.

Even though the right of everyone to take part in cultural life (art 15) is considered to be *intrinsically linked* to the right to education (arts 13–14), the examples provided in this section all referred exclusively to articles 13 and/or 14<sup>689</sup>, and not to article 15, indicating that the CESCR considers these articles to have a cultural dimension in and of themselves.

### 3.2.2.2 Health

States parties were also called upon to adopt special measures to accommodate and preserve cultural differences under article 12, which requires States parties to ‘recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.

General Comment No 14 on the right to the highest attainable standard of health mentions that ‘all health facilities, goods and services must be respectful of medical ethics and *culturally appropriate*, i.e., respectful of the culture of individuals, minorities, peoples and communities’.<sup>690</sup> In a section specifying States’ obligations to respect, protect and fulfil the right to health, the CESCR explains that ‘the obligation to *fulfil (promote)* the right to health requires States to undertake actions that create, maintain and restore the health of the population’.<sup>691</sup> Such obligations include ‘ensuring that health services are *culturally appropriate* and that health-care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups’.<sup>692</sup>

No further clarification has been given by the CESCR as to what ‘culturally appropriate’ means in practice. A review of the concluding observations reveals, firstly, that the CESCR (explicitly) referred to ‘culturally appropriate’ or ‘culturally sensitive’ health care only *once* in all the concluding observations between 2010 and 2015, and secondly, that the CESCR on that occasion chose not to specify what ‘culturally appropriate’ or ‘culturally sensitive’ means.<sup>693</sup> The example comes from the Concluding Observations on Indonesia. Concerned that mental health services are available only in a few medical institutions in large cities, the CESCR calls on the authorities ‘to adopt a national mental health policy aimed at making mental health services available and

<sup>689</sup> CESCR, CO Indonesia: art 13; CO Argentina: art 13; CO Guatemala: arts 13 and 14; CO El Salvador: arts 13 and 14; CO Thailand: arts 13 and 14; CO Iran: Arts 13 and 14.

<sup>690</sup> CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000, para 12. (emphasis added, VV).

<sup>691</sup> Ibid, para 37.

<sup>692</sup> Ibid. (emphasis added, VV).

<sup>693</sup> Based on the present mapping exercise, it is difficult to say anything meaningful about the potential differences in meaning between ‘culturally appropriate’ and ‘culturally sensitive’. Yvonne Donders has addressed this issue, indicating that *sensitive* seems to be more about *taking culture into account*, whereas *appropriate* is a value judgement and demands certain results: ‘No further specification has been given of what “culturally sensitive” or “culturally appropriate” mean in practice and to what extent these are similar concepts. While both concepts demand respect for and taking into account of cultural differences, ‘cultural appropriateness’ may seem to imply more concrete results’ YM Donders, Exploring the cultural dimensions of the right to the highest attainable standard of health, *Potchefstroom Electronic Law Journal*, vol 18, no 2, 2015, p 197.

accessible including by (...) prioritizing the development of *culturally appropriate* community-based care of persons with psychosocial disabilities'.<sup>694</sup> As almost one third of Indonesia's population is affected by tobacco addiction, the CESCR further recommends that the authorities 'apply a human rights-based approach to the treatment of tobacco and drug addiction, and provide appropriate health care, *culturally sensitive* psychological support services and rehabilitation to such persons'.<sup>695</sup> It did not elaborate on the meaning of 'culturally appropriate' and 'culturally sensitive' in its concluding observations, nor in the rest of the dialogue with Indonesia.

The CESCR also pays special attention to the right to health of indigenous peoples in its General Comment, and considers that 'these health services should be *culturally appropriate*, taking into account traditional preventive care, healing practices and medicines'.<sup>696</sup> The CESCR stipulates that '[t]he vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected'.<sup>697</sup> It also addresses the collective dimension of indigenous peoples' right to health:

The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.<sup>698</sup>

While the CESCR seemingly wishes to accommodate traditional medicines in relation to indigenous peoples, this is not often reflected in the concluding observations.<sup>699</sup> On the contrary, the CESCR addresses the practice of traditional medicine with reserve in its Concluding Observations on Mauritania, expressing concern at the absence of adequate laws regulating the practice of traditional medicine. The CESCR calls on the State party 'to regulate traditional medicine so as to meet the requirements of quality and acceptability of the right to health'.<sup>700</sup>

<sup>694</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 34.

<sup>695</sup> Ibid, para 35.

<sup>696</sup> CESCR, General Comment No 14 (n 223), para 27.

<sup>697</sup> Ibid, para 27.

<sup>698</sup> Ibid, para 27.

<sup>699</sup> It has been addressed by the CESCR in concluding observations adopted before 2010 (and therefore not included in the mapping exercise for this research). Donders: 'The analysis shows that UN and African treaty monitoring bodies have recognized and addressed these different dimensions. They have, for instance, adopted the notion that health policies, goods and services should be 'culturally appropriate' or 'culturally sensitive'. From the practice of these bodies several obligations of States can be induced that fall within these notions. These obligations include the adoption and implementation of special measures for cultural communities to ensure equal access to health goods and services and the recognition and protection of specific health goods and services of cultural communities. At the same time, the notion of 'cultural appropriateness' should not be interpreted as providing the possibility to unjustifiably limit the enjoyment of the right to health.' Donders (n 226), p 210.

<sup>700</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 26.

Overall, it seems that the CESCR hardly refers to ‘culturally appropriate’ and ‘culturally sensitive’ in its concluding observations. In relation to the right to health, only one example was found, and it does not provide any insights into what it might mean.

### 3.2.2.3 Adequate standard of living

Article 11 recognizes the right of everyone to an adequate standard of living, including adequate food, clothing and housing. The fact that there are cultural dimensions attached to article 11 is first and foremost evidenced by the general comments on the right to adequate food (General Comment No 12) and the right to adequate housing (General Comment No 4), which both aim to clarify the meaning of article 11. *Adequacy* of food as well as housing is determined in part by (prevailing) cultural ‘conditions’ or ‘factors’.<sup>701</sup> Another cultural dimension of article 11 appears in relation to the right to water. In its General Comment No 15 on the right to water, the CESCR clarifies that ‘[w]ater should be treated as a social and cultural good, and not primarily as an economic good’.<sup>702</sup>

According to the CESCR, the core content of the right to adequate food implies ‘the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and *acceptable within a given culture*’.<sup>703</sup> *Cultural acceptability* ‘implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies’.<sup>704</sup> This is also reflected in the so-called reporting guidelines, where the CESCR indicates that States parties should provide information on the measures taken ‘to satisfy the dietary needs of everyone, free from adverse substances, and *culturally acceptable*’.<sup>705</sup> The CESCR did not elaborate any further on the meaning of cultural acceptability, and also the concluding observations do not add much clarity to its interpretation. Djibouti, where the majority of the population was affected by food insecurity and malnutrition, was recommended to ‘adopt a multi-sectoral approach in the effort to combat food insecurity and malnutrition, based on strengthening household resilience and coping mechanisms and taking into account geographical, socioeconomic and *cultural contexts*’.<sup>706</sup>

The right to food is also related to access to (ancestral or traditional) lands. Communities’ food security may be threatened due to restricted access to land,

<sup>701</sup> CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), E/C.12/1999/5, 12 May 1999, para 7; CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23, 13 December 1991, para 8.

<sup>702</sup> CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11, 20 January 2003, para 11.

<sup>703</sup> CESCR, General Comment No 12 (n 234), para 8.

<sup>704</sup> *Ibid*, para 11.

<sup>705</sup> ECOSOC, *Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the ICESCR*, E/C.12/2008/2, 24 March 2009, para 44. (emphasis added, VV).

<sup>706</sup> CESCR, CO Djibouti, E/C.12/DJI/CO/1–2 (2013), para 27.

forced evictions from land, land grabbing or projects which have impact on the land they rely on for food. States parties are generally recommended to protect these communities against such restrictions on access to, and evictions from their lands, and to ensure that (construction) projects are preceded by their free, prior and informed consent. For example, the CESCR noted with concern the considerable expansion of monocultures<sup>707</sup> in Guatemala and ‘the way that has restricted indigenous peoples’ access to land on which to grow their own food’. The CESCR urged the Guatemalan authorities ‘to prevent the expansion of monocultures from exacerbating the food insecurity of rural communities’.<sup>708</sup> The CESCR has also expressed concern about the fact that several vulnerable communities in Tanzania, including pastoralist and hunter-gatherer communities, ‘have been forcibly evicted from their traditional lands for the purposes of large-scale farming, creation of game reserves and expansion of national parks, mining, construction of military barracks, tourism and commercial game-hunting’, and that ‘these practices have resulted in a critical reduction in their access to land and natural resources, particularly threatening their livelihoods and their right to food’. The State party should ensure that such projects ‘are preceded by free, prior and informed consent of the people affected’ and that these communities ‘are effectively protected from forced evictions from traditional lands’.<sup>709</sup> Regarding Ethiopia, the CESCR has concerns about the construction and operation of a hydro-electric dam which may have ‘a significant negative impact on the traditional practices and means of subsistence of indigenous peoples who rely on the *Omo River*, potentially endangering local food security’. The State party should identify and address adverse impacts of the dam, and ‘initiate, prior to construction of hydro-electric projects, (...) extensive consultations with affected communities, involving genuine opportunities to present views and influence decision-making’.<sup>710</sup> In the Concluding Observations of Cameroon, the CESCR notes that ‘the system of land tenure in the State party is out of step with the country’s economic and *cultural situation*, and that it makes some indigenous population groups and small-scale farmers vulnerable to land grabs’. The State party is urged ‘to guarantee the right of indigenous population groups and small-scale producers to ancestral and community lands’.<sup>711</sup>

With regard to adequacy of housing, the CESCR has explained cultural adequacy as follows: ‘The way housing is constructed, the building materials used and the policies supporting these must appropriately enable *the expression of cultural identity and diversity of housing*. Activities geared towards development or modernization in the housing sphere should ensure that *the cultural dimensions of housing* are not

<sup>707</sup> Monocultures are large areas of land cultivated with a single crop. The social impacts of large-scale monocultures are often disastrous for communities who continue to grow local foods using sustainable practices. Land grabbing and forced evictions of local populations are strongly linked to the expansion of monocultures.

<sup>708</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 21.

<sup>709</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1–3 (2012), para 22.

<sup>710</sup> CESCR, CO Ethiopia, E/C.12/ETH/CO/1–3 (2012), para 24.

<sup>711</sup> CESCR, CO Cameroon, E/C.12/CMR/CO/2–3 (2011), para 24.

sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured'.<sup>712</sup> Again, this meagre explanation has not been complemented much in the CESCR's observations and recommendations to States parties. In the Concluding Observation on Ireland, the CESCR expressed concern at 'the lack of *culturally appropriate* accommodation provided to Travellers and Roma' and recommended the State party 'to provide Travellers and Roma with *culturally appropriate* accommodation in consultation with them'<sup>713</sup>, without giving an explanation as to what culturally appropriate accommodation means in this particular situation.

Finally, although not specifically mentioned in the ICESCR, the right to water is deemed to be included under articles 11 (adequate standard of living) and 12 (health).<sup>714</sup> According to the CESCR, '[w]ater is essential for securing livelihoods (...) and *enjoying certain cultural practices* (right to take part in cultural life)'.<sup>715</sup> And when elaborating on the adequacy of water, measured by factors such as availability, quality and accessibility, the CESCR also points out that '[a]ll water facilities and services must be of sufficient quality, *culturally appropriate* and sensitive to gender, life-cycle and privacy requirements'.<sup>716</sup> The cultural dimension of the right to water is also reflected in the CESCR's Concluding Observations on Canada:

(...) The Committee is (...) concerned at the restricted access to safe drinking water and to sanitation by the *First Nations*, as well as the lack of water regulations for the *First Nations* living on reserves (art. 11).

The Committee urges the State party (...) to live up to its commitment to ensure access to safe drinking water and to sanitation for the *First Nations* while ensuring their active participation in water planning and management. In doing so, the State party should bear in mind not only indigenous peoples' economic right to water but also *the cultural significance of water to indigenous peoples*.<sup>717</sup>

### 3.2.2.4 Social security

Under article 9 States parties are obliged to 'recognize the right of everyone to social security, including social insurance'. In its General Comment No 19 on the right to social security (2008), the CESCR explained that the obligation to protect requires

<sup>712</sup> CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23, 13 December 1991, para 8.

<sup>713</sup> CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 27. (emphasis added, VV).

<sup>714</sup> CESCR, General Comment 15, The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003.

<sup>715</sup> CESCR, General Comment No 15 (n 235), para 6.

<sup>716</sup> Ibid, para 12; The CESCR also stresses the cultural dimension of the right to water where it discusses international cooperation: '*Depending on the availability of resources, States should facilitate realization of the right to water in other countries (...). International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate.*' CESCR, General Comment No 15 (n 235), para 34.

<sup>717</sup> CESCR, CO Canada, E/C.12/CAN/CO/6 (2016), para 44. (emphasis added, VV).

States parties to '[adopt] the necessary and effective legislative and other measures, for example, to restrain third parties from (...) arbitrarily or unreasonably interfering with self-help or *customary or traditional arrangements for social security* that are consistent with the right to social security'.<sup>718</sup> In addition, depending on the availability of resources, States parties should facilitate the realisation of the right to social security in other countries. Such international assistance 'should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and *culturally appropriate*'.<sup>719</sup> The concluding observations do not provide any further insights or examples.

To sum up, while the HRC does not seem to apply special measures to protect and promote cultural diversity (there is always a link to article 27), the CESCR regularly requires States parties to adopt special measures with a view to protecting and promoting cultural differences. According to the CESCR education, health care/ services and food/housing/water should be culturally appropriate, culturally adequate, culturally sensitive or culturally acceptable.

### 3.2.3 CEDAWCee

Like the CESCR, the CEDAWCee regularly requires States parties to adopt special measures with a view to accommodating cultural differences. Such special measures are requested to address multiple forms of discrimination against women belonging to disadvantaged groups, in the areas of health (art 12), and access to justice (art 15).

In its General Recommendation No 26 on women migrant workers, the CEDAWCee specifies the responsibilities of States parties which are countries of destination, and explains that 'States parties should ensure that *linguistically and culturally appropriate* gender-sensitive services for women migrant workers are available'<sup>720</sup>, and that efforts to integrate women migrant workers into the new society 'should be *respectful of the cultural identity* of women migrant workers'.<sup>721</sup> However, this call for accommodating the cultural specificities of women migrant workers has not been reflected in concluding observations.

The concluding observations however do reveal such special measures in relation to indigenous women (and girls).

#### 3.2.3.1 Education

On one occasion, the CEDAWCee recommended special measures of a permanent nature to address discrimination of indigenous children in access to education (art 10 CEDAW):

<sup>718</sup> CESCR, General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19, 4 February 2008, para 45. (emphasis added, VV).

<sup>719</sup> Ibid, para 55.

<sup>720</sup> CEDAWCee, General Recommendation No. 26: women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008, para 26 (i).

<sup>721</sup> Ibid, para 26 (k).

The Committee remains concerned (...) about: (...)

- (e) The difficulties faced by indigenous girls and boys in attending school owing to the insufficient flexibility of *the school system, which does not adapt to indigenous culture in general and to nomadic culture in particular.*

The Committee recommends that the State party:

- (e) Pursue efforts to develop special educational projects for indigenous girls, including nomadic girls, such as *the adoption of adapted school calendars and instruction in and of indigenous languages.*<sup>722</sup>

When concerned about the limited access to education for indigenous women in Ecuador, the CEDAWCee recommended the State party ‘to ensure adequate opportunities for indigenous women and girls to receive instruction *in their own languages in indigenous educational institutions*’.<sup>723</sup> Likewise, the limited access to education for girls belonging to ethnic minorities in Vietnam and for ethnic and religious minority women and girls (such as Tibetans and Uighurs) in China was to be addressed through ‘the provision of bilingual education’<sup>724</sup> or ‘the provision of (...) mother tongue education targeting non-Chinese speaking students’.<sup>725</sup>

### 3.2.3.2 Health

Under article 12, ‘States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning’. In its General Recommendation No 24, on women and health, the CEDAWCee requests that States parties 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’.<sup>726</sup>

An interesting example of accommodating and preserving cultural differences in the provision of health services was found in the Concluding Observations on Ecuador:

The Committee notes the numerous efforts made by the State party to improve the health situation of its population. It is concerned, however, about: (...)

<sup>722</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), paras 26–27. (emphasis added, VV).

<sup>723</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), paras 28–29. (emphasis added, VV).

<sup>724</sup> CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), paras 26–27.

<sup>725</sup> CEDAWCee, CO China, CEDAW/C/CHN/CO/7–8 (2014), paras 34–35.

<sup>726</sup> CEDAWCee, General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Ch I, 1999, para 9.

- (e) Barriers faced by indigenous, Afro-Ecuadorian and Montubio women in gaining access to health services that meet their needs and respect their health approaches, *including the practice of 'vertical births' followed by indigenous women.*

The Committee recommends that the State party: (...)

- (f) Adopt the bill on intercultural practice for assisted births under the National Health System with the aim of *recognizing intercultural care during delivery.*<sup>727</sup>

Bolivia was given compliments for its actions to accommodate cultural differences in this area. The CEDAWCee welcomed the measures taken by Bolivia 'to enhance the provision of health services for women, *including through the provision of ancestral medicine*'.<sup>728</sup> While the CEDAWCee took note of initiatives by Peru 'to include an intercultural perspective in access to sexual and reproductive health', it encouraged the State party 'to strengthen its gender-sensitive and intercultural approach to the provision of health services, including by adequately developing the capacity of health personnel'.<sup>729</sup>

### 3.2.3.3 Access to justice

Under article 15, States parties 'shall accord to women equality with men before the law'. In the CEDAWCee's concluding observations one example was identified, where the CEDAWCee showed an interest in realising this right in a way which is appropriate to the cultural context:

The Committee (...) notes the barriers faced by indigenous women in gaining access to both the regular and the traditional justice systems and the absence of information on redress and reparations available to them.

The Committee calls upon the State party: (...)

- (c) To adopt measures to harmonize the competencies of the regular and traditional justice systems to deal with complaints from women belonging to ethnic groups, ensuring that women have access to remedies through appropriate provision of interpreters, legal aid, if necessary free of charge, and adequate reparations *in accordance with their culture and traditions.*<sup>730</sup>

Access to justice can also be problematic due to a lack of rights awareness and poor knowledge about the tools which are available to access justice. An example of this can be found in the Concluding Observations on Bolivia, where the CEDAWCee expressed

<sup>727</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8-9 (2015), para 33 (emphasis added, VV).

<sup>728</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5-6 (2015), para 28. (emphasis added, VV).

<sup>729</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7-8 (2014), para 33.

<sup>730</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8-9 (2015), para 13. (emphasis added, VV).

concern about the limited awareness among indigenous and Afro-Bolivian women of their rights.<sup>731</sup> The State party was advised to enhance women's awareness of their rights and the means to enforce them, targeting specific groups of women such as indigenous women and Afro-Bolivian women living in rural and remote areas, 'including by facilitating access to information on the Convention in indigenous languages'.<sup>732</sup> Likewise, the CEDAWCee expressed concern at 'the persisting structural barriers in the "rural indigenous jurisdiction" and in the formal justice system that prevent women from gaining access to justice and obtaining redress, such as (...) limited information regarding rights and judicial procedures available in the main indigenous languages'<sup>733</sup>, and 'the barriers that limit women's access to justice and, in particular, the difficulties, including linguistic and economic barriers, faced mainly by (...) women belonging to indigenous, Amazon or Afro-Peruvian communities'.<sup>734</sup> States parties are recommended to 'provide reliable official interpretation into indigenous languages in all judicial proceedings'<sup>735</sup>, and 'enhance women's awareness of their rights and legal literacy in all areas of the law (...), in particular targeting [women belonging to indigenous, Amazon or Afro-Peruvian communities], with a view to empowering women to avail themselves of procedures and remedies for violations of their rights under the Convention'.<sup>736</sup>

Although to a lesser extent than the CESCR, the CEDAWCee also – occasionally – requires States parties to adopt (permanent) special measures, for example to recognize intercultural care during delivery, or to provide culturally sensitive redress and reparations.

### 3.3 RIGHT TO BE EQUAL: TEMPORARY MEASURES TO ENSURE EQUALITY BY ELIMINATING DIFFERENCES IN TREATMENT

The treaty bodies also protect culture in other ways: not by *accommodating* (acceptable) differences in treatment, but by *eliminating* (unacceptable) differences in treatment. Eliminating unacceptable differences in treatment, such as situations which put a segment of the population at a disadvantage in the enjoyment of rights, require both legislative measures to prohibit inequality and temporary measures to redress the inequality.

It should be kept in mind here that discrimination against members of certain cultural groups or communities may not only violate the rights of the discriminated individual. It may also, when it happens systematically, negatively affect the culture

<sup>731</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), paras 8–9.

<sup>732</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 9.

<sup>733</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 10.

<sup>734</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 11.

<sup>735</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 11.

<sup>736</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 12.

which is connected to the non-discrimination ground or ‘cultural trait’. The non-discrimination grounds of special importance to minorities and communities concern identity features like language, religion, ethnicity and race, features which are closely related to culture and cultural diversity.<sup>737</sup>

The next sections will highlight that the different treaty bodies usually do not explicitly make this connection. In fact, only one example including explicit reference was found: the CEDAWCee called upon the Chinese authorities ‘to vigorously pursue efforts aimed at eliminating the multiple and intersecting forms of discrimination experienced by ethnic and religious minority women (...), which affect (...) *the enjoyment of their cultural identity and practices*’.<sup>738</sup> Nevertheless, it can be argued that also in cases where the monitoring bodies did not explicitly consider the enjoyment of cultural identity and practices to be directly affected by discrimination, the protection of the individuals’ (minority) culture is still an intended side-effect of protecting the individual against discrimination on grounds of cultural traits.

### 3.3.1 HRC

The HRC’s concerns when it comes to protecting individuals against discrimination on grounds of cultural traits (arts 2 and 26, General Comment No 28) can broadly be divided into concerns about *de jure* inequality and concerns about *de facto* inequality. This section will show that the former concerns generally lead to recommendations which focus on adopting laws which protect against discrimination and changing laws or policies which discriminate.<sup>739</sup> Recommendations addressing only *de facto* inequality concerns are more focused on affirmative action through the adoption of temporary special measures, i.e., measures with a special focus on the particular cultural group, in order to redress the inequality the group suffers.

In its concluding observations, the HRC has on many occasions expressed concern about existing legislation not affording protection against discrimination on all the grounds prohibited under the ICCPR<sup>740</sup>, or, in other words, that ‘comprehensive’ anti-discrimination legislation is lacking.<sup>741</sup> When the HRC notes gaps or deficiencies in existing legislation, it explicitly specifies the missing grounds of discrimination, some of which are ‘cultural traits’<sup>742</sup>, such as ethnicity, race, caste (‘birth’), nationality, language or religion. For example, the HRC has noted and expressed concern about

<sup>737</sup> Henrard (n 4), p 148.

<sup>738</sup> CEDAW, CO China, CEDAW/C/CHN/CO/7–8 (2014), para 47.

<sup>739</sup> Obviously, as *de jure* inequality automatically leads to *de facto* inequality, this is also addressed under these concerns, but the focus is (more) on the legislative changes.

<sup>740</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 6; CO Malta, CCPR/C/MLT/CO/2 (2014), para 8; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 8.

<sup>741</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 12; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 8; CO Armenia, CCPR/C/ARM/CO/2 (2012), para 6.

<sup>742</sup> Discrimination on grounds of ‘gender’ or ‘sexual orientation and gender identity’ are not discussed here, they are discussed under ‘negative aspects of culture’.

‘the lack of protection against discrimination on the basis of religion and belief’<sup>743</sup>, ‘the current lack of legislation defining and prohibiting racial discrimination’<sup>744</sup>, the fact ‘that discrimination on the basis of language has not yet been prohibited by law’<sup>745</sup>, or that the law ‘is not exhaustive and does not cover discrimination based on (...) religion (...)’.<sup>746</sup> States parties are generally recommended to adopt or enact comprehensive legislation to combat discrimination based on all grounds and in all areas.<sup>747</sup>

The HRC has repeatedly taken issue with discriminatory legal provisions and practices which violate, unduly restrict or adversely affect the right to freedom of religion (in community with others).<sup>748</sup> Examples include restrictions in the law with respect to proselytism and other missionary activities, registration procedures for religious organisations, and dissemination of religious literature.<sup>749</sup> But also the existence of a constitutional obligation to take religious oaths before taking up senior public office positions (president, judiciary)<sup>750</sup>, laws which provide for religion as a basis for citizenship (a non-Muslim may not become a citizen of the Maldives)<sup>751</sup>, restrictions on access to places of prayer for certain minorities<sup>752</sup>, and laws which provide for an absolute ban of some religious denominations.<sup>753</sup> States parties should guarantee in

<sup>743</sup> HRC, CO Austria, CCPR/C/AUT/CO/5 (2015), para 11.

<sup>744</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 12; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 7.

<sup>745</sup> HRC, CO Malta, CCPR/C/MLT/CO/2 (2014), para 8.

<sup>746</sup> HRC, CO Poland, CCPR/C/POL/CO/6 (2010), para 5.

<sup>747</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 13; CO Malta, CCPR/C/MLT/CO/2 (2014), para 8; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 8; CO Armenia, CCPR/C/ARM/CO/2 (2012), para 6; CO Poland, CCPR/C/POL/CO/6 (2010), para 5. They should take all measures necessary to ensure that their legal framework provides full and effective protection against discrimination in all spheres of life – such as housing, employment, education, health care, public services, participation in public life – including in the private sphere. CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 6; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 13. Legislation should also prohibit direct, indirect and multiple discrimination (CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 6; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 13), contain a comprehensive list of grounds for discrimination on all the grounds as set out in the Covenant (CO Austria, CCPR/C/AUT/CO/5 (2015), para 12; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 13; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 6; CO Malta, CCPR/C/MLT/CO/2 (2014), para 8; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 8; CO Armenia, CCPR/C/ARM/CO/2 (2012), para 6; CO Poland, CCPR/C/POL/CO/6 (2010), para 5), impose (appropriate) penalties for (direct and indirect) discrimination committed by both public and private entities (CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 13), and provide for effective remedies in cases of violations (CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 13; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 6). States parties should undertake a thorough review of their legislation with a view to amending or revoking all provisions that are not in compliance with articles 2 and 26 of the Covenant (CO Malta, CCPR/C/MLT/CO/2 (2014), para 8).

<sup>748</sup> HRC, CO Austria, CCPR/C/AUT/CO/5 (2015), para 31; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 37; CO Sudan, CCPR/C/SDN/CO/4 (2014), para 20.

<sup>749</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 22; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 22.

<sup>750</sup> HRC, CO Ireland, CCPR/C/IRL/CO/4 (2014), para 21.

<sup>751</sup> HRC, CO Maldives, CCPR/C/MDV/CO/1 (2012), para 9.

<sup>752</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 18.

<sup>753</sup> HRC, CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 20; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 37.

practice the freedom of religion and belief and freedom to manifest a religion or belief either individually or in community with others and in public or private, in worship, observance, practice and teaching. They should eliminate discriminatory legislation and practices which violate the right to freedom of religion or belief<sup>754</sup>, bring their legislation into conformity with article 18 of the Covenant<sup>755</sup>, and refrain from imposing any restriction on the rights to freedom of religion unless they fulfil the conditions set out in article 18 (3) of the Covenant.<sup>756</sup> States parties should decriminalize proselytism and other missionary activities<sup>757</sup>, provide for a transparent, open and fair registration process for religious organisations and eliminate distinctions among religions which may lead to discrimination<sup>758</sup>, amend laws requiring religious oaths to take up senior public office positions<sup>759</sup>, revise their legislation to ensure that religion is not a basis for citizenship<sup>760</sup>, remove undue restrictions on access to places of worship<sup>761</sup>, and reverse its discriminatory refusal to register certain religious denominations.<sup>762</sup>

Distinctions among religions may lead to discrimination. A typical example would be religious discrimination in the workplace, as can be found in the Concluding Observations on Ireland:

The Committee is concerned (...) that under Section 37(1) of the Employment Equality Acts, religious-owned institutions, including in the fields of education and health, can discriminate against employees or prospective employees to protect the religious ethos of the institution (arts.2, 18, 25 and 27).

The State party should (...) amend Section 37(1) of the Employment Equality Acts in a way that bars all forms of discrimination in employment in the fields of education and health.<sup>763</sup>

Likewise, the HRC was concerned about reports that Rastafarians in Malawi do not enjoy equal access to employment<sup>764</sup>, and about the refusal of admission to school on the grounds of religion for Muslim, Tamil and Christian communities in Sri Lanka.<sup>765</sup> In such situations, States parties should undertake measures to ensure equal access to education and employment, and ensure that all members of ethnic, religious and linguistic minorities enjoy effective protection against discrimination.<sup>766</sup>

<sup>754</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 38; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 18.

<sup>755</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 22.

<sup>756</sup> HRC, CO Austria, CCPR/C/AUT/CO/5 (2015), para 32; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 22.

<sup>757</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 22.

<sup>758</sup> HRC, CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 22.

<sup>759</sup> HRC, CO Ireland, CCPR/C/IRL/CO/4 (2014), para 21.

<sup>760</sup> HRC, CO Maldives, CCPR/C/MDV/CO/1 (2012), para 9.

<sup>761</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 18.

<sup>762</sup> HRC, CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 20.

<sup>763</sup> HRC, CO Ireland, CCPR/C/IRL/CO/4 (2014), para 21.

<sup>764</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 21.

<sup>765</sup> HRC, CO Sri Lanka, CCPR/LKA/CO/5 (2014), para 23.

<sup>766</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 21; CO Sri Lanka, CCPR/LKA/CO/5 (2014), para 23.

The HRC also addressed *de jure* (as well as resulting *de facto*) discrimination on the basis of language.<sup>767</sup> Concerns about discrimination on grounds of language relate to the discriminatory effects or negative impacts of forced assimilation policies or language proficiency requirements and tests on the enjoyment of the rights in the Covenant without discrimination, and to its effects on the integration of linguistic minority communities and their opportunities in the fields of employment, education and political life.<sup>768</sup> By way of illustration, consider the following example from the Concluding Observations on Latvia:

The Committee remains concerned at the (...) situation of linguistic minorities. In particular, it is concerned about the impact of the State language policy on the enjoyment of the rights in the Covenant, without any discrimination, by members of linguistic minorities, including the right to choose and change one's own name and the right to an effective remedy. The Committee is further concerned at the discriminatory effects of the language proficiency requirement on the employment and work of minority groups (arts. 2, 26 and 27).

The State party should enhance its efforts to ensure the full enjoyment of the rights in the Covenant by (...) members of linguistic minorities, and further facilitate their integration into society. The State party should review the State Language Law and its application, in order to ensure that any restriction on the rights of non-Latvian speakers is reasonable, proportionate and non-discriminatory, and take measures to ensure access by non-Latvian speakers to public institutions and facilitate their communication with public authorities. (...).<sup>769</sup>

Poor knowledge of the national language can be a barrier for the integration of minorities in political and public life, resulting in their marginalisation.<sup>770</sup> States are recommended to promote the representation of members of (linguistic) minorities in political and public bodies at all levels<sup>771</sup>, or to integrate members of (linguistic)

<sup>767</sup> HRC, CO Estonia, CCPR/C/EST/CO/3 (2010), para 16; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 23; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 19; CO Latvia, CCPR/C/LVA/CO/3 (2014), para 7; CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 22.

<sup>768</sup> HRC, CO Estonia, CCPR/C/EST/CO/3 (2010), para 16; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 23; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 19; CO Latvia, CCPR/C/LVA/CO/3 (2014), para 7; CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 22.

<sup>769</sup> HRC, CO Latvia, CCPR/C/LVA/CO/3 (2014), para 7.

<sup>770</sup> HRC, CO Georgia, CCPR/C/GEO/CO/4 (2014), para 19: 'While noting the State party's efforts to integrate minorities into political and public life, the Committee remains concerned that poor knowledge of Georgian language continues to be the main barrier to their integration that translate into their limited representation in political life, as well as marginalization. It also remains concerned that local authorities must provide written replies to minorities in Georgian even if minority applicants do not read this language, a requirement that may also exclude members of linguistic minorities from assuming certain official functions at the local level.'

<sup>771</sup> HRC, CO Georgia, CCPR/C/GEO/CO/4 (2014), para 19; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 25; CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 22; CO Togo, CCPR/C/TGO/CO/4 (2011), para 21.

minorities into society<sup>772</sup>, the labour market<sup>773</sup>, the civil service, law enforcement and/or the judiciary<sup>774</sup>, including through language training<sup>775</sup>, and the introduction of temporary special measures.<sup>776</sup> States should consider easing the language requirements for entering the civil service<sup>777</sup>, ensure access by speakers of minority languages to public institutions and facilitate their communication with public authorities<sup>778</sup>, and increase the confidence and trust of members of (linguistic) minorities in the State and its public institutions.<sup>779</sup>

Ethnicity or race did not appear as a discrimination ground *in law*. Besides ‘religion’ and ‘language’, one other cultural trait appeared as a *de jure* discrimination ground: ‘nationality’.<sup>780</sup>

Regarding *de facto* discrimination, the HRC generally specifies which groups are still facing discrimination, and in which areas. For example, the HRC has expressed concern ‘that immigrants, foreigners and ethnic minorities, including the Roma minority, continue to face [or be subjected to] discrimination’<sup>781</sup>, ‘that non-Chinese speaking migrants face discrimination and prejudice in employment due to the requirement of written Chinese language skills, even for manual jobs’<sup>782</sup>, ‘that members of the Roma community still face *de facto* discrimination and social exclusion’<sup>783</sup>, and about the ‘persistence of *de facto* discrimination against the Dalit community’.<sup>784</sup> Usually it concerns discrimination in gaining access to housing<sup>785</sup>, education<sup>786</sup>,

<sup>772</sup> HRC, CO Latvia, CCPR/C/LVA/CO/3 (2014), para 7.

<sup>773</sup> HRC, CO Estonia, CCPR/C/EST/CO/3 (2010), para 16.

<sup>774</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 23; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 25; CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 22.

<sup>775</sup> HRC, CO Estonia, CCPR/C/EST/CO/3 (2010), para 16.

<sup>776</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 23; CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 22.

<sup>777</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 23.

<sup>778</sup> HRC, CO Latvia, CCPR/C/LVA/CO/3 (2014), para 7.

<sup>779</sup> HRC, CO Estonia, CCPR/C/EST/CO/3 (2010), para 16.

<sup>780</sup> HRC, CO United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7 (2015), para 10; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 27; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 6; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 23: the HRC expressed concern about the limited possibilities for Crimean residents ‘to make an informed decision on the free choice of their citizenship owing to the very short period granted to them to refuse Russian citizenship’, and the ‘serious implications on the ability of Crimean residents who retained Ukrainian nationality to enjoy their rights under the Covenant’. The Russian authorities should ‘consider the possibility of allowing residents to retain their Ukrainian citizenship even if they are interested in a Russian citizenship’, and ‘ensure that Crimean residents who retained their Ukrainian nationality are not discriminated against in any sphere of public life and are granted full access to public services on equal terms’.

<sup>781</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5.

<sup>782</sup> HRC, CO China (Hong Kong), CCPR/C/CHN-HKG/CO/3 (2013), para 22.

<sup>783</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 7.

<sup>784</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 9.

<sup>785</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO Norway, CCPR/C/NOR/CO/6 (2011), para 7; CO Poland, CCPR/C/POL/CO/6 (2010), para 5.

<sup>786</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO Poland, CCPR/C/POL/CO/6 (2010), para 5.

employment<sup>787</sup>, health care<sup>788</sup>, participation in public life, including the right to vote<sup>789</sup>, social protection<sup>790</sup>, and water and other (public or basic) goods and services.<sup>791</sup> The HRC generally recommends States parties to ensure equal treatment for everyone in its territory or under its jurisdiction<sup>792</sup>, and to (strengthen the measures taken to) ensure that immigrants, foreigners and all members of (ethnic, religious, linguistic) minorities do not suffer from discrimination in access to housing, employment, education, equal pay/wages, health care, public services and/or participation in public life.<sup>793</sup>

One of the most recurring (*de facto*) discrimination grounds is ethnicity. Discrimination based on ethnicity may prevent the enjoyment of human rights by certain ethnic groups/minorities, often Roma<sup>794</sup>, or indigenous peoples and Afro-descendants<sup>795</sup>, but also ethnic Vietnamese in Cambodia<sup>796</sup>, Turkish Cypriots in Cyprus<sup>797</sup>, and Roma, Ashkali and Egyptians in Montenegro.<sup>798</sup> They face rejection, exclusion and violence, and are often subjected to discrimination, especially in areas of employment, housing, health, education, social services, access to personal documents and participation in political life.<sup>799</sup> States parties are recommended to adopt measures to improve the rights of (members of) ethnic minority groups with regard to access to employment, housing, health, education, social services, personal documents and participation in political life. They should, for example, promote access to opportunities

<sup>787</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO Norway, CCPR/C/NOR/CO/6 (2011), para 7.

<sup>788</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO Yemen, CCPR/C/YEM/CO/5 (2012), para 12; CO Poland, CCPR/C/POL/CO/6 (2010), para 5.

<sup>789</sup> HRC, CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 22.

<sup>790</sup> HRC, CO Poland, CCPR/C/POL/CO/6 (2010), para 5.

<sup>791</sup> HRC, CO Austria, CCPR/C/AUT/CO/5 (2015), para 11; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO Yemen, CCPR/C/YEM/CO/5 (2012), para 12.

<sup>792</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Israel, CCPR/C/ISR/CO/4 (2014), para 7.

<sup>793</sup> HRC, CO Spain, CCPR/C/ESP/CO/6 (2015), para 9; CO Portugal, CCPR/C/PRT/CO/4 (2012), para 5; CO France, CCPR/C/FRA/CO/5 (2015), para 13.

<sup>794</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), paras 17–18; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 8; CO Croatia, CCPR/C/HRV/CO/3 (2015), paras 9, 21; CO Albania, CCPR/C/ALB/CO/2 (2013), para 23; CO Latvia, CCPR/C/LVA/CO/3 (2014), para 21; CO Czech Republic, CCPR/C/CZE/CO/3 (2013), para 9; CO Finland, CCPR/C/FIN/CO/6 (2013), para 17; CO Bosnia and Herzegovina, CCPR/C/BIH/CO/2 (2012), para 21; CO Bulgaria, CCPR/C/BGR/CO/3 (2011), para 7; CO Serbia, CCPR/C/SRB/CO/2 (2011), para 22; CO Slovakia, CCPR/C/SVK/CO/3 (2011), para 16.

<sup>795</sup> HRC, CO Peru, CCPR/C/PER/CO/5 (2013), para 7; CO Guatemala, CCPR/C/GTM/CO/3 (2012), para 10.

<sup>796</sup> HRC, CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 8.

<sup>797</sup> HRC, CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 23.

<sup>798</sup> HRC, CO Montenegro, CCPR/C/MNE/CO/1 (2014), para 19.

<sup>799</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), paras 17–18; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 8; CO Croatia, CCPR/C/HRV/CO/3 (2015), paras 9, 21; CO Albania, CCPR/C/ALB/CO/2 (2013), para 23; CO Ireland, CCPR/C/IRL/CO/4 (2014), para 23; CO Latvia, CCPR/C/LVA/CO/3 (2014), para 21; CO Czech Republic, CCPR/C/CZE/CO/3 (2013), para 9; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 27; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 19; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 25; CO Ukraine, CCPR/C/UKR/CO/7 (2013), para 12; CO Finland, CCPR/C/FIN/CO/6 (2013), para 17.

and services in all fields and at all levels through affirmative action (or temporary special measures) in order to redress existing inequalities.<sup>800</sup>

While the HRC's recommendations are usually quite broad and general, one example stands out for its specificity:

The Committee is concerned that (...) an anti-Roma climate remains prevalent among the Czech population. The Committee is also concerned about the use of discriminatory remarks against the Roma by politicians and in the media and at the extremist demonstrations, marches and attacks directed against members of the Roma community (arts. 2, 19, 20 and 27).

The State party should redouble its efforts to combat all forms of intolerance against the Roma, by, inter alia:

- (a) (...) allocating sufficient resources to awareness-raising campaigns against racism *to promote respect for human rights and tolerance for diversity*, in schools among the youth, but also throughout the media and in the political arena;
- (b) Actively engaging in *nurturing respect for the Roma culture and history through symbolic acts*, such as removing the pig farm located on a World War II Roma concentration camp in Lety; (...).<sup>801</sup>

Another major concern for the HRC relates to overrepresentation in criminal justice and access to justice for certain racial or ethnic minorities or indigenous peoples. Concerns include 'the disproportionately high rate of incarceration of indigenous people, including women, in federal and provincial prisons across Canada'<sup>802</sup>, discrimination in access to justice based on ethnicity in Kyrgyzstan<sup>803</sup>, and factors obstructing equitable access to the justice system in Uruguay for persons of indigenous origin and persons of African descent.<sup>804</sup> States parties should 'ensure that mechanisms are in place to provide vulnerable groups with access to the justice system without being subject to discrimination of any kind'<sup>805</sup>, 'prevent the excessive use of incarceration of indigenous peoples and resort, wherever possible, to alternatives to detention', enable 'indigenous convicted offenders to serve their sentences in their communities', and 'promote and facilitate access to justice at all levels by indigenous peoples'.<sup>806</sup> Moreover, they should 'robustly address racial disparities in the criminal justice system, including

<sup>800</sup> HRC, CO Latvia, CCPR/C/LVA/CO/3 (2014), para 21; CO Finland, CCPR/C/FIN/CO/6 (2013), para 17; CO Bosnia and Herzegovina, CCPR/C/BIH/CO/2 (2012), para 21; CO Slovakia, CCPR/C/SVK/CO/3 (2011), para 16; CO Serbia, CCPR/C/SRB/CO/2 (2011), para 22; CO Hungary, CCPR/C/HUN/CO/5 (2010), para 20.

<sup>801</sup> HRC, CO Czech Republic, CCPR/C/CZE/CO/3 (2013), para 8.

<sup>802</sup> HRC, CO Canada, CCPR/C/CAN/CO/6 (2015), para 18.

<sup>803</sup> HRC, CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 14.

<sup>804</sup> HRC, CO Uruguay, CCPR/C/URY/CO/5 (2013), para 14.

<sup>805</sup> HRC, CO Uruguay, CCPR/C/URY/CO/5 (2013), para 22.

<sup>806</sup> HRC, CO Canada, CCPR/C/CAN/CO/6 (2015), para 18.

by amending regulations and policies leading to racially disparate impact at the federal, State and local levels'.<sup>807</sup>

The HRC has also acknowledged the very vulnerable situation of indigenous women and women of ethnic minorities on (intersecting) grounds of both race/ethnicity and gender. Concerns include the 'high levels of racial, social and gender discrimination suffered by indigenous and Afro-descendant women'<sup>808</sup>, the high level of pay gap disproportionately affecting low-income women, in particular minority and indigenous women<sup>809</sup>, the extremely low representation of women, particularly Dalit and indigenous women, in high-level decision-making positions<sup>810</sup>, and indigenous women facing obstacles in obtaining decision-making positions.<sup>811</sup> States parties are recommended to 'promote genuine gender equality *that includes a specific perspective in favour of indigenous and Afro-descendant women*'<sup>812</sup>, 'guarantee that men and women receive equal pay for work of equal value across its territory, *with a special focus on minority and indigenous women*'<sup>813</sup>, and to 'adopt any temporary special measures necessary to continue to increase women's – *and particularly indigenous women's* – participation in public life at all levels of the State and their representation in decision-making positions in the private sector'.<sup>814</sup>

This section has shown that the HRC applies measures with a special focus on cultural groups/communities with the aim of eliminating discrimination, not preserving the cultural differences per se. The measures are not meant to protect and preserve the right of (members of) cultural groups to be different, it protects the right of (members of) cultural groups to difference in treatment with a view to achieving full and effective equality in the enjoyment of human rights. Measures are mostly of a positive nature<sup>815</sup>: change laws which discriminate; adopt laws to protect against discrimination; adopt *temporary* special measures to redress inequalities or adopt other policies which help eliminating discrimination/differences in treatment.

### 3.3.2 CESCR

Also the CESCR has eye for both *de jure* and *de facto* discrimination (art 2 (2) and General Comment No 20). Regarding *de jure* discrimination, the CESCR has frequently expressed concern about the absence of a comprehensive anti-discrimination law in States parties, which covers all grounds of discrimination.<sup>816</sup> The CESCR generally

<sup>807</sup> HRC, CO United States, CCPR/C/USA/CO/4 (2014), para 6.

<sup>808</sup> HRC, CO Guatemala, CCPR/C/GTM/CO/3 (2012), para 8.

<sup>809</sup> HRC, CO Canada, CCPR/C/CAN/CO/6 (2015), para 7.

<sup>810</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8.

<sup>811</sup> HRC, CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 8.

<sup>812</sup> HRC, CO Guatemala, CCPR/C/GTM/CO/3 (2012), para 8.

<sup>813</sup> HRC, CO Canada, CCPR/C/CAN/CO/6 (2015), para 7. (emphasis added, VV).

<sup>814</sup> HRC, CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 8. (emphasis added, VV)

<sup>815</sup> There is also the negative obligation not to discriminate.

<sup>816</sup> CESCR, CO Mongolia, E/C.12/MNG/CO/4 (2015), para 12; CO Kyrgyzstan, E/C.12/KGZ/CO/2–3 (2015), para 5; CO Uganda, E/C.12/UGA/CO/1 (2015), para 15; CO Gambia, E/C.12/GMB/CO/1

recommends States parties to adopt comprehensive anti-discrimination legislation, guaranteeing protection for all against direct and indirect discrimination in the enjoyment of economic, social and cultural rights, and encompassing all prohibited grounds of discrimination, as set out in article 2 of the Covenant.<sup>817</sup> Sometimes States parties are also urged to authorize the use of (temporary) special measures to benefit disadvantaged and marginalised groups.<sup>818</sup> An example from the Concluding Observations on Djibouti:

(...) [T]he Committee regrets that the law of the State party does not fully prohibit discrimination in the exercise of all economic, social and cultural rights and does not provide for the implementation of special measures to this end (art. 2, para. 2).

The Committee invites the State party to adopt a framework non-discrimination law that prohibits discrimination on any grounds and aims to eliminate *de jure* discrimination and *de facto* discrimination. The Committee recommends that the State party ensure that its legislation sets out a definition of indirect discrimination and provides for *temporary special measures to reduce or eliminate situations that put a segment of the population at a disadvantage in the enjoyment of economic, social and cultural rights*. Furthermore, the Committee encourages the State party to reassess and, if necessary, to amend its laws in order to ensure that they are not discriminatory and do not lead to discrimination, either in terms of form or substance, as regards the exercise and the enjoyment of the rights covered by the Covenant.<sup>819</sup>

The CESCR frequently addresses cases of *de facto* discrimination on grounds of ethnicity. Affected groups include indigenous peoples and persons of African descent<sup>820</sup>, national and ethnic minorities<sup>821</sup>, immigrants or persons with immigrant

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(2015), para 12; CO China, E/C.12/CHN/CO/2 (2014), para 14; CO Belarus, E/C.12/BLR/CO/4–6 (2013), para 8; CO Egypt, E/C.12/EGY/CO/2–4 (2013), para 8; CO Kuwait, E/C.12/KWT/CO/2 (2013), para 8; CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 8; CO Japan, E/C.12/JPN/CO/3 (2013), para 11; CO Tanzania, E/C.12/TZA/CO/1–3 (2012), para 5; CO Ethiopia, E/C.12/ETH/CO/1–3 (2012), para 8; CO Moldova, E/C.12/MDA/CO/2 (2011), para 7; CO Yemen, E/C.12/YEM/CO/2 (2011), para 7; CO Switzerland, E/C.12/CHE/CO/2–3 (2010), para 7; CO Uruguay, E/C.12/URY/CO/3–4 (2010), para 7.

<sup>817</sup> CESCR, CO Mongolia, E/C.12/MNG/CO/4 (2015), para 12; CO Uganda, E/C.12/UGA/CO/1 (2015), para 15; CO Gambia, E/C.12/GMB/CO/1 (2015), para 12; CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 8; CO Tanzania, E/C.12/TZA/CO/1–3 (2012), para 5; CO Ethiopia, E/C.12/ETH/CO/1–3 (2012), para 8; CO Moldova, E/C.12/MDA/CO/2 (2011), para 7; CO Yemen, E/C.12/YEM/CO/2 (2011), para 7; CO Switzerland, E/C.12/CHE/CO/2–3 (2010), para 7; CO Uruguay, E/C.12/URY/CO/3–4 (2010), para 7; CO Morocco, E/C.12/MAR/CO/4 (2015), para 14; CO Djibouti, E/C.12/DJI/CO/1–2 (2013), para 10; CO Kuwait, E/C.12/KWT/CO/2 (2013), para 8.

<sup>818</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 14; CO Djibouti, E/C.12/DJI/CO/1–2 (2013), para 10; CO Kuwait, E/C.12/KWT/CO/2 (2013), para 8; CO Japan, E/C.12/JPN/CO/3 (2013), para 11.

<sup>819</sup> CESCR, CO Djibouti, E/C.12/DJI/CO/1–2 (2013), para 10.

<sup>820</sup> CESCR, CO Paraguay, E/C.12/PRY/CO/4 (2015), para 13.

<sup>821</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 10; CO Finland, E/C.12/FIN/CO/6 (2014), para 12; CO China, E/C.12/CHN/CO/2 (2014), para 14; CO Serbia, E/C.12/SRB/CO/2 (2014), para 11; CO The Netherlands, E/C.12/NLD/CO/4–5 (2010), para 12; CO Ukraine, E/C.12/UKR/CO/6 (2014), para 9; CO Estonia, E/C.12/EST/CO/2 (2011), para 10.

backgrounds<sup>822</sup>, refugees and displaced persons<sup>823</sup>, *Bidouns*<sup>824</sup>, the Māori and Pasifika<sup>825</sup>, and the Roma.<sup>826</sup> They often face problems in accessing employment, social security, housing, health care and education.<sup>827</sup>

Recommendations include adopting specific or targeted measures to address the problems faced by minorities in having access to employment, housing, education and health care.<sup>828</sup> Often, the recommendations focus on combatting discrimination (negative culture, further discussed in chapter 5).<sup>829</sup> Occasionally, the CESCR refers to (temporary) special measures<sup>830</sup>: ‘[i]dentify any difficulties faced by these groups [i.e., migrants and persons from ethnic minorities in the Netherlands, VV] in accessing employment, housing, health and education, and take the necessary remedial steps’ and ‘[a]dopt and implement targeted policies and programmes to improve their situation’<sup>831</sup>, ‘[t]ake steps to ensure that Amazighs enjoy fully the rights set out in the Covenant, if necessary by adopting special measures’<sup>832</sup>, ‘adopt temporary special measures, in order to enable the Batwa to fully enjoy the rights under the Covenant’<sup>833</sup>, and ‘adopt temporary special measures (...) to promote the realization of all Covenant rights for disadvantaged and marginalized indigenous communities and Afro-descendants’.<sup>834</sup> Such temporary special measures should be in line with the Committee’s General Comment on Non-Discrimination in Economic, Social and Cultural Rights (see section 3.1).

The CESCR also addresses discrimination on grounds of ethnicity with a focus on particular areas, such as education and health. In its General Comment on the right to education (art 13), the CESCR explains that education should be ‘accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on

<sup>822</sup> CESCR, CO Finland, E/C.12/FIN/CO/6 (2014), para 12; CO Norway, E/C.12/NOR/CO/5 (2013), para 7; CO Spain, E/C.12/ESP/CO/5 (2012), para 11; CO Germany, E/C.12/DEU/CO/5 (2011), para 12; CO The Netherlands, E/C.12/NLD/CO/4–5 (2010), para 12.

<sup>823</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 10; CO Serbia, E/C.12/SRB/CO/2 (2014), para 11.

<sup>824</sup> CESCR, CO Kuwait, E/C.12/KWT/CO/2 (2013), para 9.

<sup>825</sup> CESCR, CO New Zealand, E/C.12/NZL/CO/3 (2012), para 12.

<sup>826</sup> CESCR, CO Portugal, E/C.12/PRT/CO/4 (2014), para 7; CO Romania, E/C.12/ROU/CO/3–5 (2014), para 9; CO Czech Republic, E/C.12/CZE/CO/2 (2014), para 9; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 7; CO Serbia, E/C.12/SRB/CO/2 (2014), paras 11–12; CO Ukraine, E/C.12/UKR/CO/6 (2014), para 8; CO Spain, E/C.12/ESP/CO/5 (2012), para 11; CO Slovenia, E/C.12/SVN/CO/2 (2014), para 11.

<sup>827</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 14; CO Rwanda, E/C.12/RWA/CO/2–4 (2013), para 8.

<sup>828</sup> CESCR, CO Finland, E/C.12/FIN/CO/6 (2014), para 12; CO The Netherlands, E/C.12/NLD/CO/4–5 (2010), para 12; CO Ukraine, E/C.12/UKR/CO/6 (2014), para 8.

<sup>829</sup> CESCR, CO Paraguay, E/C.12/PRY/CO/4 (2015), para 13; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 10; CO China, E/C.12/CHN/CO/2 (2014), para 14.

<sup>830</sup> The examples given here are all the examples the researcher found of references to (temporary) special measures in relation to ethnic discrimination. This is a much smaller number than in the case of gender discrimination. There were also some references to special measures with respect to language discrimination, religious discrimination and caste-based discrimination, but also in very small numbers.

<sup>831</sup> CESCR, CO The Netherlands, E/C.12/NLD/CO/4–5 (2010), para 12.

<sup>832</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 14.

<sup>833</sup> CESCR, CO Rwanda, E/C.12/RWA/CO/2–4 (2013), para 8.

<sup>834</sup> CESCR, CO Peru, E/C.12/PER/CO/2–4 (2012), para 28.

any of the prohibited grounds'.<sup>835</sup> In its concluding observations, the CESCR has expressed concerns about the existence of factors, some cultural, which limit students' access to education, and the high dropout rates, (especially) among disadvantaged and marginalised groups of the population, such as Dalit<sup>836</sup>, indigenous<sup>837</sup>, Afro-descendants<sup>838</sup>, Traveller<sup>839</sup>, Roma<sup>840</sup>, or other ethnic minority groups.<sup>841</sup> Such 'root causes' of low school enrolment and high school drop-out, some of which are of a cultural nature, include: living in rural, isolated or remote areas<sup>842</sup>, lack of birth registration or identity documents<sup>843</sup>, the lack of adequate sanitary infrastructure in schools<sup>844</sup>, the lack of awareness among parents of the value of continued education for their children's long-term socioeconomic prospects<sup>845</sup>, the lack of teachers from the community and the limited use of the community language or mother tongue in schools.<sup>846</sup> States parties are recommended to 'develop targeted programmes aimed at helping to ensure that students do not drop out of school and addressing the reasons why they do so'<sup>847</sup>, 'address the economic, social and cultural factors identified as root causes of the persistently high school dropout rates'<sup>848</sup>, 'continue its efforts to remove disparities between different societal groups and promote the educational advancement of those disadvantaged and marginalized groups and provinces'.<sup>849</sup> One State party was recommended to '[t]ake effective measures, including temporary special measures, to ensure that all Roma children complete their basic education, including through awareness-raising campaigns among the Roma community concerning the importance of education to the future well-being of children'.<sup>850</sup> Often, the CESCR recommends the

<sup>835</sup> CESCR, General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, E/1996/22, 8 December 1995, para 6.

<sup>836</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 28.

<sup>837</sup> CESCR, CO Ecuador, E/C.12/ECU/CO/3 (2012), para 31; CO Guatemala, E/C.12/GTM/CO/3 (2014), para 25; CO Argentina, E/C.12/ARG/CO/3 (2011), para 24.

<sup>838</sup> CESCR, CO Ecuador, E/C.12/ECU/CO/3 (2012), para 31; CO Uruguay, E/C.12/URY/CO/3-4 (2010), para 28.

<sup>839</sup> CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 31.

<sup>840</sup> CESCR, CO Romania, E/C.12/ROU/CO/3-5 (2014), para 23; CO Slovenia, E/C.12/SVN/CO/2 (2014), para 27; CO Bulgaria, E/C.12/BGR/CO/4-5 (2012), para 22; CO Slovakia, E/C.12/SVK/CO/2 (2012), para 26; CO Ireland, E/C.12/IRL/CO/3 (2015), para 31; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 25.

<sup>841</sup> CESCR, CO Israel, E/C.12/ISR/CO/3 (2011), para 35; CO Japan, E/C.12/JPN/CO/3 (2013), para 27; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 25.

<sup>842</sup> CESCR, CO Mongolia, E/C.12/MNG/CO/4 (2015), para 28; CO Thailand, E/C.12/THA/CO/1-2 (2015), para 33; CO Djibouti, E/C.12/DJI/CO/1-2 (2013), para 34; CO Moldova, E/C.12/MDA/CO/2 (2011), para 29.

<sup>843</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 25; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 28.

<sup>844</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 28.

<sup>845</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 25.

<sup>846</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 25; CO Nepal, E/C.12/NPL/CO/3 (2014), para 28.

<sup>847</sup> CESCR, CO Ecuador, E/C.12/ECU/CO/3 (2012), para 31; CO Guatemala, E/C.12/GTM/CO/3 (2014), para 25.

<sup>848</sup> CESCR, CO Romania, E/C.12/ROU/CO/3-5 (2014), para 23.

<sup>849</sup> CESCR, CO Argentina, E/C.12/ARG/CO/3 (2011), para 24.

<sup>850</sup> CESCR, CO Lithuania, E/C.12/LTU/CO/2 (2014), para 23.

State party to ‘identify obstacles’, address the ‘causes’, ‘factors’, or ‘reasons’, or to ‘deal with the root causes’, without specifying them.

The CESCR has repeatedly expressed concerns about discrimination in access to (adequate) health care (art 12 ICESCR) for disadvantaged and marginalised groups, such as Travellers<sup>851</sup>, Roma<sup>852</sup>, and indigenous peoples.<sup>853</sup> Immigrants may face language barriers in accessing health care<sup>854</sup>, or certain communities, like Roma or indigenous peoples, lack access to health care because they are poor, live in rural and remote areas, or lack the necessary documents.<sup>855</sup> States parties are recommended to ‘reduce the disparity between Travellers and Roma and the general public in health and access to health services’<sup>856</sup>, ‘ensure de facto access to affordable, good quality and timely health care and medical treatment for all segments of the population, including persons living in rural and remote areas, as well as disadvantaged and marginalized individuals and groups’<sup>857</sup>, ‘ensure universal access to affordable primary health care, including by increasing the number of family doctors and community health centres, and include all members of society, including Roma, in the compulsory health insurance scheme’<sup>858</sup>, or to increase the number of community nurses and Roma Health Mediators, and severely punish all cases of discrimination and segregation of patients.<sup>859</sup> Discrimination in access to health care for indigenous peoples should be remedied by consolidating ‘a national health system accessible to all without discrimination of any kind’ and ensuring ‘the coverage and accessibility of the health-care services provided by the State in rural areas and zones inhabited by the indigenous population’<sup>860</sup>, or by strengthening public health policies, ‘to ensure for all, in particular for the indigenous, Afro-Colombian peoples and persons living in rural areas, universal access to health-care services’.<sup>861</sup>

The CESCR has also expressed concerns about discrimination in access to (adequate) housing for disadvantaged and marginalised groups. The CESCR has recommended States parties very generally to address ‘issues of Roma in the area of (...) housing (...) in order to better reflect the needs of the Roma population’<sup>862</sup>, or more specifically to ‘ensure access to adequate housing for Roma, inter alia by regularizing “irregular” houses where possible’.<sup>863</sup>

<sup>851</sup> CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 28.

<sup>852</sup> CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 28; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 23; CO Romania, E/C.12/ROU/CO/3–5 (2014), para 21; CO Bosnia and Herzegovina, E/C.12/BIH/CO/2 (2013), para 32; CO Moldova, E/C.12/MDA/CO/2 (2011), para 22.

<sup>853</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 22; CO Colombia, E/C.12/COL/CO/5 (2010), para 25.

<sup>854</sup> CESCR, CO Iceland, E/C.12/ISL/CO/4 (2012), para 17.

<sup>855</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 22; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 23; CO Romania, E/C.12/ROU/CO/3–5 (2014), para 21.

<sup>856</sup> CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 28.

<sup>857</sup> CESCR, CO Romania, E/C.12/ROU/CO/3–5 (2014), para 21.

<sup>858</sup> CESCR, CO Moldova, E/C.12/MDA/CO/2 (2011), para 22.

<sup>859</sup> CESCR, CO Romania, E/C.12/ROU/CO/3–5 (2014), para 21.

<sup>860</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 22.

<sup>861</sup> CESCR, CO Colombia, E/C.12/COL/CO/5 (2010), para 25.

<sup>862</sup> CESCR, CO Bosnia and Herzegovina, E/C.12/BIH/CO/2 (2013), para 12.

<sup>863</sup> CESCR, CO Greece, E/C.12/GRC/CO/2 (2015), para 34.

The CESCR has occasionally expressed concerns about discrimination of individuals on the basis of religion.<sup>864</sup> The Concluding Observations on Iran provide an example:

The Committee is concerned that the State party discriminates against *religious communities other than those belonging to Islam, Christianity, Judaism and Zoroastrianism*, which seriously and negatively affects the people's enjoyment of economic, social and cultural rights.

The Committee urges that the State party take steps to ensure that people with beliefs other than the religions recognized by the State party can fully enjoy all aspects of economic, social and cultural rights, without any discrimination.<sup>865</sup>

The concluding observations have revealed religious discrimination in access to education (art 13 ICESCR) and employment (arts 6 and 7 ICESCR). In its Concluding Observations on Ireland, the CESCR noticed that children belonging to religious minorities face discrimination in access to education, since schools are allowed to 'give preference to admission of students based on religion'. The Irish authorities were subsequently urged to amend the laws allowing for such preferential treatment and bring them in line with international human rights standards, to increase the number of non-denominational schools and to review admissions policies of all schools with a view to removing all discriminatory criteria for enrolment.<sup>866</sup>

An example of religious discrimination in employment can be found in the Concluding Observations on Iran, where the *gozinesh process* makes access to employment conditional upon an ideological screening, the principal prerequisite for which is devotion to the tenets of Islam. The CESCR is concerned that this law 'impairs equality of opportunity or treatment in employment or occupation for persons belonging to ethnic and religious minorities', and recommends that the State 'ensure that employment is not made conditional upon political opinion, previous political affiliation or support, or religious affiliation'.<sup>867</sup>

Finally, the CESCR found situations of discrimination on grounds of other cultural traits: property and birth (or caste-based discrimination) and language. In its Concluding Observations on Nepal, the CESCR expressed concern about the fact that the constitution 'does not include provisions against discrimination on the grounds of property and birth'.<sup>868</sup> The 'widespread discrimination in the enjoyment of economic, social and cultural rights, in particular access to education, health care, food, housing, employment and income-generating activities' which they continue to face, should be addressed by including provisions in the constitution 'making it unlawful for property and birth to be used as grounds for discrimination', by 'sensitizing law enforcement officials, investigating and prosecuting those responsible for discrimination against

<sup>864</sup> CESCR, CO Sudan, E/C.12/SDN/CO/2 (2015), para 19; CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 5; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), paras 6, 8.

<sup>865</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 6. (emphasis added, VV).

<sup>866</sup> CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 31.

<sup>867</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 12.

<sup>868</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 11.

Dalits and conducting awareness-raising campaigns on the rights of Dalits’, and by establishing ‘a national strategy and plan of action with time-bound objectives to eliminate discrimination and guarantee the rights of Dalits, as well as indicators to monitor compliance’.<sup>869</sup>

Finally, one example of discrimination on grounds of language was found, in the Concluding Observations on Estonia:

The Committee expresses concern about the discrimination against the Russian-speaking population which continues to be disproportionately affected by unemployment and poverty. (art. 2, para. 2)

The Committee calls on the State party to intensify its efforts to address the persistent disadvantages faced by the Russian-speaking population in the enjoyment of economic, social and cultural rights, and to ensure that strategies and policies adopted in this regard address both formal and substantive discrimination, and include the implementation of *special measures* in the field of employment.

Furthermore, the Committee calls on the State party to ensure that language requirements in relation to employment are based on reasonable and objective criteria, linked to the needs for the performance of each individual job, so as to avoid discrimination on the basis of language.<sup>870</sup>

The differences with the CESCR’s concerns and recommendations discussed in section 3 are evident. Here, the recommendations do not have the aim of preserving and accommodating cultural differences. The aim is to avoid discrimination of individuals on grounds of certain cultural traits. Indirectly, whether intentionally or not, the CESCR protects the culture which is connected with these individuals. Not their right to be different, but their right to enjoy equal rights or to have equal opportunities.

While the CESCR’s recommendations often focus on combatting discrimination (negative culture, further discussed in chapter 5), the CESCR occasionally refers to (temporary) special measures which have the aim of redressing inequalities, i.e., to reduce or eliminate situations which put a segment of the population at a disadvantage in the enjoyment of economic, social and cultural rights.

### 3.3.3 CEDAWCee

The CEDAW is aimed at eliminating all (forms of) discrimination against women. When the CEDAWCee discusses cases of discrimination on grounds of cultural traits, this is in addition to discrimination on grounds of gender and will thus amount to multiple or intersectional discrimination (art 2 and General Recommendation No 28).<sup>871</sup>

<sup>869</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 11.

<sup>870</sup> CESCR, CO Estonia, E/C.12/EST/CO/2 (2011), para 10. (emphasis added, VV).

<sup>871</sup> See chapter 4, section 3.1. Only in cases of multiple or intersectional discrimination, where discrimination is based on gender in combination with a cultural trait or identity feature such as race,

The CEDAWCee has in several concluding observations expressed concern about the impact of multiple and intersecting forms of discrimination<sup>872</sup>, including ‘discrimination on the basis of sex and other grounds such as ethnic (...) background’<sup>873</sup>, on disadvantaged and marginalised groups of women in the State party<sup>874</sup>, such as Roma women<sup>875</sup>, migrant women<sup>876</sup>, (other) ethnic minority women<sup>877</sup>, indigenous and Afro-descendant women<sup>878</sup>, both in society at large and within their communities<sup>879</sup>, regarding access to education<sup>880</sup>, employment<sup>881</sup>, health care<sup>882</sup>, housing<sup>883</sup>, land

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language, ethnicity, religion, the recommendations see to culture as something positive; ‘gender’ as such is not a ‘culture’.

- <sup>872</sup> CEDAWCee, CO Denmark, CEDAW/C/DNK/CO/8 (2015), para 33; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 36; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 36; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 46; CO Venezuela, CEDAW/C/VEN/CO/7–8 (2014), para 36; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 39; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 34; CO Hungary, CEDAW/C/HUN/CO/7–8 (2013), para 36; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36.
- <sup>873</sup> CEDAWCee, CO Denmark, CEDAW/C/DNK/CO/8 (2015), para 33; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 36.
- <sup>874</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 36.
- <sup>875</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 36; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 34; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 40; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 34; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 37; CO Hungary, CEDAW/C/HUN/CO/7–8 (2013), para 36.
- <sup>876</sup> CEDAWCee, CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 34; CO Denmark, CEDAW/C/DNK/CO/8 (2015), para 33; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 36; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 36; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 39.
- <sup>877</sup> CEDAWCee, CO China, CEDAW/C/CHN/CO/7–8 (2014), para 46; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 40; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 34; CO Hungary, CEDAW/C/HUN/CO/7–8 (2013), para 36.
- <sup>878</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 39; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 42.
- <sup>879</sup> CEDAWCee, CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 36; CO Denmark, CEDAW/C/DNK/CO/8 (2015), para 34.
- <sup>880</sup> CEDAWCee, CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 42; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 42; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 46; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 34; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 44; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 37.
- <sup>881</sup> CEDAWCee, CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 42; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 46; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 34; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 44; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 30; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 37.
- <sup>882</sup> CEDAWCee, CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 42; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 42; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 46; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 34; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 44; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 30.
- <sup>883</sup> CEDAWCee, CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 42; CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 36; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 37.

tenure<sup>884</sup>, credit facilities<sup>885</sup>, identity documents and birth registration<sup>886</sup>, justice and protection from violence<sup>887</sup>, and political and public participation.<sup>888</sup>

A typical example can be found in the Concluding Observations on Ecuador:

The Committee is concerned (...) about the following:

(b) De facto and intersectional discrimination faced by indigenous, Afro-Ecuadorian and Montubio women, (...) migrant women, women asylum seekers and refugee women (...).

The Committee recommends that the State party:

(b) (...) [A]dopt specific targets, lines of action and indicators aimed at tackling multiple forms of discrimination against women, *and consider the specific needs and cultural contexts* of women belonging to disadvantaged groups in an adequate manner; (...).<sup>889</sup>

It is important to note here that the aim is clearly to tackle discrimination, among others through considering their specific needs and cultural contexts. The aim is not to preserve cultural differences as such. The Concluding Observations on China provide another example:

The Committee is concerned about reports that ethnic and religious minority women, such as Tibetans and Uighurs (...) continue to experience multiple and intersecting forms of discrimination. The Committee is particularly concerned that ethnic and religious minority women continue to have limited access to health, education and employment.

The Committee calls upon the State party to vigorously pursue efforts *aimed at eliminating the multiple and intersecting forms of discrimination experienced by ethnic and religious minority women (...)*, which affect their access to health, education, employment and participation in public life *and the enjoyment of their cultural identity and practices*.<sup>890</sup>

Also here, the aim of the recommendations is to eliminate the discrimination experienced by these minority women. Although the CEDAWCee notes that such discrimination in turn affects the enjoyment of their cultural identity and practices, the

<sup>884</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 36; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 44; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 39; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 34.

<sup>885</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 39.

<sup>886</sup> CEDAWCee, CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 42.

<sup>887</sup> CEDAWCee, CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 36).

<sup>888</sup> CEDAWCee, CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 40; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 36; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 37.

<sup>889</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 10–11. (emphasis added, VV).

<sup>890</sup> CEDAWCee, CO China, CEDAW/C/CHN/CO/7–8 (2014), paras 46–47. (emphasis added, VV).

aim is not – at least not in the first place – to preserve their culture. The aim is to protect their right to be treated equally, and to enjoy their rights on an equal basis.

In general, when addressing such multiple and intersecting forms of discrimination experienced by disadvantaged groups of women, the CEDAWCee calls upon States parties to take ‘effective measures’ aimed at eliminating such discrimination<sup>891</sup>, to adopt ‘measures, including temporary special measures’, to ensure equal rights and opportunities for these women<sup>892</sup>, to adopt ‘the legislative measures and targeted policies necessary to address multiple forms of discrimination and promote the integration into society’ of these women<sup>893</sup>, to ‘pay special attention to the particular needs’ of these women<sup>894</sup>, and to ensure that such disadvantaged (groups of) women have full access to justice, land tenure, (micro-)credit facilities and basic services, such as health care, education and employment.<sup>895</sup> Other recommendations include promoting positive images of women belonging to ethnic and religious minorities<sup>896</sup>, ensuring that these disadvantaged groups of women participate in decision-making processes<sup>897</sup>, and increasing their awareness of their rights.<sup>898</sup>

Indigenous, ethnic or religious minority women and girls often face discrimination in access to education (art 10 CEDAW) and marginalisation in the education system. In this respect, the CEDAWCee has expressed concerns about ‘limited opportunities for indigenous women and girls to gain access to their own educational institutions, as well as the regular education system, owing to long distances between schools and indigenous communities’<sup>899</sup>, ‘the limited access to education for indigenous and Afro-Ecuadorian women’<sup>900</sup>, and about ‘the fact that illiteracy rates among (...) indigenous women and girls (...) continue to be high owing to their lack of educational opportunities’.<sup>901</sup> Especially the education of Roma women and girls is very

<sup>891</sup> CEDAWCee, CO China, CEDAW/C/CHN/CO/7–8 (2014), para 47; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 38.

<sup>892</sup> CEDAWCee, CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 35; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 37; Kyrgyzstan, para 34; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 37; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 41.

<sup>893</sup> CEDAWCee, CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 35; Kyrgyzstan, para 34; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 37; CO Bosnia and Herzegovina, CEDAW/C/BIH/CO/4–5 (2013), para 38.

<sup>894</sup> CEDAWCee, CO Venezuela, CEDAW/C/VEN/CO/7–8 (2014), para 37; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 40.

<sup>895</sup> CEDAWCee, CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 35; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 40; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 37.

<sup>896</sup> CEDAWCee, CO Denmark, CEDAW/C/DNK/CO/8 (2015), para 34; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 37.

<sup>897</sup> CEDAWCee, (Russian Federation, para 40; Bolivia, para 35; CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 39; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 40.

<sup>898</sup> CEDAWCee, CO Finland, CEDAW/C/FIN/CO/7 (2014), para 31.

<sup>899</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 28. Although *access to their own educational institutions* is arguably accommodating cultural diversity, the principal aim of this recommendation is to provide general access.

<sup>900</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 28.

<sup>901</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 29.

problematic, with many concerns being raised about low levels of school attendance and high dropout rates among Roma girls<sup>902</sup>, and segregation of Roma children in special schools or classes.<sup>903</sup> States parties are called upon to ‘provide free school transport for women and girls in rural and remote areas’.<sup>904</sup> The CEDAWCee further recommends to use temporary special measures to promote the education of disadvantaged groups of women<sup>905</sup>, as well as (increased) financial and other resources and support afforded to ethnic and religious minority women and girls<sup>906</sup>, including free provision of textbooks, scholarships and subsidies.<sup>907</sup> Similar recommendations have been made to increase the access to education of Roma women and girls<sup>908</sup>, and raising awareness of the importance of education as the basis for the empowerment of women.<sup>909</sup>

Certain vulnerable or disadvantaged groups, in particular from minority communities, may also experience discrimination in employment (art 11 CEDAW).<sup>910</sup> The CEDAWCee has expressed concern about the very limited access to the labour market, i.e., the high unemployment, marginalisation, exclusion and/or underrepresentation, of women who belong to disadvantaged and marginalised groups, such as Roma and migrant women, or women from (other) ethnic minorities.<sup>911</sup> Some examples of such concerns include ‘the persistent marginalization and exclusion of Roma women and women belonging to other disadvantaged and marginalized groups from the formal labour market’<sup>912</sup>, and the ‘underrepresentation of women, in particular those from ethnic minorities, in decision-making and senior positions in the public and private sectors’.<sup>913</sup> States parties should adopt or encourage the adoption of temporary special measures or a quota system (in both public and private sectors) to promote access to the labour market for disadvantaged groups of women, and accelerate

<sup>902</sup> CEDAWCee, CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 26; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 30; CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 32; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 25.

<sup>903</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 26; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 30; CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 32.

<sup>904</sup> CEDAWCee, CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 29.

<sup>905</sup> CEDAWCee, CO Venezuela, CEDAW/C/VEN/CO/7–8 (2014), para 27.

<sup>906</sup> CEDAWCee, CO China, CEDAW/C/CHN/CO/7–8 (2014), para 35.

<sup>907</sup> CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 27.

<sup>908</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 27; CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 27; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 31; CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 33.

<sup>909</sup> CEDAWCee, CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 26.

<sup>910</sup> This could also be due to stereotyping by society (ie, harmful culture). However, the CEDAWCee did not explicitly link it to stereotyping in the examples provided here. A rather similar example, but *with* an explicit reference to stereotyping against these groups, can be found in chapter 5, section 2.3.3.

<sup>911</sup> CEDAWCee, CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 34; CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 28; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 29; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 28; CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 34; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 36; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 26; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 27.

<sup>912</sup> CEDAWCee, CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 29; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 28.

<sup>913</sup> CEDAWCee, CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 36.

their equal participation in the labour market<sup>914</sup>, or to promote the appointment of these women to senior and decision-making positions.<sup>915</sup> States parties are further recommended to increase employment opportunities and access to formal employment for disadvantaged and marginalised groups of women, by providing training and opportunities for women's entrepreneurship, and improving their possibilities to combine work and family life, including by expanding the number of childcare facilities.<sup>916</sup>

On one occasion, the CEDAWCee expressed concern about the lack of information on the impact of the ban on wearing headscarves on women and girls (in Belgium).<sup>917</sup> Without taking a clear stance on the legitimacy of the ban, but implicitly indicating its worries about the potentially discriminating effects of the ban, the State party was recommended to 'monitor and assess the impact on women and girls, in particular in relation to their access to education and employment, of the ban on wearing headscarves adopted by several local administrations, public hospitals, schools and private companies, and compile information on the number of women and girls who have been sanctioned on the basis of such a ban'.<sup>918</sup>

The CEDAWCee has occasionally addressed issues of discrimination in access to health or limited access to health infrastructure (art 12 CEDAW) for disadvantaged groups of women, and barriers or difficulties faced by these women in gaining access to health services.<sup>919</sup> The CEDAWCee has expressed concern about 'the limited access to health infrastructures for pregnant women, in particular for indigenous women'<sup>920</sup>, and the fact 'that women migrant workers and *Bidoun* women experience serious difficulties in gaining access to health care, (...) and that they are often unaware of how to gain access to health care and services'.<sup>921</sup> States parties should ensure that disadvantaged

<sup>914</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 29; CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 29; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 27.

<sup>915</sup> CEDAWCee, CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 37.

<sup>916</sup> CEDAWCee, CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 35; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 30; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 29.

<sup>917</sup> CEDAWCee, CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 18.

<sup>918</sup> CEDAWCee, CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 19. Interesting to compare this with the views expressed by the HRC, in its Concluding Observations on France, see chapter 4, section 3.2.1. The HRC is more outspoken in its view that the regulation of the wearing of religious symbols considered 'conspicuous' in public schools *infringes the freedom to express one's religion or belief* and that it has a disproportionate impact on members of specific religions and girls. The CEDAWCee is merely 'concerned about the lack of information on the impact of the ban on wearing headscarves on women and girls'. While the HRC recommends the State party (France) to *review the law*, the CEDAWCee recommends the State party (Belgium) to '*monitor and assess the impact on women and girls, in particular in relation to their access to education and employment, of the ban on wearing headscarves*'. In addition, the HRC is mostly concerned with the impact on the freedom of religion (though also stipulating the impact on girls), while the CEDAWCee is more concerned with the impact on (equal access to school of) girls. (emphasis added, VV).

<sup>919</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 28; CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 32; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 33; CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 39.

<sup>920</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 28.

<sup>921</sup> CEDAWCee, CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 39.

groups of women, such as indigenous women, women of African descent or migrant women (workers), enjoy access to free emergency medical care.<sup>922</sup> States parties should allocate sufficient resources to provide essential health services in rural and remote areas and among indigenous women and women of African descent<sup>923</sup>, or in isolated indigenous communities<sup>924</sup>, and conduct awareness-raising campaigns about modern contraceptive methods in indigenous languages.<sup>925</sup> Segregation of Roma women in hospitals and clinics should be monitored and sanctioned.<sup>926</sup>

Concerns regarding the right to equality in the political and public life of the country (art 7 CEDAW) generally relate to the representation of women of certain ethnic or religious minorities in (decision-making positions in) political and public life. The CEDAWCee has, for example, highlighted ‘the underrepresentation of women, especially indigenous women, in high-level decision-making positions in the Government’<sup>927</sup>, that ‘ethnic and religious minority women, such as Tibetans and Uighurs (...) are also underrepresented in decision-making positions’<sup>928</sup>, that ‘migrant women, (...) women from ethnic minorities and Roma women are underrepresented in political and public life’<sup>929</sup>, and that ‘disadvantaged groups of women, including Roma women (...) are, in practice, almost completely excluded from political and public life’.<sup>930</sup> States parties should adopt or implement temporary special measures, including statutory quota, to ‘promote the equal participation’, ‘guarantee the equal representation’, ‘increase the participation’, ‘ensure the effective participation’, or ‘promote and facilitate the participation’ of indigenous, Roma, migrant, and/or (other) ethnic or religious minority women in political and public life (including in national, departmental and municipal governments, the judiciary, the diplomatic service and in international organisations), as well as in high-level decision-making or leadership positions<sup>931</sup>, and monitor the progress achieved.<sup>932</sup> Occasionally, the CEDAWCee makes similar recommendations regarding the representation of women in the private sector.<sup>933</sup>

The CEDAWCee has also addressed discrimination in access to justice (or ‘equality before the law’; art 15 CEDAW). In its General Recommendation No 33 on access to

<sup>922</sup> CEDAWCee, CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 40.

<sup>923</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 29; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 34.

<sup>924</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 34.

<sup>925</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 29.

<sup>926</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 31.

<sup>927</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 22.

<sup>928</sup> CEDAWCee, CO China, CEDAW/C/CHN/CO/7–8 (2014), para 30.

<sup>929</sup> CEDAWCee, CO Finland, CEDAW/C/FIN/CO/7 (2014), para 22.

<sup>930</sup> CEDAWCee, CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 23.

<sup>931</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 22; CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 25; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 29; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 31; CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 29; CO Finland, CEDAW/C/FIN/CO/7 (2014), para 23; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 24.

<sup>932</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 22.

<sup>933</sup> CEDAWCee, CO Finland, CEDAW/C/FIN/CO/7 (2014), para 23.

justice, the CEDAWCee explains that ‘discrimination against women is compounded by intersecting factors that affect some women to a different degree or in different ways than men and other women’.<sup>934</sup> It subsequently enumerates the potential grounds for intersectional or compounded discrimination, some of which relate to (the protection of a certain) culture, most notably ethnicity/race, indigenous or minority status, colour, socio-economic status and/or caste, language, religion or belief, national origin, and urban/rural location. These intersecting factors make it more difficult for women from those groups to gain access to justice.<sup>935</sup>

The CEDAWCee’s recommendations often focus on combatting discrimination (negative culture, further discussed in chapter 5), but there is also attention for the more positive approach of ensuring equal access to everyone and redressing inequality. When discussing discrimination in education, employment and participation in public life, the CEDAWCee commonly refers to temporary special measures, including quota. Sometimes the CEDAWCee asks States parties to adopt special measures (of a more permanent nature) with a view to redressing inequality, such as the recommendation to adapt the school system to indigenous or nomadic culture. In the areas of health and justice, the CEDAWCee does not explicitly recommend the use of temporary special measures.<sup>936</sup>

## 4 CONCLUDING REMARKS

When looking at the way supervisory bodies, such as the treaty bodies, manage the tension between the universality of human rights and the reality of cultural differences, focus tends to be on negative aspects of culture: cultural attitudes or beliefs which form obstacles or barriers to the enjoyment of rights, or cultural practices which directly infringe rights. This is only one part of the picture (to be discussed in the next chapter). To understand how the treaty bodies manage this tension and balance universality and cultural diversity, it is necessary to also look at the way they use their mandate for the protection of cultures and the promotion of cultural diversity. The aim of this chapter was to examine whether and how the UN treaty bodies use their mandate to protect positive aspects of cultures and promote cultural diversity.

It was shown that the treaty bodies protect cultures and promote cultural diversity through: (1) a number of explicit cultural rights which aim to sustain the distinctiveness, uniqueness and exclusivity of a community’s way of life, beliefs and traditions, i.e., to protect and promote *cultural exclusivity*; (2) the overarching equality and non-discrimination principle, guaranteeing the inclusion and participation of

<sup>934</sup> CEDAWCee, General Recommendation No. 33: women’s access to justice, CEDAW/C/GC/33, 23 July 2015, para 8.

<sup>935</sup> Ibid.

<sup>936</sup> Recommendations include: creating access by allocating money to reach remote areas, raising awareness about rights and the means to enforce them, and providing interpretation into minority or indigenous languages.

persons and groups from varied cultural backgrounds, i.e., *cultural inclusivity*. Cultural inclusivity, in turn, is ensured through two distinct types of obligations: (a) obligations to ensure equality by *accommodating* differences in treatment through permanent special measures; (b) obligations to ensure equality by *eliminating* differences in treatment through temporary special measures.

The treaty bodies' measures to protect and promote cultural exclusivity concern in particular the official recognition of minorities, their enjoyment of traditional land and resources as well as cultural, linguistic and religious freedoms, and their meaningful consultation. Relevant recommendations are given to States parties with reference to article 1 ICCPR/ICESCR (the right to self-determination), article 27 ICCPR (the right to enjoy own culture), and article 15 ICESCR (the right to participate in cultural life).<sup>937</sup> The CESCR appears to make more use of the right to self-determination than the HRC does. Many of the issues that the HRC discusses with reference to article 27, are addressed by the CESCR with reference to both article 1 and article 15. This is possibly related to differences between article 15 ICESCR and article 27 ICCPR: the right to participate in cultural life used to be aimed at culture considered in its narrow scope, and thus much more confined than the right to enjoy one's own culture, which entails a broad notion of culture.<sup>938</sup> The CEDAWCee has occasionally addressed similar cultural issues, albeit without reference to the explicit cultural right established in article 13 (c) of the CEDAW.<sup>939</sup>

Under the treaty bodies' measures to protect and safeguard cultural inclusivity, a further distinction was made between measures aiming to protect a 'right to be different', and measures aiming to protect a 'right to be equal'. To guarantee a 'right to be different', the CESCR, especially in its general comments, but occasionally also in concluding observations, uses permanent special measures in areas of education, health and adequate standard of living, referring to for instance 'culturally adequate', 'culturally appropriate' or 'culturally acceptable' implementation of rights.<sup>940</sup> The

<sup>937</sup> The right to freedom of religion (art 18 ICCPR) has certain characteristics of an explicit cultural right that protects cultural exclusivity, but the HRC generally treats it as an issue of cultural inclusivity. Most freedom of religion issues concern 'cultural inclusivity': the equal enjoyment of rights by allowing religious diversity (such as wearing religious symbols or clothing to public services and institutions). Concerns were about religion as a ground for discrimination, rather than protecting a particular religious way of life.

<sup>938</sup> It was only in its General Comment No 21 (2009) that the CESCR established an explicit link between the two Arts, and emphasis shifted from *national culture* to *culture as a way of life* of individuals and groups. CESCR, General Comment No 21, para 32.

<sup>939</sup> The concluding observations show that the CEDAWCee does not use its article 13 in relation to 'culture as a way of life', but in relation to economic empowerment of women, ie, access to credit, financial assets, bank accounts, pensions, social protection schemes, and occasionally in relation to access to recreational activities and sports. See also chapter 4, section 2.3.

<sup>940</sup> 'Culturally adequate education' (CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 36); 'culturally appropriate community-based care' (CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 34); 'culturally sensitive psychological support services' (CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 34); 'culturally appropriate accommodation' (CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 27).

obligations are not merely negative; States are required to take positive measures.<sup>941</sup> The meaning of ‘culturally appropriate’ or ‘culturally adequate’ implementation is not further explained, however, making the emanating State obligations unclear. The CEDAWCee occasionally recommends permanent special measures in the areas of education, health and access to justice, for instance ‘intercultural care during delivery’<sup>942</sup>, an ‘intercultural approach to the provision of health services’<sup>943</sup>, or ‘adequate reparations in accordance with their culture and traditions’.<sup>944</sup> The HRC does not use permanent special measures; there is always a link to article 27.

The treaty bodies do not explicitly connect discrimination against members of certain cultural groups or communities on grounds of ‘cultural traits’ like ethnicity, race, caste (‘birth’), nationality, language or religion to the protection of cultures and promotion of cultural diversity. At best, it can be argued that they consider the protection of the individuals’ (minority) cultures a (welcome) side-effect of protecting the individual against such discrimination. The treaty bodies’ recommendations aim to protect the rights of (members of) cultural groups to difference in treatment with a view to achieving full and effective equality in the enjoyment of rights. These measures mostly entail positive obligations: change laws which discriminate; adopt laws to protect against discrimination; adopt temporary special measures to redress inequalities or adopt other targeted policies which help eliminating discrimination. The temporary special measures are generally not specified. Some States parties were recommended to take special measures of a more permanent nature, still with the aim of ensuring equal access and redressing inequalities. For example, the recommendation of the CESCR to ‘ensure that all Roma children attend compulsory education, including through making it more accessible for those who travel for a part of the year’<sup>945</sup>, and to ‘ensure that all children of nomadic communities have access to primary education, including through the establishment of mobile schools’.<sup>946</sup> Likewise, the CEDAWCee recommended to ‘[p]ursue efforts to develop special educational projects for indigenous girls, including nomadic girls, such as the adoption of adapted school calendars and instruction in and of indigenous languages’.<sup>947</sup>

In general the treaty bodies’ recommendations include very few negative obligations (‘refrain from pressuring victims to resort to alternative dispute-resolution processes’; ‘refrain from submitting cultural policies to development objectives’; ‘refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal

<sup>941</sup> For instance the obligation (requiring positive measures) to ensure ‘that health services are culturally appropriate and that health-care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups’. CESCR, General Comment No 14, para 37.

<sup>942</sup> CEDAWCee, CO Ecuador, CEDAW/C/EQU/CO/8–9 (2015), para 33.

<sup>943</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 33.

<sup>944</sup> CEDAWCee, CO Ecuador, CEDAW/C/EQU/CO/8–9 (2015), para 13.

<sup>945</sup> CESCR, CO Norway, E/C.12/NOR/CO/5 (2013), para 24.

<sup>946</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 28.

<sup>947</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 26.

enjoyment by women of their rights'). Perhaps this is inherent to the State reporting procedure, which is more tailored towards monitoring progress. Recommendations are usually phrased in terms of 'take measures to' or 'take steps to', indicating positive obligations.

It may be recalled that theories on reconciling universal human rights and cultural diversity build on two main principles, one being *flexibility in interpretation and implementation of rights*. The CESCR, and to a lesser extent the CEDAWCee, occasionally encourages or urges a certain flexibility in interpretation and implementation of rights, especially in its general comments (or general recommendations), for example by calling upon States parties to implement the rights in a 'culturally adequate', 'culturally appropriate' or 'culturally sensitive' manner, always in relation to rights of minorities, i.e., cultural diversity *within* the State. Other than that, the treaty bodies do not appear to *actively* use such a flexibility approach, i.e., cultural-specific interpretation and implementation of rights. The treaty bodies are not concerned with cultural variation in the content of rights. Cultural variation is inherent in the system due to the primacy of State implementation. Treaty bodies are more concerned with determining the outer limits, and only interfere when measures do not stay within the range of acceptable alternatives. They use their treaty provisions as a 'sword' to 'manage' cultural diversity, invoking human rights to oblige States parties to protect cultures and accommodate and foster cultural diversity.

Thus far, culture has been discussed as something positive, worthy of protecting and accommodating. In chapter 5, the attention will turn to the way treaty bodies 'manage' negative, adverse and harmful aspects of culture.

# CHAPTER 5

## HUMAN RIGHTS AS A SHIELD

### To Protect against Harmful Aspects of Culture

#### 1 INTRODUCTION

The present chapter examines how the treaty bodies deal with ‘adverse’, ‘negative’ or ‘harmful’ aspects of culture. While chapter 4 examined how States are to respect, protect and promote culture and cultural diversity, chapter 5 examines the obligations of States parties to promote changes in cultures. Cultures can manifest themselves in harmful values (stereotyping, attitudes) and practices (FGM, early marriage, etc.). As such, culture (in the form of practices, customs, traditions) can directly infringe upon human rights, or (in the form of stereotyping, attitudes) it can serve as an obstacle or barrier to the enjoyment of human rights. In order to map and analyse how the treaty bodies approach adverse, negative or harmful aspects of culture, three steps are to be taken. First, it is important to determine *which* concerns the treaty bodies link to culture. In general, it appears that for all three treaty bodies the vast majority of the issues linked to culture relate to different forms and manifestations of discrimination against women. Other issues relate to sexual and gender identities, such as lesbian, gay, bisexual, transgender and intersex persons (henceforth referred to as LGBT+) and other vulnerable or disadvantaged groups. Step 2 examines *how* the treaty bodies link these concerns to culture. Is the link clear, explicit and direct? Or is it ambiguous, implicit and indirect? Finally, the related recommendations are examined, with a view to outlining State obligations: are States parties required to address or challenge the culture, and how? If culture is (implicitly or explicitly) identified as contributing to situations of problematic implementation, do States (automatically) have to address that culture? What are the proposed (legal and other) measures or solutions?

It is necessary to address some additional methodological choices here.<sup>948</sup> For one, there is the choice to distinguish between *explicit* and *implicit* links to culture. The link with culture is considered *explicit* when the treaty bodies explicitly – i.e., openly, plainly, unambiguously – link the problem to culture, custom or tradition, or to cultural attitudes, stereotypes or stigma. Such ‘link’ to culture may take many forms. When few women participate in political and public life, and this is ‘perpetuated by’ the persistence of stereotypes, this is a link to culture. When violence against women

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<sup>948</sup> See chapter 1, section 1.5, for a description of the methodology used for chapters 4 and 5.

is considered to remain widespread ‘due to’ gender stereotypes or ‘owing to’ traditional societal attitudes, this is a link to culture. When stereotypes are considered ‘root causes’ for the disadvantaged position of women, this is a link to culture. When stereotypes ‘prevent’ women from exercising their rights, this is a link to culture. These are all examples of explicit links with a clear determination of a ‘cause-and-effect-relationship’.

The link is considered *implicit* when the treaty bodies do not establish a clear and direct link between the problem and culture, but *suggest* or *hint* that culture may play a role, for example by formulating a concern about stereotyping *in addition to* (but separately from) the problematic law(s) or practice(s). A treaty body may be concerned about some form of discrimination against women, and ‘also’ or ‘further’ note the existence of harmful practices or stereotypes. The discrimination against women is noted, the problematic culture is noted, yet the link between the two is missing. There is no determination of a ‘cause-and-effect-relationship’. The link to culture is also implicit when the role of culture is not identified in the formulation of the concern, but is addressed in the related recommendations.<sup>949</sup> After all: if targeting culture is considered to be part of the solution, then it should also be considered part of the problem. The distinction between explicit and implicit links to culture is considered relevant because while explicit links to culture point to a conscious choice of the treaty body to put the spotlights on culture in relation to that concern, implicit links to culture seem to indicate a certain hesitation to make that connection. There does not seem to be a systematic approach by the treaty bodies, however. If anything, the way the treaty bodies establish a link to culture is rather arbitrary.

In general, the treaty bodies’ recommendations are not limited to targeting the (underlying) culture. Changing, challenging or eradicating harmful aspects of culture is not an end in itself. It is a means to achieving equality and/or upholding human dignity. A strategy of social and cultural change is only one pillar in what is called a ‘holistic approach’ to combat discrimination, achieve equality and safeguard human dignity. Three different – and complementary – strategies should be applied simultaneously: besides a strategy to take away the structural causes of any discrimination through a process of social and cultural change (a so-called ‘transformative equality’ approach), there needs to be a ‘formal equality’ approach, ensuring individual people a right to equal treatment before and in the law, and a ‘substantive equality’ approach, a strategy of social support to those who have least opportunities to lead a meaningful life as a human being, such as women, sexual minorities and other vulnerable groups.<sup>950</sup> It is important to realize that, even though the focus in this chapter is on transformative equality measures which *directly* target culture, other measures are just as relevant with a view to combating discrimination and achieving equality, and may *indirectly*

<sup>949</sup> It may be the case that the treaty body considers the link to culture self-evident. This makes perfect sense for concerns about traditional practices such as FGM. The link to culture is evident and does not have to be expressly stated in the formulation of the concern, while addressing culture should still be part of the recommended measures.

<sup>950</sup> R Holtmaat and J Naber, *Women’s Human Rights and Culture: From Deadlock to Dialogue*, Intersentia, 2011, p 27.

affect culture. For example: traditional practices can be addressed by changing the cultural attitudes and stereotypes involved, but the practices can also be stopped by adopting legislation which prohibits and criminalizes said practices. Such legislation, and enforcement of such legislation, can also lead to awareness about the consequences of practices and, as such, change the cultural embedding of the practices. While it is argued that ‘change in laws need to be supported by change in minds of people’<sup>951</sup>, perhaps one can also argue that change in minds of people can be accelerated and supported by change in laws.<sup>952</sup>

All three treaty bodies work with a mixture of the three strategies (formal, substantive, transformative) in their recommendations. Measures to address cultural attitudes or stereotyping may or may not be complemented by recommended measures to strengthen the legislative framework<sup>953</sup>, for example to ensure that harmful traditional practices are prohibited and criminalised<sup>954</sup>, or to abolish all discriminatory provisions<sup>955</sup>, to ensure effective enforcement or implementation of the relevant legislation<sup>956</sup>, investigate, deter and prevent acts of discrimination<sup>957</sup>, encourage reporting of cases of harmful practices or other forms of violence<sup>958</sup>, ensure

<sup>951</sup> E Brems, Reconciling Universality and Diversity in International Human Rights Law, *Human Rights Review*, vol 5, no 3, 2004, p 18.

<sup>952</sup> Alternatively, it can move the practice underground. No stance is taken here regarding any preferable order of measures to tackle harmful practices.

<sup>953</sup> HRC: CO Sudan, CCPR/C/SDN/CO/4 (2014), para 13; CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 12; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 15; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 7; CO Venezuela, CCPR/C/VEN/CO/4 (2015), para 8; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 9; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 10; CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 8.

CESCR: CO Kyrgyzstan, E/C.12/KGZ/CO/2–3 (2015), para 16; CO Indonesia, E/C.12/IDN/CO/1 (2014), para 24.

CEDAWCee: CO Namibia, CEDAW/C/NAM/CO/4–5 (2015), para 11.

<sup>954</sup> HRC: CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 19; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 9; CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 9.

CESCR: CO Ethiopia, E/C.12/ETH/CO/1–3 (2012), para 14; CO Tanzania, E/C.12/TZA/CO/1–3 (2012), para 13; CO Nepal, E/C.12/NPL/CO/3 (2014), para 14.

CEDAWCee: CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 28; CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 22.

<sup>955</sup> HRC: CO Yemen, CCPR/C/YEM/CO/5 (2012), para 10.

CESCR: CO Algeria, E/C.12/DZA/CO/4 (2010), para 14.

CEDAWCee: CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 29.

<sup>956</sup> HRC: CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 8; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 23; CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 13; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 29.

CESCR: CO Italy, E/C.12/ITA/CO/5 (2015), para 37; CO Ethiopia, E/C.12/ETH/CO/1–3 (2012), para 14; CO El Salvador, E/C.12/SLV/CO/3–5 (2014), para 17.

CEDAWCee: CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 11.

<sup>957</sup> HRC: CO Benin, CCPR/C/BEN/CO/2 (2015), para 17; CO Greece, CCPR/C/GRC/CO/2 (2015), para 12.

CESCR: CO Iraq, E/C.12/IRQ/CO/4 (2015), para 40; CO Morocco, E/C.12/MAR/CO/4 (2015), para 38. CEDAWCee: CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 21, 45; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 17.

<sup>958</sup> HRC: CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 9.

prompt and effective (criminal) investigation<sup>959</sup>, prosecution of perpetrators<sup>960</sup>, and rehabilitation and compensation of victims.<sup>961</sup> States parties should also ensure that victims have access to the justice system, and that cases are referred to criminal courts, not traditional ways of mediation.<sup>962</sup> Temporary special measures, including quotas, are generally recommended as part of a strategy to accelerate the achievement of substantive equality of disadvantaged or marginalised groups who face (multiple or intersecting forms of) discrimination.<sup>963</sup>

The structure of the present chapter is as follows. Section 5.2 explores when and how the treaty bodies establish a link between culture and a problematic situation of implementation, and outlines the related State obligations to promote cultural changes. Some concluding remarks follow in section 5.3.

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- CESCR: CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 16; CO Uganda, E/C.12/UGA/CO/1 (2015), para 25; CO Tanzania, E/C.12/TZA/CO/1-3 (2012), para 13.  
 CEDAWCee: CO Swaziland, CEDAW/C/SWZ/CO/1-2 (2014), para 21; CO Kazakhstan, CEDAW/C/KAZ/CO/3-4 (2014), para 19.
- <sup>959</sup> HRC: CO Mexico, CCPR/C/MEX/CO/5 (2010), para 8; CO Bulgaria, CCPR/C/BGR/CO/3 (2011), para 12.  
 CESCR: CO Tajikistan, E/C.12/TJK/CO/2-3 (2015), para 25; CO Bulgaria, E/C.12/BGR/CO/4-5 (2012), para 15; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 37; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 15.  
 CEDAWCee: CO Russian Federation, CEDAW/C/USR/CO/7 (2010), para 25.
- <sup>960</sup> HRC: China (Hong Kong), CCPR/C/CHN-HKG/CO/3 (2013), para 18; CO Bulgaria, CCPR/C/BGR/CO/3 (2011), para 8.  
 CESCR: CO Bulgaria, E/C.12/BGR/CO/4-5 (2012), para 17; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 37; CO Ethiopia, E/C.12/ETH/CO/1-3 (2012), para 14; CO Tanzania, E/C.12/TZA/CO/1-3 (2012), para 13; CO Cameroon, E/C.12/CMR/CO/2-3 (2011), para 20; CO Armenia, E/C.12/ARM/CO/2-3 (2014), para 18; CO China, E/C.12/CHN/CO/2 (2014), para 27.  
 CEDAWCee: CO Croatia, CEDAW/C/HRV/CO/4-5 (2015), para 39; CO Namibia, CEDAW/C/NAM/CO/4-5 (2015), para 21.
- <sup>961</sup> HRC: CO Ireland, CCPR/C/IRL/CO/4 (2014), para 10; CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8.  
 CESCR: CO Tajikistan, E/C.12/TJK/CO/2-3 (2015), para 25.  
 CEDAWCee: CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), para 21; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 21; CO Georgia, CEDAW/C/GEO/CO/4-5 (2014), para 21.
- <sup>962</sup> HRC: CO Uruguay, CCPR/C/URY/CO/5 (2013), para 22; CO Greece, CCPR/C/GRC/CO/2 (2015), para 20.  
 CESCR: CO Burundi, E/C.12/BDI/CO/1 (2015), para 36; CO Morocco, E/C.12/MAR/CO/4 (2015), para 38; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 15; CO Israel, E/C.12/ISR/CO/3 (2011), para 18; CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 16; CO Uganda, E/C.12/UGA/CO/1 (2015), para 25.  
 CEDAWCee: CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 25; CO Mauritania, CEDAW/C/MRT/CO/2-3 (2014), para 17.
- <sup>963</sup> HRC: CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 17; CO Suriname, CCPR/C/SUR/CO/3 (2015), para 14; CO Croatia, CCPR/C/HRV/CO/3 (2015), para 14.  
 CESCR: CO Gambia, E/C.12/GMB/CO/1 (2015), para 13; CO Tajikistan, E/C.12/TJK/CO/2-3 (2015), para 16; CO Vietnam, E/C.12/VNM/CO/2-4 (2014), para 16.  
 CEDAWCee: CO Slovenia, CEDAW/C/SVN/CO/5-6 (2015), para 16; CO Spain, CEDAW/C/ESP/CO/7-8 (2015), para 29; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 34; CO Brunei Darussalam, CEDAW/C/BRN/CO/1-2 (2014), para 37; CO Venezuela, CEDAW/C/VEN/CO/7-8 (2014), para 15.

## 2 STATE PARTY OBLIGATIONS LINKED TO (HARMFUL) CULTURE

The following subsections are structured per treaty body, starting with the treaty body's observations on the role of culture in general comments or recommendations, followed by its observations on the role of culture in the concluding observations and then along the different areas of concerns: discrimination against women, discrimination on grounds of sexual orientation and gender identity, discrimination against other vulnerable groups, and 'other concerns', such as corporal punishment and bonded labour. Each area of concerns in turn is structured along the lines of *how the link to culture is established* by the treaty bodies (explicitly or implicitly), and subsequently *how the role of culture is to be addressed* by the States parties.

The many examples serve to illustrate the manifold ways the link to cultures is made by the treaty bodies, as well as the respective State obligations to promote changes in cultures, and to challenge and eradicate harmful cultural practices.

The structure of this section is rather flexible. Sometimes the problematic situation of implementation (or 'concern') is discussed together with the related State obligations (or 'recommendations'). Sometimes a number of 'concerns' is discussed together, before addressing the related 'recommendations' together.

### 2.1 HRC

#### 2.1.1 *Discrimination on grounds of gender*

In its General Comment on the equality of rights between men and women (art 3), the HRC explicitly highlights the connection between discrimination against women and culture:

Inequality in the enjoyment of rights by women throughout the world is *deeply embedded in tradition, history and culture, including religious attitudes*. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female foetuses. States parties should ensure that *traditional, historical, religious or cultural attitudes* are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of *tradition, history, cultural practices and religious attitudes* which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.<sup>964</sup>

<sup>964</sup> HRC, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, 2000, para 5.

The HRC also explains that the right to enjoy one's own culture should not be interpreted as allowing discrimination against women: 'the rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion *do not authorize* any State, group or person *to violate the right to the equal enjoyment by women of any Covenant rights*, including the right to equal protection of the law'.<sup>965</sup> Likewise, the HRC attends to the fact that harmful (aspects of) culture may affect individual rights from *within* the group:

States should report on any legislation or administrative practices *related to membership in a minority community* that might constitute an infringement of the equal rights of women under the Covenant (...) and on measures taken or envisaged to ensure the equal right of men and women to enjoy all civil and political rights in the Covenant. Likewise, States should report on measures taken to discharge their responsibilities in relation to *cultural or religious practices within minority communities* that affect the rights of women.<sup>966</sup>

In the same General Comment, in relation to article 24 of the Covenant<sup>967</sup>, States parties are explicitly called upon to 'eradicate, both through legislation and any other appropriate measures, *all cultural or religious practices* which jeopardize the freedom and well-being of female children'.<sup>968</sup>

In relation to the right to equality before the law and freedom from discrimination, protected by article 26, the HRC observes 'that *prevailing customs and traditions* discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value'.<sup>969</sup> States parties should 'review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields'.<sup>970</sup>

The concluding observations show that concerns about *de facto* discrimination against women are mostly about participation in political and public life and employment. These concerns include the underrepresentation of women in the public and private sectors, particularly in (high-level) decision-making positions<sup>971</sup>, and in the police and in the justice system<sup>972</sup>, the existence of a persistent or significant gender

<sup>965</sup> Ibid, para 32. (emphasis added, VV).

<sup>966</sup> Ibid, para 32.

<sup>967</sup> Article 24 mandates special protection, the right to a name, and the right to a nationality for every child.

<sup>968</sup> HRC, General Comment No 28 (n 17), para 28. (emphasis added, VV).

<sup>969</sup> Ibid, para 31. (emphasis added, VV).

<sup>970</sup> Ibid.

<sup>971</sup> HRC, CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 11; CO Benin, CCPR/C/BEN/CO/2 (2015), para 10; CO Greece, CCPR/C/GRC/CO/2 (2015), para 7; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 16; CO Suriname, CCPR/C/SUR/CO/3 (2015), para 13; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 9; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 7; CO Croatia, CCPR/C/HRV/CO/3 (2015), para 14; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 7; CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 7; CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 6.

<sup>972</sup> HRC, CO Haiti, CCPR/C/HTI/CO/1 (2014), para 8.

wage gap<sup>973</sup>, the high unemployment rate of women, the high rate of women in irregular employment, or the concentration of women in low-income and unskilled sectors of the labour force.<sup>974</sup>

Sometimes the HRC links these manifestations of discrimination *explicitly* to the existence of gender stereotypes, such as in the case of Sri Lanka:

The Committee is concerned about (...) the low rates of participation by women in political and public life, *perpetuated by the persistence of stereotypes* regarding the roles, responsibilities and identities of women and men in all spheres of life (arts. 3, 23 and 26).<sup>975</sup>

In this case, the related recommendations did not include a specific obligation for the State party to address stereotypes, but rather to 'undertake measures to raise awareness about women's rights'<sup>976</sup>

More often, however, the HRC notes the existence of stereotyping as a *separate* problem, though the connection seems to be *implied*.<sup>977</sup> The Concluding Observations on Sierra Leone are illustrative:

[T]he Committee notes with concern that *women remain underrepresented* in both the public and private sectors, particularly in decision-making positions. The Committee *further* expresses its concern at *the persistence of deep-rooted and negative patriarchal stereotypes* regarding the roles of women and men in the family and in society at large. (...) (arts. 2, 3 and 26).<sup>978</sup>

It seems that the HRC is hesitant to make the link unequivocally, but the implication is quite obviously there. Likewise, in the Concluding Observations on the Republic of Korea it is difficult to ignore the cultural attitudes and stereotypes concerning the role of women as a cause of the *separately* addressed underrepresentation of women in decision-making positions:

<sup>973</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 16; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 9; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 7; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 7; CO Japan, CCPR/C/JPN/CO/6 (2014), para 9.

<sup>974</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 7; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 16; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 7.

<sup>975</sup> HRC, CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 7.

<sup>976</sup> HRC, CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 7. the State party was recommended to 'increase the participation of women in political and public life, including by considering temporary special measures for women in political structures at the local, regional and national levels'; and to 'undertake measures to raise awareness about women's rights'.

<sup>977</sup> HRC, The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 9; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 7; CO Croatia, CCPR/C/HRV/CO/3 (2015), para 14; CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 6; CO Haiti, CCPR/C/HTI/CO/1 (2014), para 8.

<sup>978</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 10.

The Committee is concerned about:

- (a) Ongoing discrimination against women, including patriarchal attitudes and gender-based stereotypes concerning the role of women in the family and in society;
- (b) The particularly small proportion of women in decision-making positions, the high rate of women in irregular employment and the markedly high wage gap between men and women; (...).<sup>979</sup>

The link is also not explicitly established in the related recommendations. Addressing stereotypes is not discussed as part of the solution to the other problems identified.<sup>980</sup> See for example the recommendation regarding Sierra Leone:

The State party should enhance its efforts to eliminate existing patriarchal and gender stereotypes on the roles and responsibilities of women and men in the family and in society by, inter alia, adopting programmes that seek to raise awareness in society of gender equality. The State party should strengthen its efforts to increase the participation of women in the public and private sectors.<sup>981</sup>

In general, States parties are requested to promote human rights and work towards equality by promoting changes in culture and eradicating harmful aspects of culture: they are recommended to develop strategies or measures to combat and eliminate (existing) patriarchal attitudes, gender biases and (traditional or gender) stereotypes on the roles and responsibilities of men and women in the family and society at large, including campaigns aimed at raising the awareness of the population on the need to ensure the enjoyment by women of their rights.<sup>982</sup> States parties should ‘foster a better understanding of, and support for, equality between women and men in the family and in society’<sup>983</sup>, ‘eliminate gender stereotyping with a view to changing the perception of women’s roles in society’<sup>984</sup>, ‘sensitize the population to the need to ensure the enjoyment by women of their rights’<sup>985</sup>, or ‘change regressive societal perception of gender roles in the public and private spheres’.<sup>986</sup>

In relation to violence against women, the HRC tends to discuss concerns about harmful practices separately from concerns about other forms of violence against

<sup>979</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 16.

<sup>980</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 10; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 16; CO Haiti, CCPR/C/HTI/CO/1 (2014), para 8.

<sup>981</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 10.

<sup>982</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 14; CO Suriname, CCPR/C/SUR/CO/3 (2015), para 14; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 9; CO Venezuela (Bolivarian Republic of), CCPR/C/VEN/CO/4 (2015), para 7; CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 11; CO Croatia, CCPR/C/HRV/CO/3 (2015), para 14; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 11; CO Haiti, CCPR/C/HTI/CO/1 (2014), para 8.

<sup>983</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 17.

<sup>984</sup> HRC, CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 7.

<sup>985</sup> HRC, CO Georgia, CCPR/C/GEO/CO/4 (2014), para 7.

<sup>986</sup> HRC, CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 6.

women, such as domestic violence, rape and spousal or marital rape.<sup>987</sup> The HRC has expressed concerns about the persistence and/or continuing reports of violence against women, including domestic violence<sup>988</sup>, sexual harassment and marital rape.<sup>989</sup> While the HRC often chooses not to, occasionally it *explicitly* links domestic violence to culture, for instance in its recommendations to Sri Lanka:

While welcoming the State party's adoption of the Prevention of Domestic Violence Act, the Committee is concerned about *the persistence of sociocultural values that condone domestic violence*, resulting in such violence remaining widespread and subject to impunity. (...) (arts. 2, 3, 6 and 7).<sup>990</sup>

Likewise, the HRC has on several occasions *explicitly* identified domestic violence as a cultural problem by linking it to stereotypical and traditional societal attitudes. It expressed concern about the fact that violence against women, including domestic violence, 'is accepted by the society at large'<sup>991</sup>, or 'continues to be regarded as a family matter'<sup>992</sup>, and expressed the view that the prevalence of violence against women 'is exacerbated by a culture of silence and stereotypical attitudes on the role of women in the State party'.<sup>993</sup> Domestic violence often remains underreported 'due to gender stereotypes'<sup>994</sup>, and 'owing to traditional societal attitudes'.<sup>995</sup> Women victims of rape are sometimes reluctant to report rape for fear of reprisals or social stigma<sup>996</sup>, for example in Mauritania:

The Committee notes with concern that domestic violence, particularly violence against women, including rape, persists in the State party. The Committee is also concerned that such violence is not always prosecuted and punished, and that, furthermore, for rape to be punished, the victim must produce a witness in court. The Committee is also concerned by *the stigmatization of women victims of rape and the fact that they may themselves risk criminal prosecution*. (...) (arts. 3, 7 and 23).<sup>997</sup>

<sup>987</sup> Besides the articles relating to discrimination against women (arts 2, 3, 23 and 26), this also relates to the right to life, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (arts 6 and 7).

<sup>988</sup> Domestic violence may also include 'food deprivation or being locked out in the cold'. CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 16.

<sup>989</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 16; CO Greece, CCPR/C/GRC/CO/2 (2015), para 19; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 25; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 18; CO Burundi, CCPR/C/BDI/CO/2 (2014), para 12.

<sup>990</sup> HRC, CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 9. The related recommendations do not address the culture (explicitly identified in the formulation of the concern).

<sup>991</sup> HRC, CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 11; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 7.

<sup>992</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 9.

<sup>993</sup> HRC, CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 13.

<sup>994</sup> HRC, CO Georgia, CCPR/C/GEO/CO/4 (2014), para 9.

<sup>995</sup> HRC, CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 10.

<sup>996</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 16; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 10.

<sup>997</sup> HRC, CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 10.

States parties are recommended to eradicate stereotypes<sup>998</sup>, and to raise awareness among the police, the judiciary, prosecutors, community representatives or community and religious leadership, women and men and the general public on the gravity of domestic violence, the unacceptability and negative effects of violence against women, and its detrimental impact or harmful effects on the lives of victims.<sup>999</sup> States should also encourage reporting of such violence, facilitate the filing of complaints<sup>1000</sup>, and protect women from any form of reprisal and any form of social stigmatisation.<sup>1001</sup> The Concluding Observations on Indonesia provide a good illustration:

The State party should adopt a comprehensive approach to prevent and address violence, including domestic violence, against women in all its forms and manifestations, including through awareness-raising on its harmful effects. In this regard, the State party should adopt programmes to *eradicate stereotypes regarding the role of women* and to ensure that it encourages female victims of violence to report such incidents to law enforcement authorities. (...) Furthermore, the State party should conduct regular training for judges and magistrates to ensure that the crime of rape is punished with appropriate penalties commensurate to the gravity of the offence.<sup>1002</sup>

Harmful practices are another form of violence against women, often addressed separately. Usually, the HRC speaks of (harmful) ‘*traditional practices*’<sup>1003</sup>, where the reference to ‘tradition’ *explicitly* identifies the practices as cultural.<sup>1004</sup> The Concluding Observations on Kenya are illustrative:

While welcoming the enactment of the Prohibition of Female Genital Mutilation Act, 2011 and the adoption of a National Policy for the abandonment of female genital mutilation (FGM), the Committee is still concerned at the prevalence of female genital mutilation and other *harmful traditional practices* such as ‘wife inheritance’ and ‘ritual cleansing’ in various parts of the State party. (...) (arts. 3 and 7).<sup>1005</sup>

Sometimes, however, it seems that the HRC considers the role of culture in relation to harmful practices self-evident. So much so, that it speaks of ‘practices harmful to

<sup>998</sup> HRC, CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 13.

<sup>999</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 20; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 26; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 19; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 9; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 12; CO Burundi, CCPR/C/BDI/CO/2 (2014), para 12; CO Tajikistan, CCPR/C/TJK/CO/2 (2013), para 7.

<sup>1000</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 9; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 12; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 13; CO Burundi, CCPR/C/BDI/CO/2 (2014), para 12.

<sup>1001</sup> HRC, CO Burundi, CCPR/C/BDI/CO/2 (2014), para 12.

<sup>1002</sup> HRC, CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 13.

<sup>1003</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8; CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 12; CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Djibouti, CCPR/C/DJI/CO/1 (2013), para 8; CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 9; CO Kenya, CCPR/C/KEN/CO/3 (2012); CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 10.

<sup>1004</sup> The HRC does not speak of ‘harmful *cultural practices*’.

<sup>1005</sup> HRC, CO Kenya, CCPR/C/KEN/CO/3 (2012), para 15.

women'<sup>1006</sup>, or 'harmful practices'<sup>1007</sup>, without any explicit reference to culture or tradition. Consider the following example, from the Concluding Observations on Benin:

The Committee is concerned by the persistence in some areas of the country of *certain practices harmful to women*, such as female genital mutilation, rites of widowhood, levirate, child and forced marriages, as well as Oro worship, which prohibits women from leaving their homes during a certain period. The Committee reiterates its concern about the continuation of the practice of polygamy despite the legal recognition of monogamous marriage (arts. 3, 7, 23 and 26).<sup>1008</sup>

A look at the related recommendation, however, shows that the HRC *implicitly* acknowledges the role of culture, at least as a part of the solution:

The State party should step up measures to prevent and punish the practice of female genital mutilation, particularly in those areas where it is still practised. The State party should intensify its *public awareness campaigns, especially among religious and traditional leaders, to eliminate stereotypes and all practices harmful to women*.<sup>1009</sup>

Occasionally, the HRC discusses the existence or persistence of harmful practices together with the existence or persistence of gender stereotypes, *implicitly* suggesting that they are related, as in the case of Mozambique:

The Committee regrets that traditional discriminatory practices and stereotypes on the role and responsibilities of women and men in the family and society at large still persist, and is concerned at the prevalence of such harmful traditional practices as forced and early marriage and polygamy, despite their prohibition (...). (arts. 2, 3, 23, 24, 25 and 26).<sup>1010</sup>

Often, female genital mutilation (FGM) is specified as a harmful practice of particular concern.<sup>1011</sup> Other harmful practices discussed by the HRC include sexual cleansing rituals<sup>1012</sup>, practices targeting widows<sup>1013</sup>, such as rites of widowhood<sup>1014</sup>, 'levirate'<sup>1015</sup>,

<sup>1006</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12.

<sup>1007</sup> HRC, CO Cote d'Ivoire, CCPR/C/CIV/CO/1 (2015), para 12; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 15.

<sup>1008</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12.

<sup>1009</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 13.

<sup>1010</sup> HRC, CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 9.

<sup>1011</sup> HRC, CO Togo, CCPR/C/TGO/CO/4 (2011), para 13; CO Cameroon, CCPR/C/CMR/CO/4 (2010), para 10; CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8; CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 12; CO Djibouti, CCPR/C/DJI/CO/1 (2013), para 8; CO Sudan, CCPR/C/SDN/CO/4 (2014), para 13; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 12.

<sup>1012</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8; CO Kenya, CCPR/C/KEN/CO/3 (2012), para 15.

<sup>1013</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8.

<sup>1014</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12.

<sup>1015</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12.

or widow/wife inheritance<sup>1016</sup>, blood feud-related crimes<sup>1017</sup>, ‘honour killings’<sup>1018</sup>, ceremonies which lead to sexual abuse<sup>1019</sup>, the dowry system<sup>1020</sup>, son preference or pre-natal sex selection<sup>1021</sup>, witchcraft accusations<sup>1022</sup>, ‘chaupadi’<sup>1023</sup>, ‘Oro worship’<sup>1024</sup>, early (or child), temporary and/or forced marriages<sup>1025</sup>, and polygamy.<sup>1026</sup>

In general, States parties are recommended to address the problematic cultural practices by conducting trainings and public awareness-raising activities or campaigns targeting children, women, teachers, parents, police, judges, lawyers, prosecutors, religious and traditional leaders, and the population at large, about the legislation, the negative effects or harmful impact of such practices on women<sup>1027</sup>, with a view to bringing a ‘change in mentalities’<sup>1028</sup> or a ‘change in mindset’<sup>1029</sup>, particularly in rural areas<sup>1030</sup>, in communities where it is still widespread<sup>1031</sup>, or in those areas where it is still practiced.<sup>1032</sup> States parties should also encourage reporting of such offences.<sup>1033</sup> The Concluding Observations on Mozambique provide an example:

<sup>1016</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12; CO Kenya, CCPR/C/KEN/CO/3 (2012), para 15.

<sup>1017</sup> HRC, CO Albania, CCPR/C/ALB/CO/2 (2013), para 10.

<sup>1018</sup> HRC, CO Turkey, CCPR/C/TUR/CO/1 (2012), para 13.

<sup>1019</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8.

<sup>1020</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8.

<sup>1021</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 7; CO Armenia, CCPR/C/ARM/CO/2 (2012), para 6.

<sup>1022</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Angola, CCPR/C/AGO/CO/1 (2013), para 24.

<sup>1023</sup> Ibid. *Chaupadi* is a tradition that banishes females during their menstruation period from the house.

<sup>1024</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12.

<sup>1025</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 15; CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 12; CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 9; CO Angola, CCPR/C/AGO/CO/1 (2013), para 11; CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 25; CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 13; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 23; Iran (Islamic Republic of), CCPR/C/IRN/CO/3 (2011), para 28; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 29; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 8.

<sup>1026</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 12; CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 12; CO Kuwait, CCPR/C/KWT/CO/2 (2011), para 9; CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 9; CO Jordan, CCPR/C/JOR/CO/4 (2010), para 7; CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 9; CO Angola, CCPR/C/AGO/CO/1 (2013), para 11; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 8; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 29; CO Cameroon, CCPR/C/CMR/CO/4 (2010), para 9.

<sup>1027</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8; CO Benin, CCPR/C/BEN/CO/2 (2015), para 13; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 16; CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 12; CO Sudan, CCPR/C/SDN/CO/4 (2014), para 13; CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Djibouti, CCPR/C/DJI/CO/1 (2013), para 8; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 11; CO Angola, CCPR/C/AGO/CO/1 (2013), para 24; CO Kuwait, CCPR/C/KWT/CO/2 (2011), para 9; CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 9.

<sup>1028</sup> HRC, CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 9; CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 21.

<sup>1029</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 12; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 12.

<sup>1030</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 11; CO Angola, CCPR/C/AGO/CO/1 (2013), para 24.

<sup>1031</sup> HRC, CO Yemen, CCPR/C/YEM/CO/5 (2012), para 9; CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 12; CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 10; CO Togo, CCPR/C/TGO/CO/4 (2011), para 13.

<sup>1032</sup> HRC, CO Benin, CCPR/C/BEN/CO/2 (2015), para 13.

<sup>1033</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 8.

The State party should take all the necessary measures to effectively implement and enforce the existing relevant legal and policy frameworks on gender equality and non-discrimination, (...) and develop strategies *to combat stereotypes on the role of women, including by sensitizing its population* on the need to ensure the enjoyment by women of their rights. The State party should take appropriate measures to: (a) put an end to forced and early marriages and polygamy; (b) *conduct awareness-raising campaigns on the negative effects of such practices*, in particular in rural areas; (c) *encourage reporting of such offences, investigate complaints from victims and bring those responsible to justice.* (...).<sup>1034</sup>

Manifestations of *de jure* discrimination (against women) are generally not linked to culture, even where one would expect it.<sup>1035</sup> However, there are exceptions. The HRC has deliberated about the impact of certain discriminatory legislation on stereotypes. On two occasions a direct and *explicit* link with culture was found. In the Concluding Observations on Turkmenistan the HRC established a direct and causal link between discriminatory labour legislation and the prevalence of stereotyping:

The Committee expresses concern that women remain underrepresented in both the public and private sectors, particularly in decision-making positions. The Committee is also concerned at *the prevalent negative stereotypes regarding the roles of women in society, which is partly perpetuated by the Labour Code that is overly protective of the traditional roles of women in society* (arts. 2, 3 and 26).<sup>1036</sup>

This suggests that discriminatory laws may prolong the existence of stereotypes, and that the law should be changed in order to change these stereotypes, as the recommendations to Turkmenistan show:

The State party should strengthen its efforts to increase the participation of women in the public and private sectors and, if necessary, through appropriate temporary special measures to give effect to the provisions of the Covenant. *The State party should revise its Labour Code to eliminate the prevailing negative stereotypes against women* that restrict their participation in public life, particularly in the employment sector.<sup>1037</sup>

The recommendations to Japan in relation to discriminatory provisions of the Civil Code which prohibit women to remarry in the six months following divorce and establishes a different age of marriage for men and women on the grounds that it could 'affect the basic concept of the institution of marriage and that of the family' corroborate this view:

<sup>1034</sup> HRC, CO Mozambique, CCPR/C/MOZ/CO/1 (2013), para 9.

<sup>1035</sup> See section 3.1. Most provisions that discrimination against women are in the areas of family law and personal status. These areas of law, dealing with inheritance, marriage, divorce and other family matters, are intricately tied with the preservation of culture and identity. In many States parties, family law and personal status laws are a matter of cultural and religious identity.

<sup>1036</sup> HRC, CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 8.

<sup>1037</sup> HRC, CO Turkmenistan, CCPR/C/TKM/CO/1 (2012), para 8.

The State party should ensure that stereotypes regarding the roles of women and men in the family and in society are not used to justify violations of women's right to equality before the law. The State party should, therefore, take urgent action to amend the Civil Code accordingly.<sup>1038</sup>

Sometimes, the HRC is ambiguous about a link between discriminatory legislation and culture, such as when the HRC discusses concerns about discriminatory legislation together with concerns about stereotypes, but does not bother to speak out on their interrelation. Take the following example from the Concluding Observations on Jordan:

While noting the prohibition of discrimination enshrined in the Constitution (art. 6), the Committee remains concerned that *this provision does not explicitly mention discrimination on the basis of sex*. (...) In general, the Committee expresses its concern about *the existence of stereotypes and customs* in Jordan that are contrary to the principle of equality of rights between men and women and hinder the effective implementation of the Covenant (arts. 2, 3 and 26).<sup>1039</sup>

The link is *implicit* at best. Also in the related recommendations, the HRC is ambiguous in this regard. Jordan received the following recommendation:

The State party should bring its legislation (...) into conformity with the Covenant and ensure that women are not subjected to *de jure* or *de facto* discrimination (...). The State party should *also* continue and strengthen its efforts *to address discriminatory traditions and customs* (...) through education and awareness-raising campaigns.<sup>1040</sup>

There is no explicit link between the discriminatory legislation and the measures to address discriminatory traditions and customs. But the (potential) relation between the two is difficult to ignore entirely.<sup>1041</sup> Likewise, consider the Concluding Observations on Iraq. The HRC does not identify the role of culture in its formulation of the concern:

The Committee is concerned about *the persistence in legislation of discriminatory provisions against women*, such as those contained in the Criminal Code and in the Personal Status Act, including provisions that permit polygamy under certain circumstances. It is also concerned

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<sup>1038</sup> HRC, CO Japan, CCPR/C/JPN/CO/6 (2014), para 8.

<sup>1039</sup> HRC, CO Jordan, CCPR/C/JOR/CO/4 (2010), para 7.

<sup>1040</sup> HRC, CO Jordan, CCPR/C/JOR/CO/4 (2010), para 7.

<sup>1041</sup> Likewise, consider the Concluding Observations on Sri Lanka: 'The State party should strengthen its efforts to guarantee *de jure* and *de facto* equality between men and women. In that respect, the State party should: (a) Undertake a comprehensive review of its domestic laws (...) in order to bring them into full conformity with Arts 3, 23 and 26 of the Covenant; (b) Intensify its efforts to increase the participation of women in political and public life, including by considering temporary special measures for women in political structures at the local, regional and national levels; (c) Undertake measures to raise awareness about women's rights'. The recommendation under (c) is probably meant to address the identified 'persistence of stereotypes', but is discussed as a problem in itself, apparently unrelated to the problems of discriminatory legislation and unequal participation of women in political and public life (addressed under (a) and (b)). CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 7.

at the low representation of women at the highest levels of Government and in the judiciary (arts. 3 and 26).

But it does have eye for the role of culture in the related recommendation:

The State party should take more robust measures to guarantee de jure and de facto equality between men and women. In particular, it should:

- (a) Speed up the review of its domestic legislation and repeal, or amend in accordance with the Covenant, all provisions that discriminate against women and permit violence against them;
- (b) Strengthen its efforts to increase the representation of women in public life, particularly at the highest levels of the Government and in the judiciary;
- (c) Step up its efforts to *eliminate gender stereotypes* regarding the role and responsibilities of men and women in the family and society.<sup>1042</sup>

The HRC leaves undetermined whether the recommendation to eliminate gender stereotyping (under (c)) is meant to address ‘the persistence in legislation of discriminatory provisions against women’ (which is addressed under (a)), to address ‘the low representation of women’ in government and judiciary (which is addressed under (b)), or to address both.

Another example can be found in the Concluding Observations on Cote d’Ivoire, where the HRC does not establish any link with culture in its formulation of the concerns:

The Committee is concerned about the continued existence of provisions that discriminate against women in the State party’s legislation on divorce, descent and succession. In particular, the Committee notes with concern that the 1964 Act on divorce and separation still requires women to wait for 300 days before remarrying and that adultery still constitutes a crime under the Criminal Code and is furthermore defined in discriminatory terms when it is committed by a woman. The Committee is concerned, in addition, about the practices of levirate and sororate, and notes that the minimum age for marriage remains different for men and women (arts. 2, 3, 17, 23 and 26).<sup>1043</sup>

In the related recommendations, however, the HRC does attend to the role of culture:

The State party should, in full compliance with the Covenant, expedite the amendment of its Personal and Family Code and all relevant legislation with a view to guaranteeing equality between men and women and decriminalizing adultery. The State party should also set the same minimum age of marriage for men and women, in accordance with international standards. Furthermore, the State party should step up its *public awareness campaigns to help*

<sup>1042</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), paras 13–14.

<sup>1043</sup> HRC, CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 11.

*bring about a change in traditional attitudes* that impede women's ability to exercise their fundamental human rights.<sup>1044</sup>

### 2.1.2 Discrimination on grounds of sexual orientation and gender identity

Discrimination on grounds of sexual orientation and gender identity (arts 2 and 26) is often justified on grounds of public health and morals. In this respect, the HRC warns States parties in its General Comment No 34 that when it comes to justifying limitations of rights on the basis of protecting morals, conditions are attached to the concept of morals:

(...) the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations (...) for the purpose of protecting morals must be based on *principles not deriving exclusively from a single tradition*. Any such limitation must be understood in the light of universality of human rights and the principle of non-discrimination.<sup>1045</sup>

In other words, where there is a tension between morals and traditions, which are closely linked to culture, and the universality of human rights, the latter must prevail.

In the analysis of the concluding observations, the role of culture in relation to *de facto* discrimination on grounds of sexual orientation and gender identity becomes most apparent where the HRC *explicitly* expresses concerns about 'social stigmatization' and 'social exclusion' of LGBT+ persons<sup>1046</sup>, the prevalence in society of 'stereotypes and prejudice' against LGBT+ persons<sup>1047</sup>, or the 'widespread discriminatory attitudes' towards LGBT+ persons.<sup>1048</sup> An example from the Concluding Observations on Greece:

The Committee remains concerned about *the prevalence in society of stereotypes and prejudice against lesbian, gay, bisexual and transgender persons* (...). In particular, it is concerned about the lack of an adequate official response to complaints relating to discrimination on the grounds of sexual orientation and gender identity (arts. 2 and 26).<sup>1049</sup>

In exceptional cases, the HRC has explicitly clarified that it acknowledges or observes 'the diversity of morality and cultures internationally'<sup>1050</sup>, or that it respects 'the

<sup>1044</sup> HRC, CO Cote d'Ivoire, CCPR/C/CIV/CO/1 (2015), para 11.

<sup>1045</sup> HRC, General Comment No. 34: Article 19, Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 32.

<sup>1046</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 11; CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 8; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 8; CO Japan, CCPR/C/JPN/CO/6 (2014), para 11.

<sup>1047</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 11; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 7; CO Croatia, CCPR/C/HRV/CO/3 (2015), para 10; CO Haiti, CCPR/C/HTI/CO/1 (2014), para 9; CO Montenegro, CCPR/C/MNE/CO/1 (2014), para 8; CO Japan, CCPR/C/JPN/CO/6 (2014), para 11; CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 11; CO Albania, CCPR/C/ALB/CO/2 (2013), para 8.

<sup>1048</sup> HRC, CO Mongolia, CCPR/C/MNG/CO/5 (2011), para 9.

<sup>1049</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 11.

<sup>1050</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 11; CO Maldives, CCPR/C/MDV/CO/1 (2012), para 8; CO Ukraine, CCPR/C/UKR/CO/7 (2013), para 10.

cultural diversity and moral principles of all countries<sup>1051</sup>, before recalling that these always remain subject or subordinate to the principles of the universality of human rights and non-discrimination.<sup>1052</sup> An example can be found in the Concluding Observations on Maldives:

The Committee (...) is concerned about discrimination against people on the basis of their sexual orientation as well as the social stigmatization and social exclusion of these groups. *While the Committee observes the diversity of morality and cultures internationally, it recalls that they must always be subject to the principles of universality of human rights and non-discrimination (...).* Accordingly, the State party has the duty to protect the individual's liberty and privacy, including in the context of same sex sexual activities among consenting adults (arts. 2, 17 and 26).<sup>1053</sup>

LGBT+ persons may not enjoy effective or equal access to health services<sup>1054</sup>, education<sup>1055</sup>, or housing<sup>1056</sup>, due to such stigmatisation.

In the recommendations, States parties are generally called upon to address the problematic culture by combatting stereotypes and prejudice against, as well as negative attitudes towards, LGBT+ persons, including by clearly and officially stating that it does not tolerate any form of social stigmatisation of, or discrimination against, persons based on their sexual orientation or gender identity<sup>1057</sup>, by organising awareness-raising campaigns aimed at the general public, as well as providing appropriate training to public officials<sup>1058</sup>, with a view to promoting awareness and respect for diversity in respect of sexual orientation and gender identity, and to end social stigmatisation of LGBT+ persons.<sup>1059</sup> The Concluding Observations on the Republic of Korea provide an example:

The State party should clearly and officially state that it does not tolerate any form of *social stigmatization* of, or discrimination against, persons based on their sexual orientation or gender identity, (...). It should also develop and carry out public campaigns and provide

<sup>1051</sup> HRC, CO Turkey, CCPR/C/TUR/CO/1 (2012), para 10.

<sup>1052</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 11; CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 8; CO Ukraine, CCPR/C/UKR/CO/7 (2013), para 10; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 10.

<sup>1053</sup> HRC, CO Maldives, CCPR/C/MDV/CO/1 (2012), para 8.

<sup>1054</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 10; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 10; CO Kenya, CCPR/C/KEN/CO/3 (2012), para 9; CO Jamaica, CCPR/C/JAM/CO/3 (2011), para 9.

<sup>1055</sup> HRC, CO Turkey, CCPR/C/TUR/CO/1 (2012), para 10.

<sup>1056</sup> HRC, CO Japan, CCPR/C/JPN/CO/6 (2014), para 11.

<sup>1057</sup> HRC, CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 10; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 15; CO Turkey, CCPR/C/TUR/CO/1 (2012), para 10.

<sup>1058</sup> HRC, CO Haiti, CCPR/C/HTI/CO/1 (2014), para 9.

<sup>1059</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 12; CO Iraq, CCPR/C/IRQ/CO/5 (2015), para 12; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 15; CO The former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (2015), para 7; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 9; CO Croatia, CCPR/C/HRV/CO/3 (2015), para 10; CO Haiti, CCPR/C/HTI/CO/1 (2014), para 9; CO Montenegro, CCPR/C/MNE/CO/1 (2014), para 8.

training for public officials to *promote awareness and respect for diversity in respect of sexual orientation and gender identity*.<sup>1060</sup>

In the Concluding Observations on Turkey, the HRC explicitly points out that culture is subordinate to the principles of universality and non-discrimination:

While acknowledging the diversity of morality and cultures internationally, the Committee recalls that all cultures are always subject to the principles of universality of human rights and non-discrimination (...). The State party should therefore state clearly and officially that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transsexuality, or harassment of or discrimination or violence against persons because of their sexual orientation or gender identity.<sup>1061</sup>

Sometimes, the HRC *implicitly* links such discrimination to culture. It is silent about the role of culture in relation to such discrimination in its formulation of the concern, but obliges the State party to address the problematic culture in the related recommendation.<sup>1062</sup> See for example the Concluding Observations on Cambodia:

The Committee is also concerned about reports of discrimination against lesbian, gay, bisexual and transgender persons, in particular in employment and health-care settings. It notes with concern the lack of legislation expressly prohibiting discrimination on the grounds of sexual orientation or gender identity (arts. 2 and 26).

The State party should review its legislation to ensure that discrimination on grounds of sexual orientation and gender identity are prohibited. It should also conduct public awareness-raising activities *to combat the social stigmatization of lesbian, gay, bisexual and transgender persons*.<sup>1063</sup>

Sometimes *de facto* discrimination is (or may be) a consequence of *de jure* discrimination. This is due to the stigmatising effects of discriminatory laws. For example, there have been ‘reports of prevalent societal stigmatization of people with HIV/AIDS, which conflates HIV/AIDS with homosexuality’.<sup>1064</sup> Such stigmatisation may be (partly) attributable to laws which criminalize consensual same-sex relationships, hampering access to treatment and medical care by persons living with HIV/AIDS, including homosexuals.<sup>1065</sup> The Concluding Observations on Jamaica provide an example:

<sup>1060</sup> HRC, CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 15.

<sup>1061</sup> HRC, CO Turkey, CCPR/C/TUR/CO/1 (2012), para 10.

<sup>1062</sup> HRC, CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 9; CO Republic of Korea, CCPR/C/KOR/CO/4 (2015), para 14–15; CO Malta, CCPR/C/MLT/CO/2 (2014), para 10; CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 7; CO Peru, CCPR/C/PER/CO/5 (2013), para 8; CO Armenia, CCPR/C/ARM/CO/2 (2012), para 10; CO Dominican Republic, CCPR/C/DOM/CO/5 (2012), para 16.

<sup>1063</sup> HRC, CO CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 9.

<sup>1064</sup> HRC, CO Jamaica, CCPR/C/JAM/CO/3 (2011), para 9; CO Kenya, CCPR/C/KEN/CO/3 (2012), para 9.

<sup>1065</sup> HRC, CO Jamaica, CCPR/C/JAM/CO/3 (2011), para 9; CO Kenya, CCPR/C/KEN/CO/3 (2012), para 9.

The Committee regrets reports of *prevalent societal stigmatization* of people with HIV/AIDS, which conflates HIV/AIDS with homosexuality. The Committee is concerned that *this stigmatization, which is partly fuelled by the laws that criminalize consensual same-sex relationships*, hampers access to treatment and medical care by persons living with HIV/AIDS, including homosexuals (arts. 2, 6 and 26).<sup>1066</sup>

Here too, the recommendations are focused on modifying the underlying culture:

The State party should take concrete measures to *raise awareness of HIV/AIDS with a view to combating prejudices and negative stereotypes against people living with HIV/AIDS*, including homosexuals. The State party should also ensure that persons living with HIV/AIDS, including homosexuals, have equal access to medical care and treatment.<sup>1067</sup>

Other concerns relate to discrimination in legislation, and on the lack of enforcement of legislation. Here, the HRC does not establish any – explicit or implicit – link with culture.<sup>1068</sup>

### 2.1.3 Discrimination against other vulnerable or disadvantaged groups

Discrimination against other vulnerable groups may also be grounded in cultural attitudes and stereotyping, and thus rooted in cultures. Traditional forms of bonded labour and corporal punishment against children, for example, have been linked to tradition and cultural attitudes.

The HRC has expressed concern about ‘*traditional practices of bonded labour*’ in its observations on Nepal.<sup>1069</sup> These practices, such as Haliya, Kamaiya and Kamlari, affect especially vulnerable groups such as the Tharu people and Dalits.

The HRC has also repeatedly established a link between the persistence of corporal punishment, especially in the home, and culture. This link is *explicit*, with the HRC pointing at the ‘social acceptance’ of corporal punishment<sup>1070</sup>, or the fact that it ‘traditionally continues to be accepted and practiced’ as a form of discipline by parents and guardians.<sup>1071</sup> Consider this example from the Concluding Observations on Montenegro:

<sup>1066</sup> HRC, CO Jamaica, CCPR/C/JAM/CO/3 (2011), para 9.

<sup>1067</sup> HRC, CO Jamaica, CCPR/C/JAM/CO/3 (2011), para 9.

<sup>1068</sup> According to the author, these laws are related to culture and need to be considered. They may be a cause or a consequence of the discussed culture as reflected in stigmatization, stereotyping and prejudice. It seems safe to assume that there is a certain interplay between laws negatively affecting LGBT+ people, acts of violence against such persons, and the prevalence of stereotypes and prejudice against such persons.

<sup>1069</sup> HRC, CO Nepal, CCPR/C/NPL/CO/2 (2014), para 18.

<sup>1070</sup> HRC, CO Japan, CCPR/C/JPN/CO/6 (2014), para 25.

<sup>1071</sup> HRC, CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 24; CO Montenegro, CCPR/C/MNE/CO/1 (2014), para 13; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 9.

While taking note that violence against children and corporal punishment is legally prohibited in schools and some institutional settings, the Committee notes that corporal punishment remains a concern especially in the home where it *traditionally continues to be accepted and practiced* as a form of discipline by parents and guardians (arts. 7 and 24).<sup>1072</sup>

States parties are recommended to ‘encourage non-violent forms of discipline as alternatives’ to corporal punishment, and to ‘conduct public information campaigns to raise awareness about its/the harmful effects’.<sup>1073</sup>

Vulnerable groups which have suffered from stereotyping include, among others, persons with albinism, migrants, refugees, Roma and religious minorities. The HRC has *explicitly* pointed at the role of culture in relation to discrimination against persons with albinism, linking the phenomenon in its formulation of the concern to ‘negative stereotyping’ and ‘stigmatization’.<sup>1074</sup> Occasionally, the HRC *explicitly* connects ethnic or racial discrimination to negative cultural attitudes. For example, in the Concluding Observations on the United Kingdom it speaks of ‘extremely negative stereotypes of ethnic, religious or other minorities, including persons of African descent and Muslims and particularly migrants and asylum seekers’.<sup>1075</sup> More often, however, the link to culture is more *implicit*, as it is part of the recommendations to address such discrimination. For example, the HRC recommends ‘awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity’ to address the problem of hate incidents and crimes on the basis of race, religion or nationality.<sup>1076</sup> States parties should strengthen efforts to eradicate stereotyping and discrimination against migrants, refugees and/or Roma, inter alia, by conducting public awareness campaigns *to promote tolerance and respect for diversity*.<sup>1077</sup> States parties should tackle the problem of ethnic profiling by providing all law enforcement personnel with racial sensitivity training or (mandatory) training on such issues as cultural awareness and the inadmissibility of the use of ethnic profiling (including the widespread surveillance

<sup>1072</sup> HRC, CO Montenegro, CCPR/C/MNE/CO/1 (2014), para 9.

<sup>1073</sup> HRC, CO Suriname, CCPR/C/SUR/CO/3 (2015), para 46; CO Cambodia, CCPR/C/KHM/CO/2 (2015), para 24; CO Montenegro, CCPR/C/MNE/CO/1 (2014), para 13; CO Sri Lanka, CCPR/C/LKA/CO/5 (2014), para 19; CO Georgia, CCPR/C/GEO/CO/4 (2014), para 9; CO Japan, CCPR/C/JPN/CO/6 (2014), para 25.

<sup>1074</sup> HRC, CO Burundi, CCPR/C/BDI/CO/2 (2014), para 9; CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 9; The related recommendations overlook the role of culture, however: States parties should take steps to ensure that persons with albinism are protected, in law and in practice, against all forms of discrimination, ‘including attacks on their physical integrity, and should find lasting solutions that will give persons with albinism access, without discrimination, to health care, social services, employment and education’.

<sup>1075</sup> HRC, CO United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7 (2015), para 10.

<sup>1076</sup> HRC, CO United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7 (2015), para 10.

<sup>1077</sup> HRC, CO Greece, CCPR/C/GRC/CO/2 (2015), para 14; CO Cyprus, CCPR/C/CYP/CO/4 (2015), para 7; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 8; CO Malta, CCPR/C/MLT/CO/2 (2014), para 9; CO Ukraine, CCPR/C/UKR/CO/7 (2013), para 11.

of Muslims).<sup>1078</sup> In order to combat acts of violence and hate speech against religious minorities, States parties should institute awareness-raising campaigns aimed at promoting religious tolerance or respect for human rights and tolerance for diversity.<sup>1079</sup> No instances have been found of *de jure* discrimination against these groups.

## 2.2 CESCR

### 2.2.1 *Discrimination on grounds of gender*

The CESCR established a link between discrimination against women and the role of culture in its General Comments No 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3), No 20 on non-discrimination in economic, social and cultural rights (art 2(2)), No 14 on the right to the highest attainable standard of health (art 12), No 21 on the right of everyone to take part in cultural life (art 15(1)(a)), and No 22 on the right to sexual and reproductive health (art 12).

The CESCR *explicitly* acknowledges the connection between discrimination against women and culture in its General Comment No 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3). The CESCR explains that '[w]omen in particular, are often denied equal enjoyment of their human rights, by virtue of the lesser status ascribed to them *by tradition and custom* or as a result of overt and covert discrimination'.<sup>1080</sup> The CESCR further explains that 'discrimination on the basis of sex may be based on the differential treatment of women because of their biology, (...) or *stereotypical assumptions*, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men'.<sup>1081</sup> It then explains the concept of gender, which according to the CESCR 'refers to *cultural expectations and assumptions* about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women', before it emphasizes that '[g]ender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights', and that '[g]ender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality'.<sup>1082</sup> In this regard, the CESCR identifies a number

<sup>1078</sup> HRC, CO Austria, CCPR/C/AUT/CO/5 (2015), para 20; CO Spain, CCPR/C/ESP/CO/6 (2015), para 8; CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 9; CO Japan, CCPR/C/JPN/CO/6 (2014), para 20; CO United States, CCPR/C/USA/CO/4 (2014), para 7.

<sup>1079</sup> HRC, CO Georgia, CCPR/C/GEO/CO/4 (2014), para 18; CO Kyrgyzstan, CCPR/C/KGZ/CO/2 (2014), para 22.

<sup>1080</sup> CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), E/C.12/2005/4, 11 August 2005, para 5. (emphasis added, VV).

<sup>1081</sup> Ibid, para 11. (emphasis added, VV).

<sup>1082</sup> Ibid, para 14. (emphasis added, VV).

of obligations of States parties under article 3, separately and in conjunction with other articles. Article 3 ‘requires addressing *gendered social and cultural prejudices*, providing for equality in the allocation of resources and promoting the sharing of responsibilities in the family, community and public life’.<sup>1083</sup> In conjunction with article 7 (right to just and favourable conditions of work) it requires, inter alia, ‘that the State party identifies and eliminates the underlying causes of pay differentials, such as *gender biased* job evaluation or the perception that productivity differences between men and women exist’.<sup>1084</sup> In relation to article 11(2) (right to be free from hunger) it requires States parties, inter alia, ‘to actively address *customary practices* under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food’.<sup>1085</sup> The implementation of article 3 in relation to article 12 (right to the highest attainable standard of health) ‘requires, at a minimum, the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality. This includes, inter alia, addressing the ways in which *gender roles* affect access to determinants of health, such as water and food’.<sup>1086</sup> And finally, in relation to article 15(1)(a) and (b) (the right to take part in cultural life and enjoy benefits of scientific progress), implementation ‘requires, inter alia, overcoming institutional barriers and other obstacles, such as those based on *cultural and religious traditions*, which prevent women from fully participating in cultural life, science education and scientific research, and directing resources to scientific research relating to the health and economic needs of women on an equal basis with those of men’.<sup>1087</sup>

The elaborate discussion of the role of culture in relation to discrimination against women is very briefly reiterated in General Comment No 20 on non-discrimination in economic, social and cultural rights (art 2(2)), where the CESCR explains that ‘[s]ince the adoption of the Covenant, the notion of the prohibited ground “sex” has evolved considerably to cover not only physiological characteristics but also *the social construction of gender stereotypes, prejudices and expected roles*, which have created obstacles to the equal fulfilment of economic, social and cultural rights’.<sup>1088</sup>

In its General Comment No 14 on the right to the highest attainable standard of health (art 12), the CESCR *explicitly* points out that ‘*sociocultural factors* play a significant role in influencing the health of men and women’<sup>1089</sup> and that it is important ‘to undertake preventive, promotive and remedial action to shield women from the impact of *harmful traditional cultural practices and norms* that deny them their full

<sup>1083</sup> Ibid, para 22. (emphasis added, VV).

<sup>1084</sup> Ibid, para 24. (emphasis added, VV).

<sup>1085</sup> Ibid, para 28. (emphasis added, VV).

<sup>1086</sup> Ibid, para 29.

<sup>1087</sup> Ibid, para 31.

<sup>1088</sup> CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para 20. (emphasis added, VV).

<sup>1089</sup> CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000, para 20.

reproductive rights'.<sup>1090</sup> States should adopt measures 'to abolish *harmful traditional practices* affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children'.<sup>1091</sup> States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family planning, and to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation.<sup>1092</sup> It considers 'the failure to discourage the continued observance of *harmful traditional medical or cultural practices*' a violation of the obligation to protect.<sup>1093</sup>

In General Comment No 21, the CESCR initially refers back to the general 'limitation' on the role of culture established in the Vienna Declaration, before it *explicitly* specifies the implications for the right of women to participate fully in cultural life. It recalls that, 'while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Thus, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope'.<sup>1094</sup> The CESCR explains:

Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights.<sup>1095</sup>

Subsequently, when discussing the persons and communities requiring special protection, the CESCR specifies the implications for women: States parties must ensure the right of women to participate fully in cultural life, which may require 'the elimination of institutional and legal obstacles as well as those based on negative practices, *including those attributed to customs and traditions*'.<sup>1096</sup> In this respect, the CESCR also contends that 'a violation occurs (...) when a State party fails to take steps to combat practices harmful to the well-being of a person or group of persons. These harmful practices, *including those attributed to customs and traditions*, such as female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in article 15, paragraph 1(a)'.<sup>1097</sup>

In General Comment No 22 the CESCR has eye for the '*systemic discrimination and marginalization*' and '*systemic discrimination and violence*' which women experience

<sup>1090</sup> Ibid, para 21. (emphasis added, VV).

<sup>1091</sup> Ibid, para 22. (emphasis added, VV).

<sup>1092</sup> Ibid, para 35.

<sup>1093</sup> Ibid, para 51.

<sup>1094</sup> CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009, para 18; The Committee took this literally from the UNESCO Universal Declaration on Cultural Diversity, art 4.

<sup>1095</sup> Ibid, para 19.

<sup>1096</sup> Ibid, para 25. (emphasis added, VV).

<sup>1097</sup> Ibid, para 64. (emphasis added, VV).

throughout their lives<sup>1098</sup>, and the need for ‘removal of not only direct discrimination but also indirect discrimination and ensuring of formal as well as substantive equality’.<sup>1099</sup> It repeats its recommendation from General Comment No 14 (see above), although instead of shielding ‘*women* from the impact of harmful traditional cultural practices’, it now speaks of shielding ‘*all individuals* from the harmful practices and norms and gender-based violence that deny them their full sexual and reproductive health, such as female genital mutilation, child and forced marriage and domestic and sexual violence including marital rape, among others’.<sup>1100</sup> States parties have a core obligation to ‘enact and enforce the legal prohibition of harmful practices and gender-based violence, including female genital mutilation, child and forced marriages and domestic and sexual violence including marital rape, while ensuring privacy, confidentiality and free, informed and responsible decision-making, without coercion, discrimination or fear of violence, on individual’s sexual and reproductive needs and behaviours’.<sup>1101</sup>

The concluding observations reveal that in relation to situations of *de facto* discrimination against women, an often recurring concern is the existence or persistence of patriarchal attitudes and stereotypes, an *explicitly* cultural concern. The CESCR has used many different formulations to convey the same message: it is concerned about the persistence of entrenched, patriarchal or deep-rooted attitudes and stereotypes regarding gender roles in the family and in society at large<sup>1102</sup>, and its

<sup>1098</sup> CESCR, General Comment No. 22: the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 8 and 26.

<sup>1099</sup> Ibid, para 26. (emphasis added, VV).

<sup>1100</sup> Ibid, para 29. (emphasis added, VV).

<sup>1101</sup> Ibid, para 49(d).

<sup>1102</sup> For example, the CESCR has expressed concern about ‘the fact that women continue to face discrimination in many domains, due to (...) the persistence of stereotypes and customary practices that marginalize them’ (CESCR, CO Afghanistan, E/C.12/AFG/CO/2–4 (2010), para 18), ‘the strong gender role stereotypes in the family and society’ (CESCR, CO Ireland, E/C.12/IRL/CO/3 (2015), para 15), ‘the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in all spheres of life’ (CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 18), ‘the persistence of stereotypes concerning gender roles’ (CO Montenegro, E/C.12/MNE/CO/1 (2014), para 11), ‘deeply rooted patriarchal attitudes and stereotypes regarding the role of women and men in the family and in society’ (CO Armenia, E/C.12/ARM/CO/2–3 (2014), para 13), ‘entrenched gender role stereotypes’ in the State party (CO Japan, E/C.12/JPN/CO/3 (2013), para 13), in society (Estonia, para 11), or in the family and society at large (CO Ukraine, E/C.12/UKR/CO/6 (2014), para 11; CO Belarus, E/C.12/BLR/CO/4–6 (2013), para 11), ‘the stereotypical perception of traditional roles of women’ (CO Albania, E/C.12/ALB/CO/2–3 (2013), para 16), the ‘prevailing gender role stereotypes in society’ (CO Bulgaria, E/C.12/BGR/CO/4–5 (2012), para 8), ‘harmful traditions and stereotypes about the lesser role of women in the State party’ (CO Russian Federation, E/C.12/RUS/CO (2011), para 12), ‘prejudices and perception about gender roles’ (CO Turkey, E/C.12/TUR/CO/1 (2011), para 14), ‘the persistence of stereotypes, attitudes and patriarchal traditions on family and societal roles of men and women’ (CO Sri Lanka, E/C.12/LKA/CO/2–4 (2010), para 15; CO Algeria, E/C.12/DZA/CO/4 (2010), para 8), and ‘the persistence of prejudices and customary practices that perpetuate negative stereotyped roles for women’ (CO Kazakhstan, E/C.12/KAZ/CO/1 (2010), para 15)..

negative effects on the equal enjoyment of rights by women. Consider the following example from the Concluding Observations on Turkmenistan:

The Committee is concerned about *strong negative traditional attitudes or practices and deep-rooted stereotypes* which discriminate against women and are *root causes* for the disadvantaged position of women in a number of areas affecting their enjoyment of economic, social and cultural rights, including in the labour market, in public life, and in higher education as well.<sup>1103</sup>

Here the CESCR is very explicit in pointing at culture – in the form of attitudes and stereotypes – as the cause of discrimination: culture is explicitly identified as the culprit. Another example from the Concluding Observations on Ecuador:

[T]he Committee is concerned by the existence of gender stereotypes that cast women as being of an inferior status within the family and in society at large and that are preventing women from exercising all their rights on an equal footing with men.<sup>1104</sup>

Culture – in the form of stereotypes – prevents the exercise of rights: the CESCR shows no restraint in pointing out culture as the problem.

Usually, the CESCR refers to stereotypes in rather general terms. Occasionally, however, the CESCR tries to specify *what* the stereotype is, as in the case of Mauritius:

The Committee is concerned about the persistence of stereotypes regarding the division of responsibilities between women and men in the family, the community and in public life, *where men are still considered the main source of income for the family and women are expected to be primarily responsible for household chores* (art. 3).<sup>1105</sup>

Unlike the HRC, the CESCR is generally more explicit in pointing out the negative effects which women experience because of these stereotypes. While the HRC often chooses to leave the connection between the stereotypes and the discriminatory law or practice implicit, the CESCR does not hesitate to point out that these attitudes and stereotypes are preventing women from exercising all their rights on an equal footing with men, including in the labour market, in political and public life and in education. For example, it prevents women from owning lands<sup>1106</sup>, leads to disproportionately high unemployment of women<sup>1107</sup>, contributes to the limited political participation of women<sup>1108</sup> and the underrepresentation of women in decision-making positions<sup>1109</sup> as

<sup>1103</sup> CESCR, CO Turkmenistan, E/C.12/TKM/CO/1 (2011), para 10.

<sup>1104</sup> CESCR, CO Ecuador, E/C.12/ECU/CO/3 (2012), para 14.

<sup>1105</sup> CESCR, CO Mauritius, E/C.12/MUS/CO/4 (2010), para 15.

<sup>1106</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 18.

<sup>1107</sup> CESCR, CO Albania, E/C.12/ALB/CO/2–3 (2013), para 16.

<sup>1108</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 18.

<sup>1109</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 11; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 9.

well as a (persistent and significant) gender pay gap owing to vertical and horizontal gender segregation in the labour market ('occupational sex segregation')<sup>1110</sup> and the concentration or over-representation of women in low-paid sectors<sup>1111</sup>, part-time employment<sup>1112</sup> or the informal economy.<sup>1113</sup>

In general, States parties are recommended to target the persistent patriarchal attitudes and stereotypes which cause the inequality. States parties should (1) raise awareness or carry out awareness-raising campaigns about gender equality and harmonising work and family duties, i.e., to promote the equal sharing of responsibilities in the family, community and public life; with a view to (2) eliminating or eradicating patriarchal attitudes and social perceptions of traditional gender roles, stereotypes and prejudices; promoting a positive, non-stereotypical and non-discriminatory portrayal of women. The Concluding Observations on Montenegro provide a typical example:

The Committee recommends that the State party: (...) Analyse the underlying causes of the underrepresentation of women in senior and decision-making positions and take appropriate measures to *eliminate the social perceptions of traditional gender roles and stereotypes, including those concerning employment, while raising awareness of both men and women about harmonizing work and family responsibilities.*<sup>1114</sup>

Occasionally, the CESCR also designates which actors should be involved in such campaigns.<sup>1115</sup> In Guatemala, both civil society and the media were considered important, or even necessary, partners in conducting such awareness-raising campaigns:

The Committee (...) recommends that the State party: (...) Carry out, in conjunction with civil society organizations and the mass media, campaigns to raise public awareness in order to eliminate gender stereotypes and roles within the family and in society at large which discriminate against women; (...).<sup>1116</sup>

While patriarchal attitudes and stereotypes are by far the most identified cultural factor affecting gender equality, other cultural factors and barriers have been found in relation to discrimination against women in access to health (art 12) and education (art 13). In Indonesia, the CESCR has noted an increase in the maternal mortality rate, and considers that this is in part due to '*cultural barriers* to their access'.<sup>1117</sup> Only in the corresponding recommendation, these cultural barriers are specified:

<sup>1110</sup> CESCR, CO Czech Republic, E/C.12/CZE/CO/2 (2014), para 11; CO Uganda, E/C.12/UGA/CO/1 (2015), para 18; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 9.

<sup>1111</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 18.

<sup>1112</sup> CESCR, CO Czech Republic, E/C.12/CZE/CO/2 (2014), para 11.

<sup>1113</sup> CESCR, CO Vietnam, E/C.12/VNM/CO/2-4 (2014), para 16.

<sup>1114</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 11. Another example: CO Albania, E/C.12/ALB/CO/2-3 (2013), para 16.

<sup>1115</sup> For example, Italy was recommended to make use of the media (CO Italy, E/C.12/ITA/CO/5 (2015), para 23), while Uganda was recommended to seek collaboration with civil society (CO Uganda, E/C.12/UGA/CO/1 (2015), para 18).

<sup>1116</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 11.

<sup>1117</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 33.

The Committee also calls on the State party to ensure access to sexual and reproductive health services to *unmarried women and teenagers* as well as to *married women without the consent of spouses*.<sup>1118</sup>

With regard to Afghanistan, the Concluding Observations show similar concerns:

The Committee, while taking note of the efforts undertaken by the State party to promote the right to health, (...) remains concerned about the high maternal, infant and child morbidity and mortality rates, as well as the failure of the health system to respond adequately to the needs of women, and the lack of a gender-sensitive approach in health services provision. The Committee also *notes that the harmful practices and barriers (for example, women cannot be examined by a male doctor without a chaperone) have detrimental impacts on the women's health*, and regrets the lack of sufficient female nurses and doctors in the hospitals (art. 12).<sup>1119</sup>

In its Concluding Observations on Ecuador, the CESCR expresses concern about 'the existence of restrictions on access to emergency contraceptives, which is *prejudicial* to women's enjoyment of their right to sexual and reproductive health'.<sup>1120</sup> The link to culture is more explicitly established in the related recommendation, where the State party is urged 'to do away with barriers to access to emergency contraceptives and, in particular, to remove restrictions on the free distribution of such contraceptives, to develop strategies for overcoming *culturally based prejudices against their provision to women* and to carry out campaigns on women's right to have access to such contraceptives'.<sup>1121</sup>

In relation to access to education, cultural factors which (may) contribute to high dropout rates, especially among girls, include early marriage and excessive housework or duties at home.<sup>1122</sup> Taking a closer look at girls' excessive domestic duties as a barrier to education, the concluding observations show different approaches. In its Concluding Observations on Uganda, the CESCR has expressed concerns about 'high school drop-out rates and low transition rate of pupils from primary to secondary level, especially among girls mainly attributed to early marriage, teenage pregnancy, and excessive housework'.<sup>1123</sup> The identified causes of high school drop-out are not framed as 'cultural' nor attributed to stereotyping, also not in the related recommendation. By contrast, in the recommendations to Mauritania 'the high school dropout rate' is clearly and explicitly linked to culture:

<sup>1118</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 33.

<sup>1119</sup> CESCR, CO Afghanistan, E/C.12/AFG/CO/2-4 (2010), para 40.

<sup>1120</sup> CESCR, CO Ecuador, E/C.12/EQU/CO/3 (2012), para 28.

<sup>1121</sup> CESCR, CO Ecuador, E/C.12/EQU/CO/3 (2012), para 28. (emphasis added, VV).

<sup>1122</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1-3 (2014), para 27; CO Uganda, E/C.12/UGA/CO/1 (2015), para 36; CO Mauritania, E/C.12/MRT/CO/1 (2012), para 30.

<sup>1123</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 36.

The Committee calls on the State party to continue to address the various obstacles to the enjoyment of the right to education, including the distance to school, the cost of education and *the social and cultural factors involved such as girls' duties at home*. (...).<sup>1124</sup>

Thus, a similar factor causing school dropout of girls ('excessive housework' or 'duties at home') is explicitly identified as 'cultural' in one instance, but not in the other.

In relation to violence against women and harmful practices, the CESCR does not always clearly differentiate between the two. Sometimes they are discussed together, for example when FGM is discussed as a form of violence against women, but often they are separated.

Under article 10, the CESCR addresses, among others, domestic violence<sup>1125</sup>, sexual harassment<sup>1126</sup>, sexual violence (including spousal or marital rape)<sup>1127</sup>, and 'honour killings'.<sup>1128</sup> On occasion, the CESCR has *explicitly* discussed the role of culture in relation to violence against women.<sup>1129</sup> The following example is from the Concluding Observations on Iceland:

The Committee is concerned that domestic violence is not specifically defined as a crime, despite the explanations given by the State party (...). It is concerned about *persisting attitudes and stereotypes leading to violence against women*. (...) (art. 10).<sup>1130</sup>

Or in the case of Thailand:

The Committee is concerned at *the persistent gender-role stereotypes* in the family and society, which results in (...) violence against women, including domestic violence (arts. 3 and 10).

In these examples the CESCR *explicitly* treats culture as a direct cause of violence against women. On other occasions, the CESCR has *implicitly* acknowledged the role

<sup>1124</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 30.

<sup>1125</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 14; CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 16; CO Portugal, E/C.12/PRT/CO/4 (2014), para 13; CO Slovenia, E/C.12/SVN/CO/2 (2014), para 19; CO Finland, E/C.12/FIN/CO/6 (2014), para 22; CO China, E/C.12/CHN/CO/2 (2014), para 27; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 15; CO Armenia, E/C.12/ARM/CO/2-3 (2014), para 18; CO El Salvador, E/C.12/SLV/CO/3-5 (2014), para 17; CO Uzbekistan, E/C.12/UZB/CO/2 (2014), para 18; CO Albania, E/C.12/ALB/CO/2-3 (2013), para 23; CO Austria, E/C.12/AUT/CO/4 (2013), para 18; CO Bulgaria, E/C.12/BGR/CO/4-5 (2012), para 15; CO Iceland, E/C.12/ISL/CO/4 (2012), para 15; CO Tanzania, E/C.12/TZA/CO/1-3 (2014), para 15; CO Cameroon, E/C.12/CMR/CO/2-3 (2011), para 20; CO Estonia, E/C.12/EST/CO/2 (2011), para 20; CO Dominican Republic, E/C.12/DOM/CO/3 (2010), para 21; CO Afghanistan, E/C.12/AFG/CO/2-4 (2010), para 31; CO Kazakhstan, E/C.12/KAZ/CO/1 (2010), para 25.

<sup>1126</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), paras 31-32.

<sup>1127</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 21; CO Cameroon, E/C.12/CMR/CO/2-3 (2011), para 20; CO Sri Lanka, E/C.12/LKA/CO/2-4 (2010), para 25; CO Morocco, E/C.12/MAR/CO/4 (2015), para 37; CO Belarus, E/C.12/BLR/CO/4-6 (2013), para 19; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 17.

<sup>1128</sup> CESCR, CO Afghanistan, E/C.12/AFG/CO/2-4 (2010), para 31.

<sup>1129</sup> CESCR, CO Iceland, E/C.12/ISL/CO/4 (2012), para 15; Thailand, E/C.12/THA/CO/1-2, para 18; CO Jamaica, E/C.12/JAM/CO/3-4 (2013), para 19.

<sup>1130</sup> CESCR, CO Iceland, E/C.12/ISL/CO/4 (2012), para 15.

of culture in relation to violence against women in the related recommendation. For example, in the Concluding Observations on Estonia:

The Committee notes with concern *the prevalence of domestic violence* in the State party and the absence of a specific provision of domestic violence as an offence in the Penal Code. (...).

The Committee calls on the State party to include a specific offence of domestic violence in the Penal Code. (...) The Committee also recommends that the State party conduct media campaigns targeting all segments of the population *with a view to changing the society's attitudes* regarding domestic violence.<sup>1131</sup>

And in the case of Jamaica:

Despite the measures taken by the Government to address violence against women and girls, (...) the Committee expresses its profound concern at *high rates of domestic and sexual violence*, and the lack of a comprehensive strategy to address the phenomenon (art. 10).

The Committee urges the State party to intensify its efforts to combat high levels of violence against women and girls in Jamaica, including through the adoption and implementation of the National Strategic Action Plan to Eliminate Gender-Based Violence. The Committee also underscores the importance of organizing public campaigns and trainings targeted at men, *with a view to combating attitudes and behaviour* that perpetrate violence against women in all forms.<sup>1132</sup>

The CESCR has also signalled more indirect factors contributing to violence against women. Women are often prevented from reporting cases of domestic violence, and when they are reported, they are often not adequately investigated and perpetrators often avoid punishment.<sup>1133</sup> Sometimes women are deterred from lodging complaints of rape due to the criminalisation of 'illicit relations'.<sup>1134</sup> Such factors are potentially cultural, but, unlike the HRC<sup>1135</sup>, the CESCR has not (explicitly) qualified them as such. The CESCR did, however, refer to the role of culture in relation to obtaining justice in cases of sexual harassment:

While it notes the State party's assertion that a new bill on sexual harassment will have a broader field of application, the Committee finds it regrettable that sexual harassment is

<sup>1131</sup> CESCR, CO Estonia, E/C.12/EST/CO/2 (2011), para 20.

<sup>1132</sup> CESCR, CO Jamaica, E/C.12/JAM/CO/3-4 (2013), para 19.

<sup>1133</sup> CESCR, CO Tajikistan, E/C.12/TJK/CO/2-3 (2015), para 25; CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 16; CO Tanzania, E/C.12/TZA/CO/1-3 (2014), para 13; CO Uganda, E/C.12/UGA/CO/1 (2015), para 25.

<sup>1134</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 37.

<sup>1135</sup> The HRC found, for example, that the prevalence of violence against women 'is exacerbated by a culture of silence and stereotypical attitudes on the role of women in the State party', and that domestic violence remains underreported 'due to gender stereotypes' or 'owing to traditional societal attitudes'; see section 3.1.3.

widespread and is concerned that women have limited means of obtaining justice and redress for fear of reprisals or social disapproval (arts. 7 and 10).<sup>1136</sup>

The CESCR is not in favour of local, traditional ways of resolving these cases. Consider the following example from the Concluding Observations on Uganda:

The Committee is concerned about the prevalence of violence against women, in particular domestic and sexual violence. It is also concerned about (...) the underreporting to the police by victims of violence, and the resorting to traditional ways of mediation that often override women's rights.<sup>1137</sup>

Likewise, the CESCR is concerned that many cases of domestic violence are referred to community elders' ('*aksakals*') courts in Kyrgyzstan.<sup>1138</sup>

In its recommendations the CESCR addresses the cultural aspects of violence against women by calling upon States parties to 'conduct national public information campaigns and stimulate broader public discussion with the aim to address attitudes and stereotypes leading to violence against women'<sup>1139</sup>, or to carry out (focused) awareness-raising campaigns 'to sensitize the population on the severe effects of domestic violence'<sup>1140</sup>, or 'to sensitize the general public about domestic violence as a human rights violation'.<sup>1141</sup> The following illustration is from the Concluding Observations on Portugal:

The Committee recommends that the State party strengthen measures aimed at preventing and combating domestic violence by *addressing its root causes* and ensuring the effective implementation of the existing relevant legal and policy frameworks, including by: (...) *Pursuing its awareness-raising efforts to widely sensitize the public at large, and in particular boys and men, about the unacceptability of any form of domestic violence and its criminal nature; (...)*.<sup>1142</sup>

Not only the general public should be targeted when raising awareness about the unacceptability and the severe effects of violence against women. States parties should also conduct awareness-raising activities for law enforcement officials such as police officers, prosecutors and judges, as well as for social workers and teachers.<sup>1143</sup> Law enforcement officials should be sensitised to the serious and criminal nature and unacceptability of such violence<sup>1144</sup>, and receive mandatory training on handling domestic violence cases.<sup>1145</sup>

<sup>1136</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 31.

<sup>1137</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 25.

<sup>1138</sup> CESCR, CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 16.

<sup>1139</sup> CESCR, CO Iceland, E/C.12/ISL/CO/4 (2012), para 15.

<sup>1140</sup> CESCR, CO Bulgaria, E/C.12/BGR/CO/4-5 (2012), para 15.

<sup>1141</sup> CESCR, CO Kazakhstan, E/C.12/KAZ/CO/1 (2010), para 25.

<sup>1142</sup> CESCR, CO Portugal, E/C.12/PRT/CO/4 (2014), para 13.

<sup>1143</sup> CESCR, CO Armenia, E/C.12/ARM/CO/2-3 (2014), para 18; CO Guyana, E/C.12/GUY/CO/2-4 (2015), para 37.

<sup>1144</sup> CESCR, CO Slovenia, E/C.12/SVN/CO/2 (2014), para 19; CO Finland, E/C.12/FIN/CO/6 (2014), para 22; CO China, E/C.12/CHN/CO/2 (2014), para 27; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 15.

<sup>1145</sup> CESCR, CO Kyrgyzstan, E/C.12/KGZ/CO/2-3 (2015), para 16; CO Portugal, E/C.12/PRT/CO/4 (2014), para 13.

Under articles 2, 3 and/or 10, the CESCR regularly reports concerns about the persistence of ‘harmful practices’<sup>1146</sup>, ‘harmful traditional practices’<sup>1147</sup>, ‘customary practices’<sup>1148</sup>, ‘religion or belief-based practices’<sup>1149</sup>, ‘traditional practices and customs’<sup>1150</sup>, or ‘practices that are harmful’.<sup>1151</sup> These practices include early or child marriage<sup>1152</sup>, forced marriage (including bride kidnapping)<sup>1153</sup>, temporary marriage<sup>1154</sup>, polygamy<sup>1155</sup>, and female genital mutilation.<sup>1156</sup> Sometimes, harmful practices occur exclusively in a particular country, such as in the case of Nepal:

The Committee is concerned that deep-rooted stereotypes and patriarchal attitudes that discriminate against women and girls continue to be prevalent in society, despite measures taken to curb them. It is particularly concerned that women and girls, in particular of Dalit origin, continue to suffer from *harmful traditional practices such as forced and early marriages, accusations of boxi (witchcraft), deuki tradition (offering girls to deities to fulfil religious obligations), jhumas (offering young girls to Buddhist monasteries to perform religious functions), kamlari (offering girls for domestic work to the families of landlords) chapaudi (isolating menstruating girls) and badi (widespread practice of prostitution)* (arts. 3 and 10).<sup>1157</sup>

<sup>1146</sup> CESCR, CO Iraq, E/C.12/IRQ/CO/4 (2015), para 41; CO Uganda, E/C.12/UGA/CO/1 (2015), para 26; CO Gambia, E/C.12/GMB/CO/1 (2015), para 14.

<sup>1147</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 14; CO Afghanistan, E/C.12/AFG/CO/2–4 (2010), para 31.

<sup>1148</sup> CESCR, CO Albania, E/C.12/ALB/CO/2–3 (2013), para 33.

<sup>1149</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 10.

<sup>1150</sup> CESCR, CO Equatorial Guinea, E/C.12/GNQ/CO/1 (2012), para 15.

<sup>1151</sup> CESCR, CO Gabon, E/C.12/GAB/CO/1 (2013), para 14; CO Togo, E/C.12/TGO/CO/1 (2013), para 14; CO Afghanistan, E/C.12/AFG/CO/2–4 (2010), para 31.

<sup>1152</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 14; CO Afghanistan, E/C.12/AFG/CO/2–4 (2010), para 18; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 19; CO Indonesia, E/C.12/IDN/CO/1 (2014), para 22; CO Uzbekistan, E/C.12/UZB/CO/2 (2014), para 17; CO Bosnia and Herzegovina, E/C.12/BIH/CO/2 (2013), para 27; CO Kuwait, E/C.12/KWT/CO/2 (2013), para 24; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 18; CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 21; CO Mauritania, E/C.12/MRT/CO/1 (2012), para 18; CO Estonia, E/C.12/EST/CO/2 (2011), para 21; CO Turkmenistan, E/C.12/TKM/CO/1 (2011), para 19; CO Yemen, E/C.12/YEM/CO/2 (2011), para 19; CO Uruguay, E/C.12/URY/CO/3–4 (2010), para 17; CO Colombia, E/C.12/COL/CO/5 (2010), para 18; CO Uganda, E/C.12/UGA/CO/1 (2015), para 26; CO Iraq, E/C.12/IRQ/CO/4 (2015), para 41; CO Nepal, E/C.12/NPL/CO/3 (2014), para 14.

<sup>1153</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 19; CO Uzbekistan, E/C.12/UZB/CO/2 (2014), para 17; CO Switzerland, E/C.12/CHE/CO/2–3 (2010), para 16; CO Uganda, E/C.12/UGA/CO/1 (2015), para 26; CO Iraq, E/C.12/IRQ/CO/4 (2015), para 41; CO Nepal, E/C.12/NPL/CO/3 (2014), para 14.

<sup>1154</sup> CESCR, CO Iraq, E/C.12/IRQ/CO/4 (2015), para 41.

<sup>1155</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 14; CO Turkmenistan, E/C.12/TKM/CO/1 (2011), para 18; CO Algeria, E/C.12/DZA/CO/4 (2010), para 14; CO Uganda, E/C.12/UGA/CO/1 (2015), para 26.

<sup>1156</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 14; CO Indonesia, E/C.12/IDN/CO/1 (2014), para 25; CO Egypt, E/C.12/EGY/CO/2–4 (2013), para 16; CO Mauritania, E/C.12/MRT/CO/1 (2012), para 21; CO Tanzania, E/C.12/TZA/CO/1–3 (2014), para 18; CO Cameroon, E/C.12/CMR/CO/2–3 (2011), para 20; CO Yemen, E/C.12/YEM/CO/2 (2011), para 20; CO Uganda, E/C.12/UGA/CO/1 (2015), para 26.

<sup>1157</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 14.

In some States female genital mutilation (FGM) is still legal.<sup>1158</sup> The CESCR ‘notes with concern’ that FGM is ‘still not explicitly prohibited by the law of the State party, in spite of the Committee’s previous recommendations’<sup>1159</sup>, ‘expresses its deep concern about the continued harmful practice of female genital mutilation in the State party’<sup>1160</sup>, or ‘is concerned about the absence of a provision criminalizing female genital mutilation’.<sup>1161</sup> Often, however, FGM has already been criminalised, and the CESCR’s concerns relate to its lack of enforcement, as is the case in Egypt:

The Committee is concerned that female genital mutilation continues to be widely practiced, including on so-called medical grounds, and *the criminalization of the practice has not been followed up with prosecutions* (art. 10).<sup>1162</sup>

Also with regard to Mauritania, Tanzania and Uganda the CESCR is concerned that the practice of FGM ‘remains highly prevalent’ in the State party, in spite of ‘the legal prohibition’, ‘the criminalization of the practice’ or ‘the measures taken’.<sup>1163</sup>

Finally, the CESCR has also expressed concerns about ‘a practice of sex-selective abortions due to discrimination against women’. Here it is necessary to read the related recommendations to find out that the CESCR considers this a cultural problem. The State party is advised to ‘take appropriate measures to address practices and *social norms fuelling a preference for sons*, with a view to eliminating such a practice’.

To combat harmful traditional practices, States parties should conduct (widespread) awareness-raising or educational campaigns on the (long-lasting) harmful or negative effects of such practices, and educate parents, particularly mothers, and children, as well as community leaders.<sup>1164</sup> In its observations on Nepal, the CESCR formulated its recommendation as follows:

The Committee urges the State party to: (...) Reinforce its awareness-raising campaigns among the population and in particular in districts and social groups where such practices are prevalent, reiterating that those practices are violating human rights and that they have long-lasting negative effects; (...).<sup>1165</sup>

Regarding FGM, States parties are recommended to strengthen their awareness-raising and education efforts with the aim of countering ‘the underlying arguments’ of the

<sup>1158</sup> CESCR, CO Cameroon, E/C.12/CMR/CO/2–3 (2011), para 20; CO Yemen, E/C.12/YEM/CO/2 (2011), para 20; CO Gambia, E/C.12/GMB/CO/1 (2015), para 14.

<sup>1159</sup> CESCR, CO Cameroon, E/C.12/CMR/CO/2–3 (2011), para 20.

<sup>1160</sup> CESCR, CO Yemen, E/C.12/YEM/CO/2 (2011), para 20.

<sup>1161</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 14.

<sup>1162</sup> CESCR, CO Egypt, E/C.12/EGY/CO/2–4 (2013), para 16.

<sup>1163</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1–3 (2014), para 18; CO Mauritania, E/C.12/MRT/CO/1 (2012), para 21; CO Uganda, E/C.12/UGA/CO/1 (2015), para 26.

<sup>1164</sup> CESCR, CO Afghanistan, E/C.12/AFG/CO/2–4 (2010), para 31; CO Iraq, E/C.12/IRQ/CO/4 (2015), para 42.

<sup>1165</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 14.

practice.<sup>1166</sup> Indonesia was called upon ‘to raise awareness of the prohibition of FGM and to conduct *culturally sensitive* education campaigns against FGM’.<sup>1167</sup>

On several occasions the CESCR has established an *implicit* cultural link. For example, in its formulation of concerns regarding discrimination against women in the Concluding Observations on Kuwait, the CESCR did not mention any role of culture, even though the issues are easily associated with culture or religion:

The Committee is concerned that, in spite of the recommendations made by the Committee and other treaty bodies, discrimination against women under the various laws in force in the State party – such as those on nationality, marriage, inheritance, polygamy, parental authority or insurance rights – still exist and hamper women’s equal enjoyment of economic, social and cultural rights. The Committee also notes with concern that the omission of the ground of ‘sex’ among the grounds of non-discrimination in the provisions of article 29 of the Constitution of the State party deprives women of a crucial legal protection against gender-based discrimination (art. 3).

One of its recommendations, however, shows that the CESCR is aware that culture is involved:

The Committee calls on the State party to enshrine equal rights for men and women in its Constitution. (...) the Committee calls on the State party to: (...)

- (c) Draw primarily on international law on equality between men and women, as well as *the experiences of other States with similar legal and cultural traditions*, for any legislative change; (...).

By drawing the attention to the legislative changes by States with similar legal and cultural traditions, the CESCR’s recommended solution takes cultural factors and obstacles into account. *Implicitly* the CESCR seems to say: we know that you will use your cultural traditions as an excuse or justification for non-compliance, but other States with similar cultural traditions have shown that it can be done.

Manifestations of *de jure* discrimination are *generally not explicitly linked to culture*.<sup>1168</sup> Two exceptions were found, both in relation to laws assigning different duties and rights for men and women. A first example is found in the Concluding Observations on Mauritania, where the CESCR acknowledges the role of culture by pointing at the inferior social status of women and girls, and by unequivocally mentioning the State party’s reluctance on religious grounds:

The Committee is deeply concerned that, under the Personal Status Code of 2001, adult women are placed under guardianship, ‘hadhana’, if unmarried. The Committee is also deeply

<sup>1166</sup> CESCR, CO Yemen, E/C.12/YEM/CO/2 (2011), para 20.

<sup>1167</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 25.

<sup>1168</sup> This may seem somewhat surprising, since most *de jure* discrimination against women is in the areas of family law and personal status, which are often a matter of cultural and religious identity.

concerned about the other provisions of the Code *assigning different roles, duties and rights to the husband and the wife in family matters, and different treatment to girls and to boys, resulting in inferior social status to women and girls* and the deprivation of their equal rights provided in the Covenant. The Committee is further concerned at the State party's reluctance, *invoking religious grounds*, to take steps to amend the 2001 Code (arts. 3 and 10).<sup>1169</sup>

In the related recommendation, the CESCR is very outspoken on the role of culture, and more specifically the role of religion and belief:

'Recalling the reaffirmation in the Vienna Declaration of the obligation of States *to counter religion or belief-based practices* of discrimination on the grounds of gender (...) it calls on the State party *to raise awareness* among the population, including religious leaders, *of the discriminatory nature of the guardianship as well as of the differentiated roles and responsibilities of the spouses in family matters*, as far as they contravene the Covenant'.<sup>1170</sup>

The other example, in connection with similar provisions, is found in the Concluding Observations on Afghanistan, where the CESCR *explicitly* addressed culture by formulating concerns about 'the persistence of stereotypes and customary practices' which marginalize women and about the fact that provisions 'remain discriminatory against women, including with regard to guardianship, inheritance, underage marriages, and limitations on movements outside the home'.<sup>1171</sup> In the related recommendations, Afghanistan was requested to use media and education to 'address the *historical discrimination and inequality, cultural barriers and patriarchal attitudes* in order to counter inequality between the sexes and discrimination against women'.<sup>1172</sup>

Some manifestations of *de jure* discrimination are *implicitly* linked to culture. In relation to discriminatory provisions on early and forced marriages, polygamy, and provisions which discriminate against women under customary law, the CESCR sometimes establishes an *implicit* link by addressing the role of culture in the related recommendation. In relation to early and forced marriages, for example, the CESCR expresses concerns about 'the continued prevalence' of child marriage<sup>1173</sup>, 'the still existing practice of early marriage before the legal age'<sup>1174</sup>, and the fact that 'child marriage is still practiced in the State party'<sup>1175</sup>, or within certain communities in the State party, such as the Roma community.<sup>1176</sup> States parties are recommended to raise awareness of the negative, harmful or adverse effects of early and forced marriages<sup>1177</sup>,

<sup>1169</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 10.

<sup>1170</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 10.

<sup>1171</sup> CESCR, CO Afghanistan, E/C.12/AFG/CO/2-4 (2010), para 18.

<sup>1172</sup> CESCR, CO Afghanistan, E/C.12/AFG/CO/2-4 (2010), para 18. (emphasis added, VV).

<sup>1173</sup> CESCR, CO Uzbekistan, E/C.12/UZB/CO/2 (2014), para 17.

<sup>1174</sup> CESCR, CO Bosnia and Herzegovina, E/C.12/BIH/CO/2 (2013), para 27.

<sup>1175</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 14; CO Indonesia, E/C.12/IDN/CO/1 (2014), para 22.

<sup>1176</sup> CESCR, CO Montenegro, E/C.12/MNE/CO/1 (2014), para 19; CO Bosnia and Herzegovina, E/C.12/BIH/CO/2 (2013), para 27.

<sup>1177</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 26; CO Yemen, E/C.12/YEM/CO/2 (2011), para 19; CO Iraq, E/C.12/IRQ/CO/4 (2015), para 42.

or to conduct widespread educational campaigns on the harmful effects or negative consequences of these practices, if necessary with a specific focus on communities where the practices are (more) prevalent.<sup>1178</sup>

In relation to polygamy, Uganda, a country where it is still legal and widely practiced<sup>1179</sup>, is recommended to conduct ongoing awareness campaigns to draw attention to the practice, and to foster the (cultural) conditions for a prohibition:

The Committee recommends that the State party, as a matter of priority, take comprehensive measures aimed at eliminating all harmful practices against women and girls. To this end the State party should: (...) Adopt effective measures aimed at abolishing the practice of polygamy, including by *conducting a nation-wide sensitization campaign* targeting all components of society and in collaboration with civil society *with the aim of fostering a culture of equality between women and men that creates the necessary conditions for the adoption of a legal provision criminalizing polygamy*.<sup>1180</sup>

This is a particularly interesting example. Since polygamy is still legal, one would expect the CESCR to be straightforward and call for a legal prohibition of the practice. Its recommendation, however, seems to indicate a recognition by the CESCR that it is first and foremost necessary to create ‘the necessary conditions’ before adopting such legislation. As such, it seems to acknowledge that ‘change in minds’ may have to precede ‘change in law’.

Finally, the CESCR has expressed concerns about provisions which discriminate against women under customary law, for example in matters of inheritance, marital regimes and voluntary dispositions<sup>1181</sup>, in matters of succession<sup>1182</sup>, or in matters of the non-recognition of married women as independent landowners.<sup>1183</sup> See for example the Concluding Observations on Burundi:

The Committee is concerned by the application of customary law in matters of inheritance, marital regimes and voluntary dispositions insofar as that reinforces the unequal treatment of men and women (art. 3).<sup>1184</sup>

In the related recommendation, the CESCR is clear about the role of culture:

The Committee recommends that the State party enact, without delay, a law on inheritance, marital regimes and voluntary dispositions in line with international standards. The Committee also recommends that the State party conduct awareness campaigns *to reshape traditional attitudes* that impede women from exercising their economic, social and cultural rights.<sup>1185</sup>

<sup>1178</sup> CESCR, CO Bosnia and Herzegovina, E/C.12/BIH/CO/2 (2013), para 27; CO Montenegro, E/C.12/MNE/CO/1 (2014), para 19.

<sup>1179</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 26.

<sup>1180</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 26.

<sup>1181</sup> CESCR, CO Burundi, E/C.12/BDI/CO/1 (2015), para 21–22.

<sup>1182</sup> CESCR, CO Gabon, E/C.12/GAB/CO/1 (2013), para 13; CO Togo, E/C.12/TGO/CO/1 (2013), para 13.

<sup>1183</sup> CESCR, CO Gabon, E/C.12/GAB/CO/1 (2013), para 13.

<sup>1184</sup> CESCR, CO Burundi, E/C.12/BDI/CO/1 (2015), para 21.

<sup>1185</sup> CESCR, CO Burundi, E/C.12/BDI/CO/1 (2015), para 22.

States parties may not rely on the communities themselves to amend their personal status laws:

‘the equal right of men and women to the enjoyment of all (...) rights is an immediate obligation of the States parties which cannot be conditioned to willingness of concerned communities to amend their laws’.<sup>1186</sup>

The majority of discriminatory laws is not linked to culture at all, however.<sup>1187</sup>

### 2.2.2 *Discrimination on grounds of sexual orientation and gender identity*

The CESCR has recognised sexual orientation as an independent discrimination ground, to be read under ‘other status’.<sup>1188</sup> The CESCR has elaborated on this in its General Comment No 22 on the right to sexual and reproductive health:

Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including LGBTI persons, to be fully respected for their sexual orientation, gender identity and intersex status. Criminalisation of sex between consenting adults of same gender or expression of one’s gender identity is a clear violation of human rights. Likewise, regulations treating LGBTI persons as mental or psychiatric patients or requiring that they be ‘cured’ by so-called ‘treatment’ are a clear violation of their right to sexual and reproductive health. States parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.<sup>1189</sup>

The CESCR *explicitly* (though briefly) discussed the role of culture in relation to ‘sexual diversity’ when it explained the normative content of the right to sexual and reproductive health in terms of ‘acceptability’:

All facilities, goods, information and services related to sexual and reproductive health must be *respectful of the culture* of individuals, minorities, peoples and communities and *sensitive to gender, age, disability, sexual diversity* and life-cycles requirements. However, *this cannot be used to justify the refusal to provide tailored facilities, goods, information and services to specific groups*.<sup>1190</sup>

In other words, access of LGBT+ persons to sexual and reproductive health goods and services cannot be denied for cultural reasons.

<sup>1186</sup> CESCR, CO Sri Lanka, E/C.12/LKA/CO/2–4 (2010), para 15.

<sup>1187</sup> This may surprise, because many of these discriminatory laws are concerned with matters of family law and personal status. These areas of law, dealing with inheritance, marriage, divorce and other family matters, are intricately tied with the preservation of culture and identity.

<sup>1188</sup> Unlike the HRC, which subsumes sexual orientation under ‘sex’; W Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, 2005, p 146.

<sup>1189</sup> CESCR, General Comment No. 22: the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 23.

<sup>1190</sup> *Ibid.*, para 20.

In the concluding observations the role of culture in relation to (*de facto*) discrimination on grounds of sexual orientation and gender identity is *explicitly* reflected in the CESCR's expression of concern about 'the prevalence of societal stigma and discrimination on the grounds of sexual orientation [and] gender identity'<sup>1191</sup>, the 'stigmatization' to which LGBT+ persons are subjected<sup>1192</sup>, or the fact that members of the LGBT+ community 'face discrimination (...) as well as social stigma and marginalization'.<sup>1193</sup>

Similar concerns were raised in relation to persons living with HIV/AIDS. An *explicit* cultural link was established in the form of (persistent) 'stigma'<sup>1194</sup>, 'social stigma'<sup>1195</sup>, or 'social stigmatization'<sup>1196</sup> of, and discrimination against, persons living with HIV/AIDS, particularly in relation to men in same-sex relationships and transgender persons.<sup>1197</sup> They face discrimination in employment, in education and, particularly, in access to health care.<sup>1198</sup> The Concluding Observations on Belarus provide an example:

The Committee expresses concern at the spread of HIV/AIDS beyond the original risk groups and the rising prevalence of HIV/AIDS in rural areas and *the persistent social stigmatization of, and discrimination against, persons living with HIV/AIDS*, in particular in access to health care and employment, despite the efforts made by the State party to combat HIV/AIDS and the establishment of facilities across the country providing testing services free of charge. The Committee is also concerned that *the definition of HIV as a socially dangerous disease and the provisions in the law for compulsory testing of persons believed to be HIV-infected may further exacerbate stigma* and discrimination against persons living with HIV/AIDS (art. 2, paras. 2 and 12).<sup>1199</sup>

Generally, the CESCR calls for 'steps to combat and prevent discrimination and societal stigma'<sup>1200</sup> and awareness-raising measures.<sup>1201</sup> Occasionally, the CESCR may request the State party to 'send a clear public message that any form of discrimination, harassment or violence against individuals for their sexual orientation is not tolerated'.<sup>1202</sup>

The CESCR also pays attention to instances of discrimination *in the law* (i.e., *de jure*). It has raised concerns about laws which discriminate against persons on grounds of their sexual orientation and gender identity<sup>1203</sup>, legal provisions which are discriminatory against same-sex partners or couples (and their families)<sup>1204</sup>, and the

<sup>1191</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 15.

<sup>1192</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), paras 15–16.

<sup>1193</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 7.

<sup>1194</sup> CESCR, CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 28.

<sup>1195</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1–3 (2014), para 5.

<sup>1196</sup> CESCR, CO China, E/C.12/CHN/CO/2 (2014), para 34; CO Belarus, E/C.12/BLR/CO/4–6 (2013), para 24.

<sup>1197</sup> CESCR, CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 28;

<sup>1198</sup> CESCR, CO China, E/C.12/CHN/CO/2 (2014), para 34; CO Belarus, E/C.12/BLR/CO/4–6 (2013), para 24; CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 28.

<sup>1199</sup> CESCR, CO Belarus, E/C.12/BLR/CO/4–6 (2013), para 24.

<sup>1200</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 15; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 7.

<sup>1201</sup> CESCR, CO Mongolia, E/C.12/MNG/CO/4 (2015), para 13; CO Guatemala, E/C.12/GTM/CO/3 (2014), para 9.

<sup>1202</sup> CESCR, CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 9.

<sup>1203</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 16.

<sup>1204</sup> CESCR, CO Slovenia, E/C.12/SVN/CO/2 (2014), para 12; CO Japan, E/C.12/JPN/CO/3 (2013), para 10.

criminalisation of homosexuality or consensual same-sex sexual conduct (or ‘activity’, or ‘relations’).<sup>1205</sup> An example of such discrimination, *implicitly* implying a connection between law and practice, can be found in the Concluding Observations on Iran:

The Committee is concerned that consensual same-sex sexual activity is criminalized and that convicted persons may even receive the death penalty. It is also concerned that members of the lesbian, gay, bisexual, and transgender community face discrimination with respect to access to employment, housing, education and health care, as well as *social stigma* and marginalization (art. 2).<sup>1206</sup>

It is interesting to see that the CESCR sometimes *explicitly* recognizes that such laws may serve to cause or exacerbate stigma. States parties have been recommended to ‘ensure that discrimination against persons with HIV/AIDS is prohibited under its legislation, and *to repeal or amend laws that stigmatize* and increase the vulnerability of those most at risk’<sup>1207</sup>, and ‘*to repeal or amend laws and policies that perpetuate the stigmatization and rejection* of persons living with HIV/AIDS and adversely impact on any progress made in combating HIV’.<sup>1208</sup>

### 2.2.3 Discrimination against other vulnerable or disadvantaged groups

Discrimination against other disadvantaged groups may also be grounded in cultural attitudes and stereotyping, and thus rooted in culture.

The CESCR has *explicitly* linked culture to issues of (*de facto*) discrimination against other disadvantaged groups, on grounds of ethnicity, disability and age, among others. For example, it has expressed concern about ‘the *traditional* bonded labour system’ (in Nepal)<sup>1209</sup>, or ‘the *customary* practice of ‘*ubugererwa*’ (servitude)’ (in Burundi)<sup>1210</sup>, ‘discrimination and *stigmatization* of all low-income and marginalized individuals and groups’<sup>1211</sup>, ‘*social exclusion*’ of Roma<sup>1212</sup>, ‘the persistence of *stereotypes* against the “Batwa” population’<sup>1213</sup>, ‘*prejudices*’ against persons with a migration background<sup>1214</sup>, ‘the prevalence of *societal stigma* and discrimination on the grounds of (...) ethnicity, and disability’<sup>1215</sup>, ‘the *cultural barriers and prejudices* that bar persons with disabilities

<sup>1205</sup> CESCR, CO Gambia, E/C.12/GMB/CO/1 (2015), para 12; CO Tanzania, E/C.12/TZA/CO/1–3 (2014), para 6; CO Uganda, E/C.12/UGA/CO/1 (2015), para 16; CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 7; CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 9.

<sup>1206</sup> CESCR, CO Iran (Islamic Republic of), E/C.12/IRN/CO/2 (2013), para 7.

<sup>1207</sup> CESCR, CO Jamaica, E/C.12/JAM/CO/3–4 (2013), para 28.

<sup>1208</sup> CESCR, CO China, E/C.12/CHN/CO/2 (2014), para 34; CO Belarus, E/C.12/BLR/CO/4–6 (2013), para 24.

<sup>1209</sup> CESCR, CO Nepal, E/C.12/NPL/CO/3 (2014), para 18.

<sup>1210</sup> CESCR, CO Burundi, E/C.12/BDI/CO/1 (2015), para 29.

<sup>1211</sup> CESCR, CO Gabon, E/C.12/GAB/CO/1 (2013), para 12.

<sup>1212</sup> CESCR, CO Portugal, E/C.12/PRT/CO/4 (2014), para 7.

<sup>1213</sup> CESCR, CO Rwanda, E/C.12/RWA/CO/2–4 (2013), para 8.

<sup>1214</sup> CESCR, CO Germany, E/C.12/DEU/CO/5 (2011), para 12.

<sup>1215</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 15.

from access to the labour market<sup>1216</sup>, ‘the widespread discrimination based on (...) disability, (...) due to, inter alia, *social prejudice and stereotypes*<sup>1217</sup>, that ‘persons with disabilities and persons with albinism face *social stigma* and discrimination<sup>1218</sup>, that ‘the State party invokes *traditional values* to explain practices that are not in line with obligations flowing from international human rights law, such as (...) corporal punishment of children in schools<sup>1219</sup>, and that ‘*stigma* discourages older persons from applying for public welfare benefits’.<sup>1220</sup>

States parties have been called upon to prevent and combat discrimination against such disadvantaged groups, inter alia through awareness raising and public information campaigns<sup>1221</sup>, and through ‘[a]ddressing *negative prejudices and stereotypes*, which are among the underlying causes of the systemic discrimination experienced by the Roma’<sup>1222</sup>, ‘efforts aimed at the elimination of *stereotypes and negative prejudices* against Roma, including by increasing awareness-raising campaigns that promote tolerance and respect for ethnic diversity<sup>1223</sup>, ‘firmly combat[ing] *stereotypes, stigma* and discrimination against and marginalization of Batwa’<sup>1224</sup>, ‘steps to combat and prevent discrimination and *societal stigma*, in particular against persons with disabilities [and] persons with albinism’<sup>1225</sup>, ‘[a]wareness-raising campaigns to eliminate *stigma, negative stereotypes and other cultural barriers* to their full participation [of persons with disabilities, VV] in society’, and ‘educat[ing] the population with a view to eliminating the *stigma* attached to public welfare benefits’.<sup>1226</sup>

The CESCR has *implicitly* linked culture to child labour. While the CESCR has consistently abstained from specifying the cultural factors involved in its formulation of the concerns<sup>1227</sup>, in its recommendations, cultural dimensions are occasionally acknowledged, for example, where States parties are called upon to undertake awareness-raising campaigns with a view to ‘addressing *the social acceptance* of the worst forms of child labour’<sup>1228</sup> or ‘eradicating *socially accepted* child labour’.<sup>1229</sup>

No instances were found of *de jure* discrimination against these groups.

<sup>1216</sup> CESCR, CO El Salvador, E/C.12/SLV/CO/3–5 (2014), para 9.

<sup>1217</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 11; CO Guyana, E/C.12/GUY/CO/2–4 (2015), para 20.

<sup>1218</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1–3 (2014), para 5.

<sup>1219</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1–3 (2014), para 4.

<sup>1220</sup> CESCR, CO Japan, E/C.12/JPN/CO/3 (2013), para 22.

<sup>1221</sup> For example, against the use of forced labour (CESCR, CO Burundi, E/C.12/BDI/CO/1 (2015), para 30) and against the use of violence against children, including corporal punishment (CESCR, CO Turkey, E/C.12/TUR/CO/1 (2011), para 24; CO Lithuania, E/C.12/LTU/CO/2 (2014), para 14; CO Uzbekistan, E/C.12/UZB/CO/2 (2014), para 20).

<sup>1222</sup> CESCR, CO Czech Republic, E/C.12/CZE/CO/2 (2014), para 9.

<sup>1223</sup> CESCR, CO Portugal, E/C.12/PRT/CO/4 (2014), para 7.

<sup>1224</sup> CESCR, CO Rwanda, E/C.12/RWA/CO/2–4 (2013), para 8.

<sup>1225</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 15.

<sup>1226</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 11.

<sup>1227</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 23; CO Dominican Republic, E/C.12/DOM/CO/3 (2010), para 23.

<sup>1228</sup> CESCR, CO Indonesia, E/C.12/IDN/CO/1 (2014), para 23.

<sup>1229</sup> CESCR, CO Dominican Republic, E/C.12/DOM/CO/3 (2010), para 23.

## 2.3 CEDAWCEE

### 2.3.1 *Discrimination on grounds of gender*

In its general recommendations the CEDAWCee has identified culture as an important – if not paramount – factor contributing to discrimination against women in law and practice.

A very general link between culture and discrimination against women was established in General Recommendation No 28, in which the CEDAWCee clarified the core obligations of States parties under article 2 of the Convention. According to the CEDAWCee, the principle of equality ‘entails the concept that all human beings (...) are free to develop their personal abilities, pursue their professional careers and make choices *without the limitations set by stereotypes, rigid gender roles, and prejudices*’.<sup>1230</sup>

In General Recommendation No 25, the CEDAWCee explains how temporary special measures are crucial in correcting culturally embedded structural discrimination against women in general. Several other general recommendations discuss or explain the role of culture in relation to one particular area, such as General Recommendation No 23 in relation to women’s ability to participate in political and public life, General Recommendation No 24 in relation to women’s access to health-care, and General Recommendation No 33 on women’s access to justice.

Temporary special measures are important in the work of the CEDAWCee. It dedicated an entire General Recommendation (No. 25) to it. The CEDAWCee explains that there is a third layer beyond *de jure* and *de facto* discrimination, which occurs through society’s major structures (i.e., family, government, labour market, education system, etc.). The role of culture is considered to play a major part in this third layer of structural discrimination:

Firstly, States parties’ obligation is to ensure that there is no *direct or indirect discrimination against women in their laws* and that women are protected against discrimination – committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties’ obligation is to improve the *de facto position of women* through concrete and effective policies and programmes. Thirdly, States parties’ obligation is to *address prevailing gender relations and the persistence of gender-based stereotypes that affect women* not only through individual acts by individuals but *also in law, and legal and societal structures and institutions*.<sup>1231</sup>

In the CEDAWCee’s view, a purely formal legal or programmatic approach is not sufficient to achieve substantive equality. This also requires that women are given an equal start and that they are empowered by an enabling environment to achieve

<sup>1230</sup> CEDAWCee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para 18. (emphasis added, VV).

<sup>1231</sup> CEDAWCee, General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 18 August 2004, para 7.

equality of results. To guarantee women identical treatment is not enough. Biological as well as socially and culturally constructed differences between women and men must be taken into account: under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Achieving substantive equality also requires ‘an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women’.<sup>1232</sup>

The CEDAWCee argues that ‘[t]he position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined *male paradigms of power and life patterns*’.<sup>1233</sup> The CEDAWCee continues, arguing that ‘[w]omen’s biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in *social and cultural structures and institutions*’. Differentiation in treatment need not be permanent, however: ‘(...) continuous monitoring of laws, programmes and practices directed at the achievement of women’s *de facto* or substantive equality is needed so as to avoid a perpetuation of non-identical treatment that may no longer be warranted’.<sup>1234</sup>

The Convention ‘targets *discriminatory dimensions of past and current societal and cultural contexts* which impede women’s enjoyment of their human rights and fundamental freedoms’ and ‘aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their *de facto* or substantive inequality’. The application of temporary special measures ‘is one of the means to realize *de facto* or substantive equality for women, rather than an exception to the norms of non-discrimination and equality’.<sup>1235</sup> The CEDAWCee briefly refers to the potential role of temporary special measures in addressing harmful practices, reminding States parties that ‘temporary special measures should be adopted *to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour* that discriminate against or are disadvantageous for women’.<sup>1236</sup>

It is important to note that the CEDAWCee considers there to be ‘a clear difference between the purpose of the “special measures” under article 4, paragraph 1, and those of paragraph 2’. According to the CEDAWCee, ‘[t]he purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their *de facto* or substantive equality with men, and *to effect the structural, social and cultural changes* necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of a temporary

<sup>1232</sup> Ibid, para 8.

<sup>1233</sup> Ibid, para 10. (emphasis added, VV).

<sup>1234</sup> Ibid, para 11. (emphasis added, VV).

<sup>1235</sup> Ibid, para 14. (emphasis added, VV).

<sup>1236</sup> Ibid, para 38. (emphasis added, VV).

nature'.<sup>1237</sup> Article 4, paragraph 2, 'provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature'.<sup>1238</sup>

In its General Recommendation No 23 on political and public life, the CEDAWCee clearly sees a negative role for culture, as it 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 life*'.<sup>1239</sup> 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'.<sup>1240</sup>

In its General Recommendation No 24, on women and health, States parties are requested to show how they address 'distinctive features and factors that differ for women in comparison to men'.<sup>1241</sup> These include socio-economic factors, such as *unequal power relationships between women and men* in the home and workplace, which may negatively affect women's nutrition and health, and *cultural or traditional practices*, such as female genital mutilation, which 'carry a high risk of death and disability'.<sup>1242</sup>

The Committee has devoted an entire General Recommendation to women's access to justice, namely No 33 (2015), in which the CEDAWCee takes the opportunity to explain how a society's cultural norms may also affect a society's legal institutions:

Discrimination may be directed against women on the basis of their sex and gender. *Gender refers to socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society on biological differences, which are constantly reproduced amongst the justice system and its institutions.* Under article 5 (a) of the Convention, States parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotypes, that prevent women from exercising and claiming their rights and impede their access to effective remedies.<sup>1243</sup>

Discrimination against women, based on *gender stereotypes, stigma, harmful and patriarchal cultural norms*, and gender-based violence, which particularly affect women, have an adverse impact on the ability of women to gain access to justice on an equal basis with men.<sup>1244</sup>

The CEDAWCee dedicates an entire section to 'stereotyping and gender bias in the justice system and the importance of capacity building'<sup>1245</sup>, in which the following argument is made:

<sup>1237</sup> Ibid, para 15. (emphasis added, VV).

<sup>1238</sup> Ibid, para 16.

<sup>1239</sup> CEDAWCee, General Recommendation No. 23: Political and Public Life, A/52/38, 1997, para 10. (emphasis added, VV).

<sup>1240</sup> Ibid, para 48(b).

<sup>1241</sup> CEDAWCee, General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Ch I, 1999, para 12.

<sup>1242</sup> Ibid, para 12(b). (emphasis added, VV).

<sup>1243</sup> CEDAWCee, General Recommendation No. 33: women's access to justice, CEDAW/C/GC/33, 23 July 2015, para 7. (emphasis added, VV).

<sup>1244</sup> Ibid, para 8. (emphasis added, VV).

<sup>1245</sup> Ibid, paras 26–29.

Stereotyping and gender bias in the justice system have far-reaching consequences on women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. *Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts.* Often judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women's voices, arguments and testimonies, as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, *stereotyping compromises the impartiality and integrity of the justice system*, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.<sup>1246</sup>

Not only judges, magistrates and adjudicators, but also prosecutors, law enforcement officials and other actors allow stereotypes to influence investigations and trials, especially in cases of gender-based violence. According to the CEDAWCee, 'women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions'.<sup>1247</sup>

Another section is devoted to 'plural justice systems'<sup>1248</sup>, i.e., the coexistence of religious, customary, indigenous, community and other justice systems in one State party. The CEDAWCee appears to be open to such plural justice systems, as long as States parties 'ensure that women's rights are equally respected and that women are protected against violations of their human rights by all components of plural justice systems'.<sup>1249</sup> The CEDAWCee recommends States parties to 'take immediate steps, including capacity-building and training programmes on the Convention and women's rights for the providers of justice, to ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments'. States parties should also 'enact legislation to regulate the relationship between the different mechanisms of plural justice systems in order to reduce potential conflict', and 'provide safeguards against violations of women's human rights by enabling review by State courts or administrative bodies of the activities of all components of plural justice systems, with special attention to village courts and traditional courts'.<sup>1250</sup>

The CEDAWCee further recommends States parties to 'take measures, including awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system'<sup>1251</sup>, and to 'raise awareness on the negative impact

<sup>1246</sup> Ibid, para 26. (emphasis added, VV).

<sup>1247</sup> Ibid, para 28.

<sup>1248</sup> Ibid, paras 61–64.

<sup>1249</sup> Ibid, para 61.

<sup>1250</sup> Ibid, para 64.

<sup>1251</sup> Ibid, para 29(a).

of stereotyping and gender bias and encourage advocacy related to stereotyping and gender bias in justice systems, especially in gender-based violence cases'.<sup>1252</sup> Finally, States parties should emphasize 'the role that the media and ICT can play in dismantling cultural stereotypes about women in connection with their right to access to justice, paying particular attention to challenging cultural stereotypes concerning gender-based discrimination and violence, including domestic violence, rape and other forms of sexual violence'.<sup>1253</sup>

The role of culture in relation to violence against women and/or harmful practices is prominently discussed in General Recommendation No 19 and No 35, both on gender-based violence against women, and General Recommendation No 31, which is specifically on harmful practices.

There is no explicit provision in the Convention on violence against women. However, in its General Recommendation No 19, the CEDAWCee has established that the definition of discrimination in article 1 includes gender-based violence, or 'violence that is directed against a woman because she is a woman or that affects women disproportionately'<sup>1254</sup>, and that gender-based violence 'is discrimination within the meaning of article 1 of the Convention'.<sup>1255</sup> The CEDAWCee links the issue of violence against women to other articles as well. The link between culture and violence against women is explicitly established in relation to articles 2 (f), 5 and 10 (c):

*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. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.*<sup>1256</sup>

The CEDAWCee also considers the role of culture in relation to violence against women under article 12 (health):

In some States there are *traditional practices perpetuated by culture and tradition* that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.<sup>1257</sup>

Under article 14 (rural women), the CEDAWCee states that 'rural women are at risk of gender-based violence because of *traditional attitudes regarding the subordinate role of women* that persist in many rural communities'.<sup>1258</sup> A final link between culture and

<sup>1252</sup> Ibid, para 29(e).

<sup>1253</sup> Ibid, para 35.

<sup>1254</sup> CEDAWCee, General Recommendation No. 19: Violence against women, A/47/38, 1992, para 6.

<sup>1255</sup> Ibid, para 7.

<sup>1256</sup> Ibid, para 11.

<sup>1257</sup> Ibid, para 20.

<sup>1258</sup> Ibid, para 21. (emphasis added, VV).

violence against women is established under article 16 (matters relating to marriage and family relations):

‘Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are *perpetuated by traditional attitudes*’.<sup>1259</sup>

The CEDAWCee recommends States parties (among others) to: ensure gender-sensitive training of judicial and law enforcement officers and other public officials; identify in their reports the nature and extent of attitudes, customs and practices which perpetuate violence against women and the kinds of violence which result; report on measures to overcome these attitudes and practices; introduce education and public information programmes to help eliminate prejudices which hinder women’s equality; take measures which are necessary to overcome family violence, including legislation to remove the defence of honour in regard to the assault or murder of a female family member; take preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women.<sup>1260</sup>

In 2017 the CEDAWCee adopted General Recommendation No 35, updating General Recommendation No 19. Again, the Committee stresses the influence of culture on violence against women:

Gender-based violence against women is affected and often exacerbated by cultural, economic, ideological, technological, political, religious, social and environmental factors, (...). Harmful practices (...) are also forms of gender-based violence against women *affected by such cultural, ideological and political factors*.<sup>1261</sup>

The obligation to eliminate discrimination against women, including gender-based violence against women, is an obligation of an immediate nature: delays cannot be justified on any grounds, including on economic, cultural or religious grounds.<sup>1262</sup>

The CEDAWCee further considers that legislation addressing gender-based violence against women is in many States ‘non-existent, inadequate and/or poorly implemented’<sup>1263</sup>, and contemplates that this is in part due to culture:

An erosion of legal and policy frameworks to eliminate gender-based discrimination or violence, *often justified in the name of tradition, culture, religion or fundamentalist ideologies*, (...) further weaken the State responses.<sup>1264</sup>

States parties are recommended to ensure that all legal systems, *plural legal systems* included, protect victims of gender-based violence against women and ensure they

<sup>1259</sup> Ibid, para 23.

<sup>1260</sup> Ibid, para 24.

<sup>1261</sup> CEDAWCee, General Recommendation No. 35: gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017, para 14.

<sup>1262</sup> Ibid, para 21.

<sup>1263</sup> Ibid, para 7.

<sup>1264</sup> Ibid, para 7.

have access to remedy.<sup>1265</sup> To this end, States should abolish discriminatory legislation, which often bears a cultural fingerprint:

Repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; *including in customary, religious and indigenous laws*. In particular, repeal:

- a) Provisions that allow, tolerate or condone forms of gender-based violence against women, including child or forced marriage and other harmful practices, (...) as well as legislation that criminalises abortion, (...) adultery or any other criminal provisions that affects women disproportionately (...).
- b) Discriminatory evidentiary rules and procedures, including procedures allowing for women's deprivation of liberty to protect them from violence, practices focused on 'virginity' and legal defences or mitigating factors *based on culture, religion or male privilege*, such as the so-called 'defence of honour', traditional apologies, pardons from victims/survivors' families or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death being often reserved to women, as well as judicial practices that disregard a history of gender-based violence to the detriment of women defendants.
- c) All laws that prevent or deter women from reporting gender-based violence, such as guardianship laws that deprive women of legal capacity (...).<sup>1266</sup>

States parties should not only focus on legislation. In addition they are recommended to take preventive measures, aimed at the cultural attitudes underlying laws and practices condoning violence against women. They should, with the help of relevant stakeholders such as women's organizations and those representing marginalised groups of women and girls, 'address and eradicate the stereotypes, prejudices, customs and practices, laid out in article 5 of the Convention, that condone or promote gender-based violence against women and underpin structural inequality of women with men'.<sup>1267</sup>

Finally, States parties are encouraged to conduct research on gender-based violence against women, in order to, among other things, 'assess (...) the social or cultural beliefs exacerbating such violence and shaping gender relations'.<sup>1268</sup>

<sup>1265</sup> Ibid, para 30; in line with the guidance provided in the Committee's General Recommendation No 33 (n 296). States parties should, for example, ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments.

<sup>1266</sup> Ibid, para 31.

<sup>1267</sup> Ibid, para 35; Measures to that end include: the integration of gender equality content into education curricula, 'target[ing] stereotyped gender roles and promot[ing] values of gender equality and non-discrimination, including non-violent masculinities, as well as ensur[ing] (...) comprehensive sexuality education for girls and boys'; and '[a]wareness-raising programmes that (1) promote an understanding of gender-based violence against women as unacceptable and harmful and inform about available legal recourses against it, [and] encourage its reporting (...); (2) address the stigma experienced by victims/survivors of such violence, and (3) dismantle the commonly held victim-blaming beliefs that make women responsible for their own safety and for the violence they suffer. These programmes should target all relevant actors, including both women and men, education, health and law enforcement personnel, traditional and religious leaders, and perpetrators.

<sup>1268</sup> Ibid, para 50.

Harmful practices are considered a form of violence against women. This is also reflected in General Recommendation No 31 on harmful practices, which the CEDAWCee issued together with the Committee on the Rights of the Child (CRC), and which ‘should be read in conjunction with (...) in particular General Recommendation no. 19 on violence against women’.<sup>1269</sup> The relation between culture and harmful practices – often named ‘harmful cultural practices’ or ‘harmful traditional practices’, after all – is almost self-evident. The Committees note that ‘harmful practices are *deeply rooted in social attitudes* according to which women and girls are regarded as inferior to men and boys *based on stereotyped roles*’, highlight ‘the gender dimension of violence’ and indicate that ‘*sex- and gender-based attitudes and stereotypes*, power imbalances, inequalities and discrimination perpetuate the widespread existence of practices that often involve violence or coercion’.<sup>1270</sup> The Committees are concerned that the practices ‘are also used to justify gender-based violence as a form of “protection” or control of women and children in the home or community, at school or in other educational settings and institutions and in wider society’<sup>1271</sup>, and subsequently contends:

Harmful practices are therefore grounded in discrimination based on sex, gender and age, among other things, and have often been justified by invoking *sociocultural and religious customs and values* (...). Overall, harmful practices are often associated with serious forms of violence or are themselves a form of violence against women and children. While the nature and prevalence of the practices *vary by region and culture*, the most prevalent and well documented are female genital mutilation, child and/or forced marriage, polygamy, crimes committed in the name of so-called honour and dowry-related violence.<sup>1272</sup>

Other practices that the Committees have identified as harmful include the following:

neglect of girls (linked to the preferential care and treatment of boys), extreme dietary restrictions, including during pregnancy (force-feeding, food taboos), virginity testing and related practices, binding, scarring, branding/infliction of tribal marks, corporal punishment, stoning, violent initiation rites, widowhood practices, accusations of witchcraft, infanticide and incest. They also include body modifications that are performed for the purpose of beauty or marriageability of girls and women (such as fattening, isolation, the use of lip discs and neck elongation with neck rings) or in an attempt to protect girls from early pregnancy or from being subjected to sexual harassment and violence (such as breast ironing). In addition, many women and children increasingly undergo medical treatment and/or plastic surgery to comply with social norms of the body, rather than for medical or health reasons, and many are also pressured to be fashionably thin, which has resulted in an epidemic of eating and health disorders.<sup>1273</sup>

<sup>1269</sup> CEDAWCee, Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 4 November 2014, para 5.

<sup>1270</sup> Ibid, para 6. (emphasis added, VV).

<sup>1271</sup> Ibid, para 6.

<sup>1272</sup> Ibid, para 7.

<sup>1273</sup> Ibid, para 9.

The Committees subsequently provide criteria for determining which practices are ‘harmful’:

For the purposes of the present joint general recommendation/general comment, practices should meet the following criteria to be regarded as harmful:

- (a) They constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the two Conventions;
- (b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;
- (c) *They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms* that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors;
- (d) They are imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.<sup>1274</sup>

Having identified that harmful practices are kept in place by social norms and traditional cultural attitudes, the Committees explain:

Efforts to change the practices must address those *underlying systemic and structural causes* of traditional, re-emerging and emerging harmful practices, empower girls and women and boys and men to contribute to *the transformation of traditional cultural attitudes* that condone harmful practices, act as agents of such change and strengthen the capacity of communities to support such processes.<sup>1275</sup>

In the next sections, the Committees discuss in more depth – and with attention for the role of culture – the most prevalent and well documented harmful practices, which are female genital mutilation<sup>1276</sup>, child and/or forced marriage<sup>1277</sup>, polygamy<sup>1278</sup>, and crimes committed in the name of honour.<sup>1279</sup>

<sup>1274</sup> Ibid, para 16.

<sup>1275</sup> Ibid, para 17.

<sup>1276</sup> Ibid, para 19; The Committees contend that *FGM* is performed in every region, and ‘within some cultures, [it] is a requirement for marriage and believed to be an effective method of controlling the sexuality of women and girls’.

<sup>1277</sup> Ibid, paras 20–24; *Child marriage or early marriage* is defined as ‘any marriage where at least one of the parties is under 18 years of age’. It is considered to be a form of forced marriage, since ‘one and/or both parties have not expressed full, free and informed consent’. The Committees subsequently introduce the possibility for States parties to derogate from the minimum age of 18, but immediately add that this cannot be for cultural reasons: As a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.

There are several forms of *girls being married against their full, free and informed consent*, such as cases in which ‘they have been married too young to be physically and psychologically ready for adult life or to make conscious and informed decisions and thus not ready to consent to marriage’, and ‘cases in which guardians have the legal authority to consent to marriage of girls in accordance

The Committees subsequently explain the ‘holistic framework for addressing harmful practices’.<sup>1280</sup> States parties should establish ‘a well-defined, rights-based and *locally relevant* holistic strategy that includes supportive legal and policy measures, including social measures that are combined with commensurate political commitment and accountability at all levels’.<sup>1281</sup> Such a holistic strategy must be coordinated both horizontally (across sectors, including education, health, justice, social welfare, law enforcement, immigration and asylum and communications and media) and vertically (between actors at the local, regional and national levels and with traditional and religious authorities).<sup>1282</sup> The CEDAWCee further elaborates in detail on States parties obligations regarding (1) data collection and monitoring<sup>1283</sup>; (2) legislation and its

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with customary or statutory law and in which girls are thus married contrary to the right to freely enter into marriage’. Forced marriages are defined as ‘marriages in which one and/or both parties have not personally expressed their full and free consent to the union’. Forms of forced marriage include child marriage, exchange or trade-off marriages (ie, *baad* and *baadal*), servile marriages and levirate marriages (coercing a widow to marry a relative of her deceased husband). In addition, ‘[i]n some contexts, a forced marriage may occur when a rapist is permitted to escape criminal sanctions by marrying the victim, usually with the consent of her family’. The payment of dowries and bride prices, ‘which varies among practising communities, may increase the vulnerability of women and girls to violence and to other harmful practices’, as husbands or their family members ‘may engage in acts of physical or psychological violence, including murder, burning and acid attacks, for failure to fulfil expectations regarding the payment of a dowry or its size’.

<sup>1278</sup> Ibid, paras 25–28; According to the Committees, *polygamy* ‘varies across, and within, legal and social contexts and its impact includes harm to the health of wives, understood as physical, mental and social well-being, the material harm and deprivation that wives are liable to suffer and emotional and material harm to children, often with serious consequences for their welfare’. The Committees consider that ‘[t]he coexistence of statutory laws with religious, personal status and traditional customary laws and practices often contributes to the persistence of the practice’, although it is in some States parties authorized by civil law. Finally, it is observed that ‘[c]onstitutional and other provisions that protect the right to culture and religion have also at times been used to justify laws and practices that allow for polygamous unions’.

<sup>1279</sup> Ibid, paras 29–30; *Crimes committed in the name of so-called honour* are defined as ‘acts of violence that are disproportionately, although not exclusively, committed against girls and women because family members consider that some suspected, perceived or actual behaviour will bring dishonour to the family or community’. Such forms of behaviour include ‘entering into sexual relations before marriage, refusing to agree to an arranged marriage, entering into a marriage without parental consent, committing adultery, seeking divorce, dressing in a way that is viewed as unacceptable to the community, working outside the home or generally failing to conform to stereotyped gender roles’. Sometimes such crimes are committed against girls and women because they have been victims of sexual violence. These crimes are frequently committed by a spouse, female or male relative or a member of the victim’s community, and are often ‘sanctioned by the community as a means of preserving and/or restoring the integrity of its cultural, traditional, customary or religious norms following alleged transgressions’. In some contexts, ‘national legislation or its practical application, or the absence thereof, allows for the defence of honour to be presented as an exculpatory or a mitigating circumstance for perpetrators of such crimes, resulting in reduced sanctions or impunity’. In addition, ‘prosecution of cases may be impeded by unwillingness on the part of individuals with knowledge of the case to provide corroborating evidence’.

<sup>1280</sup> Ibid, paras 31–87.

<sup>1281</sup> Ibid, para 33.

<sup>1282</sup> Ibid, para 34.

<sup>1283</sup> Ibid, paras 37–39; According to the Committees, the availability of data ‘allows for the examination of trends and enables the establishment of the relevant connections between policies and effective programme implementation (...) and *the corresponding changes in attitudes, forms of behaviour, practices and prevalence rates*’. (emphasis added, VV).

enforcement<sup>1284</sup>; (3) prevention of harmful practices<sup>1285</sup>; and (4) protective measures and responsive services.<sup>1286</sup>

While culture plays a role in relation to each of these four categories of obligations, it is worthwhile to selectively zoom in on the recommendations regarding prevention of harmful practices. The Committees contend that combating harmful practices through prevention ‘can best be achieved through a rights-based approach to changing social and cultural norms, empowering women and girls<sup>1287</sup>, building the capacity of all relevant professionals who are in regular contact with victims, potential victims and perpetrators of harmful practices at all levels<sup>1288</sup> and raising awareness of the causes

<sup>1284</sup> Ibid, paras 40–55; GR 31, para 55: The Committees recommend that the States parties ‘adopt or amend legislation with a view to effectively addressing and eliminating harmful practices’, and in doing so, should ensure, among others: that the legislation takes precedence over *customary, traditional or religious laws that allow, condone or prescribe any harmful practice*, especially in countries with plural legal systems; that they repeal all legislation that condones, allows or leads to harmful practices, including *traditional, customary or religious laws* and any legislation that accepts the defence of honour as a defence or mitigating factor in the commission of crimes in the name of so-called honour; that the legislation adequately addresses *the root causes of harmful practices*, including discrimination on the basis of sex, gender, age and other intersecting factors; and that women and children subjected to harmful practices have equal access to justice, including by addressing legal and practical barriers to initiating legal proceedings, and that the perpetrators and those who aid or condone such practices are held accountable. (emphasis added, VV).

<sup>1285</sup> Ibid, paras 56–81. Further discussed below.

<sup>1286</sup> Ibid, paras 82–87. Women and children who are victims of harmful practices are in need of protective measures and responsive services. Responsive or support services include medical, psychological and legal services. National protection services should provide all necessary protection services to women and girls who face a high risk of being subjected to violence, including girls running away to avoid being subjected to FGM, forced marriage or crimes committed in the name of so-called honour. Safety and security measures include the provision of temporary shelters or specialized services within shelters for victims of violence. Given that perpetrators of harmful practices are often the spouse of the victim, a family member or a member of the victim’s community, protective services should seek to relocate victims outside their immediate community if there is reason to believe that they may be unsafe (General Recommendation No 31 (n 322), para 83). Victims seeking justice for violations of their rights as a result of harmful practices often face stigmatization, revictimization, harassment and possible retribution, and should be protected throughout the legal process (ibid, para 85). The Committees recommend States parties (among others) to: ensure that protection services are mandated and adequately resourced to provide all necessary prevention and protection services to children and women who are, or are at high risk of becoming, victims of harmful practices; establish a free, 24-hour hotline that is staffed by trained counsellors, to enable victims to report instances when a harmful practice is likely to occur or has occurred; and develop and implement capacity-building programmes for judicial officers, including judges, lawyers, prosecutors and all relevant stakeholders on applying laws in a gender-sensitive and age-sensitive manner in conformity with the Convention (ibid, para 87).

<sup>1287</sup> Education is an important tool for empowering women and girls to claim their rights, and as such for the prevention of harmful cultural practices (General Recommendation No 31 (n 322), para 61). States parties are thus recommended to (among others): include in the educational curriculum information on human rights, gender equality and self-awareness and *contribute to eliminating gender stereotypes*; ensure that schools provide age-appropriate information on sexual and reproductive health and rights, including in relation to gender relations and responsible sexual behaviour and protection from violence and harmful practices; and engage men and boys in creating an enabling environment that supports the empowerment of women and girls (ibid, para 69). (emphasis added, VV).

<sup>1288</sup> States parties should aim to engage influential leaders, such as *traditional and religious leaders*, and as many relevant professional groups as possible. The Committees recommend States parties in this regard to inform professionals about harmful practices and applicable human rights norms and standards and ensure that they are adequately trained. This could include training to individuals

and consequences of harmful practices, including through dialogue with relevant stakeholders'.<sup>1289, 1290</sup>

It is interesting to see that the Committees specifically highlight that social norms can have both positive and negative effects:

A social norm is a contributing factor to and social determinant of certain practices in a community *that may be positive and strengthen its identity and cohesion or may be negative and potentially lead to harm*. It is also a social rule of behaviour that members of a community are expected to observe. This creates and sustains a collective sense of social obligation and expectation that conditions the behaviour of individual community members, even if they are not personally in agreement with the practice.<sup>1291</sup>

This is subsequently illustrated with the following example on FGM:

[W]here female genital mutilation is the social norm, parents are motivated to agree to its being performed on their daughters because they see other parents doing so and believe that others expect them to do the same. The norm or practice is often perpetuated by other women in community networks who have already undergone the procedure and exert additional pressure on younger women to conform to the practice or risk ostracism, being shunned and stigmatization. Such marginalization may include the loss of important economic and social support and social mobility. Conversely, if individuals conform to the social norm, they expect to be rewarded, for example through inclusion and praise. *Changing social norms that underlie and justify harmful practices requires that such expectations be challenged and modified.*<sup>1292</sup>

This leads the Committees to a call for 'culturally sensitive interventions':

Culturally sensitive interventions that reinforce human rights and enable practising communities to collectively explore and agree upon *alternative ways to fulfil their values*

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involved in alternative dispute resolution and *traditional justice systems* to appropriately apply key human rights principles as well as to (other) law enforcement personnel, including the judiciary, on new and existing legislation prohibiting harmful practices and of their role in prosecuting perpetrators and protecting victims of harmful practices (General Recommendation No 31 (n 322), para 73). (emphasis added, VV).

<sup>1289</sup> States parties should: develop and adopt comprehensive awareness-raising programmes *to challenge and change cultural and social attitudes, traditions and customs* that underlie forms of behaviour that perpetuate harmful practices; ensure that awareness-raising programmes provide accurate information and clear and unified messages from trusted sources about the negative impact of harmful practices on women, children, in particular girls, their families and society at large; take all appropriate measures to ensure that *stigma* and discrimination are not perpetuated against the victims and/or practising immigrant or minority communities; initiate public discussions to prevent and promote the elimination of harmful practices, by engaging all relevant stakeholders in the preparation and implementation of the measures, including local leaders, practitioners, grass-roots organizations and religious communities, *affirming the positive cultural principles of a community* that are consistent with human rights and including information on experiences of successful elimination by formerly practising communities with similar backgrounds; and build or reinforce effective partnerships with the mainstream media to support the implementation of awareness-raising programmes and promote public discussions (General Recommendation No 31 (n 322), para 81). (emphasis added, VV).

<sup>1290</sup> General Recommendation No 31 (n 322), para 56.

<sup>1291</sup> Ibid, para 57.

<sup>1292</sup> Ibid.

*and honour or celebrate traditions* without causing harm and violating the human rights of women and children can lead to the sustainable and large-scale elimination of the harmful practices and *the collective adoption of new social rules*.<sup>1293</sup>

The Committees recommend that the States parties ‘ensure that any efforts undertaken to tackle harmful practices and to challenge and change underlying social norms are holistic, community based and founded on a rights-based approach that includes the active participation of all relevant stakeholders, especially women and girls’.<sup>1294</sup>

Finally, the role of culture is also discussed in relation to the rights of women in marriage and family life (arts, 9, 15 and 16)<sup>1295</sup>, examined in general recommendations Nos 21 and 29. Matters relating to marriage, the dissolution of marriage, inheritance, property rights, custody and guardianship of children are often subject to customary and religious laws and practices.

In its introductory remarks in General Recommendation No 21, the CEDAWCee points out ‘the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women’<sup>1296</sup>, underscoring the importance of taking culture and tradition into account when dealing with equality in marriage and family relations. Acknowledging that there are various forms and concepts of the family between and within States, the CEDAWCee argues 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’.<sup>1297</sup> The CEDAWCee 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’.<sup>1298</sup>

The CEDAWCee carefully examines article 16 and all its subparagraphs, and notes among others that ‘there are countries, which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages’, while ‘other countries allow a woman’s marriage to be arranged for payment or preferment’.<sup>1299</sup> It also notes ‘that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law’ and considers that ‘these variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage’. According to the CEDAWCee, ‘[s]uch limitations often

<sup>1293</sup> Ibid, para 59.

<sup>1294</sup> Ibid, para 60.

<sup>1295</sup> The CEDAWCee identifies three articles in the Convention as having special significance for the status of women in the family: articles 9 (nationality), 15 (equality before the law) and 16 (equality in all matters relating to marriage and family relations).

<sup>1296</sup> CEDAWCee, General Recommendation No. 21: Equality in Marriage and Family Relations, A/49/38, 1994, para 3.

<sup>1297</sup> Ibid, para 13 (emphasis added, VV).

<sup>1298</sup> Ibid, para 15.

<sup>1299</sup> Ibid, para 16.

result in the husband being accorded the status of head of household and primary decision maker and therefore contravene the provisions of the Convention'.<sup>1300</sup> The CEDAWCee further notes 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'. Hence, 'any law or custom that grants men a right to a greater share of property at the end of a marriage or *de facto* relationship, or on the death of a relative, is discriminatory'.<sup>1301</sup> Greater emphasis should be placed on non-financial contributions to property acquired during a marriage, such as raising children, caring for elderly relatives and discharging household duties, and 'financial and non-financial contributions should be accorded the same weight'.<sup>1302</sup> Finally, the CEDAWCee notes that 'there are many countries where the law and practice concerning inheritance and property result in serious discrimination against women'. Such uneven treatment may result in women receiving a smaller share of the husband's or father's property at his death than widowers and sons. According to the CEDAWCee, 'such provisions contravene the Convention and should be abolished'.<sup>1303</sup>

In the final paragraph of the General Recommendation, the CEDAWCee argues that States parties should 'introduce measures directed at encouraging full compliance with the principles of the Convention, *particularly where religious or private law or custom conflict with those principles*' [emphasis add, VV].<sup>1304</sup>

In its General Recommendation No 29, the CEDAWCee builds upon the principles articulated in General Recommendation No 21, with a focus on the economic dimensions of marriage and its dissolution. The CEDAWCee defines the family as 'the basic unit of society', and as 'a social and legal construct and, in various countries, a religious construct'.<sup>1305</sup> According to the CEDAWCee, 'inequality in the family underlies all other aspects of discrimination against women *and is often justified in the name of ideology, tradition and culture*'.<sup>1306</sup> In respect of the economic dimensions of family relations, formal equality is not enough. A substantive equality approach – ensuring that laws and policies provide for equality in fact, by accounting for women's disadvantage or exclusion – is needed, addressing matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and *the impact of gender stereotypes and gender roles* on women's economic capacity.<sup>1307</sup> The CEDAWCee touches on some cultural dimensions in this regard.

<sup>1300</sup> Ibid, para 17.

<sup>1301</sup> Ibid, para 28.

<sup>1302</sup> Ibid, para 32.

<sup>1303</sup> Ibid, para 35.

<sup>1304</sup> Ibid, para 50.

<sup>1305</sup> CEDAWCee, General Recommendation No. 29: article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29, 30 October 2013, para 1.

<sup>1306</sup> Ibid, para 2. (emphasis added, VV).

<sup>1307</sup> Ibid, para 8.

The CEDAWCee first of all notes that ‘the constitutions or legal frameworks of a number of States parties still provide that personal status laws (...) are exempt from constitutional provisions prohibiting discrimination or *reserve matters of personal status to the ethnic and religious communities* within the State party to determine’, and that in such cases ‘constitutional equal protection provisions and anti-discrimination provisions do not protect women from *the discriminatory effects of marriage under customary practices and religious laws*’. Other States parties ‘have adopted constitutions that include equal protection and non-discrimination provisions but have not revised or adopted legislation to eliminate the discriminatory aspects of their family law regimes, whether they are regulated by civil code, religious law, ethnic custom or any combination of laws and practices’. The CEDAWCee considers all such constitutional and legal frameworks to be discriminatory.<sup>1308</sup>

The subsequent section is devoted to ‘multiple family law systems’. Here, the CEDAWCee argues ‘that *identity-based personal status laws and customs perpetuate discrimination against women* and that the preservation of multiple legal systems is in itself discriminatory against women’, adding that ‘[l]ack of individual choice relating to the application or observance of particular laws and customs exacerbates this discrimination’.<sup>1309</sup> According to the CEDAWCee, ‘States parties should adopt written family codes or personal status laws that provide for equality between spouses or partners *irrespective of their religious or ethnic identity or community*’. It further argues that ‘in the absence of a unified family law, the system of personal status laws should provide for individual choice as to the application of religious law, ethnic custom or civil law at any stage of the relationship’, and ‘personal status laws should embody the fundamental principle of equality between women and men, and should be fully harmonized with the provisions of the Convention so as to eliminate all discrimination against women in all matters relating to marriage and family relations’.<sup>1310</sup>

Acknowledging that ‘families take many forms’ and that ‘the concept of “family” must be understood in a wide sense’<sup>1311</sup>, the CEDAWCee considers that ‘States parties are obligated to address the sex- and gender-based discriminatory aspects of all the various forms of family and family relationships’ and ‘must address *patriarchal traditions and attitudes* (...) with the same scrutiny that is given to the “public” aspects of individual and community life’.<sup>1312</sup> Even though registration of marriage is important to protect the rights of spouses with regard to property issues upon dissolution of the marriage by death or divorce<sup>1313</sup>, some States parties do not require registration of *religious and customary marriages* in order for them to be valid.<sup>1314</sup> This is a violation of the Convention.<sup>1315</sup>

<sup>1308</sup> Ibid, para 10. (emphasis added, VV).

<sup>1309</sup> Ibid, para 14. (emphasis added, VV).

<sup>1310</sup> Ibid, para 15. (emphasis added, VV).

<sup>1311</sup> Ibid, paras 16–17.

<sup>1312</sup> Ibid, para 18.

<sup>1313</sup> Ibid, para 25.

<sup>1314</sup> Ibid, para 20.

<sup>1315</sup> Ibid, para 25.

The Concluding Observations show that, when it comes to *de facto* gender discrimination, the CEDAWCee has on many occasions *explicitly* expressed its concern about 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 the family and society.<sup>1316</sup> The CEDAWCee is concerned that such attitudes and stereotypes may perpetuate discrimination against women and their subordination within the family and society, and constitute serious obstacles to women's enjoyment of their human rights and the fulfilment of the rights enshrined in the Convention.<sup>1317</sup> The issue of cultural or traditional stereotypes, attitudes and practices, and their systemic and structural dimensions, are thus not only discussed in general terms (under the headings 'stereotypes' or 'stereotypes and harmful practices', for example), but also in relation to specific rights in the Convention (under 'education', 'employment', 'health', etc.).

When phrasing its concerns on the issue of stereotypes and harmful or discriminatory practices, the CEDAWCee seems to be juggling with several words, continuously changing the order and combinations. The key words are 'discriminatory', 'patriarchal', 'deep-rooted', 'deeply entrenched', 'traditional', 'adverse', 'negative' and/or 'cultural', as adjectives to 'attitudes', 'stereotypes', 'values', 'norms', 'practices', or 'traditions', always in relation to 'the roles and responsibilities of women and men in the family and in society'.<sup>1318</sup> The intended message is always the same: society's social and cultural meaning for biological differences between men and women has resulted in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.<sup>1319</sup> The Concluding Observations on Gabon are illustrative:

The Committee is concerned, however, at the persistence of *adverse cultural norms, practices and traditions* and *patriarchal attitudes* and *deep-rooted stereotypes* regarding the roles, responsibilities and identities of women and men in the family and society.<sup>1320</sup>

Another example, from the Concluding Observations on Guyana:

While noting the State party's efforts to counter stereotypes and prejudices through education and awareness campaigns in the mass media, the Committee expresses its serious concern about the persistence of *harmful norms, practices and traditions, patriarchal*

<sup>1316</sup> See, eg. CEDAWCee, CO Congo, CEDAW/C/COG/CO/6 (2012), para 21.

<sup>1317</sup> See, eg. CEDAWCee, CO South Africa, CEDAW/C/ZAF/CO/4 (2011), para 20.

<sup>1318</sup> CEDAWCee, CO Lebanon, CEDAW/C/LBN/CO/4-5 (2015), para 25; CO Liberia, CEDAW/C/LBR/CO/7-8 (2015), para 21; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4-8 (2015), para 18; CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), para 18; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 18; CO Guyana, CEDAW/C/GUY/CO/7-8 (2012), para 20.

<sup>1319</sup> CEDAWCee, General Recommendation No 28 (n 283), para 5.

<sup>1320</sup> CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; almost similar formulation in CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), para 18; CO Liberia, CEDAW/C/LBR/CO/7-8 (2015), para 21.

*attitudes and deep-rooted stereotypes* regarding the roles, responsibilities and identities of women and men in all spheres of life.<sup>1321</sup>

The CEDAWCee often specifies *what* the stereotype is, pointing out that these stereotypes, attitudes and values overemphasize the role of women as (house)wives, mothers and caregivers.<sup>1322</sup> While men are largely considered the main breadwinners, women are seen as having the primary responsibility for child-rearing and domestic tasks.<sup>1323</sup> An example from the Concluding Observations on the United Arab Emirates:

The Committee takes note of the State party's commitment to change socio-cultural patterns and patriarchal attitudes that discriminate against women in society. It remains however concerned that the State party retains *discriminatory stereotypes on the roles of women and men in society and in the family, focusing primarily on women's roles as mothers and housewives and not considering women as full rights holders*.<sup>1324</sup>

Or consider the following example from the Concluding Observations on Slovakia:

The Committee notes with concern that:

- (a) Discriminatory stereotypes about the roles and responsibilities of women and men in society and in the family are deeply rooted in the State party and women continue to bear a disproportionate share of family and household responsibilities;

<sup>1321</sup> CEDAWCee, CO Guyana, CEDAW/C/GUY/CO/7–8 (2012), para 20.

<sup>1322</sup> For example: 'Stereotypes (...) focusing primarily on women's roles as mothers and housewives' (CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 23); 'over-emphasizing the roles of women as mothers and caretakers' (CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 18); 'patriarchal attitudes and stereotypes (...) which consider women primarily as mothers and caregivers' (CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 19); 'stereotypes (...) that perpetuate traditional roles of women as mothers and housewives' (CEDAWCee, CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 17); 'stereotypes, negative traditional values and patriarchal attitudes (...) that overemphasize women's roles as mothers and housewives' (CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 18); 'patriarchal attitudes and deep-rooted gender stereotypes (...) that overemphasize the subordinate and caring roles of women' (CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 16); 'deeply entrenched traditional stereotypes (...) which overemphasize the role of women as wives, mothers and caregivers' (CEDAWCee, CO Maldives, CEDAW/C/MDV/CO/4–5 (2015), para 20); 'gender stereotypes, negative traditional values and patriarchal attitudes (...) that overemphasize women's roles as mothers and housewives' (CEDAWCee, CO Tuvalu, CEDAW/C/TUV/CO/3–4 (2015), para 19); 'stereotypes (...) which subordinates women to men, overemphasizes women's roles as mothers and housewives' (CEDAWCee, CO Solomon Islands, CEDAW/C/SLB/CO/1–3 (2014), para 22); 'adverse cultural practices and traditions and patriarchal attitudes and deep-rooted stereotypes (...), especially those portraying women as caregivers' (CEDAWCee, CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 18); 'deeply entrenched traditional stereotypes (...) which overemphasize the role of women as caregivers' (CEDAWCee, CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 21); 'stereotypes (...) that have the effect of perpetuating traditional roles for women as mothers and wives' (CEDAWCee, CO Croatia, CCPR/C/HRV/CO/3 (2015), para 16); 'patriarchal attitudes and deep-rooted stereotypes (...) whereby men are largely still considered the main breadwinners and women are considered as having the primary responsibility for child-rearing and domestic tasks' (CEDAWCee, CO Mauritius, CEDAW/C/MUS/CO/6–7 (2011), para 18); 'traditional attitudes and cultural norms hamper access to contraceptives (...) because clinic nurses frequently consider that it is not appropriate for schoolgirls to be sexually active' (CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 36).

<sup>1323</sup> CEDAWCee, CO Mauritius, CEDAW/C/MUS/CO/6–7 (2011), para 18.

<sup>1324</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 23.

- (b) There have been strong campaigns by non-State actors, including the religious and civic organizations, the media and politicians, advocating for *traditional family values*, *over-emphasizing the roles of women as mothers and caretakers*, and criticizing gender equality as ‘gender ideology’.<sup>1325</sup>

Generally, the CEDAWCee also identifies some of the most problematic consequences of these stereotypes and attitudes. It notes that such attitudes and stereotypes ‘undermine women’s social status’<sup>1326</sup>, ‘impede women’s equal participation’<sup>1327</sup>, ‘perpetuate their subordination within the family and society’<sup>1328</sup>, ‘constitute serious obstacles to women’s enjoyment of their rights’<sup>1329</sup>, ‘are root causes of women’s disadvantaged position’<sup>1330</sup>, or ‘perpetuate discrimination against women, and are reflected in women’s disadvantageous and unequal status in many areas’<sup>1331</sup>, including in education<sup>1332</sup>, employment<sup>1333</sup>, health<sup>1334</sup>, and public life and decision-making<sup>1335</sup>, thus ultimately restricting their (other) rights under the Convention. According to

<sup>1325</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 18.

<sup>1326</sup> CEDAWCee, CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 17; CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 25; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 18; CO Azerbaijan, CEDAW/C/AZE/CO/5 (2015), para 20.

<sup>1327</sup> CEDAWCee, CO Andorra, CEDAW/C/AND/CO/2–3 (2013), para 19.

<sup>1328</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 19; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 15; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20; CO Syria, CEDAW/C/SYR/CO/2 (2014), para 21.

<sup>1329</sup> CEDAWCee, CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23.

<sup>1330</sup> CEDAWCee, CO Colombia, CEDAW/C/COL/CO/7–8 (2013), para 13; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 17.

<sup>1331</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 16; CO Guyana, CEDAW/C/GUY/CO/7–8 (2012), para 20; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 16; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 19; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 19; CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 20.

<sup>1332</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 19; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 17; CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 25; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 15; CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 16; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 16; CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 18; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 22; CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 20; CO Colombia, CEDAW/C/COL/CO/7–8 (2013), para 13; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 17; CO Guyana, CEDAW/C/GUY/CO/7–8 (2012), para 20; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 19.

<sup>1333</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 16; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 17; CO Azerbaijan, CEDAW/C/AZE/CO/5 (2015), para 20; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 17; CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 25; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 16; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 18; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 15; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20.

<sup>1334</sup> CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 16; CO Ecuador, CEDAW/C/ECU/CO/8–9 (2015), para 18.

<sup>1335</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 19; CO Solomon Islands, CEDAW/C/SLB/CO/1–3 (2014), para 22; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 15; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Maldives, CEDAW/C/MDV/CO/4–5 (2015), para 20; CO Tuvalu, CEDAW/C/TUV/CO/3–4 (2015), para 19; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20; CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 18; CO Colombia, CEDAW/C/COL/CO/7–8 (2013), para 13; CO Moldova, CEDAW/C/MDA/CO/4–5 (2013), para 17; CO Guyana, CEDAW/C/GUY/CO/7–8 (2012), para 20; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 19; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 19.

the CEDAWCee, stereotypes ‘restrict women’s educational and professional choices, as well as their participation in political and public life and in the labour market, as well as perpetuates their unequal status in family relations’<sup>1336</sup>, undermine women’s educational and career prospects<sup>1337</sup>, or more generally ‘undermine women’s and girls’ rights and capacity to develop their personal abilities and make free choices about their lives and life plans’.<sup>1338</sup> The Concluding Observations on Russia provide a case in point:

The Committee remains concerned at the persistence of patriarchal attitudes and stereotypes concerning the roles and responsibilities of women and men in the family and in society, *which consider women primarily as mothers and caregivers, discriminate against women and perpetuate their subordination within the family and society, restrict women’s educational and professional choices, as well as their participation in political and public life and in the labour market, as well as perpetuates their unequal status in family relations.*<sup>1339</sup>

States parties are systematically reminded of their obligations to address not only the manifestations of gender-based discrimination, but also its underlying cultural justifications<sup>1340</sup>, the underlying cultural and traditional beliefs<sup>1341</sup>, or the underlying causes, including prevailing social and (traditional) cultural attitudes.<sup>1342</sup> The standard recipe is to conduct education and awareness-raising campaigns targeted at all relevant stakeholders. In order to eliminate stereotypes (and harmful or discriminatory practices), States parties are generally advised to conduct (public) education and awareness-raising programmes, campaigns, efforts or initiatives on the negative effects of harmful practices and discriminatory stereotypes on women’s enjoyment of their rights<sup>1343</sup>, on the sharing of domestic and family responsibilities between women and men<sup>1344</sup>, or to ‘create an environment that is supportive of equality between women and men’.<sup>1345</sup> The Concluding Observations on Liberia provide a typical example:

Recalling (...) General Recommendation No. 31 of the Committee (...) on harmful practices, the Committee urges the State party to:

<sup>1336</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 19; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20.

<sup>1337</sup> CEDAWCee, CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 17; CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 25.

<sup>1338</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 23.

<sup>1339</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 19; another illustrative example: CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 15.

<sup>1340</sup> CEDAWCee, CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 19; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 22.

<sup>1341</sup> CEDAWCee, CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 31.

<sup>1342</sup> CEDAWCee, CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 20; CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 30; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 24.

<sup>1343</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 26; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 19; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 19; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21; CO Venezuela, CEDAW/C/VEN/CO/7–8 (2014), para 17; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17.

<sup>1344</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 19.

<sup>1345</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 26.

- (a) Intensify media and other awareness-raising efforts to sensitize the public about existing discriminatory gender stereotypes that persist at all levels of society, with a view to eliminating them.<sup>1346</sup>

The CEDAWCee often specifies who the State party should collaborate with, and who should be targeted through the programmes or campaigns, with a great deal of overlap between the ‘partners’ and the ‘targets’. Suggested partners or parties to collaborate with are the (mass) media<sup>1347</sup>, civil society organizations<sup>1348</sup>, the educational or school system (both formal and informal)<sup>1349</sup>, traditional or religious leaders<sup>1350</sup>, health, education and social systems and other relevant professional groups.<sup>1351</sup> The CEDAWCee further recommends that these efforts should be targeted at ‘the general public’<sup>1352</sup>, women and men at all levels of society<sup>1353</sup>, children and parents<sup>1354</sup>, women and men as well as girls and boys<sup>1355</sup>, traditional, community or religious leaders or opinion leaders in the communities<sup>1356</sup>, officials at all levels<sup>1357</sup>, authorities and civil servants<sup>1358</sup>, teachers<sup>1359</sup>,

<sup>1346</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 22.

<sup>1347</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 22; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 18; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 19; CO Namibia, CEDAW/C/NAM/CO/4–5 (2015), para 19; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 19; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 19; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17.

<sup>1348</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 19; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 19; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 22.

<sup>1349</sup> CEDAWCee, CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 18; CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 26; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 19; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 19; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21.

<sup>1350</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 19; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 22.

<sup>1351</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17.

<sup>1352</sup> CEDAWCee, CO Namibia, CEDAW/C/NAM/CO/4–5 (2015), para 19.

<sup>1353</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 21; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 22; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19.

<sup>1354</sup> CEDAWCee, CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 18; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 19; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 19; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19.

<sup>1355</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 26; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 19; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19.

<sup>1356</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 22; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 21; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 19; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 19; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19; CO Tuvalu, CEDAW/C/TUV/CO/3–4 (2015), para 20; CO Oman, CEDAW/C/OMN/CO/1 (2011), para 26.

<sup>1357</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 19; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19.

<sup>1358</sup> CEDAWCee, CO Venezuela, CEDAW/C/VEN/CO/7–8 (2014), para 17.

<sup>1359</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 19; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 19.

the judiciary and law enforcement personnel<sup>1360</sup>, legislators<sup>1361</sup>, and health and education professionals.<sup>1362</sup> An example:

The Committee calls on the State party to: (...)

- (b) (...) Reinforce awareness-raising programmes targeting the judiciary, law enforcement personnel, teachers, parents and community leaders, as well as women and men and girls and boys, particularly in rural areas, on the negative effects of discriminatory stereotypes and harmful practices on women's enjoyment of their human rights.<sup>1363</sup>

And another example, from Namibia:

The Committee urges the State party:

- (a) To expand public education programmes on the negative impact of discriminatory stereotypes on women's enjoyment of their rights, in particular in rural areas, *targeting traditional leaders who are the custodians of customary values in the State party*;
- (b) To *cooperate with the media to educate the general public* and raise awareness about existing sex-based stereotypes that persist at all levels of society, with a view to eliminating them; (...).<sup>1364</sup>

While in the above examples traditional leaders are framed as the target of such awareness-raising campaigns, they may also be identified as the party to collaborate with:

The Committee recommends that the State party:

- (a) Put in place, without delay and within a clear time frame, a comprehensive strategy, in conformity with articles 2 (f) and 5 (a) of the Convention, to eliminate stereotypes and harmful practices that discriminate against women, such as child and forced marriages; female genital mutilation; breast ironing; the stigmatization of widows and widowhood rites; and the kidnapping of children, especially young girls, for the sale of organs or magic/religious practices; and, *in collaboration with civil society, the media, health, education and social systems and other relevant professional groups, and traditional leaders*, raise awareness about the adverse effects of harmful practices, *targeting women and girls as well as men and boys at all levels of society*; (...).<sup>1365</sup>

The CEDAWCee also addresses stereotypes and harmful practices in relation to specific rights in the Convention (under headings such as 'education', 'employment',

<sup>1360</sup> CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7-8 (2015), para 17.

<sup>1361</sup> CEDAWCee, CO Tuvalu, CEDAW/C/TUV/CO/3-4 (2015), para 14; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 12.

<sup>1362</sup> CEDAWCee, CO Oman, CEDAW/C/OMN/CO/1 (2011), para 26.

<sup>1363</sup> CEDAWCee, CO Timor-Leste, CEDAW/C/TLS/CO/2-3 (2015), para 15.

<sup>1364</sup> CEDAWCee, CO Namibia, CEDAW/C/NAM/CO/4-5 (2015), para 19; rather similar formulations occur in CO Liberia, CEDAW/C/LBR/CO/7-8 (2015), para 22; CO Swaziland, CEDAW/C/SWZ/CO/1-2 (2014), para 19.

<sup>1365</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4-5 (2014), para 17.

'health', 'access to justice', etc.). For example, consider the following example from the Concluding Observations on Malawi in relation to education:

(...) the Committee is concerned at:

- (c) Significantly high dropout and low transition and completion rates among school girls, at primary and secondary levels, *as a result of child and/or forced marriages, early pregnancies and traditional attitudes*, (...).

The Committee recommends that the State party:

- (c) Further promote the retention of girls in school, including by reinforcing its policy on the readmission to school of pregnant girls and young mothers, particularly in rural areas, and *addressing stigmatization faced by these girls upon return to school*; (...).<sup>1366</sup>

Another example from the Concluding Observations on Russia:

The Committee commends the State party for high numbers of women in the academia. However, the Committee is concerned at (...) *the persistence of negative stereotypes* against women and girls in the school curricula and textbooks.

The Committee recommends that the State party: (...)

- (b) Intensify its efforts in reviewing school curricula and textbooks *to eliminate negative stereotypes* against women and girls in the school curricula and textbooks.<sup>1367</sup>

An example in relation to employment:

The Committee acknowledges the adoption of legislative and other measures by the State party to eliminate discrimination against women in the field of employment and ensure that women and men have equal access to the labour market (...). While noting the efforts by the State party to increase female participation in non-traditional sectors of the economy, the Committee remains concerned about the clear horizontal segregation of the labour market and the concentration of women in low-income occupational categories.

The Committee recommends that the State party:

Adopt and implement policies, with time-bound targets and indicators, to reverse cultural patterns and transform traditional gender stereotypes and norms of sex-appropriate roles in the society transmitted through schooling and parenting in order to eliminate occupational segregation and achieve substantive equality of women and men in the labour market, including in traditionally male fields, through intensified technical and vocational training for women in those areas.<sup>1368</sup>

<sup>1366</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), paras 30–31.

<sup>1367</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), paras 31–32.

<sup>1368</sup> CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), paras 30–31.

An example in relation to health:

The Committee notes with concern (...)

The inadequate sexual and reproductive health services, including family planning services, the infrequent use of modern contraceptive methods *owing to traditional stereotypes, misconceptions, the social taboos around sexual activity before marriage* and the lack of information;

In line with general recommendation No. 24 on women and health, the Committee recommends that the State party: (...)

Ensure free access to modern contraceptive methods for women as part of the policy on free health care and provide age-appropriate information and education on sexual and reproductive health to *address misconceptions, stereotypes and the stigma attached to those methods*; (...).<sup>1369</sup>

And finally, an example on the role of stereotyping in relation to access to justice:

The Committee is concerned that, when seeking redress in cases of violence, women face difficulties, including discrimination, *prejudice* and gender insensitivity on the part of judicial authorities, prosecutors and police officers, which have the effect of discouraging them from gaining access to justice. (...)

The Committee urges the State party to strengthen its efforts, in a more articulated manner, to *modify entrenched gender stereotypes* and to comply with article 2 of the Convention and:

- (a) To strengthen the capacity of judges, prosecutors, law enforcement personnel and health professionals, especially forensic doctors, to deal with women who are victims of violence seeking access to justice in a *gender-sensitive* manner;
- (b) To *encourage women to report* all incidents of violence, including sexual violence, both inside and outside the family sphere; (...)
- (d) To carry out research on the impact of discriminatory and *stereotypical judicial reasoning and practices* on women's access to justice.<sup>1370</sup>

*De facto* gender discrimination may also manifest in violence against women. The CEDAWCee does not always clearly differentiate between 'violence against women' and 'harmful practices'. Violence against women takes many different forms, such as domestic violence<sup>1371</sup>, sexual violence (including rape)<sup>1372</sup>, rape and murder, committed by intimate

<sup>1369</sup> CEDAWCee, CO Solomon Islands, CEDAW/C/SLB/CO/1-3 (2014), paras 36-37.

<sup>1370</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7-8 (2014), paras 19-20.

<sup>1371</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 22; CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 21; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 20; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 17; CO Ghana, CEDAW/C/GHA/CO/6-7 (2014), para 26.

<sup>1372</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 21; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 17; CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), para 20; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 17; CO Ghana, CEDAW/C/GHA/CO/6-7 (2014), para 26.

partners<sup>1373</sup>, sexual harassment in school<sup>1374</sup>, or in the workplace<sup>1375</sup>, in the context of national service<sup>1376</sup>, *or in the form of harmful practices*. The most common and prevalent harmful practices in the concluding observations include female genital mutilation<sup>1377</sup>, early or child marriage<sup>1378</sup>, forced marriage<sup>1379</sup>, polygamy<sup>1380</sup>, widowhood practices or rites<sup>1381</sup>, levirate<sup>1382</sup>, sororate<sup>1383</sup>, bride price<sup>1384</sup>, dowry and dowry-related violence<sup>1385</sup>,

<sup>1373</sup> CEDAWCee, CO Namibia, CEDAW/C/NAM/CO/4–5 (2015), para 20.

<sup>1374</sup> CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 26.

<sup>1375</sup> CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 18.

<sup>1376</sup> CEDAWCee, CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 20.

<sup>1377</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 16; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 18; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 18; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 16; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20; CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 28; CO Central African Republic, CEDAW/C/CAF/CO/1–5 (2014), para 25; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 22; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 16; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 18; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO Colombia, CEDAW/C/COL/CO/7–8 (2013), para 13.

<sup>1378</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 16; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 19; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 14; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 18; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 16; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 18; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20; CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 28; CO Solomon Islands, CEDAW/C/SLB/CO/1–3 (2014), para 22; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 22; CO Syria, CEDAW/C/SYR/CO/2 (2014), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 16; CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 25; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 18; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO Afghanistan, CEDAW/C/AFG/CO/1–2 (2013), para 22; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23; CO India, CEDAW/C/IND/CO/4–5 (2014), para 20; CO Nepal, CEDAW/C/NPL/CO/4–5 (2011), para 17.

<sup>1379</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 18; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 14; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 16; CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 28; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 22; CO Syria, CEDAW/C/SYR/CO/2 (2014), para 21; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 16; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO Afghanistan, CEDAW/C/AFG/CO/1–2 (2013), para 22; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23.

<sup>1380</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 16; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 19; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 14; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 18; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 18; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 20; CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 28; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 19; CO Nepal, CEDAW/C/NPL/CO/4–5 (2011), para 17.

<sup>1381</sup> CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Central African Republic, CEDAW/C/CAF/CO/1–5 (2014), para 25; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 16; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23.

<sup>1382</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 18; CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 28; CO Central African

crimes committed in the name of so-called honour<sup>1386</sup>, ‘acid attacks’<sup>1387</sup>, the accusing or even criminalisation of witchcraft, and violence against children and women considered to be witches.<sup>1388</sup> Other harmful practices which are less common, or even specific to one particular State are sexual cleansing of widows<sup>1389</sup>, initiation rites and ceremonies for girls which lead to abuse<sup>1390</sup>, temporary marriage<sup>1391</sup>, exchange marriage<sup>1392</sup>, repudiation<sup>1393</sup>, food prohibitions or taboos<sup>1394</sup>, forced feeding<sup>1395</sup>, son preference or sex-selective abortion<sup>1396</sup>, ritual crimes<sup>1397</sup>, bride-selling or sale of wives<sup>1398</sup>, settlement of disputes by giving away girls (*baad*)<sup>1399</sup>, prescribing sex with girls or women with albinism as a cure of HIV<sup>1400</sup>, bride kidnapping<sup>1401</sup>, kidnapping of children, especially young girls, for the sale of organs or magic/religious practices<sup>1402</sup>, purification rites for adulterous women<sup>1403</sup>, enslaving young girls in *trokosi* shrines<sup>1404</sup>,

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- Republic, CEDAW/C/CAF/CO/1–5 (2014), para 25; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23.
- 1383 CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), para 28; CO Central African Republic, CEDAW/C/CAF/CO/1–5 (2014), para 25; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16.
- 1384 CEDAWCee, CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 19; CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 18; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 14; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 19.
- 1385 CEDAWCee, CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 23; CO India, CEDAW/C/IND/CO/4–5 (2014), para 20; CO Nepal, CEDAW/C/NPL/CO/4–5 (2011), para 17.
- 1386 CEDAWCee, CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 16; CO Syria, CEDAW/C/SYR/CO/2 (2014), para 21; CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 25; CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 20; CO India, CEDAW/C/IND/CO/4–5 (2014), para 20.
- 1387 CEDAWCee, CO India, CEDAW/C/IND/CO/4–5 (2014), para 10.
- 1388 CEDAWCee, CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Central African Republic, CEDAW/C/CAF/CO/1–5 (2014), para 25; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16; CO India, CEDAW/C/IND/CO/4–5 (2014), para 20; CO Nepal, CEDAW/C/NPL/CO/4–5 (2011), para 17.
- 1389 CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 19; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20.
- 1390 CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20.
- 1391 CEDAWCee, CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 25.
- 1392 CEDAWCee, CO Afghanistan, CEDAW/C/AFG/CO/1–2 (2013), para 22.
- 1393 CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18.
- 1394 CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18.
- 1395 CEDAWCee, CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 22.
- 1396 CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 16; CO India, CEDAW/C/IND/CO/4–5 (2014), para 20; CO Nepal, CEDAW/C/NPL/CO/4–5 (2011), para 17; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 24.
- 1397 CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20.
- 1398 CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 18; CO Solomon Islands, CEDAW/C/SLB/CO/1–3 (2014), para 22.
- 1399 CEDAWCee, CO Afghanistan, CEDAW/C/AFG/CO/1–2 (2013), para 22.
- 1400 CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20.
- 1401 CEDAWCee, CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 15; CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 20.
- 1402 CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 16.
- 1403 CEDAWCee, CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16.
- 1404 CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 22.

breast ironing<sup>1405</sup>, property grabbing<sup>1406</sup>, *sati* and *devadasi*<sup>1407</sup>, *chaupadi*, *jhuma*, *deuki* and *dhan-khaane*.<sup>1408</sup>

The CEDAWCee tends to address harmful practices together with – and as a form of – violence against women<sup>1409</sup>, although sometimes it chooses to address them separately.<sup>1410</sup> The fact is that the Committee sees them as interrelated, and that they are both *explicitly* considered as being caused by or exacerbated by cultural norms and stereotypes. See, for instance, the Concluding Observations on Angola:

The Committee expresses its deep concern at the persistence of *adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes* regarding the roles and responsibilities of women and men in the family and society. *It notes that stereotypes contribute to the persistence of violence against women as well as harmful practices*, including early marriage, polygamy, female genital mutilation, levirate, and acts of violence against women of the San Community and against children or old women considered to be witches. The Committee expresses its deep concern that the State party has not taken sufficient sustained and systematic action to eliminate stereotypes and negative cultural values and harmful practices.<sup>1411</sup>

In general, the CEDAWCee is concerned that ‘the persistence of adverse cultural norms, practices and traditions’ and ‘patriarchal attitudes and deep-rooted stereotypes’ *contribute to* ‘the persistence of violence against women as well as harmful practices’<sup>1412</sup>, although occasionally harmful practices are considered a cause instead of a consequence:

<sup>1405</sup> CEDAWCee CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 16.

<sup>1406</sup> CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 19.

<sup>1407</sup> CEDAWCee, CO India, CEDAW/C/IND/CO/4–5 (2014), para 20; *Sati* and *devadasi* are special forms of cultural violence against women and girls prevalent in the Indian subcontinent. *Sati* or self-immolation is a practice where the widow is burned on the funeral pyre along with her dead husband; *devadasi* is the practice of prostitution in the name of religion.

<sup>1408</sup> CEDAWCee, CO Nepal, CEDAW/C/NPL/CO/4–5 (2011), para 17; *Chaupadi* is a tradition that banishes females during their menstruation period from the house. *Jhuma* is the practice of offering the second girl child of a family to the monastery, where she will spend her whole life without marriage. *Deuki* is the practice of offering a girl child to a temple to collect religious merits; the *deuki* has to spend her whole life in the temple by taking care of the temple, and she has to live on the offerings offered by worshippers; *deukis* are physically exploited by priests and worshippers. *Dhan-khaane* is a tradition whereby the bride’s father takes money from the groom’s family for marriage.

<sup>1409</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 22; CO Democratic Republic of the Congo, CEDAW/C/COD/CO/6–7 (2013), para 19; CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 16.

<sup>1410</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 21; CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 18; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 20; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 14; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 18; CO Namibia, CEDAW/C/NAM/CO/4–5 (2015), para 18.

<sup>1411</sup> CEDAWCee, CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17.

<sup>1412</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 18; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 20; CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 22; CO Democratic Republic of the

The Committee notes some efforts by the State party to address harmful traditional practices but remains concerned at 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. The Committee is concerned that such customs and practices perpetuate discrimination against women, and are reflected in women's disadvantageous and unequal status in many areas (...). The Committee is concerned *that stereotypes as well as harmful practices* such as sexual cleansing, polygamy, bride price (lobola), and property-grabbing *contribute to the persistence of violence against women* and that the State party has not taken sustained and systematic action to eliminate stereotypes and harmful practices.<sup>1413</sup>

The CEDAWCee has thus established a clear link between culture and violence against women, including harmful practices.

The CEDAWCee has repeatedly considered that violence against women, and in particular domestic and sexual violence, is 'culturally accepted'<sup>1414</sup>, 'perceived as normal owing to deep-rooted patriarchal attitudes'<sup>1415</sup>, or appears to be 'socially legitimized'.<sup>1416</sup> It has also expressed concern at 'the persistence of sociocultural attitudes condoning such violence'<sup>1417</sup>, 'the persistence of sociocultural patterns and attitudes used to justify violence against women'<sup>1418</sup>, and at 'the high levels of social acceptance' of such forms of violence.<sup>1419</sup> In addition, the CEDAWCee has contemplated several times that such violence against women is 'accompanied by a culture of silence and impunity'<sup>1420</sup>, which it considers to be 'contributing to high levels of underreporting'.<sup>1421</sup> Other possible reasons or causes of underreporting identified by the CEDAWCee include: cultural taboos or beliefs<sup>1422</sup>, the prevalence of discriminatory social and cultural norms<sup>1423</sup>, cases of violence against women being considered a

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Congo, CEDAW/C/COD/CO/6-7 (2013), para 19; CO Angola, CEDAW/C/AGO/CO/6 (2013), para 17; CO Djibouti, CEDAW/C/DJI/CO/1-3 (2011), para 16.

<sup>1413</sup> CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5-6 (2011), para 19.

<sup>1414</sup> CEDAWCee, CO Guyana, CEDAW/C/GUY/CO/7-8 (2012), para 22.

<sup>1415</sup> CEDAWCee, CO Iraq, CEDAW/C/IRQ/CO/4-6 (2014), para 28.

<sup>1416</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6-7 (2015), para 20; CO Tuvalu, CEDAW/C/TUV/CO/3-4 (2015), para 21; CO Zambia, CEDAW/C/ZMB/CO/5-6 (2011), para 21; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 23; CO Turkmenistan, CEDAW/C/TKM/CO/3-4 (24 October 2012), para 22.

<sup>1417</sup> CEDAWCee, CO Italy, CEDAW/C/ITA/CO/6 (26 July 2011), para 26; CO Bulgaria, CEDAW/C/BGR/CO/4-7 (27 July 2012), para 25.

<sup>1418</sup> CEDAWCee, CO Peru, CEDAW/C/PER/CO/7-8 (2014), para 17.

<sup>1419</sup> CEDAWCee, CO Solomon Islands, CEDAW/C/SLB/CO/1-3 (2014), para 24.

<sup>1420</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6-7 (2015), para 20; CO Tuvalu, CEDAW/C/TUV/CO/3-4 (2015), para 21; CO Zambia, CEDAW/C/ZMB/CO/5-6 (2011), para 21; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 23.

<sup>1421</sup> CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5-6 (2011), para 23.

<sup>1422</sup> CEDAWCee, CO Benin, CEDAW/C/BEN/CO/4 (2013), para 18; CO Chad, CEDAW/C/TCD/CO/1-4 (2011), para 22; CO Afghanistan, CEDAW/C/AFG/CO/1-2 (2013), para 22.

<sup>1423</sup> CEDAWCee, CO Cuba, CEDAW/C/CUB/CO/7-8 (2013), para 24; CO Greece, CEDAW/C/GRC/CO/7 (2013), para 20; CO Jamaica, CEDAW/C/JAM/CO/6-7 (2012), para 21.

private matter<sup>1424</sup>, to be settled within the family<sup>1425</sup>, victims' fear of stigmatisation (by their communities) or re-victimisation<sup>1426</sup>, fear of reprisals and retaliation<sup>1427</sup>, an apparent lack of trust in the judicial institutions or law enforcement officers<sup>1428</sup>, the subordinate role of women in society<sup>1429</sup>, and the potential consequences for their family life, and the lack of awareness among women of the criminalisation of domestic violence.<sup>1430</sup> An example from the Concluding Observations on Tuvalu:

The Committee is concerned, however, about:

- (a) The persistence of violence against women, including domestic violence, and the insufficient information about its extent and prevalence;
- (b) The fact that such violence would appear to be *socially legitimized* and accompanied by a culture of silence and impunity, *owing to women's reluctance to report such cases out of fear of reprisals, stigmatization and inadequate response by the police; (...)*<sup>1431</sup>

Or consider this example from the CEDAWCee's observations regarding the Maldives:

While noting the State party's efforts to strengthen its criminal law provisions against violence against women, the Committee notes with concern: (...) *Social stigma attached to women who bring cases of sexual and domestic violence to court and the widespread perception among law enforcement officials that domestic violence cases are private family matters*, which deter victims from reporting.<sup>1432</sup>

To combat the social acceptance of violence against women, and the (related) underreporting of such violence, States parties should encourage women to lodge formal complaints about domestic and sexual violence, by 'destigmatizing victims'<sup>1433</sup>,

<sup>1424</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 21; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 17; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 17; CO Maldives, CEDAW/C/MDV/CO/4-5 (2015), para 22.

<sup>1425</sup> CEDAWCee, CO Djibouti, CEDAW/C/DJI/CO/1-3 (2011), para 20; CO Mauritius, CEDAW/C/MUS/CO/6-7 (2011), para 22.

<sup>1426</sup> CEDAWCee, CO Timor-Leste, CEDAW/C/TLS/CO/2-3 (2015), para 16; CO Solomon Islands, CEDAW/C/SLB/CO/1-3 (2014), para 24; CO Georgia, CEDAW/C/GEO/CO/4-5 (2014), para 20; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 18; CO Afghanistan, CEDAW/C/AFG/CO/1-2 (2013), para 22.

<sup>1427</sup> CEDAWCee, CO Solomon Islands, CEDAW/C/SLB/CO/1-3 (2014), para 24; CO Georgia, CEDAW/C/GEO/CO/4-5 (2014), para 20; CO Afghanistan, CEDAW/C/AFG/CO/1-2 (2013), para 22.

<sup>1428</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6-7 (2015), para 20; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4-8 (2015), para 20; CO Maldives, CEDAW/C/MDV/CO/4-5 (2015), para 22; CO Solomon Islands, CEDAW/C/SLB/CO/1-3 (2014), para 24; CO Georgia, CEDAW/C/GEO/CO/4-5 (2014), para 20.

<sup>1429</sup> CEDAWCee, CO Afghanistan, CEDAW/C/AFG/CO/1-2 (2013), para 22.

<sup>1430</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), para 20.

<sup>1431</sup> CEDAWCee, CO Tuvalu, CEDAW/C/TUV/CO/3-4 (2015), para 21.

<sup>1432</sup> CEDAWCee, CO Maldives, CEDAW/C/MDV/CO/4-5 (2015), para 22.

<sup>1433</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 23; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4-8 (2015), para 21; CO Viet Nam, CEDAW/C/VNM/CO/7-8

raising awareness about the ‘grave and serious’ or ‘criminal’ nature of such acts<sup>1434</sup>, and ‘eradicating the underlying cultural justifications’ for such violence and practices.<sup>1435</sup> The Concluding Observations on Senegal provide another interesting example:

The Committee urges the State party:

- (a) *To encourage women to report cases of domestic violence* by raising awareness of the legal provisions criminalizing domestic violence and ensure effective access to remedies for victims of domestic violence, *taking into consideration their social and economic dependence on their husbands*, and issue protection orders when necessary; (...)
- (d) *To undertake awareness-raising and educational activities*, targeted at men and women, *as well as training* for judges, prosecutors, the police and other law enforcement officials and health-care and social workers, with support from civil society, *to eliminate prejudices relating to violence against women such as considering women responsible for the violence that they suffer*; (...).<sup>1436</sup>

States parties should address the root causes of violence against women, notably the subordinate status of women and girls in the family<sup>1437</sup>, and ensure that women victims of harmful practices can report cases without having to fear retribution or stigma.<sup>1438</sup> The CEDAWCee also recommends providing training or capacity building for judges, prosecutors, the police and other law enforcement officials, and occasionally also for health professionals, teachers, social workers, members of the military and/or religious and traditional leaders<sup>1439</sup>, on the strict application of legislation criminalising violence against women and on gender-sensitive procedures to deal with women victims of violence.<sup>1440</sup>

A second concern for the CEDAWCee is the role of culture when it comes to the use of mediation instead of criminal proceedings in cases of domestic violence. Such

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(2015), para 19; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 18; CO Tuvalu, CEDAW/C/TUV/CO/3–4 (2015), para 22; CO Cambodia, CEDAW/C/KHM/CO/4–5 (2013), para 21; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 21.

<sup>1434</sup> CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 21; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 23; CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 21; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 17; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 18; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 19; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 18.

<sup>1435</sup> CEDAWCee, CO Mauritius, CEDAW/C/MUS/CO/6–7 (2011), para 23.

<sup>1436</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 21.

<sup>1437</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 28.

<sup>1438</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 24.

<sup>1439</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 21; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 19; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 19; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 21.

<sup>1440</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 23; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 17; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 18; CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 19; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 21; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 18; CO Tuvalu, CEDAW/C/TUV/CO/3–4 (2015), para 23.

mediation procedures are often part of an informal or traditional justice system.<sup>1441</sup> The CEDAWCee has *explicitly* identified culture – in the form of gender bias – as a problematic issue in relation to the (excessive) use of ‘conciliation’<sup>1442</sup>, ‘reconciliation procedures’<sup>1443</sup>, ‘reconciliatory mediation’<sup>1444</sup>, ‘mediation and conciliation procedures’<sup>1445</sup>, ‘community dispute settlement’<sup>1446</sup>, ‘out-of-court settlements’<sup>1447</sup>, etc.<sup>1448</sup> According to the CEDAWCee such conciliation or mediation can be ‘detrimental to women due to the prevailing gender bias in society’<sup>1449</sup>, ‘often do not take into account women’s best interests’<sup>1450</sup>, and ‘may lead to the re-victimization of women who have suffered violence’.<sup>1451</sup> This is not to say that criminal proceedings or taking such cases to court is a guarantee that gender is adequately taken into account. The (official) justice system may just as well be hindered by stereotypes and negative attitudes.<sup>1452</sup> The CEDAWCee has, for example, expressed concern about ‘the persistence of stereotypes within the judiciary according to which women are perceived to be partly responsible for the violence that they suffer’<sup>1453</sup>, and about ‘the lack of public trust in the justice system and the negative attitudes of judicial officers and law enforcement personnel towards women victims of violence’.<sup>1454</sup>

The CEDAWCee has frequently expressed concern about *de facto* and *de jure* discrimination in the areas of marriage and family relations, which are closely connected to matters of culture, religion and identity. The link to culture and/or religion is not always explicitly established by the Committee, however.

Occasionally, the CEDAWCee *explicitly* points at traditional or cultural attitudes as an underlying factor perpetuating discrimination against women in marriage and family life. Take the Concluding Observations on Madagascar, for example:

The Committee notes the State party’s efforts to regulate some aspects of traditional marriages, including their registration and the equitable distribution of property upon dissolution. However, it remains concerned that traditional marriages remain largely unregistered, resulting in lack of access for women to protection (...). It is also concerned

<sup>1441</sup> CEDAWCee, CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 16; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 17; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 20.

<sup>1442</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 20.

<sup>1443</sup> CEDAWCee, CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 18.

<sup>1444</sup> CEDAWCee, CO Lithuania, CEDAW/C/LTU/CO/5 (2014), para 24.

<sup>1445</sup> CEDAWCee, CO Finland, CEDAW/C/FIN/CO/7 (2014), para 18.

<sup>1446</sup> CEDAWCee, CO Solomon Islands, CEDAW/C/SLB/CO/1–3 (2014), para 24.

<sup>1447</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 22.

<sup>1448</sup> CEDAWCee, CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 16; CO Uzbekistan, CEDAW/C/UZB/CO/5 (2015), para 17; CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 18; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 18; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 20; CO Eritrea, CEDAW/C/ERI/CO/5 (2015), para 20; CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 26.

<sup>1449</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6–7 (2015), para 20.

<sup>1450</sup> (CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 22.

<sup>1451</sup> CEDAWCee, CO Finland, CEDAW/C/FIN/CO/7 (2014), para 18.

<sup>1452</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 20; CO Cambodia, CEDAW/C/KHM/CO/4–5 (2013), para 20.

<sup>1453</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 20.

<sup>1454</sup> CEDAWCee, CO Cambodia, CEDAW/C/KHM/CO/4–5 (2013), para 20.

that *due to customary and traditional attitudes women are considered inferior to men and do not benefit from the right to an equal treatment in marriage and family matters* including divorce, inheritance, and custody, and that cases of polygamy persist. It reiterates its concern about the overall lack of awareness of the law on marriage among the population as well as about its enforcement.<sup>1455</sup>

Likewise, the CEDAWCee has noted ‘that women are deprived of their inheritance rights *owing to their subordinate role in society* and domination by their male relatives’<sup>1456</sup>, and the ‘persistence of *cultural attitudes* and power imbalances within family relations that lead to *discriminatory attitudes* towards women and girls’.<sup>1457</sup>

To resolve such discrimination, States parties are recommended to conduct awareness-raising campaigns with a view to making women and girls aware of their rights with regard to family relations and marriage<sup>1458</sup>, and to change attitudes and behaviour in that connection.<sup>1459</sup> Consider the related recommendation from the example of Madagascar:

The Committee (...) recommends that the State party:

- (a) Ensure the equal rights of women and men in all matters relating to marriage and family relations, as well as to inheritance, divorce and custody of children, without further delay;
- (b) *Increase knowledge and awareness of the law* on marriage, ensure its enforcement, facilitate the registration of all marriages to protect the rights of women in de facto unions as well as enforce the prohibition of polygamy;
- (c) Carry out wide-reaching awareness-raising and education campaigns to change attitudes and behaviour about practices related to marriage and family relations among traditional leaders and the population in general;
- (d) Conduct awareness-raising campaigns targeting women and girls to make them aware of their rights with regard to family relations and marriage.<sup>1460</sup>

The CEDAWCee has often expressed concern about the existence or persistence of provisions in personal status laws which discriminate against women and girls, including provisions relating to marriage (minimum age of marriage, polygamy), divorce, nationality, child custody, guardianship, inheritance, marital property, adoption, burial and devolution of property on death. The CEDAWCee does not explicitly link these provisions to culture. In general, States parties are recommended to undertake legal reforms. States parties need to review or repeal all provisions which discriminate against women, including those on minimum age of marriage and polygamy, and all those

<sup>1455</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6-7 (2015), para 46.

<sup>1456</sup> CEDAWCee, CO Afghanistan, CEDAW/C/AFG/CO/1-2 (2013), para 42.

<sup>1457</sup> CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4-8 (2015), para 42.

<sup>1458</sup> CEDAWCee, CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 42; CO Afghanistan, CEDAW/C/AFG/CO/1-2 (2013), para 43.

<sup>1459</sup> CEDAWCee, CO Madagascar, CEDAW/C/MDG/CO/6-7 (2015), para 47; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4-8 (2015), paras 42-43.

<sup>1460</sup> CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4-8 (2015), para 47.

(patriarchal) laws regulating spousal rights and duties.<sup>1461</sup> While recommendations nowhere explicitly oblige States to change, challenge or eradicate any underlying culture, States parties may – and this indicates that the CEDAWCee *implicitly* recognizes the religious/cultural nature of the provisions – be invited to take the experiences of other countries with similar cultural or religious backgrounds and legal norms into account when reviewing their personal status laws, and in particular the existing discriminatory provisions relating to marriage and family relations.<sup>1462</sup> See, for instance, the Concluding Observations on the United Arab Emirates:

The Committee reiterates its recommendation that the State party (...) undertake a comprehensive legislative review of its Personal Status Law, *taking into account the experience of other countries with similar cultural backgrounds and legal norms*, to provide women with equal rights in marriage, divorce, property relations, and with regard to the custody of children.<sup>1463</sup>

Or the Concluding Observations on Oman:

The Committee recommends that the State party:

- (a) Embark on law reform with regard to the Personal Status Code *taking into consideration the experiences of countries with similar religious backgrounds and legal systems* that have successfully accommodated their domestic legislation to commitments emanating from the legally binding international instruments they have ratified, specifically with respect to matters of property, divorce, inheritance and the requirement of the ‘wali’ in entering marriage; (...).<sup>1464</sup>

Finally, the CEDAWCee has repeatedly expressed concern about the existence of ‘multiple legal systems’.<sup>1465</sup> Occasionally, the CEDAWCee specifies that these different

<sup>1461</sup> CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 45; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 39; CO Democratic Republic of the Congo, CEDAW/C/COD/CO/6–7 (2013), para 38; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 39; CO Oman, CEDAW/C/OMN/CO/1 (2011), para 45; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 39; CO Seychelles, CEDAW/C/SYC/CO/1–5 (2013), para 39; States parties should repeal provisions relating to polygamy, differences in spousal obligations, the husband’s role as the head of household, the choice of residence being solely that of the husband, the need for women to gain authorization by their husband for any legal act, the requirement of the ‘wali’ in entering marriage, the woman’s duty to obey her husband, the husband’s right to forbid his wife to (continue to) work, the practice of repudiation, the administration of family property solely by the husband, discrimination in the consequences of breach of marriage, discrimination against (Muslim) women with regard to their right to inheritance, adultery, and giving preference to the father as regards the administration of the child’s property, the consent to the child’s marriage and the domicile of the child.

<sup>1462</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 46; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 49; CO Bahrein, CEDAW/C/BHR/CO/3 (2014), para 44; CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 42; CO Oman, CEDAW/C/OMN/CO/1 (2011), para 45.

<sup>1463</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 46.

<sup>1464</sup> CEDAWCee, CO Oman, CEDAW/C/OMN/CO/1 (2011), para 45.

<sup>1465</sup> CEDAWCee, CO Pakistan, CEDAW/C/PAK/CO/4 (2013), para 37; CO Afghanistan, CEDAW/C/AFG/CO/1–2 (2013), para 42.

legal systems apply to different cultural or religious groups. For instance, it expressed concern about ‘the coexistence of multiple legal systems with regard to marriage and family relations in the State party, *applying to the various religious groups*’<sup>1466</sup>, and ‘the adoption of different personal status laws *according to religious doctrines*’.<sup>1467</sup> The CEDAWCee has also expressed concern about the coexistence of customary and civil law systems<sup>1468</sup>, and of civil, religious and customary law.<sup>1469</sup> According to the CEDAWCee, multiple family law systems may result in diverging levels of protection afforded to women depending on one’s personal status<sup>1470</sup>, and are to the detriment of women’s rights in the field of marriage and family relations.<sup>1471</sup> The Concluding Observations on Lebanon provide an example:

The Committee is concerned that the multiplicity of personal status laws in the State party on account of its religious diversity, is resulting in discrimination against women within their sect, and inequality among women belonging to different sects in key aspects of their lives, including marriage, divorce, and custody of children.<sup>1472</sup>

The CEDAWCee is also concerned at the lack of awareness among women as to their choices and their consequences<sup>1473</sup>, as can be seen in the Concluding Observations on Liberia:

The Committee notes the complexity of the different and sometimes contradictory customary and civil marital regimes in the State party with varied legal implications, and is concerned at *the lack of awareness among women as to their choices of applicable legal mechanisms for redress and their consequences*.<sup>1474</sup>

Regarding the existence of multiple family laws in a State party, the CEDAWCee generally refers to its General Recommendation No 29, sometimes explicitly recalling ‘that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women’.<sup>1475</sup> States parties are recommended to ‘harmonize civil, religious and

<sup>1466</sup> CEDAWCee, CO India, CEDAW/C/IND/CO/4–5 (2014), para 40.

<sup>1467</sup> CEDAWCee, CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 52.

<sup>1468</sup> CEDAWCee, CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 42; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 43; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 41; CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 43.

<sup>1469</sup> CEDAWCee, CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 47–48.

<sup>1470</sup> CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 40.

<sup>1471</sup> CEDAWCee, CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 43; CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 52.

<sup>1472</sup> CEDAWCee, CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 45.

<sup>1473</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 43; CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 42.

<sup>1474</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 43.

<sup>1475</sup> CEDAWCee, General Recommendation No. 29: article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29, 30 October 2013, para 14; see also CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 53.

customary law with article 16 of the Convention<sup>1476</sup>, or to ensure that ‘all the laws on marriage and family relations governing the various religious groups (...) are in full compliance with articles 15 and 16 of the Convention’.<sup>1477</sup> States parties should ‘take measures to ensure that statutory law does in fact prevail where there is a conflict with customary practices, especially in family relations and given the patriarchal focus of the customary law’<sup>1478</sup>, or adopt ‘a unified family law’ guaranteeing equal rights to women and men in family relations and during and upon dissolution of a marriage.<sup>1479</sup> The Concluding Observations on Lebanon can serve as an example:

The Committee recommends that the State party:

- (a) Adopt *an optional civil personal status law* based on the principles of equality and non-discrimination and *the right to choose one’s religious affiliation* in order to protect women and alleviate their legal, economic and social marginalization;
- (b) Require religious sects to codify their laws and submit them to Parliament for review of their conformity with the Constitution and the provisions of the Convention; establish an appeals mechanism to oversee religious court proceedings and *ensure that judgements of religious courts do not discriminate against women; (...)*.<sup>1480</sup>

Local customary leaders and magistrates or administrators of customary and traditional courts should be trained to uphold the rights of women and girls (including land and inheritance rights) at the community level<sup>1481</sup>:

The Committee calls upon the State party to: (...)

- (c) *Train and sensitize administrators of customary and traditional courts* about the Convention and statutory laws that promote and guarantee the rights of women and girls, including with regard to marriage and family relations; (...).<sup>1482</sup>

The CEDAWCee recommends States parties to repeal or withdraw all discriminatory provisions or to bring those provisions into full conformity with (art 16 of) the Convention, providing women and men with equal rights with regard to their responsibilities within the family, and in marriage, divorce, marital property or property relations, adoption, custody, inheritance or devolution of property on death, land ownership and land inheritance, burial, etc.<sup>1483</sup> States parties may be called upon to evaluate their traditional customs and usages:

<sup>1476</sup> CEDAWCee, CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 48.

<sup>1477</sup> CEDAWCee, CO India, CEDAW/C/IND/CO/4–5 (2014), para 41.

<sup>1478</sup> CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 42.

<sup>1479</sup> CEDAWCee, CO Solomon Islands, CEDAW/C/SLB/CO/1–3 (2014), para 55; CO Bahrein, CEDAW/C/BHR/CO/3 (2014), para 44.

<sup>1480</sup> CEDAWCee, CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 46.

<sup>1481</sup> CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 42; CO Tuvalu, CEDAW/C/TUV/CO/3–4 (2015), para 34.

<sup>1482</sup> CEDAWCee, CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 42.

<sup>1483</sup> CEDAWCee, CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 39; CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 46; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 49; CO

The Committee recommends that the State party: (...)

- (h) Provide assistance to the National House of Chiefs and ensure that it complies with its constitutional mandate to undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law and *an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful* (...); (...).<sup>1484</sup>

### 2.3.2 Discrimination on grounds of sexual orientation and gender identity

The CEDAWCee has not really touched on the issue of discrimination on grounds of sexual orientation and gender identity in its general recommendations, although in General Recommendation No 29 it briefly notes that ‘certain forms of relationships, namely same-sex relationships, are not legally, *socially or culturally accepted* in a considerable number of States parties’. According to the CEDAWCee, ‘where they are recognized, whether as a *de facto* union, registered partnership or marriage, the State party should ensure protection of the economic rights of the women in those relationships’.<sup>1485</sup>

In its concluding observations, the CEDAWCee generally remains silent on the role of culture in relation to discrimination against lesbian, bisexual, transgender and intersex (LBTI) women, possibly due to its focus on gender discrimination. There are concerns about forms of *de facto* discrimination against LBTI women<sup>1486</sup>, including by the judiciary and law enforcement personnel<sup>1487</sup>, and in employment, health care and education.<sup>1488</sup> These concerns include reports of hate speech or acts of incitement to hatred against LBT women, the arbitrary detention of women perceived to be lesbian<sup>1489</sup>, and physical violence and harassment against LBT women.<sup>1490</sup> There are also concerns about forms of *de jure* discrimination, such as restrictions on

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Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 39; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 45; CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 42; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 39; CO Seychelles, CEDAW/C/SYC/CO/1–5 (2013), para 39; CO Afghanistan, CEDAW/C/AFG/CO/1–2 (2013), para 43; CO Democratic Republic of the Congo, CEDAW/C/COD/CO/6–7 (2013), para 38; CO Djibouti, CEDAW/C/DJI/CO/1–3 (2011), para 37.

<sup>1484</sup> CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 41.

<sup>1485</sup> CEDAWCee, General Recommendation No. 29: article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29, 30 October 2013, para 24.

<sup>1486</sup> CEDAWCee, CO Uganda, CEDAW/C/UGA/CO/7 (2010), paras 43–44; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 38; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 9; CO Venezuela, CEDAW/C/VEN/CO/7–8 (2014), para 36; CO Peru, CEDAW/C/PER/CO/7–8 (2014), para 39; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 36.

<sup>1487</sup> CEDAWCee, CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 38.

<sup>1488</sup> CEDAWCee, CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 29; CO Norway, CEDAW/C/NOR/CO/8 (2012), para 33; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 43.

<sup>1489</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 44.

<sup>1490</sup> CEDAWCee, CO Georgia, CEDAW/C/GEO/CO/4–5 (2014), para 34.

obtaining identity documents for transgender persons<sup>1491</sup>, about the criminalisation of homosexual acts or same sex relationships between women<sup>1492</sup>, and about laws banning ‘formation of a positive attitude to non-traditional sexual relations’.<sup>1493</sup> In all these instances, the role of culture remains unclear. Exceptionally, however, the CEDAWCee (*explicitly*) acknowledges the role of ‘negative stereotypes’ in relation to discrimination against LGBTI women.<sup>1494</sup> The Concluding Observations on the Russian Federation provide an example:

The Committee notes that *the laws* adopted at regional and federal levels banning ‘promotion of non-traditional sexual relations to minors’, have been upheld by the Constitutional Court (...), and *may reinforce homophobia*. It is concerned at reports of discrimination, harassment and hate speech, *based on negative stereotypes, against lesbian, bisexual, transgender and intersex women*, including by the police. The Committee is also concerned at reported cases of unjustified dismissals of teachers belonging to the LGBTI community.<sup>1495</sup>

In these instances, the respective States parties were recommended to ‘[p]rovide training to the police and law-enforcement officials, as well as *sensitization campaigns* aimed at the general public’<sup>1496</sup>, and ‘[e]valuate and strengthen measures *to counter negative stereotypes* against (...) lesbian, bisexual, transgender and intersex women (...)’.<sup>1497</sup>

### 2.3.3 Discrimination against other vulnerable or disadvantaged groups

The CEDAWCee’s general recommendations regarding women migrant workers (No. 26) and older women (No. 27), show some cultural dimensions. In relation to women migrant workers, the CEDAWCee considers ‘gendered cultural practices’ to be among the factors determining women’s migration<sup>1498</sup>, and observes that ‘women migrant workers who migrate as spouses of male migrant workers or along with family members face an added risk of domestic violence from their spouses or relatives if they come from a culture that values the submissive role of the women in the family’.<sup>1499</sup>

<sup>1491</sup> Ibid.

<sup>1492</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 10; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 44.

<sup>1493</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 41; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 9; the reference to ‘non-traditional’ in relation to sexual relations clearly implies certain moral/cultural connotations. These words are chosen by the State, however. They are cited by the Committee. As such, it is not a link to culture made by the Committee.

<sup>1494</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 41; CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 22.

<sup>1495</sup> CEDAWCee, CO Russian Federation, CEDAW/C/RUS/CO/8 (2015), para 41.

<sup>1496</sup> Ibid.

<sup>1497</sup> CEDAWCee, CO Poland, CEDAW/C/POL/CO/7–8 (2014), para 22. (emphasis added, VV).

<sup>1498</sup> CEDAWCee, General Recommendation No. 26: women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008, para 8.

<sup>1499</sup> Ibid, para 20.

Regarding older women, the CEDAWCee considers that ‘the impact of gender inequality throughout their lifespan is exacerbated in old age and is often based on *deep-rooted cultural and social norms*’.<sup>1500</sup> The CEDAWCee also points out the importance of context, saying that ‘concrete forms of discrimination against older women may differ considerably (...) in various sociocultural environments’<sup>1501</sup>, and explains that ‘many older women face neglect as they are no longer considered useful in their productive and reproductive roles, and are seen as a burden on their families. Widowhood and divorce further exacerbate discrimination’.<sup>1502</sup> According to the CEDAWCee, ‘*gender stereotyping, traditional and customary practices* can have harmful impacts on all areas of the lives of older women (...), including family relationships, community roles, portrayal in the media, employers’ attitudes, health care and other service providers, and can result in physical violence as well as psychological, verbal and financial abuse’.<sup>1503</sup> Older refugee and internally displaced women ‘may (...) experience cultural and language barriers in accessing services’.<sup>1504</sup> The CEDAWCee maintains that States parties have an obligation ‘to eliminate negative stereotyping and modify social and cultural patterns of conduct that are prejudicial and harmful to older women, so as to reduce the (...) abuse that older women, including those with disabilities, experience based on negative stereotyping and cultural practices’<sup>1505</sup>, and ‘to investigate, prosecute and punish all acts of violence against older women, including those committed as a result of traditional practices and beliefs’.<sup>1506</sup>

The CEDAWCee has also regularly discussed concerns about *de facto* discrimination against other disadvantaged groups of women in its concluding observations. The CEDAWCee frequently invokes the concept of multiple or intersecting (forms of) discrimination. Women suffering multiple forms of discrimination include, for example, migrant women, rural women<sup>1507</sup>, older women<sup>1508</sup>, women with disabilities<sup>1509</sup>,

<sup>1500</sup> CEDAWCee, General Recommendation No. 27 on older women and protection of their human rights, CEDAW/C/GC/27, 16 December 2010, para 11.

<sup>1501</sup> Ibid, para 12.

<sup>1502</sup> Ibid, para 14.

<sup>1503</sup> Ibid, para 16.

<sup>1504</sup> Ibid, para 18.

<sup>1505</sup> Ibid, para 36.

<sup>1506</sup> Ibid, para 37.

<sup>1507</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 42; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 35; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 34; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 32; CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 38; CO India, CEDAW/C/IND/CO/4–5 (2014), para 32; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 42; CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 36; CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 44; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 34; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 34; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 39; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 37; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 41.

<sup>1508</sup> CEDAWCee, CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 34; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 33; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 36; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 46.

<sup>1509</sup> CEDAWCee, CO Spain, CEDAW/C/ESP/CO/7–8 (2015), para 34; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 36; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 36.

women albinos<sup>1510</sup>, and widows.<sup>1511</sup> The Committee has *explicitly* identified a number of cultural barriers to the enjoyment of their rights.

Concerns about rural women are mainly about their access to land. The CEDAWCee has expressed concerns about the prevalence or persistence of traditional and discriminatory laws, structures, (traditional) customs and practices or ‘*socio-cultural barriers*’ which limit rural women’s access to credit, inheritance and (agricultural) land.<sup>1512</sup> The result is limited land ownership by women. Other concerns include the fact that women are largely excluded from involvement and participation in decision-making processes concerning the use of land (or ‘on matters of rural development and policy’) owing to persistent negative social and cultural norms regarding their participation<sup>1513</sup>, and the prevalence of harmful practices such as early marriage in rural areas.<sup>1514</sup> The Concluding Observations on Swaziland can be used to illustrate these concerns:

While noting the efforts of the State party to protect equal access to land under (...) the Constitution, the Committee is concerned that *women, especially those in rural areas, continue to face barriers to acquiring land owing to prevailing discriminatory customary laws and structures*. The Committee is also concerned at reports that *women are largely excluded from participating in decision-making on matters of rural development and policy owing to persisting negative social and cultural norms regarding their participation*. The Committee is further concerned at the lack of income-generating opportunities for rural women.<sup>1515</sup>

The CEDAWCee further expressed concerns about the impact of multiple and intersecting forms of discrimination<sup>1516</sup>, both in society at large and within communities.<sup>1517</sup> Examples include restrictions on widows’ right to inheritance<sup>1518</sup>,

<sup>1510</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 36; CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 44.

<sup>1511</sup> CEDAWCee, CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 36.

<sup>1512</sup> CEDAWCee, CO Liberia, CEDAW/C/LBR/CO/7–8 (2015), para 42; CO Slovenia, CEDAW/C/SVN/CO/5–6 (2015), para 35; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 34; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 32; CO Gabon, CEDAW/C/GAB/CO/6 (2015), para 36; CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 38; CO India, CEDAW/C/IND/CO/4–5 (2014), para 32; CO Mauritania, CEDAW/C/MRT/CO/2–3 (2014), para 42; CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 36; CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 44; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 34; CO Benin, CEDAW/C/BEN/CO/4 (2013), para 34; CO Equatorial Guinea, CEDAW/C/GNQ/CO/6 (2012), para 39; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 37; CO Uganda, CEDAW/C/UGA/CO/7 (2010), para 41.

<sup>1513</sup> CEDAWCee, CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 36; CO Iraq, CEDAW/C/IRQ/CO/4–6 (2014), para 44; CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 34; CO Senegal, CEDAW/C/SEN/CO/3–7 (2015), para 32.

<sup>1514</sup> CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 38; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 34.

<sup>1515</sup> CEDAWCee, CO Swaziland, CEDAW/C/SWZ/CO/1–2 (2014), para 36.

<sup>1516</sup> CEDAWCee, CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 36; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36; CO Kyrgyzstan, CEDAW/C/KGZ/CO/4 (2015), para 33; CO Brunei Darussalam, CEDAW/C/BRN/CO/1–2 (2014), para 36.

<sup>1517</sup> CEDAWCee, CO Denmark, CEDAW/C/DNK/CO/8 (2015), para 33; CO Belgium, CEDAW/C/BEL/CO/7 (2014), para 36.

<sup>1518</sup> CEDAWCee, CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 36.

the stigmatisation of persons with albinism and severe threats and attacks on their physical integrity, such as ritual killings, abductions and mutilation<sup>1519</sup>, reports that older women are subjected to violence for being suspected of practicing witchcraft and teaching it to children<sup>1520</sup>, the high rates of school dropout among Roma girls ‘due to child and/or forced marriages’ or due to ‘the persistence of traditional harmful practices such as early marriage’<sup>1521</sup>, and the cultural barriers faced by Dalit women and women from scheduled tribes in gaining access to justice and health services.<sup>1522</sup>

The link to culture is rather *implicit*, and becomes especially apparent in the related recommendations, i.e., in the measures the CEDAWCee has identified to combat these multiple or intersecting forms of discrimination. States should raise awareness among these women about their rights<sup>1523</sup>, address customs and traditions which justify and perpetuate (harmful practices and) discrimination against these women<sup>1524</sup>, address their stigmatisation and social exclusion, among others by conducting awareness-raising campaigns<sup>1525</sup>, and/or eradicate negative and harmful beliefs, or superstitious beliefs which are detrimental to the well-being of these women and girls, also through awareness-raising efforts.<sup>1526</sup>

Consider the recommendations to Ghana with regard to rural women:

The Committee recommends that the State party:

- (a) Ensure that rural women have access to basic services and infrastructure, including health-care services and education, (...);
- (b) *Ensure that obstacles to land ownership by women are removed* and that national courts, including customary courts, enforce the land and property rights of women, in line with the provisions of the Convention;
- (c) Eliminate harmful practices and discrimination against rural women and address customs and traditions that perpetuate them;
- (d) Ensure that all discriminatory customary laws are repealed or amended and brought into full compliance with the Convention and the Committee’s general recommendations.<sup>1527</sup>

<sup>1519</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 44.

<sup>1520</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 46.

<sup>1521</sup> CEDAWCee, CO Portugal, CEDAW/C/PRT/CO/8–9 (2015), para 42; CO Croatia, CEDAW/C/HRV/CO/4–5 (2015), para 36.

<sup>1522</sup> CEDAWCee, CO India, CEDAW/C/IND/CO/4–5 (2014), para 34.

<sup>1523</sup> CEDAWCee, CO Qatar, CEDAW/C/QAT/CO/1 (2014), para 37; CO Bahrein, CEDAW/C/BHR/CO/3 (2014), para 40; CO United Arab Emirates, CEDAW/C/ARE/CO/2–3 (2015), para 44; CO Slovakia, CEDAW/C/SVK/CO/5–6 (2015), para 37; CO Lebanon, CEDAW/C/LBN/CO/4–5 (2015), para 38.

<sup>1524</sup> CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 39; CO Sierra Leone, CEDAW/C/SLE/CO/6 (2014), para 35.

<sup>1525</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 45; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 37; CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 31; CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 39; CO Viet Nam, CEDAW/C/VNM/CO/7–8 (2015), para 33; CO Azerbaijan, CEDAW/C/AZE/CO/5 (2015), para 33; CO China, CEDAW/C/CHN/CO/7–8 (2014), para 41.

<sup>1526</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 45; CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), para 37; CO Zambia, CEDAW/C/ZMB/CO/5–6 (2011), para 36.

<sup>1527</sup> CEDAWCee, CO Ghana, CEDAW/C/GHA/CO/6–7 (2014), para 39.

The Concluding Observations on Malawi provide an example in relation to women with albinism:

The Committee urges the State party to reinforce its measures to protect women and girls with albinism from all forms of violence and *address discrimination, stigmatization and social exclusion* faced by them. In particular, it calls upon the State party to effectively investigate, prosecute and punish those responsible for these crimes, expand its awareness-raising efforts *to combat superstitious beliefs which are detrimental to the well-being of women and girls with albinism* and ensure that those women and girls have access, without discrimination and fear, to education, employment, health care and other basic services.<sup>1528</sup>

No instances have been found of discussions of *de jure* discrimination against these groups.

### 3 CONCLUDING REMARKS

The aim of this chapter was to examine how the treaty bodies deal with ‘adverse’, ‘negative’ or ‘harmful’ aspects of culture in relation to the interpretation and implementation of international human rights law by their respective States parties. Together with chapter 4, which analysed the treaty bodies’ dealings with ‘positive’ aspects of culture, it set out to analyse how the treaty bodies deal with the notion of ‘culture’ in their monitoring role of the respective treaties. This feeds into the more general question as to how the treaty bodies manage the tension between universality and cultural diversity in practice: how does culture affect the content of rights? And is the proposition that ‘universality does not mean uniformity’ and that universal rights leave room for culture-specific implementation corroborated by the practice of the treaty bodies?

Altogether it turned out to be very difficult to show whether, let alone how, the treaty bodies use the State reporting procedure to manage the tension between universality and cultural diversity. Culture-specific interpretations and implementations of rights cannot be detected, unless they are picked up and challenged by the treaty bodies. When a certain manifestation of culture is considered to be at odds with the (universal) right, the treaty bodies establish a link, either explicitly or implicitly, between the culture and the problematic situation of implementation, and the State party is recommended to change, challenge or eradicate that aspect of its culture. As such, the findings do not show how the treaty bodies ‘mediate’ or ‘reconcile’ tension between universality and cultural diversity; it shows which manifestations and expressions of culture treaty bodies identify as problematic or even harmful (in relation to the rights), and how the treaty bodies use and apply human rights to eradicate and change aspects of culture identified as harmful; it thereby shows the limits of acceptable diversity. When treaty

<sup>1528</sup> CEDAW/Cee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 45.

bodies establish a negative link with culture, this cultural aspect or practice always has to be changed or eradicated, according to treaty bodies' recommendations. Thus, it cannot be said that treaty bodies take an active role in mediating, reconciling or balancing between universality and cultural diversity. If anything, they are the guardians of universality: they monitor the interpretation and implementation of the treaties with a view to safeguarding against unacceptable cultural variations.

The research shows that the lion's share of the negative or harmful (or at least sensitive) aspects of culture relates to sex- and gender-based discrimination, i.e., discrimination against women. All three treaty bodies acknowledge in one way or another that many forms of discrimination against women are grounded in culture, tradition and religion. According to the HRC, '[i]nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes'<sup>1529</sup>, while the CESCR states that '[w]omen in particular, are often denied equal enjoyment of their human rights, by virtue of the lesser status ascribed to them by tradition and custom'.<sup>1530</sup> The CEDAW [Convention] is even specifically concerned with 'the impact of cultural factors on gender relations', and 'the influence of culture and tradition on restricting women's enjoyment of their fundamental rights', as the preamble to the Convention attests to.<sup>1531</sup> In relation to gender discrimination, cultural factors were found in relation to overall discrimination against women, as well as in relation to specific areas, such as participation in political and public life, employment, health, education, violence against women and harmful practices, and matters relating to marriage and family life. In addition, cultural factors were uncovered in relation to discrimination against LGBT+ persons and other vulnerable or disadvantaged groups of people, such as persons with HIV/AIDS, persons with albinism or (other) disabilities, migrants, refugees, and ethnic, religious or other minorities (i.e., Roma, Muslims, etc.), rural women, older women (i.e., intersectional discrimination).<sup>1532</sup>

Having identified *which* concerns the treaty bodies link to culture, the next question is *how* the treaty bodies have linked the concerns to culture. This link with culture may be (1) *explicit*, in the sense that the treaty bodies openly and unambiguously link the problem to culture, custom or tradition, or to cultural attitudes, stereotypes or stigma; or it may be (2) *implicit*, in the sense that the treaty bodies do not establish a clear link between the problem and culture, but *suggest* or *hint* that culture may play a role, for example by formulating a concern about stereotyping in addition to (but separately from) the problematic law(s) or practice(s), or by targeting culture in the related recommendations. After all: if addressing culture is considered to be part of the solution (i.e., recommended measures), then it must also be part of the problem.

<sup>1529</sup> HRC, General Comment No 28 (n 17), para 5.

<sup>1530</sup> CESCR, General Comment No 16 (n 133), para 5.

<sup>1531</sup> Preamble to CEDAW.

<sup>1532</sup> Cultural factors were also found in relation to corporal punishment and traditional forms of forced labour, but in an incidental manner.

Irrespective of the link being explicit or implicit: once a link between (negative) culture and a problematic situation of implementation has been identified, an obligation to try to change that cultural practice or custom arises automatically. Concerns about ‘the persistence of deep-rooted and negative patriarchal stereotypes regarding the roles of women and men in the family and in society at large’ thus lead to the recommendation that the State party ‘should enhance its efforts to eliminate existing patriarchal and gender stereotypes on the roles and responsibilities of women and men in the family and in society by, inter alia, adopting programmes that seek to raise awareness in society of gender equality’.<sup>1533</sup> Concerns about ‘the persistence of discriminatory stereotypes concerning the roles and responsibilities of women and men in society and in the family, such as the concept of “the head of the household” assigning this role to men and perpetuation of “the father’s name and estate” through male heirs’ is predictably followed by a recommendation to ‘combat discriminatory stereotypes such as the concept of “the head of the household” and “perpetuation of the father’s name and estate” (...)’.<sup>1534</sup>

There are situations where the treaty bodies do not identify a link with culture in the formulation of the concern, yet subsequently recommend measures to change the culture as part of remediating the concern. This seems inconsequential: an obligation to change culture only makes sense if it is identified as part of the problem. There does not seem to be any rationale for it. In general, the treaty bodies do not seem to have a systematic approach when it comes to explicating the role of culture.

Instances of *de facto* discrimination, or discrimination *in practice*, are more often *explicitly* linked to culture. Instances of *de jure* discrimination, or discrimination *in law*, especially in matters relating to marriage and family relations, are sometimes *implicitly* linked to culture, though usually not at all. One may ask: why would treaty bodies be careful or hesitant to establish a link between such *de jure* discrimination and culture, and sometimes even avoid it completely? Why do the treaty bodies not mention and target culture in these circumstances, while there is a clear cultural or religious fingerprint? Examples include legislative provisions, including customary laws, in the areas of family and personal status law, concerning matters of inheritance, succession, property division, parental authority, divorce and marriage, but also about provisions whereby a husband may prohibit his wife from working, and laws which condone violence against women, such as laws which criminalize adultery, which provide for a defence of honour as a mitigating circumstance, or which provide for exemptions of perpetrators of rape in case of subsequent marriage to the rape victim. All laws which are intricately tied with the preservation of culture and identity.<sup>1535</sup> There are several possible explanations. The treaty bodies might consider the influence or role of culture in these instances self-evident, and therefore not worth mentioning. This seems

<sup>1533</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 10.

<sup>1534</sup> CEDAW/CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), paras 18–19.

<sup>1535</sup> The treaty bodies also realize that such laws are connected to culture, as on some occasions they have, very carefully, recommended States parties to look at the ‘experiences of other States with similar legal and cultural traditions, for any legislative change’.

unlikely, however, since there are many examples where the role of culture appears self-evident, and is nevertheless made explicit by the treaty bodies. Another possibility is that the treaty bodies do not wish to offend the States parties, as criticism on culture is always a sensitive issue. But then, again, the treaty bodies do not seem to mind being critical of culture in many other instances. A third possible explanation relates to differences in the nature of the obligations. State obligations to adopt or amend laws (i.e., strengthen the legal framework) with a view to ensuring formal equality are of an immediate nature. The adoption of legislation safeguarding equality and prohibiting discrimination constitutes a necessary first step. However, to achieve not only equality in law, but also equal opportunities and equal treatment – in other words substantive equality – States would have to take measures beyond the adoption of legislative measures, and take affirmative action measures to advance the situation of vulnerable or disadvantaged groups in society. Such measures include actions to change, challenge or eradicate certain aspects of culture which impede the full enjoyment of rights by all. These measures require more time and are obligations of a progressive nature. To sum up: eliminating *de jure* discrimination is an immediate obligation, a hard and fast obligation of result, i.e., to change the law, whether grounded in culture or not; eliminating *de facto* discrimination is an obligation of progressive realisation<sup>1536</sup>, a weaker obligation of conduct, for example to change culturally entrenched attitudes and stereotypes. With this in mind, it can be argued that establishing any link between *de jure* discrimination and culture brings the danger of confusing a direct and immediate obligation to review the law with a progressive obligation to change the (underlying) culture. Linking it to culture would seem to put the obligation to change the law on the level of the obligations of conduct which apply in relation to changing culture. Referring to culture in this regard could indicate acknowledging that it is logical (and perhaps even acceptable) that the law cannot be changed right away. It could confuse the understanding of the immediate, hard and fast obligation. This reasoning is defensible, although it can be questioned for overlooking the fact that ‘change in laws need to be supported by change in minds of people’<sup>1537</sup>, and that the legislators/parliamentarians responsible for legislative actions are also human beings (with constituencies) from a certain cultural background, whose cultural attitudes may be an obstacle to changing or adopting legislation.<sup>1538</sup> The treaty bodies could clarify the role of culture in relation to *de jure* discrimination by explicitly identifying the cultural link, pointing out the separate obligation of the State party to take all reasonable steps to change the culture which underlies the discrimination in law, while also stressing that the obligation to

<sup>1536</sup> See chapter 3, section 7. Brems argues that important change cannot be expected to take place overnight. Therefore, ‘human rights obligations that require profound societal changes should be realized progressively within a reasonable timeframe’.

<sup>1537</sup> See chapter 3, section 7. According to Brems, important change cannot be expected to take place overnight, and *it makes no sense to change the laws if these changes are not supported by a change in the minds of people*. Therefore, ‘human rights obligations that require profound societal changes should be realized progressively within a reasonable timeframe’.

<sup>1538</sup> This issue is further discussed in chapter 6.

change the law is an immediate one, and that the State party cannot rely on its culture or the cultural attitudes of its legislators to justify not amending the law.

Having looked at the links to culture and the related obligations to address culture, and having concluded that there are differences between the obligations to address (culture in relation to) *de facto* and *de jure* discrimination, we can draw some preliminary conclusions about the role of the treaty bodies in reconciling universality and diversity. A first observation relates to *what we cannot observe*. Analysing the concluding observations does not reveal anything about the *legitimate* cultural variation in the interpretation and implementation of rights. Recalling the theories of Donnelly and Donoho<sup>1539</sup>, it was established earlier that flexibility and diversity are inherent in the treaty body system. Given the primacy of State implementation, the first layer of interpretation is made by national authorities. The second layer of interpretation is made by the treaty bodies which supervise State implementation. The degree of deference given to national authorities serves the critical function of preserving a balance between universality and diversity, and between the need for international supervision and respect for self-governance and majoritarian preferences.<sup>1540</sup> Universality and diversity are already somewhat balanced as a result of this degree of deference to national authorities. This has to be taken into account: the treaty body system<sup>1541</sup> works in such a way that it does not show the many legitimate (State party) interpretations and implementations of rights, but only the situations of problematic interpretation and implementation.

Two flexibility tools discussed in previous chapters are seen in the practice of the treaty bodies. Another possible flexibility tool is not. The two tools which appear to be used were both identified by Brems.<sup>1542</sup> One flexibility technique she identified is to include certain ‘factors and difficulties impeding the implementation of the Convention (or the Covenant)’. If the treaty bodies refer to culture in the formulation of the concern it is generally (if not always) in this way: as a factor or barrier standing in the way of the full realisation of rights. The second technique which Brems identified is the ‘progressive realization’ doctrine, which is generally used to take contextual factors of an economic nature into account, but can arguably be extended to factors of a cultural nature. The treaty bodies’ practice to challenge culture in relation to issues of *de facto* discrimination and not *de jure* discrimination seems to corroborate the use of this technique, since it allows the States parties time to overcome the cultural obstacles to full realisation (through ‘educating’ and ‘raising awareness’), while holding States immediately accountable for the realisation of their core obligations.<sup>1543</sup> It appears that the treaty bodies apply the tools complementarily: culture is identified as a potential ‘factor’ or ‘difficulty’ impeding the implementation of the Covenant/Convention in the

<sup>1539</sup> See chapter 2, section 4 and chapter 3, section 7.

<sup>1540</sup> See chapter 2, section 4.

<sup>1541</sup> Perhaps with the exception of the individual complaints procedure. See, eg, Legg and Shany, discussed in chapter 1, section 2.

<sup>1542</sup> See chapter 2, section 4 and chapter 3, section 7.

<sup>1543</sup> See chapter 3, section 7.

formulation of the concern; while in the recommendations the ‘progressive realization’ doctrine seems to be applied in relation to overcoming the identified cultural obstacle. The use of a third possible flexibility tool, the margin of appreciation (or something similar), is not supported by evidence. Culture is not discussed as a reason for giving a State party a certain discretion.

Comparing the three treaty bodies shows that, overall, the HRC is the least preoccupied with the role of culture, while the CEDAWCee is the treaty body with the most attention for the role of culture.

A quick glance at the general comments and recommendations shows that the CESCR and the CEDAWCee appear to have elaborated their understanding of culture more than the HRC.<sup>1544</sup> The CESCR and the CEDAWCee deal with it on more occasions, explaining differences between biology/physiological characteristics and social construction of gender stereotypes, prejudices and expected roles, sometimes even specifying possible stereotypes. The CESCR and especially the CEDAWCee also have more eye for transformative and structural equality (and the role of culture in systemic discrimination). Donoho, who recognised the potential of general comments and recommendations for mediating between the competing goals of universality and diversity, concluded that their role would be limited by definition: ‘general’ comments are too general to address the contextual ‘particularities’ presented by diverse States.<sup>1545</sup> However, general comments and recommendations have become more and more elaborate and detailed. While the HRC often chooses not to establish any link with culture, the CESCR and especially the CEDAWCee nowadays address the role of culture in much detail. The CEDAWCee’s general recommendations discuss the most common cultural obstacles and issues in-depth, including detailed recommendations on how to address these issues. To say that they play a role in *mediating* between universality and diversity, however, would be false. They do not ‘allow the expression of various interpretations of rights that may slowly inch the international community toward some common understandings’.<sup>1546</sup> If anything, they express *one* interpretation, that of the Committee; not toward ‘some common understandings’, but toward the Committee’s (universal) understanding.

From the analysis of the concluding observations, we see that all three treaty bodies frequently note the existence of stereotypes. The HRC regularly notes the existence of stereotypes as a separate and independent problem while being ambiguous about the relation with the other identified problems of discrimination, while the CESCR and the

<sup>1544</sup> When the researcher states that the CESCR and CEDAWCee have a more *developed* understanding of culture than the HRC, this is based on the CESCR and the CEDAWCee recognizing the role of culture/stereotyping and structural discrimination more clearly. HRC uses a more simple *de jure/de facto* distinction, while CESCR and CEDAWCee add a third layer: systemic discrimination, where culture becomes part of the equation.

<sup>1545</sup> See chapter 3, section 7.

<sup>1546</sup> DL Donoho, Autonomy, self-governance and the margin of appreciation: developing a jurisprudence of diversity within universal human rights, *Emory International Law Review*, vol 15, no 2, 2001, p 438. See chapter 3, section 7.

CEDAWCee generally point out the (direct link with) negative effects which women experience because of the stereotypes. All three treaty bodies tend to refer to cultural attitudes and stereotypes or to cultural factors, obstacles and barriers in rather general terms. To start with stereotypes: the HRC never specifies *what* the stereotype is, it merely speaks of concerns about the existence or persistence of stereotypes. The CESCR sometimes specifies the stereotype ('stereotypes (...) where men are still considered the main source of income for the family and women are expected to be primarily responsible for household chores'), while the CEDAWCee does it regularly ('stereotypes (...) focusing primarily on women's roles as mothers and housewives', 'stereotypes (...) which consider women primarily as mothers and caregivers', 'stereotypes (...) which overemphasize the role of women as wives, mothers and caregivers', etc.). However, these formulations are still somewhat general.

Finally, it is interesting to note that two of the three treaty bodies are hesitant to use the word 'culture' in the context of negative or harmful culture. The HRC and the CESCR are rather creative in avoiding the term 'culture', and speak of 'patriarchal', 'societal', 'social', 'traditional', 'traditions', 'customs', 'customary', 'religion or belief-based', etc., although the CESCR has occasionally referred to 'culturally based prejudices' or 'cultural factors and barriers'. The CEDAWCee, on the other hand, has no restraint whatsoever in using the word 'culture' in a negative context, speaking of 'adverse cultural norms, practices and traditions' (very often), 'socio-cultural patterns', 'discriminatory cultural norms', 'cultural taboos or beliefs', 'cultural attitudes and power imbalances', etc. One can only guess about the rationale for this difference. Unlike CEDAW, the ICCPR and ICESCR contain explicit cultural rights which emphasise the value of different cultures. As a consequence, the HRC and the CESCR could be more occupied with both the positive and negative aspects of culture. Framing negative aspects of culture as 'tradition' or 'custom' is also friendlier towards State delegations. 'Culture' is, after all, also a source of identity and pride, while 'tradition' or 'custom' is perhaps 'something from the past' or for 'the backward rural people' which members of State delegations do not identify with. For the CEDAWCee, however, combatting cultural attitudes and stereotypes is at the heart of the treaty, so much so that positive aspects of culture are snowed under. The CEDAW also explicitly speaks of the need 'to modify social and cultural patterns of conduct'. In other words: the treaty itself has framed 'culture' in a negative connotation.



# CHAPTER 6

## CULTURAL ARGUMENTATION

### The State Reporting Procedure as a Platform for Cross-Cultural Dialogue

#### 1 INTRODUCTION

In chapter 2 it was explained that all (of the most authoritative) theories which argue that the dichotomy between universalism and cultural relativism can be overcome build on two principles: (1) flexibility in interpretation and implementation; (2) internal debate and cross-cultural dialogue. The previous chapters discussed whether and how the treaty bodies accommodate cultural diversity by applying the first principle, and showed the different issues and aspects of cultural diversity which feature in the work of the treaty bodies, in particular in the concluding observations and general comments, and how their perceptions of culture and cultural diversity translate into State obligations to change, challenge or eradicate negative aspects of culture. The present chapter examines whether and how the treaty bodies (and States parties) apply the second principle<sup>1547</sup>, using the interactive dialogue which is part of the State reporting procedure to create a platform for so-called ‘constructive cross-cultural dialogue’ with a view to reconciling universal rights with cultural differences. It shows that States parties still – and rather frequently – make use of cultural arguments when they interact with the Committees on their progress in the implementation of human rights obligations. It provides insights in the different kinds of cultural arguments provided in front of these Committees, and in the way States parties deal with cultural criticism by the Committees: do they accept the need to change culture, or defend the (room for) culture?

Ultimately, this chapter aims to clarify how, and to what extent, this interaction enables the Committees to challenge cultural norms and practices, and States parties to explain, reiterate or revisit the (value of) particular cultural norms and practices. What are the dynamics around these cultural arguments? It is one thing to give States parties opportunity to explain, excuse or justify a practice or measures based on cultural

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<sup>1547</sup> While authors identify a need for both ‘internal debate and cross-cultural dialogue’ this research will focus exclusively on ‘cross-cultural dialogue’. It should not be overlooked that the treaty bodies also play a role in stimulating internal (societal) debate on their human rights record, by default, and sometimes by explicitly recommending the State party to do so. However, this is outside the scope of this research.

arguments, but it is another to resolve disagreements in this regard. Committees insist on referring to their interaction with States parties as ‘constructive dialogue’ or ‘interactive dialogue’.<sup>1548</sup> This terminology seems to indicate a certain intention (at the least) to learn from each other, an intention to resolve disagreements and to come closer to each other. Do the Committees and States parties indeed shift positions or develop alternative visions around cultural arguments, and is it appropriate to speak of a ‘constructive dialogue’?

The previous chapters identified both State obligations to protect and promote culture and cultural diversity (‘positive aspects of culture’) and State obligations to modify or eradicate harmful culture (‘negative aspects of culture’). The focus of the present chapter is however exclusively on the (dialogue around) negative expressions or manifestations of culture. The reason for this is quite simple: the debate on reconciling universality and cultural diversity is about balancing the tension between universal rights and *adverse* cultural norms, values and practices. Obligations to preserve and foster culture and cultural diversity are generally not challenged or rejected by States parties.

The structure of this chapter is as follows. Section 2 examines the different cultural arguments used by States parties when reporting on the progress achieved in advancing the rights enumerated in the treaties, and the Committees’ reactions to those arguments. Three modes of engagement are identified, depending on the extent to which States parties (dis)agree with the Committees’ criticism of culture. In section 3 the process of the dialogue will be analysed. This section takes a closer look at the dynamics of the interaction, using several illustrations, and tries to establish to what extent the term ‘dialogue’ or ‘constructive dialogue’ is appropriate. The chapter ends with some concluding remarks in section 4.

## 2 CULTURAL ARGUMENTS IN THE DISCOURSE BETWEEN STATES PARTIES AND COMMITTEES

Using a selection of examples<sup>1549</sup>, this section aims to show the different cultural arguments used by States parties when reporting on the progress achieved in advancing the rights enumerated in the treaties, and the Committees’ reactions to those arguments.

First, it is important to briefly highlight here that cultural factors may hinder human rights enjoyment on several levels<sup>1550</sup>: on a structural level, culture may affect

<sup>1548</sup> See, chapter 2, section 4.1.

<sup>1549</sup> While it is a selection of examples, they follow from an exhaustive study of State reporting procedures before the HRC, the CESCR and the CEDAWCee between 2010 and 2015. Examples have been selected according to their explanatory value. In other words, the examples have been selected which in the researcher’s view best illustrate and support the point to be made.

<sup>1550</sup> These ‘levels’ are based on the indicator structure of OHCHR; Although these indicators were developed to (among others) improve follow up to the recommendations and concluding observations of the treaty bodies, the terminology (structural, process, outcome indicators) is not used by the

the acceptance, intent and commitment of a State party to undertake measures in keeping with its human rights obligations<sup>1551</sup>; on a process level, culture may affect the implementation of specific interventions and policy instruments which a State undertakes to give effect to its legislation<sup>1552</sup>; and on an outcome level, culture may affect the results of State efforts in furthering the enjoyment of human rights.<sup>1553</sup> States may feel that they have fulfilled their obligations when they satisfy the structural and process requirements despite lack of progress, i.e., when they have appropriate human rights legislation in place, and apply the required interventions and policies to give effect to the legislation. The treaty bodies, however, seem to consider obligations fulfilled only when there is (also) full and effective enjoyment of rights. It is important to keep this difference between perceptions of ‘compliance’ in mind, as it will be used to analyse both the State party argumentation and the Committees’ reactions and recommendations which feature in subsequent sections.

The examples are structured first according to the State party’s (lack of) acceptance of the need to change or eradicate the cultural value or practice at issue, and subsequently per Committee, in order to enable comparison between them. Some analysis is provided along the way, and each subsection ends with conclusions, highlighting the predominant trends which were identified in the discourse between States parties and Committees.

## 2.1 STATE PARTY ACCEPTS NEED TO CHANGE CULTURE

Even though States parties themselves refer to culture and cultural obstacles in rather general terms, below a distinction is made between States parties which refer to (1) the culture and cultural attitudes of private parties (non-State actors) to *explain* why their efforts (legislation, policies) are not (fully) effective and do not yield sufficient progress (despite – in the States parties’ view – having taken all relevant measures and thus having fulfilled all obligations); (2) the culture and cultural attitudes of (the constituencies of) parliamentarians and public officials (State actors) to *excuse* their inability to (entirely) fulfil their obligations, such as adopting the necessary legal and policy instruments or problems with their enforcement.

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treaty bodies. OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, HR/PUB/12/5, 2012, pp 33–41.

<sup>1551</sup> Structural indicators help in capturing the acceptance, intent and commitment of the State to undertake measures in keeping with its human rights obligations. OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (n 4), pp 34–35.

<sup>1552</sup> Process indicators help in assessing a State’s efforts, through its implementation of policy measures and programmes of action, to transform its human rights commitments into the desired results. OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (n 4), pp 36–37.

<sup>1553</sup> Outcome indicators help in assessing the results of State efforts in furthering the enjoyment of human rights. OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (n 4), 2012, pp 37–38. It can help to look at the process and outcome levels as flow and stock variables, respectively. A ‘flow’ variable allows monitoring of changes over a period of time. A ‘stock’ variable measures the consolidated result of changes at one point in time.

When cultural arguments are used by States parties, the dominant trend is that culture is not so much used as an excuse or a justification, but mostly as a factor which explains why their efforts (legislation, policies) have not been effective yet, and do not yield sufficient progress.<sup>1554</sup> The State party relies on the culture and cultural attitudes of private actors as a barrier to the *de facto* enjoyment of rights. The State party shares the Committee's criticism of the culture under scrutiny and explains its efforts to eradicate its harmful aspects. Identified 'barriers' or 'obstacles' to the enjoyment of rights are generally the attitudes and beliefs of 'the general public' or 'society at large', religious and societal institutions, but also of victims themselves. The State party's cultural argument concentrates on the lack of progress, irrespective of compliance. Often its argumentation can be construed as implying compliance with positive obligations: the State party has done everything in its power to implement the rights, it has adopted the necessary legislation and policies, even awareness-raising campaigns, but culture is resilient, and stands in the way of practical and effective enjoyment of rights. In some instances, its argumentation is not meant to suggest compliance: the State party may acknowledge flaws in its legislation and/or policies, and still refer to the resilience of culture as a barrier to the practical and effective enjoyment of rights. A State party may even argue that culture and cultural attitudes need to change before legislation can be changed or before legislation can be enforced. To be clear: this is the State party's perspective and argumentation. The Committees often do not seem to agree that the positive obligations have been fulfilled. They point out that the prohibitions are not sufficiently specific, that the efforts to educate and raise awareness have to be increased, etc.

It also happens that States parties refer to the culture and cultural attitudes of State actors as a barrier to the implementation of rights by States.<sup>1555</sup> When such arguments are brought forward, States parties are using culture and cultural attitudes as an *excuse*, as will be shown below.<sup>1556</sup> Their argumentation is based on the supposition that they *want* to comply, but *cannot*, because cultural attitudes of State actors impede the practical and effective enjoyment of rights. Culture may stand in the way of adequate enforcement, because public officials, such as judges, prosecutors, police officers, health personnel and teachers, may follow it. Or culture may stand in the way of *de jure* compliance with human rights treaties by States, because parliamentarians (and/or their constituencies) follow it, and obstruct the repealing, revising or adopting of legislation. It is interesting to note the ambiguous relation between the State and for example parliamentarians or judges in this regard.<sup>1557</sup> While the State is not directly

<sup>1554</sup> 5 examples for the HRC were found, 3 examples for the CESCR, and 5 examples for the CEDAWCee (on a total of respectively 92 (HRC), 82 (CESCR) and 131 (CEDAWCee) State reporting cycles).

<sup>1555</sup> 6 examples were found for the HRC, 2 examples for the CESCR, and 5 examples for the CEDAWCee (on a total of respectively 92 (HRC), 82 (CESCR) and 131 (CEDAWCee) State reporting cycles).

<sup>1556</sup> See sections 2.1.1 (HRC), 2.1.2 (CESCR), and 2.1.3 (CEDAWCee).

<sup>1557</sup> An independent judiciary and parliament are important elements of an effective human rights protection system. An OHCHR report states that a national protection system includes 'as a minimum' an independent judiciary, human rights-respecting law enforcement and corrections officers, an independent national human rights institution, 'systems for the protection of minorities and the most vulnerable groups' and 'freedom for human rights defenders and media professionals to undertake

responsible for the voting of parliamentarians, it is in fact directly responsible for the (non-)adoption of legislation. Likewise, judges are supposed to be independent, while at the same time they are a branch of government.<sup>1558</sup>

While States parties themselves do not really seem to be aware of any significant differences between these different arguments (lack of progress, with or without compliance), it is interesting to see that also the Committees do not really seem to care whether culture is relied on as an explanation for lack of progress, or as an explanation for lack of compliance.

### 2.1.1 HRC

#### 2.1.1.1 Culture as ‘explanation’ for lack of progress

An example of the use of this argument can be found in the HRC’s dialogue with Angola. With regard to the persistence of early marriage and polygamy, the Angolan authorities argued that they were meeting their obligations, while raising certain cultural obstacles. According to a member of the State party delegation, ‘as a deeply ingrained custom, early marriage was seen by many as a social obligation even though it was prohibited by law’.<sup>1559</sup> Likewise, ‘polygamy was not recognized under the law but was nevertheless widespread. In rural areas, in particular, customary law on polygamy held sway’. The State party contended that it was launching education campaigns aimed at discouraging the practice, ‘but faced an uphill struggle to convince the population to abandon such deeply-rooted customs’.<sup>1560</sup> The HRC did not directly address the State party’s cultural explanations. In the Concluding Observations, it focused on the gap between law and practice: the State party should ‘ensure that its legislation effectively prohibits polygamy and is effectively implemented’. It should also ‘ensure

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investigative work’. This system also requires ‘a parliament that contributes to the application of international human rights obligations and that has an oversight function with respect to human rights’. The potential for a parliamentary contribution to human rights protection is great – through oversight of government activity, the development of human rights-compliant legislation, carrying out inquiries, awareness raising, promoting ratification of international human rights treaties and ensuring that other national mechanisms, such as the NHRI, are able to function effectively. OHCHR, *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, A/HRC/38/25, 2018, paras 18–32; At the same time, the required independence of judiciary and parliament imply that States parties (governments) have no influence over them. Parliaments can play a positive role in human rights protections, but can also be at the heart of legislative undermining of human rights standards. EJIL: Talk!, *Parliaments as Human Rights Actors – Proposed Standards from the UN*, <<https://www.ejiltalk.org/parliaments-as-human-rights-actors-proposed-standards-from-the-un/>> accessed 7 September 2019.

<sup>1558</sup> UN General Assembly, Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly, A/RES/56/83, 2002, art 4: ‘The conduct of any State organ shall be considered an act of that State under international law, *whether the organ exercises legislative, executive, judicial or any other functions*, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.’

<sup>1559</sup> HRC, Summary Record of the 2957<sup>th</sup> meeting, CCPR/C/SR.2957 (2013), para 24.

<sup>1560</sup> *Ibid.*, para 30.

the application of its legislation which prohibits early marriage and ensure that all marriages are registered'. The education campaigns mentioned by the State party seem to be considered insufficient by the HRC, which recommends that the State party should conduct awareness campaigns on the prohibition of polygamy and its negative effects, and *pursue* community awareness-raising strategies focusing on the consequences of early marriages.<sup>1561</sup> The State party alleges compliance with its obligations, arguing that its legal and policy measures are in order, and that it is trying to address the cultural obstacles hampering the practical and effective enjoyment of the rights. The HRC nevertheless calls for education and awareness-raising.

Angola also raised a cultural argument when it was criticised for its lack of birth registration. Angola acknowledged the need for, and importance of, birth registration, and contended that civil registration was a priority for the Government.<sup>1562</sup> When asked why many children remain undocumented despite free birth registration, the State party explained as follows:

*information and awareness activities were increased due to the constraints caused by cultural situations* in certain regions. In some regions, a child cannot be named until the family, in the broader sense of maternal and paternal lineage, meets to choose a name consensually. Meanwhile, the child can reach more than 5 years of age. In other regions, *the cultural creed is so entrenched* that children cannot be registered until they reach age five, (...). This and other similar situations are the basis for information and awareness campaigns (...).<sup>1563</sup>

The HRC, 'while *noting* the explanations provided by the State party', expressed concern at reports on the number of children not registered and called upon the State party to improve its official system of birth registration and to conduct awareness-raising campaigns on birth registration procedures within communities.<sup>1564</sup> The State party's argument, 'noted' but not addressed, again related to the resilience of cultural beliefs, and hence a lack of practical and effective enjoyment of rights despite its legal and policy efforts. By pointing at shortcomings in the official system of birth registration and the need for awareness-raising campaigns, the HRC, on the other hand, hinted at Angola not fulfilling its (positive) obligations, i.e., lack of compliance. Since the HRC selected birth registration as an issue for follow-up within one year, the dialogue continued. In the information given by Angola on follow-up to the Concluding Observations, the State party repeated its cultural argument:

<sup>1561</sup> HRC, CO Angola, CCPR/C/AGO/CO/1 (2013), para 11.

<sup>1562</sup> HRC, Information received from Angola on Follow-up to the Concluding Observations, CCPR/C/AGO/CO/1/Add.1 (2014), para 46.

<sup>1563</sup> HRC, Replies of Angola to the list of issues, CCPR/C/AGO/Q/1/Add.1 (2013), question 24, para 101.

<sup>1564</sup> HRC, CO Angola, CCPR/C/AGO/CO/1 (2013), para 23; From the *Report of the Special Rapporteur for follow-up to concluding observations* it appears that the State party's action (within one year) was partially satisfactory. Substantive action had been taken, but additional information was required on awareness-raising campaigns on birth registration procedures and on measures taken to improve the official system of birth registrations. HRC, Report on follow-up to the concluding observations of the Human Rights Committee, CCPR/C/118/2 (2017).

In addition to practical concerns and the limited nature of civil registration services across the national territory, *other factors of a cultural nature* have hampered the civil registration procedure, particularly regarding children. For example, in certain areas, children cannot be given a name until both sides of the extended family have come together to reach a consensus; a process that can take years. Elsewhere in Angola, there exists a *long-held cultural belief* that children should not be registered before they are five years old.<sup>1565</sup>

Given the restrictions arising from cultural and other factors, the Government has intensified information and awareness-raising campaigns, distributing leaflets on civil registration to parents in maternity wards as a matter of course.<sup>1566</sup>

In its follow-up report, once again the HRC did not explicitly address the cultural argument. While welcoming the adoption of decrees on free birth registration and free identification cards, the HRC found that additional information was required on ‘awareness-raising campaigns on birth registration procedures’ and on ‘measures taken to improve the official system of birth registration’.<sup>1567</sup>

Another example can be found in the dialogue with Malawi. In its initial (periodic) report, Malawi acknowledged the existence of gender-based discrimination in the country:

The main challenge in ensuring equality of rights and responsibilities during marriage is people’s culture/perceptions which still has gender stereotypes at its centre. Malawi still faces challenges in this respect, in particular, there are cultural practices that favour men as opposed to women or the male as opposed to the female child in a family set up. An example is where a woman is at times forced to marry her brother in law following the death of her husband or, where a male child is given financial support by his family to attain education whereas a female child is encouraged to stay at home and help to look after the family.<sup>1568</sup>

It further explained:

(...) Malawi recognizes that cases of discrimination still exist, most especially in relation to (...) gender based discrimination. *Existing inequalities between men and women are largely due to customary laws and traditions. There is discrepancy between the declaration in the Constitution<sup>1569</sup> and the actual relationship between men and women.*<sup>1570</sup>

<sup>1565</sup> HRC, Information received from Angola on Follow-up to the Concluding Observations, CCPR/C/AGO/CO/1/Add.1 (2014), para 47.

<sup>1566</sup> Ibid, para 48.

<sup>1567</sup> HRC, Follow-up letter sent to the State party, Follow-up letter dated 19 November 2015, under para 23; the State party’s replies on this issue were assessed with ‘B1’, which means *Reply/action partially satisfactory: Substantive action taken, but additional information required*’.

<sup>1568</sup> HRC, Malawi periodic report, CCPR/C/MWI/1 (2012), para 76.

<sup>1569</sup> Section 20 of the Constitution of Malawi makes provision for the equality of all persons before the law and equal protection without any discrimination.

<sup>1570</sup> HRC, Malawi periodic report, CCPR/C/MWI/1 (2012), para 98.

The State party contended that it would address the disparities by introducing policies which ‘prohibit traditional beliefs and customs that reinforce gender inequalities (...) and which perpetuate women’s secondary status in society’.<sup>1571</sup> Malawi adopted legislation as a first step towards eliminating these practices:

The Gender Equality Act *prohibits what are called harmful practices* which mean a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person; or result in physical, sexual, emotional, or psychological harm to any person.<sup>1572</sup>

During the constructive dialogue, when asked ‘what action the Government was taking to make it clear to the public that practices such as the appropriation of widows’ estates, “sexual cleansing” and levirate were completely unacceptable in a State which had undertaken to fully respect human rights’<sup>1573</sup>, the Malawian delegation even suggested that (some of) these traditional beliefs and customs, such as those imposed on widows, were already changing:

(...) *the traditional customs imposed upon widows were no longer generally held to be acceptable by Malawian society.* Given that such practices were harmful and constituted discrimination based on gender and marital status, they were covered by the Gender Equality Act and were prohibited.<sup>1574</sup>

Addressing requests for information about ‘awareness-raising campaigns or training programmes to eliminate those practices, as well as statistics on the number of cases related to those practices that had been brought before the courts and the number that had resulted in a conviction’<sup>1575</sup>, the delegation also added:

[N]o cases of widow cleansing had been brought before the courts because the practice had only been criminalized in 2014 through the adoption of the Gender Equality Act. Previously, public awareness campaigns had been launched. Professional cleansers had also been sensitized and were subsequently involved in efforts to end that harmful practice.<sup>1576</sup>

The HRC did not specifically address the explanation of the State party. Malawi argues that it has prohibited and criminalised harmful practices in the Gender Equality Act. In its Concluding Observations, the HRC nevertheless expresses concern about the prevalence and persistence of traditional practices, and considers the prohibition too vague and general. The State party should ‘*explicitly criminalize* the practices of female genital mutilation, “sexual cleansing” rituals, “widow inheritance”, ceremonies

<sup>1571</sup> HRC, Malawi periodic report, CCPR/C/MWI/1 (2012), para 101.

<sup>1572</sup> HRC, Replies of Malawi to the list of issues, CCPR/C/MWI/Q/1/Add.2 (2014), para 10.

<sup>1573</sup> HRC, Summary Record of the 3072<sup>nd</sup> meeting, CCPR/C/SR.3072, para 8.

<sup>1574</sup> *Ibid.*, para 20.

<sup>1575</sup> *Ibid.*, para 8.

<sup>1576</sup> HRC, Summary Record of the 3073<sup>d</sup> meeting, CCPR/C/SR.3073, para 2.

which lead to sexual abuse and any other specific harmful traditional practice that discriminates against women and girls'.<sup>1577</sup> The State party should also adopt 'a comprehensive strategy to address such practices which includes trainings and awareness-raising activities targeting children, women, teachers, parents, police, judges, lawyers, prosecutors, traditional leaders and population at large', and it should '[p]roactively investigate cases of traditional harmful practices'.<sup>1578</sup> Both the State party's legislation on harmful practices, and its enforcement are considered inadequate. While the State party's argument is one of resilient culture and shortcomings in the practical and effective enjoyment of rights, the HRC's recommendations focus on shortcomings in the State party's legal commitments and policy efforts.<sup>1579</sup>

Mauritania blamed the persistence of early marriages in the country on socio-cultural factors. In its initial report, the State party declared that its Personal Status Code recognised several women's rights, including 'the right of a girl child not to marry without her consent and to attain majority at the age of 18'.<sup>1580</sup> The public dialogue shed some light on the challenges the State party encountered in eradicating the phenomenon. When a Committee member said it had information 'that, despite legislation, early marriage was widely practised due to poverty and slavery'<sup>1581</sup>, the delegation explained that, despite the Personal Status Code having set the age of marriage at 18 years, 'harmful sociocultural practices subsisted, partly owing to a misinterpretation of Islam'.<sup>1582</sup> A commission of religious representatives had been set up with a view to issuing a fatwa on early marriage. Such a ruling would enable the Government to conduct awareness-raising campaigns and change mind-sets in Mauritania.<sup>1583</sup> The HRC did not directly address the State party's cultural arguments, nor did it welcome or even note the State party's efforts to address the cultural barriers, the idea to issue a fatwa in particular. In its Concluding Observations the HRC *noted* that the Personal Status Code established the age of marriage at 18 years, while expressing concern at the persistence of early marriage.<sup>1584</sup> Its recommendations were aimed at eliminating the gap between law and practice. The State party should 'ensure the strict application of its legislation banning early marriages', and 'carry out campaigns to publicize the legislation and inform girls, their parents and community leaders of the harmful effects of early marriage'.<sup>1585</sup> While the State party's explanations focus on the cultural attitudes and practices among private parties as the main barrier to the enjoyment of rights, the HRC considers that the State party can do more in terms of enforcing legislation and promoting the awareness and acceptance of legislation.

<sup>1577</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 8. (emphasis added, VV).

<sup>1578</sup> *Ibid.*

<sup>1579</sup> Which is defensible, since the State party has decreed a rather vague law, and is not implementing.

<sup>1580</sup> HRC, Mauritania periodic report, CCPR/C/MRT/1 (2012), para 190, 195.

<sup>1581</sup> HRC, Summary Record of the 3019<sup>th</sup> meeting, CCPR/C/SR.3019 (2013), para 23.

<sup>1582</sup> *Ibid.*, para 34.

<sup>1583</sup> *Ibid.*

<sup>1584</sup> HRC, CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 10, 23.

<sup>1585</sup> *Ibid.*, para 23.

In Côte d'Ivoire the practices of female genital mutilation, early marriage and polygamy persist, despite their prohibition.<sup>1586</sup> Côte d'Ivoire stated in its periodic report that 'female genital mutilation still commands wide social acceptance, particularly in Muslim communities'<sup>1587</sup>, and provided the following explanation:

There are real obstacles to implementing the law against female genital mutilation in Côte d'Ivoire, most particularly sociocultural inertia. It is a practice whose origins lie in the education and socialization of girls. To deal with this difficulty, the Government is placing the emphasis on awareness-raising and publicizing the law.<sup>1588</sup>

To eradicate this phenomenon, a number of actions have been targeted at practitioners of female circumcision to discourage them from continuing the practice. Most of these actions involve the implementation of income-generating activities. It must be acknowledged, however, that these programmes do not usually yield convincing results, owing to the importance of the social issues linked to the practice of female circumcision as compared to economic issues.<sup>1589</sup>

Likewise, the delegation of Côte d'Ivoire explained the cultural factors involved in early marriage and polygamy:

*Early marriage was a cultural issue.* Agriculture in Côte d'Ivoire required physical labour, thus affecting specific social relations. Until farming was modernized and schools were introduced in every village, *many cultural and social habits would be difficult to change, including early marriage.* Polygamy was addressed through awareness raising campaigns. However, it was an economic question for many people due to, again, the prevalence of intensive physical farming.<sup>1590</sup> (...) The Government (...) regularly runs awareness-raising campaigns targeting religious and community leaders on the issue of early and forced marriage, and also uses radio and television broadcasts to denounce all forms of violence against women and harmful practices.<sup>1591</sup>

The actions to discourage practitioners of female circumcision to continue the practice were criticised by the HRC in its Concluding Observations:

The Committee is concerned about the persistence of certain harmful practices, notwithstanding their prohibition by law, such as female genital mutilation, early marriage and polygamy, particularly in rural areas and in some regions of the State party's territory. Moreover, *the Committee is concerned that the State party cites the economic interests of practitioners of excision as an obstacle to prosecution against them.*<sup>1592</sup>

<sup>1586</sup> HRC, Côte d'Ivoire periodic report, CCPR/C/CIV/1 (2013), para 168, 174.

<sup>1587</sup> Ibid, para 167.

<sup>1588</sup> Ibid, para 169.

<sup>1589</sup> Ibid, para 170.

<sup>1590</sup> Ibid.

<sup>1591</sup> Ibid, para 175. (emphasis added, VV).

<sup>1592</sup> HRC, CO Côte d'Ivoire, CCPR/C/CIV/CO/1 (2015), para 12 (emphasis added, VV).

In the Concluding Observations, the State party is recommended to ‘ensure *the effective enforcement* of Act No 98/757 of 23 December 1998, which prohibits female genital mutilation, the provisions of the Criminal Code that render early marriage illegal and the legislation that prohibits polygamy’. It should also ‘generate public awareness, including among religious leaders and traditional authorities, of the legislation and the harmful impact of such practices on women’.<sup>1593</sup> Côte d’Ivoire relies on culture to explain why its efforts are not effective. It allegedly complies with its positive obligations, but culture is resilient. It is also conducting awareness-raising efforts to address these cultural barriers. The HRC’s recommendations indicate that it does not consider the State party to comply. It calls for effective enforcement, thereby implying non-compliance<sup>1594</sup>, and also recommends the State party to conduct the awareness-raising measures which the State party has suggested to be doing. This seems a bit superfluous. What is the HRC’s message? Are the State party’s current awareness-raising efforts inadequate? Should they do more? Or is this a mere repetition of the obligations? The State authorities are kept in the dark in this regard.

The Kenyan delegation pointed out that the law prohibiting female genital mutilation had only recently been adopted (in 2011) and that it was too early to draw conclusions:

[T]he members of the communities that practised female genital mutilation must first come to consider those acts as crimes and report them to the authorities. Bearing in mind how entrenched the practice was, it would take time for the actions of the Government, which was committed to eradicating the practice, to yield results.<sup>1595</sup>

The HRC *welcomed* the prohibition of the practice and the adoption of a national policy for its abandonment, but ‘is still concerned at the prevalence of female genital mutilation’.<sup>1596</sup> The State party suggests compliance with its obligations, while acknowledging that there are cultural obstacles impeding the actual enjoyment of rights, because the practice is so entrenched. According to the HRC, however, the State party ‘should ensure that cases of FGM (...) are thoroughly investigated and that the perpetrators are brought to justice, and the victims adequately compensated’.<sup>1597</sup> This suggests a lack of compliance: enforcement needs to be improved. Although the HRC calls for ‘a comprehensive approach to preventing and addressing FGM’ and suggests that ‘the State party should improve its research and data collection methods in order to establish the extent of the problem, its causes and consequences on women’, it does not speak of (a need for) awareness-raising and education efforts.<sup>1598</sup> This is remarkable, considering the main argument of the State party that people must first come to

<sup>1593</sup> Ibid. (emphasis added, VV).

<sup>1594</sup> Perhaps this approach is inherent in the State reporting procedure, where non-compliance or violations are not often made explicit.

<sup>1595</sup> HRC, Summary Record of the 2907<sup>th</sup> meeting, CCPR/C/SR.2907 (2012), para 11.

<sup>1596</sup> HRC, CO Kenya, CCPR/C/KEN/CO/3 (2012), para 15.

<sup>1597</sup> Ibid.

<sup>1598</sup> Ibid.

consider FGM a crime and report the practice. Awareness-raising or sensitisation efforts would be a logical first step to accomplish this.

Likewise, Mauritania pointed out that the issuance of a fatwa regarding the harmful effects of FGM would help overcome cultural obstacles to adopting legislation:

Sociocultural factors and a misguided interpretation of Islam were at the root of most violence against women in Mauritania. (...) The practice of female genital mutilation was waning. The issuance of the fatwa regarding female circumcision had drawn public attention to the harmful effects of such practices on health, and religious leaders had helped raise awareness of the issue. (...) It was hoped that, despite the cultural obstacles encountered, it would be possible to enact the bill on female genital mutilation, the consideration of which had been greatly delayed.<sup>1599</sup>

The HRC did not address the fatwa, and did nothing more than *take note* of the information provided by the State party on the measures taken to combat FGM. It remained concerned by the persistence of the practice in the State party.<sup>1600</sup> The HRC recommended the State party to adopt the bill specifically criminalising female genital mutilation, and to 'step up and continue its campaigns and other measures to raise awareness of and combat female genital mutilation among the population, including in rural areas'.<sup>1601</sup>

#### 2.1.1.2 Culture as 'excuse' for lack of compliance

States parties do not only refer to the culture and cultural attitudes of private parties as obstacles to the effective enjoyment of rights. Occasionally, States parties refer to the culture and cultural attitudes of public officials or parliamentarians and their constituencies. Culture may stand in the way of compliance, because public officials, such as judges, prosecutors, police officers, health personnel and teachers, and parliamentarians may hesitate not to follow the cultural values of the communities or society which they are a part of and/or represent.

Cultural attitudes of private parties as well as public officials feature in the dialogue with Mozambique, and culture is thus used both as an explanation for lack of progress/ results and as an excuse for lack of compliance. Addressing its obligations to combat violence against women, Mozambique noted that '[t]he greatest challenge (...) is to make people, and women in particular, aware about the laws that protect their rights in order to gradually reduce the negative cultural practices that violate their rights'.<sup>1602</sup> The constructive dialogue clarified some of the challenges Mozambique had to face in promoting gender equality and eradicating violence against women. It first explained

<sup>1599</sup> HRC, Summary Record of the 3018<sup>th</sup> meeting, CCPR/C/SR.3018 (2013), para 18.

<sup>1600</sup> HRC, CO Mauritania, CCPR/C/MRT/CO/1 (2013), para 11.

<sup>1601</sup> Ibid.

<sup>1602</sup> HRC, Replies of Mozambique to the list of issues, CCPR/C/MOZ/Q/1/Add.1 (2013), para 65; Mozambique periodic report, CCPR/C/MOZ/1 (2013), para 174.

that legislation was in place, but that the cultural attitudes of victims themselves were a barrier to the enjoyment of rights:

There was a law against violence towards women, but victims of domestic violence rarely availed themselves of it because of the weight of tradition, which dictated that a woman should submit to her husband, even when he abused her.<sup>1603</sup>

Subsequently, however, the State party admitted that public officials also failed in properly enforcing the law:

In addition, judges, who were mainly men, were not always willing to condemn that type of violence. A dramatic change in attitudes was needed in order for the law to be effectively applied.<sup>1604</sup>

This latter argument was immediately addressed by the HRC:

The fact that judges, because they were men, could justify violence towards women was a cause for great concern and raised the question of training for judges and the selection criteria used.<sup>1605</sup>

The delegation further pointed out that ‘not all traditional practices were bad, but those that prevented women from obtaining equal rights with men must be combated’. According to the delegation, ‘*it would take time to bring about the necessary change in people’s attitudes*’.<sup>1606</sup> The State party confirmed that ‘many Mozambicans remained unaware of the law and of their rights, despite efforts made by the Government’, and that crimes often went unreported:

Even if a woman was aware of the law, she might decide not to report abuse committed by her husband, for fear that he would be placed in detention and the family left without its breadwinner.<sup>1607</sup>

In its Concluding Observations, the HRC expressed concern at the persistence of gender-based violence and ‘the low reporting of such crimes owing to traditional societal attitudes’, and recommended the State party to ensure ‘the effective implementation of the existing relevant legal and policy frameworks’.<sup>1608</sup> It should also ‘conduct awareness-raising campaigns on the negative effects of domestic violence, inform women of their rights (...), and facilitate complaints from victims’, and ‘ensure that cases of domestic violence are thoroughly investigated, perpetrators are prosecuted

<sup>1603</sup> HRC, Summary Record of the 3020<sup>th</sup> meeting, CCPR/C/SR.3020 (2013), para 16.

<sup>1604</sup> Ibid, para 16.

<sup>1605</sup> Ibid, para 18.

<sup>1606</sup> Ibid, para 24.

<sup>1607</sup> Ibid, para 28.

<sup>1608</sup> Ibid, para 10.

and, if convicted, punished with appropriate sanctions, and that victims have access to effective remedies and means of protection'. Although the HRC addresses the lack of enforcement (by recommending 'effective implementation' of laws, and calling for thorough investigation and prosecution of cases of domestic violence), it does not specifically address the cultural attitudes of judges as such.

An example in relation to the culture and cultural attitudes of parliamentarians is found in the Concluding Observations on Malawi. When the HRC initially considered the human rights situation in Malawi in the absence of a report, it expressed concern about 'the reported practice of forced and early marriages by some parts of its population', and encouraged the State party to take legislative steps to protect children against forced and early marriages and to conduct awareness-raising campaigns on the negative effects of forced and early marriages.<sup>1609</sup> In its replies to the list of issues, Malawi explained that there were problems with adopting the necessary legislation:

The Marriage, Divorce and Family Relations Bill has not yet been tabled in Parliament because of the outstanding issues including the prohibition of polygamy, and the minimum age for marriage which were contested during the previous tabling of the Bill in Parliament.<sup>1610</sup>

During the constructive dialogue, the State party reiterated that the Bill had not yet been adopted 'because its provisions prohibiting polygamy and raising the legal minimum age of marriage continued to provoke debate', adding that 'efforts were being made to find a way out of the impasse'.<sup>1611</sup> Malawi was encouraged to ensure that the Bill was enacted as a matter of urgency.<sup>1612</sup> This was also reflected in the Concluding Observations, where the HRC urged the authorities to 'expedite the adoption of the Marriage, Divorce and Family Relations Bill and ensure that it explicitly criminalizes forced and child marriages and sets the minimum age of marriage in accordance with international standards'.<sup>1613</sup> In addition, the State party should '[p]rovide training to relevant stakeholders and conduct awareness-raising campaigns aiming to prevent forced and child marriages'. Whether this also includes sensitisation of parliamentarians remains unclear.<sup>1614</sup> It is perhaps noteworthy that the HRC does not refer to the inclusion of a prohibition of polygamy in the bill, an issue which was also contested. Polygamy is not mentioned at all in the Concluding Observations.

Likewise, in Paraguay, an anti-discrimination bill had not yet been adopted. The State party's excuse was formulated as follows:

The anti-discrimination bill had not yet been adopted because certain extremely conservative sections of society vehemently opposed and wrongly feared that its adoption might open

<sup>1609</sup> HRC, provisional CO Malawi (in the absence of a report), CCPR/C/MWI/CO/1 (2012), para 19.

<sup>1610</sup> HRC, Replies of Malawi to the list of issues, CCPR/C/MWI/Q/1/Add.2 (2014), para 12.

<sup>1611</sup> HRC, Summary Record of the 3072<sup>nd</sup> meeting, CCPR/C/SR. 3072 (2014), para 4.

<sup>1612</sup> Ibid, para 19 and 20.

<sup>1613</sup> HRC, CO Malawi, CCPR/C/MWI/CO/1/Add.1 (2014), para 25.

<sup>1614</sup> Ibid.

the way for bills such as ones authorizing same-sex marriage. The authors of the anti-discrimination bill were doing all in their power to have the bill considered by parliament, but the President of the Senate did not want to put it on the agenda as he did not believe there was any chance that it would be adopted.<sup>1615</sup>

This parliamentary resistance to the adoption of new legislation was ignored by the HRC, which ‘regrets that the State party has not yet adopted the bill (...) to outlaw all forms of discrimination, since stereotyping, discrimination and marginalization are still prevalent and are especially detrimental to women, persons with disabilities, indigenous people, people of African descent, and lesbians, gays, bisexuals and transsexuals’.

[The State party] should adopt comprehensive legislation to combat discrimination, including provisions that provide protection against discrimination on grounds of sexual orientation and gender identity, and should prioritize the implementation of programmes to eliminate stereotyping and discrimination and guarantee tolerance and respect for diversity.<sup>1616</sup>

The HRC did not recommend any training, education or sensitisation activities towards parliamentarians or society in general.

The delegation of Sierra Leone used its public dialogue with the HRC, to argue the following:

[A] long legislative process would be needed before a law on female genital mutilation could be adopted, as Members of Parliament would have to be sensitized to the issue in advance. Sierra Leone was determined to eradicate the practice but had chosen to do so at what it judged to be the most appropriate pace.<sup>1617</sup>

The HRC directly addressed this argument:

(...) if such practices were not clearly prohibited by Parliament, there was little likelihood that society would move to abolish them.<sup>1618</sup>

In its Concluding Observations, the HRC ‘is concerned by the continuing reports of harmful traditional practices, especially female genital mutilation’, and ‘*notes with serious concern the rejection of a proposed provision to criminalize female genital mutilation*’. The State party is urged to explicitly prohibit FGM, to ‘[strengthen, VV] its awareness-raising and education programmes in consultation with women’s organizations and traditional leaders’, and ‘to develop a common perception on the

<sup>1615</sup> HRC, Summary Record of the 2952<sup>nd</sup> meeting, CCPR/C/SR.2952 (2013), para 28.

<sup>1616</sup> HRC, CO Paraguay, CCPR/C/PRY/CO/3 (2013), para 9.

<sup>1617</sup> HRC, Summary Record of the 3041<sup>st</sup> meeting, CCPR/C/SR.3041 (2014), para 12.

<sup>1618</sup> Ibid, para 14.

issue of FGM'.<sup>1619</sup> While the dialogue clearly indicated that it was the cultural attitudes of parliamentarians which impeded the adoption of a law prohibiting FGM, the recommended awareness-raising and education programmes seem to be directed at the general population. The cultural barrier of the attitudes of parliamentarians remains unaddressed.

Even though the HRC has repeatedly expressed concerns about discriminatory provisions in the Civil Code, Japan has consistently refused to take any action in this regard. At several occasions, the HRC took issue with the prohibition for women to remarry within six months following the date of the dissolution or annulment of their marriage and the different age of marriage for men and women.<sup>1620</sup> In its latest periodic report, Japan explained that a bill had been drafted which included provisions for shortening the period of prohibition from remarrying for women and harmonising the minimum age of marriage for men and women. However, 'this bill was not submitted to the *Diet* because it was so controversial in the ruling party that it was not decided on in the Cabinet'.<sup>1621</sup> The HRC subsequently wished to know what measures the State party had taken to overcome the difficulties experienced in the adoption of that bill.<sup>1622</sup> Japan's response:

Whether or not to revise the [Civil Code] to shorten the period of prohibition for remarriage for women and to harmonize the minimum age of marriage for women and men is a significant issue that may affect the basic concept of the institution of marriage and that of family. Therefore, [the Civil Code] should be revised after obtaining consensus among the public. However, there are still varying opinions on this matter and it is too early to make such a revision.<sup>1623</sup>

During the constructive dialogue, the Japanese delegation reiterated that since 'public opinion was divided' it was deemed 'preferable not to revise legislation for the time being'.<sup>1624</sup> Changing the legal age of marriage, the delegation reiterated, was 'a sensitive issue which formed the subject of debate in Japanese society', and 'it was therefore too early to alter it'.<sup>1625</sup> The purpose of the waiting period which women had to observe before remarriage, it explained, was 'to avoid any filiation problems which might arise in the event of rapid remarriage'.<sup>1626</sup>

This reasoning was directly addressed by the HRC:

[F]rom some of the delegation's answers, there appeared to be a conception that a human right could be outweighed if there was any possibility that respecting it would cause a disadvantage, which was not the understanding expressed in the Covenant. For example,

<sup>1619</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 12. (emphasis added, VV).

<sup>1620</sup> HRC, CO Japan, CCPR/C/79/Add.102 (1998), para 16; CO Japan, CCPR/C/JPN/CO/5 (2008), para 11.

<sup>1621</sup> HRC, Japan periodic report, CCPR/C/JPN/6 (2012), para 284.

<sup>1622</sup> HRC, List of issues, CCPR/C/JPN/Q/6 (2013), question 5.

<sup>1623</sup> HRC, Replies of Japan to the list of issues, CCPR/C/JPN/Q/6/Add.1 (2014), para 27.

<sup>1624</sup> HRC, Summary Record of the 3080<sup>th</sup> meeting, CCPR/C/SR.3080 (2014), para 7.

<sup>1625</sup> Ibid, para 28.

<sup>1626</sup> Ibid, para 28.

women could be forbidden from marrying for six months after divorce because of the possibility that a child could be born and there might be a doubt as to paternity. Given the advances in DNA technology, such an argument was no longer justified.<sup>1627</sup>

In the Concluding Observations, the HRC explicitly rejected Japan's grounds for refusing to amend the law:

*The Committee is concerned at the State party's continuing refusal to amend the discriminatory provisions of the Civil Code that prohibit women to remarry in the six months following divorce and establishes a different age of marriage for men and women, on the grounds that it could 'affect the basic concept of the institution of marriage and that of the family'.*

The State party should ensure that stereotypes regarding the roles of women and men in the family and in society are not used to justify violations of women's right to equality before the law. The State party should, therefore, take urgent action to amend the Civil Code accordingly.<sup>1628</sup>

The HRC's explicit reference to 'stereotypes' in the recommendation is exceptional. Whether the HRC refers to stereotyping by the legislators/parliamentarians or by the society/general public remains ambiguous, however.

Kenya pointed at the fact that public consultations showed support for the practice of polygamy:

Polygamy was not considered a form of discrimination against women in Kenya. *Public consultations had shown that polygamy was accepted among the communities that practised it.* The Marriage Bill therefore provided for both monogamous and polygamous marriage, but the latter was allowed only with the consent of the other spouse.<sup>1629</sup>

According to the delegation, Kenya could not ignore majority opinion, as it was an important part of the democratic process:

(...) traditional cultural practices were not considered obstacles to the application of the Covenant. Rather, they were sensitive issues that the authorities inevitably had to take into account. (...) Nonetheless, *it was true that cultural factors, including polygamy in particular, had delayed the adoption of several bills. It was difficult for deputies to disregard the majority opinion among voters on issues such as marriage and polygamy;* moreover, there was a consultation process on all bills, involving all stakeholders, whose views on those matters ranged from liberal to conservative. *Public participation in the legislative process was a requirement under the new Constitution, the aim being to expand the democratic space.* The authorities were very proud of the process, but were also *conscious that it could sometimes impede the adoption of laws.* They were therefore committed to combining legislative

<sup>1627</sup> HRC, Summary Record of the 3081<sup>st</sup> meeting, CCPR/C/SR.3081, para 26.

<sup>1628</sup> HRC, CO Japan, CCPR/C/JPN/CO/6 (2014), para 8.

<sup>1629</sup> HRC, Summary Record of the 2906<sup>th</sup> meeting, CCPR/C/SR.2906 (2012), para 79.

participation and civic education measures to help change attitudes. *Important progress had already been made, as the Parliament had been able to overcome cultural resistance and adopt the law on female genital mutilation, for example.*<sup>1630</sup>

In the Concluding Observations, the HRC regrets that the draft Marriage bill endorses polygamous marriages, and argues that polygamous marriages undermine the non-discrimination provisions and are incompatible with the Covenant. The State party should, therefore, take concrete measures to prohibit polygamous marriages.<sup>1631</sup> The HRC did not address the cultural obstacles to adopting legislation as put forward by the State party. There is no recommendation to raise awareness or sensitize the general public about the harmful effects of polygamy, nor is there a recommendation to address cultural attitudes of parliamentarians (or ‘deputies’). Also the flawed argument that ‘[i]t was difficult for deputies to disregard the majority opinion among voters’ remains unchallenged.

Sierra Leone explained how cultural factors formed a barrier to the (complete) prohibition of FGM:

A ban on the practice of female genital mutilation (FGM) on girls aged under 18 had been included in the Agenda for Prosperity. *The enactment of laws, however, was insufficient; FGM must be addressed through public awareness-raising and education.* FGM in Sierra Leone took place voluntarily in the context of ‘initiation’ into a women’s secret society, known as Bondo. Women who had not been ‘initiated’ into the Bondo society faced stigma; female political candidates who had not been circumcised tended not to receive support in their political campaigns. *Since Bondo was instrumental in women’s education and empowerment, simply prohibiting FGM in law would not stop it in practice. Attitudes must be changed and new types of initiation into Bondo developed so that women could belong to the society without being subjected to genital cutting.* In that regard, agreements had been concluded with practitioners, or ‘Soweis’, to prevent underage ‘initiation’. Efforts were being made to ensure that they were aware of the negative consequences of FGM and to offer them alternative employment if they ceased to practise.<sup>1632</sup>

This argumentation was directly addressed by a Committee member:

(...) while he agreed that enacting legislation might not be the only solution to the issue of female genital mutilation, it was a fundamental part of the solution. FGM must be subject to appropriate punishment.<sup>1633</sup>

Another Committee member wished to emphasize that ‘female genital mutilation should not be seen as a means of empowering women’.<sup>1634</sup> In the Concluding

<sup>1630</sup> HRC, Summary Record of the 2907<sup>th</sup> meeting, CCPR/C/SR.2907 (2012), para 32.

<sup>1631</sup> HRC, CO Kenya, CCPR/C/KEN/CO/3 (2012), para 7.

<sup>1632</sup> HRC, Summary Record of the 3040<sup>th</sup> meeting, CCPR/C/SR.3040 (2014), para 29.

<sup>1633</sup> Ibid, para 45.

<sup>1634</sup> HRC, Summary Record of the 3041<sup>st</sup> meeting, CCPR/C/SR.3041 (2014), para 8.

Observations, the HRC ‘welcomes the Child Rights Act (2007), which criminalizes the commission of some harmful traditional practices, but notes with serious concern the rejection of a proposed provision to criminalize female genital mutilation during the adoption of the Child Rights Act’, and ‘regrets that impunity for perpetrators of this unlawful and harmful practice still prevails’. The State party is recommended to explicitly prohibit female genital mutilation, and to ‘make efforts to prevent and eradicate harmful traditional practices, including female genital mutilation, by strengthening its awareness-raising and education programmes in consultation with women’s organizations and traditional leaders’. A national-level team established to develop a common perception on the issue of female genital mutilation should ensure that communities where the practice is widespread are targeted in order to bring about a change in mind-set.<sup>1635</sup>

## 2.1.2 CESCR

### 2.1.2.1 Culture as ‘explanation’ for lack of progress

In the dialogue between the CESCR and Cameroon regarding female genital mutilation, the State party delegation explained that the problem was not so much its lack of criminalisation, as there were provisions in the Criminal Code which could be invoked to combat and prosecute this offence<sup>1636</sup>, but instead that ‘it was very difficult to take action in the absence of complaints and evidence’<sup>1637</sup>:

(...) genital mutilation was an offence under the draft criminal code. Under current criminal law, that practice was deemed to constitute serious injury and perpetrators faced 10 to 20 years’ imprisonment. *No complaint concerning female genital mutilation had ever been filed in Cameroon, because the victims regarded it not as an offence, but as a rite of passage.*<sup>1638</sup>

This argument was directly addressed by a Committee member:

(...) female genital mutilation, which could be diagnosed by a simple medical examination, was intrinsic proof. The absence of a complaint was not a reason for inertia, because when a crime had been committed the Government could itself take legal action.<sup>1639</sup>

The Committee member did not specify how the State party should take legal action without complaints: should doctors be obliged to report evidence of FGM, or should the State party organize obligatory medical check-ups?

<sup>1635</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 12.

<sup>1636</sup> CESCR, Summary Record of the 42<sup>nd</sup> meeting, E/C.12/2011/SR.42 (2011), para 33. The Cameroonian delegation assured the Committee that, while the Criminal Code did not make specific reference to gender-specific offences such as female genital mutilation, there were provisions in the Code that could be invoked to combat and prosecute such offences.

<sup>1637</sup> CESCR, Summary Record of the 41<sup>st</sup> meeting, E/C.12/2011/SR.41 (2011), para 50.

<sup>1638</sup> *Ibid*, para 51.

<sup>1639</sup> *Ibid*, para 52.

In the Concluding Observations, the CESCR noted with concern that female genital mutilation is ‘still not explicitly prohibited by the law of the State party, in spite of the Committee’s previous recommendations’, and strongly recommends the State party to ensure that female genital mutilation is made punishable under the Criminal Code and that perpetrators are prosecuted. It also recommends, in rather general terms, ‘that national awareness-raising campaigns be conducted to combat all forms of violence against women and girls’.<sup>1640</sup> While the State party acknowledges shortcomings in its legislative efforts, it clearly argues that the problem lies elsewhere: victims do not perceive FGM as an offence. This cultural argument is not specifically addressed by the CESCR, although it seems likely that the recommended awareness-raising campaigns are expected to address this issue. The focus in the Committee’s recommendations is on *de jure* compliance and effective enforcement, i.e., the obligation to prosecute.

The Guatemalan authorities explained that there was debate in society about therapeutic abortion, currently illegal:

The Constitutional Court had been asked to review the relevant law and consider the possibility of reforming it or adding exceptions in cases of rape or incest. *The debate on the issue was ongoing, and the conservative positions of religious communities and other sectors of society must be considered.*<sup>1641</sup>

This turned out to be an obstacle:

The parliament was considering lifting the ban on abortion or allowing exceptions to the ban, but it had met with *resistance on the part of various Christian denominations.*<sup>1642</sup>

The CESCR ignored this argument and urged the State party ‘to review its legislation on abortion and to study the possibility of providing for exceptions to the prohibition on abortion, including in cases of pregnancies resulting from rape or incest’.<sup>1643</sup>

Sometimes it is rather unclear whether a State party is referring to culture as an *explanation* for lack of progress, or as an *excuse* for non-compliance. In the dialogue between Yemen and the CESCR, for example, the State party seems to refer to culture, as standing in the way of both the *de facto* enjoyment of human rights (outcome) and of its *de jure* compliance with human rights. This distinction is hard to make, because the opposition from Islamists or extremists which the delegation refers to as obstacle to adopting new legislation, could refer to both parliamentarians and (sections of) society. It is discussed here, because, even though culture is clearly having an impact on the legislative process, it seems that the State party is referring to culture first and foremost to explain the lack of progress. It seems to be arguing that, *even if legislation would be adopted*, traditions and customs remain:

<sup>1640</sup> CESCR, CO Cameroon, E/C.12/CMR/CO/2–3 (2012), para 20.

<sup>1641</sup> CESCR, Summary Record of the 53d meeting, E/C.12/2014/SR.53 (2014), para 33.

<sup>1642</sup> Ibid, para 39.

<sup>1643</sup> CESCR, CO Guatemala, E/C.12/GTM/CO/3 (2014), para 23.

Yemen was taking steps to enhance and modernize its legislation governing fundamental rights, particularly those of women and children, in accordance with the international instruments to which it was a party. However, much as the changes had been positive, they had been introduced only recently. It therefore remained particularly difficult to eliminate human rights violations completely, *not because of the gaps in legislation, but more often owing to existing traditions and customs*, that required patience and awareness-raising as well as cooperation between the authorities, the opposition and civil society.<sup>1644</sup>

When a Committee member asked ‘why, unlike in other Arab countries, Yemeni parliamentarians refused to adopt legislation establishing the minimum age of marriage at 17, because they considered it “un-Islamic”’, the State party explained:

While there used to be legislation in place that fixed the minimum age of marriage and political majority at 18, those provisions had been abolished. When they had been resubmitted, *they had met with strong opposition from the Islamists*. The Government was endeavouring to *raise public awareness about the validity of those rules, but it would take time and effort to overcome the traditional and cultural heritage of Yemen that inhibited the exercise of human rights*.<sup>1645</sup>

The State party also elaborated on its actions to overcome this opposition:

Since the bill on the minimum age of marriage had been shelved, the Supreme Council for Motherhood and Childhood had published several documents and conducted campaigns based on jurisprudence and medical information, showing what an important issue early marriage was. The testimonies from young girls who had married at an early age had had a particularly powerful impact on public opinion. Some members of the opposition had joined the majority parties in voting for the bill.<sup>1646</sup>

The delegation also used a cultural argument to explain why it had failed to introduce a quota system to increase women’s representation:

(...) *gender equality came up against many obstacles, particularly in cultural terms*. The President and the Government had backed programmes for women and the President had indicated his support for a quota system to increase women’s representation. However, faced with *the wave of protest the project had provoked, especially among extremists*, the Council of Ministers had abandoned it.<sup>1647</sup>

The CESCR explained that the existence of cultural obstacles did not discharge a State party of its duties:

<sup>1644</sup> CESCR, Summary Record of the 12<sup>th</sup> meeting, E/C.12/2011/SR.12 (2011), para 5.

<sup>1645</sup> Ibid, para 26.

<sup>1646</sup> Ibid, para 32.

<sup>1647</sup> Ibid, para 28.

Several factors could come into play in the area of discrimination, such as culture and sometimes poverty, but what was needed above all, was political will and financial resources. *The argument that discrimination against women was a cultural issue applied almost worldwide, but that in no way precluded countries from making progress in combating the problem.* It was not sufficient to enshrine equal rights in the Constitution, as Yemen had done, without taking concrete measures and adopting more comprehensive legislation that specifically focused on gender equality.<sup>1648</sup>

In this regard, another Committee member added:

(...) despite some legislative changes, the status of women in Yemen had not improved in practice. It seemed that the State lacked the political will to remedy that situation. The conservative and religious culture in Yemen could not be used to justify a lack of improvement in women's rights.<sup>1649</sup>

One Committee member even denied that harmful practices can be considered cultural:

*With regard to cultural barriers in Yemen in relation to the status of women, mentioned in the delegation's opening statement, he recalled that the Committee's general comment No. 21 (Right of everyone to take part in cultural life) noted that cultural diversity could not be invoked to infringe upon human rights guaranteed by international law, nor to limit their scope. Thus, only positive and constructive values could be considered as cultural in nature, and not practices or traditions that infringed upon rights.* The Committee therefore recommended that the State party should use culture as a tool for correcting the many inequalities that existed in various areas. Since all countries had a cultural heritage, not strictly in material terms, the Government could, for example, explain what ethnic diversity meant in Yemen and what rights its various ethnic groups enjoyed.<sup>1650</sup>

In its Concluding Observations, the CESCR is 'deeply concerned that the amendment to the Personal Status Act (...), legalizing marriage for girls under 15 years of age with the consent of their guardians, remains in force and that (...) the Parliamentary Sharia Committee prevented the entry into force of an amending act aimed at establishing a minimum age of marriage'.<sup>1651</sup> The CESCR recommends that the State party adopt and implement the law on the minimum age of marriage and set it at 18 years of age in accordance with recommendations by relevant international bodies, and raise

<sup>1648</sup> Ibid, para 14.

<sup>1649</sup> Ibid, para 87.

<sup>1650</sup> CESCR, Summary Record of the 14<sup>th</sup> meeting, E/C.12/2011/SR.14 (2011), para 3.

<sup>1651</sup> The Yemeni government nearly passed similar legislation in 2009. Parliament was then scheduled to vote on a minimum age for marriage provision, but a small conservative bloc sought and obtained an additional review by the parliamentary Sharia Committee, which reviews draft laws to assess their compatibility with Sharia (Islamic law). After the Committee objected to the draft law on religious grounds, neither parliament nor the president took further steps to adopt the law. Human Rights Watch, Yemen: End Child Marriage, <<https://www.hrw.org/news/2014/04/27/yemen-end-child-marriage>> accessed 7 September 2019.

awareness of the negative effects of child marriages.<sup>1652</sup> The State party's cultural argument seems to be in the first place about cultural attitudes of private actors, although it also acknowledges gaps in legislation. Gaps in legislation are attributed to opposition from Islamists/extremists, which also seems to point at opposition from society, not from parliament. While the State party's main concern thus relates to cultural attitudes of private parties which impede the *de facto* enjoyment of rights, the CESCR's recommendations address *de jure* compliance.

#### 2.1.2.2 Culture as 'excuse' for lack of compliance

There were several examples in the State reporting procedure of States parties which referred to culture as an obstacle to complying with obligations to adopt legislation. For example, the delegation of Guyana explained that there was opposition to raising the minimum age of marriage to 18 years:

(...) the low age of consent for sexual activity and marriage could be explained by historical and cultural factors. Many indigenous workers had come to Guyana in the nineteenth century and their children married at the age of 12 or earlier. The age of consent had recently been raised to 16 years and, *despite some opposition based on traditions and religious beliefs, steps were being taken to increase it further to 18 years.*<sup>1653</sup>

This reference to cultural factors evoked several comments from Committee members, such as the following, quite constructive, remark:

[A]lthough she understood that there were cultural barriers to increasing that age to 18 years, the Government should make additional efforts to do so, by, for instance creating schooling opportunities for children up to the age of 18. It was clear that marriage before the age of 18 was fraught with grave consequences for the health, employment and other aspects of the life of the girls concerned.<sup>1654</sup>

Another Committee member stressed that the existence of cultural factors did not discharge a State party of its duties:

(...) notwithstanding the existence of customs and traditions that made it difficult for the Government to raise the minimum age of consent for marriage to 18 years, it was the State party's obligation under the Covenant to do so.<sup>1655</sup>

Despite Guyana's assurances that it 'took whatever measures it could to eradicate the practice and to punish those responsible'<sup>1656</sup>, the CESCR was 'concerned at the low

<sup>1652</sup> CESCR, CO Yemen, E/C.12/YEM/CO/2 (2011), para 19.

<sup>1653</sup> CESCR, Summary Record of the 61<sup>st</sup> meeting, E/C.12/2015/SR.61 (2015), para 30.

<sup>1654</sup> Ibid, para 32.

<sup>1655</sup> Ibid, para 35.

<sup>1656</sup> Ibid, para 36.

age of consent to marriage (16 years of age) set out in the [law]<sup>1657</sup>, and recommended ‘that the legal age of consent to marriage be raised to 18 years’.<sup>1658</sup> Although the CESCR showed a constructive attitude during the public dialogue, its recommendations did not specifically address the cultural argument raised by the State party.

Uganda argued that its parliament formed a barrier to the adoption of a (more progressive) Marriage and Divorce Bill:

(...) Parliament (...) reviewed the bill clause by clause. After considering 22 of the 178 clauses of the Bill, it was realized that further consultations were needed on some of the clauses in the Bill that were regarded as contentious. Members of Parliament were given time to consult further with their constituencies about the Bill. The contentious provisions in the Bill include: exchange of marriage gifts (bride-wealth), parental consent at the time of marriage; definition of matrimonial property; property sharing at the dissolution of a marriage, whether due to natural causes or in case of divorce; cohabitation and property rights of cohabitantes; protection against abuse of conjugal rights of married persons and the title of the Bill (Marriage and Divorce). The Bill is yet to be re-scheduled for debate. The Government remains committed to complete the review process on the Marriage and Divorce Bill as soon as the Bill is rescheduled for debate and enactment by Parliament.<sup>1659</sup>

During the public session the delegation explained why it was important for Parliament to consult its constituencies:

It was also important to take the opinions and traditions of the different communities in Uganda into account when implementing international standards and incorporating them into national law, as failure to do so could lead to conflict, as had been the case with the marriage and divorce bill.<sup>1660</sup>

This argument was directly addressed by a Committee member:

(...) he was intrigued that the head of the delegation felt obliged to yield to his constituents on the issue of gender equality. It was the responsibility of a State to observe the basic norms of human rights, which could not be sacrificed under pressure from specific groups. The Government’s duty was to make it clear to the public that, under the country’s treaty obligations, gender equality was sacrosanct. Unfortunately, people whose rights had been denied for so long were not in a position to push for those rights.<sup>1661</sup>

In its Concluding Observations, the CESCR says it is concerned about the existence of sex-based discriminatory provisions in the State party’s legislation, the long delay in the adoption of the Marriage and Divorce Bill, and about ‘the persistence of patriarchal

<sup>1657</sup> CESCR, CO Guyana, E/C.12/GUY/CO/2–4 (2015), para 38.

<sup>1658</sup> Ibid, para 39.

<sup>1659</sup> CESCR, Replies of Uganda to the list of issues, E/C.12/UGA/Q/1/Add.1 (2015), under article 3.

<sup>1660</sup> CESCR, Summary Record of the 36<sup>th</sup> meeting, E/C.12/2015/SR.36 (2015), para 40.

<sup>1661</sup> Ibid, para 45.

attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in all spheres of life'.<sup>1662</sup> The State party should '[s]tep up its efforts to achieve legislative reform, and to this end abolish, as a matter of priority, all the remaining discriminatory provisions against women in its national laws', and 'adopt the Marriage and Divorce Bill without further delay, and raise awareness among the judiciary, prosecutors, the police and the general public about the provisions of these laws once adopted to ensure their full implementation'.<sup>1663</sup> It should also 'eliminate traditional practices and stereotypes that discriminate against women and raise awareness of this subject, targeting women and men at all levels of society, including traditional and religious leaders, in collaboration with civil society'.<sup>1664</sup> While the CESCR pays attention to the obstacles posed by cultural attitudes of the general public, it did not specifically address the problems posed by the implications of this for the role of parliamentarians in the legislative reform process.

Sri Lanka faced obstacles in relation to amending legislation on abortion:

The penal code permitted abortions to take place only if the delivery was going to cause a risk to life of the mother. *Efforts were being made to loosen restrictions on abortion but this received opposition from Parliament and society.* The Health Ministry was working on this issue and considering other grounds under which abortion would be considered legal, such as rape or incest.<sup>1665</sup>

The CESCR urged the State party to amend abortion laws and to consider providing for exceptions to the prohibition on abortion in cases of therapeutic abortion or pregnancies resulting from rape or incest.<sup>1666</sup> The cultural argument brought up by the State party remains unaddressed.

### 2.1.3 CEDAWCee

#### 2.1.3.1 Culture as 'explanation' for lack of progress

Also in the State reporting procedure before the CEDAWCee, the dominant trend is that culture is used by States parties as an explanation for lack of progress.

Kenya, for example, conceded in its periodic report 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

<sup>1662</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), paras 18–19.

<sup>1663</sup> Ibid.

<sup>1664</sup> Ibid.

<sup>1665</sup> UNOG, Committee on Economic, Social and Cultural Rights considers report of Sri Lanka, 9 November 2010, <[https://www.unog.ch/unog/website/news\\_media\\_archive.nsf/\(httpNewsByYear\\_en\)/C125763C00590FD6C12577D6004F0E70?OpenDocument](https://www.unog.ch/unog/website/news_media_archive.nsf/(httpNewsByYear_en)/C125763C00590FD6C12577D6004F0E70?OpenDocument)> accessed 7 September 2019.

<sup>1666</sup> CESCR, CO Sri Lanka, E/C.12/LKA/CO/2–4 (2010), para 34.

and, in many cases, retrogressive cultural practices<sup>1667</sup>, and contended that measures were being taken for modification of social and cultural patterns of conduct.<sup>1668</sup> In the Concluding Observations, the CEDAWCee nevertheless continued to be concerned at ‘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’. It further expressed concern ‘that such customs and practices perpetuate discrimination against women’, and that ‘despite such negative impacts on women, the State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and harmful practices’.<sup>1669</sup> The State party is recommended to ‘[p]ut in place, without delay, a comprehensive strategy to modify or eliminate harmful practices and stereotypes that discriminate against women, in conformity with articles 2 (f) and 5 (a) of the Convention’. Measures should include efforts ‘to educate and raise awareness of this subject, targeting women and men at all levels of society, including traditional leaders’. The State party should further ‘[a]ddress harmful practices (...) by instituting public education programmes and enforcing prohibition of those practices’, and ‘strengthen understanding of the equality of women and men including working with the media to enhance a positive and non-stereotypical portrayal of women’.<sup>1670</sup>

Likewise, Cambodia admitted in its periodic report that, despite its ‘concerted effort to change these attitudes’<sup>1671</sup>, ‘some traditional attitudes are deeply rooted in Cambodian society and cannot easily be changed’ and that ‘gender attitudes such as women’s code of conduct (*Chbab Srey*), related to women’s behaviour and attitude, still have a strong influence in terms of preventing the achievement of gender equality in the social, economic and political sectors’.<sup>1672</sup> In the Concluding Observations, the CEDAWCee ‘remains concerned that the *Chbab Srey*, the traditional code of conduct for women, is deeply rooted in Cambodian culture and continues to define everyday life on the basis of stereotypical roles of women and men in the family and in society’.<sup>1673</sup> It recommends the State party to adopt a strategy ‘aimed at modifying or eliminating patriarchal attitudes and stereotypes that discriminate against women, including those based on the *Chbab Srey*’, and to ‘conduct national public information and awareness-raising campaigns and stimulate broader public debate in order to address attitudes and stereotypes that discriminate against women, in collaboration with civil society, community leaders and the media’.<sup>1674</sup>

Senegal also submitted several cultural explanations for its lack of progress. In its periodic report, the State party explained that legislation did not solve the issue of repudiation:

<sup>1667</sup> CEDAWCee, Kenya periodic report, CEDAW/C/KEN/7 (2010), para 265.

<sup>1668</sup> Ibid, paras 74–96.

<sup>1669</sup> CEDAWCee, CO Kenya, CEDAW/C/KEN/CO/7 (2011), para 17.

<sup>1670</sup> Ibid, para 18.

<sup>1671</sup> CEDAWCee, Cambodia periodic report, CEDAW/C/KHM/4–5 (2011), para 71.

<sup>1672</sup> Ibid, para 76.

<sup>1673</sup> CEDAWCee, CO Cambodia, CEDAW/C/KHM/CO/4–5 (2013), para 18.

<sup>1674</sup> Ibid, para 19.

Despite the fact that divorce is legal, some women continue to be repudiated owing to ignorance of the law or sociocultural constraints. However, it should be noted that outreach and awareness-raising programmes continue to be implemented in order to change the behaviour of communities in areas resistant to change.<sup>1675</sup>

Another implementation problem, raised under article 15 regarding women's civil and legal capacity, is that '[s]ociocultural constraints stop women from going to court over their domestic problems; if they do, in some cases, they risk being divorced'.<sup>1676</sup>

During the public session, the Committee wished to learn more about the sociocultural constraints involved in reporting domestic violence:

It would be useful to know *what was being done to encourage women to report cases of domestic violence*, to encourage society as a whole to talk about such issues (...). A comment on whether Senegal intended to introduce a law or national strategy to combat domestic violence would also be appreciated, as would any information on *efforts to train members of the judiciary and law enforcement agencies to overcome inherited stereotypes*.<sup>1677</sup>

The State party first addressed the request for information on efforts to train its law enforcement personnel:

(...) considerable efforts had been made, by both the State and civil society organizations, to train law enforcement and judicial officials on the issue of discrimination and violence against women. (...).<sup>1678</sup>

Then it addressed the sociocultural constraints involved in reporting domestic violence:

[I]t was perhaps the rigour of national laws that prevented women from reporting cases of domestic violence because of the consequences that the imprisonment of their husbands would have on their families and the upbringing of their children. Nonetheless, the severity of the law in itself demonstrated that Senegal was a country that was willing to do all it could to protect women.<sup>1679</sup>

Senegal also explained the cultural obstacle in combating FGM:

Senegal had also developed a national strategy to eliminate FGM, and had adopted Act No. 99-05 prohibiting excision, although *the latter had not yet been enforced due to the unwillingness of victims to come forward and report crimes*.<sup>1680</sup>

<sup>1675</sup> CEDAWCee, Senegal periodic report, CEDAW/C/SEN/3-7 (2013), para 46.

<sup>1676</sup> Ibid, para 141.

<sup>1677</sup> CEDAWCee, Summary Record on the 1307<sup>th</sup> meeting, CEDAW/C/SR.1307 (2015), para 48.

<sup>1678</sup> Ibid, para 49.

<sup>1679</sup> Ibid, para 50.

<sup>1680</sup> Ibid, para 52.

The CEDAWCee acknowledged these arguments, especially those explaining the lack of knowledge of the law (repudiation, domestic violence), and the lack of reporting (FGM, domestic violence) to some extent in its Concluding Observations. The CEDAWCee addressed this first under ‘access to justice’, expressing concern about ‘[p]ersistent barriers faced by women in effectively gaining access to justice, including legal illiteracy, stigmatization of victims, stigmatization of women fighting for their rights, fear of reprisals, difficulties in gaining access to justice infrastructure, difficulties in producing evidence and the limited number of female police officers, especially in rural and peri-urban areas’. Senegal is recommended to remove all these barriers.<sup>1681</sup> Under ‘violence against women’, the CEDAWCee expressed concern about ‘[t]he persistence of domestic violence and the limited number of cases of domestic violence reported *owing to women’s fear of reporting them because of the potential consequences for their family life*, as well as to the lack of awareness among women of the criminalization of domestic violence’, and about ‘the persistence of stereotypes within the judiciary according to which women are perceived to be partly responsible for the violence that they suffer’, and urges the State party to ‘encourage women to report cases of domestic violence by raising awareness of the legal provisions criminalizing domestic violence and ensure effective access to remedies for victims of domestic violence, *taking into consideration their social and economic dependence on their husbands*’, and to undertake training for law enforcement officials ‘to eliminate prejudices relating to violence against women such as considering women responsible for the violence that they suffer’.<sup>1682</sup> Finally, the CEDAWCee welcomed the adoption of a law criminalising FGM, and recommended the authorities to ensure its effective implementation.<sup>1683</sup> The CEDAWCee appears rather sensitive to the cultural arguments brought forwards by the State party, at least in terms of sincerely considering the cultural arguments. While the State party is mainly focusing on the cultural attitudes of private parties as a barrier to the *de facto* enjoyment of rights, the CEDAWCee is also concerned with the cultural attitudes and ‘inherited stereotypes’ of public officials.

The authorities of Benin referred to cultural obstacles several times throughout the dialogue. In its periodic report, it explained:

[T]he constitutional principles are ahead of society and the moral and customary standards that continue to hold sway, often posing obstacles to the fulfilment of rights. This sociological reality accounts for men’s reluctance to accept and carry out these constitutional provisions and underlies their resistance to change. (...).

Even women are resistant to the change that is now called for. Women are narrowly cast in the role of daughter, wife and mother by the culture, the education they receive, and religion. They do not have a clear awareness of the status of women as fully independent human

<sup>1681</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), paras 12–13.

<sup>1682</sup> Ibid, paras 20–21. (emphasis added, VV).

<sup>1683</sup> Ibid, paras 18–19.

beings. This explains why relations between men and women continue to be unequal in so many respects. The disparities encountered are most often to the detriment of women.<sup>1684</sup>

Later on in the report, it adds:

Despite the constant efforts made by Benin on the legal and institutional front to improve the situation of women, tradition and social and cultural practices continue to weigh heavily against the political will to reduce age-old inequalities that continue to adversely affect women.<sup>1685</sup>

While emphasising that it has made progress in its legislative framework, the State party acknowledges that ‘the full achievement of *de facto* equality still lies ahead and is part of a longer-term process of social change’ (emphasis added, VV), and adds:

Custom, tradition and religion still dominate social life in Benin. They have a power that helps to create and perpetuate discriminatory practices against women. The threat of punishment by ancestors or the gods brandished in religious and traditional rites continues to influence the behaviour of women, who endure or are subjected to all kinds of violence.<sup>1686</sup>

During the constructive dialogue, the State party delegation reiterated these cultural arguments:

Yet, despite those efforts, women’s enjoyment of rights continued to be hampered by entrenched traditional beliefs and practices. Women themselves were sometimes resistant to change and insufficiently aware of their status as full citizens, shackled by cultural and traditional stereotypes.<sup>1687</sup>

The CEDAWCee used its Concluding Observations to replicate its rather generally formulated concerns ‘about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in all spheres of life and the State party’s limited efforts to combat customs and practices that perpetuate discrimination against women and the subordination of women within the family and society’.<sup>1688</sup> The State party’s legislative steps were acknowledged and appreciated, however, when the CEDAWCee *welcomed* ‘the inclusion of harmful practices in the newly enacted law on violence against women’. It nevertheless expressed deep concern ‘that harmful practices (...) continue to be prevalent and go unpunished, the comprehensive legislative framework notwithstanding’. The State party was urged to ‘hold consultations with civil society and women’s organizations and traditional leaders (...) with a view to fostering a dialogue on harmful practices

<sup>1684</sup> CEDAWCee, Benin periodic report, CEDAW/C/BEN/4 (2012), paras 3–4.

<sup>1685</sup> *Ibid*, para 16.

<sup>1686</sup> *Ibid*, para 21.

<sup>1687</sup> CEDAWCee, Summary Record of the 1163<sup>rd</sup> meeting, CEDAW/C/SR.1163 (2013), para 2.

<sup>1688</sup> CEDAWCee, CO Benin, CEDAW/C/BEN/CO/4 (2013), para 16.

and promoting wide acceptance of the new legislative framework’, and to ‘eliminate stereotypes that discriminate against women, including by conducting awareness-raising efforts targeting the general public and the media, and urgently complete the review of school textbooks (...) to eliminate gender-based stereotypes’. Benin is also recommended to ‘effectively implement its legislative framework addressing harmful practices, by systematically training judges and law enforcement officers’ and to ‘establish mechanisms to facilitate victim identification’. The CEDAWCee thus showed some appreciation for the legislative steps, while it clearly considers that the State party should do more to make that legislation practical and effective. While the State party’s cultural arguments focus on the lack of progress due to cultural attitudes of private actors, the CEDAWCee’s recommendations also include training of judges and law enforcement officers.

Saint Vincent and the Grenadines explained in its periodic report under article 12, regarding equality for women in accessing health care, that there were cultural factors involved:

Some of the main obstacles to the fulfilment of this article are the attitudes prevalent in the society whereby some men resist the idea of using condoms and where women themselves are afraid to insist for fear of the negative or even violent reaction on the part of their male partners. Much still needs to be done at all classes of society for many women to become confident and assertive in the control of their sexual reproductive health. The fact that their lives are being put at risk has not become a strong enough deterrent for them to confront the prevailing social and cultural attitudes. Similar attitudes also present an obstacle to the use of the condom as a family planning method although women have other alternatives easily accessible such as the pill.<sup>1689</sup>

During the public session, a Committee member pointed at the cultural attitudes of health personnel as an obstacle to family planning services:

The Committee had information that traditional attitudes meant that family planning and health personnel tended to stigmatize sexually active schoolgirls, refused to provide them with contraceptives or even informed their parents of the fact. That contributed to adolescent pregnancy; the delegation should indicate what measures were in place to ensure that women and girls had access to reproductive and sexual health counselling and emergency contraception.<sup>1690</sup>

The State party’s replies however, focused on the cultural attitudes of private actors:

Since the preparation of the report, an improved school curriculum dealing with sexual and reproductive health had been developed and was currently offered in nearly 50 per cent

<sup>1689</sup> CEDAWCee, Saint Vincent and the Grenadines periodic report, CEDAW/C/VCT/4–8 (2013), pp 50–51, under art 12.

<sup>1690</sup> CEDAWCee, Summary Record of the 1324<sup>th</sup> meeting, CEDAW/C/SR.1324 (2015), para 4.

of schools. It placed increased emphasis on roles, power and sexual issues in relationships. Information was also provided (...) on contraception and making informed choices.<sup>1691</sup>

In its Concluding Observations, the CEDAWCee ‘*notes with appreciation* the awareness-raising activities carried out (...) to address issues such as responsible sexual behaviour, adolescent pregnancy, family planning services, including contraceptives, and sexually transmitted diseases’. In its subsequent recommendations, the CEDAWCee did not repeat the need for awareness-raising among private actors. Instead it focused entirely on the cultural attitudes of health personnel:

The Committee nevertheless remains concerned about information that traditional attitudes and cultural norms hamper access to contraceptives, including emergency contraceptives, because clinic nurses frequently consider that it is not appropriate for schoolgirls to be sexually active and either refuse to supply contraceptives or inform their mothers about their sexual activity.

In line with article 12 of the Convention (...), the Committee recommends that the State party: (...) Review policies and protocols governing the provision of sexual and reproductive health services to women and girls and ensure their effective implementation by *developing and conducting awareness-raising and training programmes for health-care providers with a view to addressing traditional attitudes and overcoming cultural barriers that constrain access to family planning services, including contraceptives; (...)*.<sup>1692</sup>

### 2.1.3.2 Culture as ‘excuse’ for lack of compliance

In the previous section, there were already some examples where cultural attitudes of public officials appeared to be a barrier to the *de facto* implementation of rights. However, in the previous section, this was not brought up as an argument by the State party. That is different in the examples discussed now.

In its periodic report, Saint Vincent and the Grenadines contended that sometimes incidents of domestic violence are not reported to the police due to cultural reasons:

In some cases due to the stereotyping of women as weaker and requiring of protection, women are treated with more courtesy and respect than men. *Conversely, due to cultural values supportive of male dominance, it has been recorded that women are sometimes discriminated against by members of the police force* in cases where the police are required to pursue investigations into acts of domestic violence. In these situations, women are sometimes actively discouraged from pursuing their complaints under the Domestic Violence Act (...) or may even be treated with contempt and hostility by members of the police. (...) *Measures taken by the Government of Saint Vincent and the Grenadines in partnership with civil society organizations to address this issue includes the implementation of training programmes for police.*<sup>1693</sup>

<sup>1691</sup> Ibid, para 7.

<sup>1692</sup> CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), paras 36–37.

<sup>1693</sup> CEDAWCee, Saint Vincent and the Grenadines periodic report, CEDAW/C/VCT/4–8 (2013), p 20.

These explanations are reflected in the Concluding Observations. Addressing the discriminatory attitudes among the police force, the CEDAWCee notes that police attitudes ‘sometimes actively discourage women who are victims of violence from pursuing their complaint, given that law enforcement officers treat them with contempt and hostility’, and urges the State party to ‘provide continuous training to the judiciary and law enforcement officers on gender-sensitive procedures to deal with women who are victims of violence’ and to ‘encourage women to report incidents of sexual and domestic violence by destigmatizing victims and raising awareness about the grave and serious nature of such acts’.<sup>1694</sup> The CEDAWCee thus specifically acknowledged and addressed the State party’s cultural argument. Its recommendation, however, does not go beyond the measures already taken by the State party.

Other examples relate to the cultural attitudes of (constituencies of) parliamentarians. Three States parties, Togo, Guinea and Gabon, contended that they had to retain polygamy due to strong opposition to its abolition. According to the Togolese delegation, ‘[t]he new Personal and Family Code represented a step forward’.<sup>1695</sup> While the changes were ‘progressive, in line with the Convention’, polygamy had been retained on a provisional basis, as ‘local customs had to be taken into account in order to ensure that the new Code was acceptable to the population’.<sup>1696</sup> Another member of the delegation concurred and added: ‘Monogamy was clearly defined as the norm under current legislation, but polygamy had been retained for sociocultural reasons’.<sup>1697</sup> Confronted with the retention of polygamy in the law, the State party replied:

[L]ike the Committee, the Government was also displeased that polygamy had not been abolished in the final version of the Personal and Family Code. Since parliament had arrived at an impasse on the issue, a compromise had been reached so that the positive aspects of the Code in other areas would not be lost. The Government was optimistic that greater equality in marriage would be achieved in the near future.<sup>1698</sup>

The CEDAWCee showed no sympathy for this argument:

*(...) as a State party, Togo had an obligation to implement the provisions of the Convention without delay. Responsibility for improving the situation of women lay primarily with the Government and should not be delegated to NGOs or to women themselves. The Government needed to issue a clear signal regarding its position on the issue of polygamy and other harmful practices by passing specific laws and not waiting until society evolved to a point that women no longer accepted those practices.*<sup>1699</sup>

<sup>1694</sup> CEDAWCee, CO Saint Vincent and the Grenadines, CEDAW/C/VCT/CO/4–8 (2015), para 20.

<sup>1695</sup> CEDAWCee, Summary Record of the 1075<sup>th</sup> meeting, CEDAW/C/SR.1075 (2012), para 22.

<sup>1696</sup> Ibid.

<sup>1697</sup> Ibid, para 24.

<sup>1698</sup> CEDAWCee, Summary Record of the 1076<sup>th</sup> meeting, CEDAW/C/SR.1076 (2012), para 62.

<sup>1699</sup> CEDAWCee, Summary Record of the 1077<sup>th</sup> meeting, CEDAW/C/SR.1077 (2012), para 28.

In its Concluding Observations, the CEDAWCee addressed polygamy both under ‘stereotypes and harmful practices’ and under ‘marriage and family relations’. Under the former, the CEDAWCee noted ‘that stereotypes contribute to the persistence of violence against women and harmful practices, including polygamy’. Recalling that combating negative gender stereotypes is one of the most important factors of social advancement, the Committee recommends that the State party adopt a strategy ‘to eliminate stereotypes and harmful practices that discriminate against women, such as polygamy’. Measures should include education and awareness-raising targeting women and men at all levels of society.<sup>1700</sup> The CEDAWCee thus acknowledged that the cultural attitudes of private parties (‘women and men at all levels of society’) formed an obstacle which needed to be addressed. The lack of legislation was – of course – also a point of concern. The State party was recommended to include provisions prohibiting polygamy in the revised Penal Code<sup>1701</sup>, and to ‘[w]ithdraw the discriminatory provisions of the 2012 Code of Persons and Family that recognize polygamy’.<sup>1702</sup> The CEDAWCee did *not* pay attention to the role of cultural values and attitudes in parliament, and it did *not* pay attention to the State party’s – perhaps valid – argument that the new legislation also had many positive aspects and that it may not have been possible to pass the law had the prohibition of polygamy not been dropped.

In a similar fashion, the Guinean delegation pointed out that it was forced to repeal articles under the Civil Code relating to the prohibition of polygamy to ensure other amendments would pass:

(...) when the revision process had commenced, Guinea had been led by a polygamous President who had systematically rejected any draft which prohibited polygamous practices. The Prime Minister at the time had also been seeking to take a second wife. The judges involved in the harmonization effort had therefore advised ministers that, in order to ensure the smooth passage of all other amendments, the article in question should allow for the option of limited polygamy.<sup>1703</sup>

With the new democratic civil government in place ‘objections to the prohibition against polygamy should be a thing of the past’.<sup>1704</sup> The CEDAWCee, in the end, *welcomed* ‘the ongoing revision of discriminatory provisions in the Civil Code’, but was ‘nonetheless concerned about the delay in finalizing the reform of the Civil Code and about the introduction of a new discriminatory provision relating to polygamy’.<sup>1705</sup> In this example the problem is not so much the cultural attitudes of (members of) parliament, but more the cultural attitudes of the previous Government, notably the President and Prime Minister. According to the State party cultural attitudes no longer stand in the

<sup>1700</sup> CEDAWCee, CO Togo, CEDAW/C/TGO/CO/6–7 (2012), paras 20–21.

<sup>1701</sup> Ibid, para 21.

<sup>1702</sup> Ibid, paras 40–41.

<sup>1703</sup> CEDAWCee, Summary Record of the 1261<sup>st</sup> meeting, CEDAW/C/SR.1261 (2014), para 18.

<sup>1704</sup> Ibid.

<sup>1705</sup> CEDAWCee, CO Guinea, CEDAW/C/GIN/CO/7–8 (2014), paras 14–15.

way of prohibiting polygamy. The CEDAWCee did not make any recommendations aimed at addressing cultural attitudes of parliamentarians, instead calling upon the State party to adopt strategies, including ‘education, information and awareness-raising campaigns for *the general public, in particular girls and women, parents, teachers and religious leaders*, aimed at the elimination of stereotypes discriminating against and practices harmful to women’.<sup>1706</sup>

Gabon explained that nothing had been done to address polygamy in legislation due to ‘the notorious parliamentary inaction on this issue’.<sup>1707</sup> The delegation added:

Despite the petitions submitted to Parliament and the Government and the awareness-raising seminars, forums and other actions carried out by civil society, *legislators take no action, which is due to their attachment to that traditional practice*.<sup>1708</sup>

The CEDAWCee, ignoring this argumentation, expressed concern about ‘[t]he existence in the Civil Code of numerous discriminatory provisions, including those relating to polygamy’, and recommended the State party to ‘[r]epeal without delay all discriminatory provisions relating to marriage and family relations in the Civil Code, including those relating to polygamy’, and to ‘adopt legal provisions that prohibit polygamy’.<sup>1709</sup> The role of cultural attitudes of parliamentarians/legislators in the legislative process seems to be completely overlooked.

Also in the dialogue between the CEDAWCee and Kenya features a tension which results from sharing the Committee’s criticism of a cultural practice, in this case FGM/C, while facing strong opposition to adopting legislation and policies in order to end the practice. In its periodic report, the State party first explained why FGM persists in the country:

The study also found that girls are now being subjected to FGM at earlier ages (7–12) than in the past (12–15) and that increasingly, FGM is being conducted under medication unlike in the past when it was conducted solely by traditional practitioners (...). The Government has taken a variety of legal and administrative measures including Presidential decrees to outlaw *the practice, which persists for various reasons, including: rite of passage, ensuring marriageability, family honour, controlling sexuality, religious requirement and cultural and ethnic identity*.<sup>1710</sup>

It subsequently explained that adopting legislation would be a challenge:

Efforts by the Law Reform Commission to have laws governing women in areas most affected by traditional cultures and practices are bold and is appreciable. However, *Kenya’s Parliament*

<sup>1706</sup> Ibid, para 29.

<sup>1707</sup> CEDAWCee, Gabon periodic report, CEDAW/C/GAB/6 (2013), para 151.

<sup>1708</sup> Ibid, para 153.

<sup>1709</sup> CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), paras 44–45.

<sup>1710</sup> CEDAWCee, Kenya periodic report, CEDAW/C/KEN/7 (2010), para 48.

*is still dominated by men (only 21 out of 222 members of parliament are women). Therefore, it will be a big challenge for the bills aforementioned, to be enacted by Parliament.*<sup>1711</sup>

This was confirmed during the public session, when the delegation explained why FGM was only prohibited for girls under 18 years:

(...) girls above the age of 18 could decide to submit to female genital mutilation voluntarily. That provision arose out of the politics of Kenya: any proposal to change the situation of women became a political issue, in which men had the controlling position. It had been a real struggle even to achieve the outlawing of the practice for girls under 18.<sup>1712</sup>

In its Concluding Observations, the CEDAWCee expressed concern ‘at the continued prevalence of the harmful practice of female genital mutilation in some communities, which is a grave violation of girls’ and women’s human rights and of the State party’s obligations under the Convention’, and that this practice has not been prohibited for women over 18 years. The State party should ensure the effective implementation of the law prohibiting FGM for girls under 18 years, and expedite the enactment of legislation which will outlaw the practice for all women. Finally, the CEDAWCee calls on the State party to ‘[c]ontinue and increase its awareness-raising and education efforts targeting families, practitioners and medical personnel, with the support of civil society organizations and religious authorities, in order to completely eliminate female genital mutilation and its underlying cultural justifications’.<sup>1713</sup> The CEDAWCee did not address the argument that parliament obstructs the outlawing of the practice for girls over 18 years, and its recommendations to address cultural attitudes (and justifications) are not targeted at parliamentarians.

#### 2.1.4 Concluding Remarks

States parties regularly refer to culture as an explanation for lack of progress in the enjoyment of rights.<sup>1714</sup> Such lack of progress can, for example, be reflected in the fact that certain practices persist because of their social importance, i.e., they are seen as a social obligation. Or they persist because of long-held cultural beliefs which support a certain practice, because practices are rooted in gender stereotypes and traditional roles, because practices are so deep-rooted that it is difficult to change perceptions and consider a certain practice as an offence (and is therefore not reported), due to misinterpretation of religion, due to ignorance of the law, et cetera.

<sup>1711</sup> Ibid, para 96.

<sup>1712</sup> CEDAWCee, Summary Record of the 964<sup>th</sup> meeting, CEDAW/C/SR.964 (2011), para 51.

<sup>1713</sup> CEDAWCee, CO Kenya, CEDAW/C/KEN/CO/7 (2011), paras 19–20.

<sup>1714</sup> 5 examples were found for the HRC, 3 examples for the CESCR, and 5 examples for the CEDAWCee (on a total of respectively 92 (HRC), 82 (CESCR) and 131 (CEDAWCee) State reporting cycles). Examples are not exhaustive, but still a good indication.

States parties also repeatedly use culture as an excuse for lack of compliance.<sup>1715</sup> Some States parties point at particular State actors who fail to comply with obligations due to cultural values, such as judges, members of the police force, or legislators. Or States parties point at the legislative process and the importance of taking the majority opinions or opinions and traditions of communities and constituents into account when adopting new laws. States parties thus often refer to ‘contentious issues’, ‘sensitive issues’, or ‘contentious clauses’, and a recurring argument is that a failure to take local customs or traditions into account could lead to conflict or an impasse, and that it was better to compromise on those issues and ensure passage of other amendments.

In general, while the HRC and the CESCR do have attention for the role of public officials, such as police, prosecutors and judges, and for the need to train them on for example women’s rights or the criminal nature of gender-based violence, they tend to overlook the role of culture (i.e., cultural awareness) in relation to public officials, and do not address the cultural attitudes and stereotypes among public officials in their recommendations. The CEDAWCee, on the other hand, has repeatedly expressed concerns about (the persistence of) gender stereotypes and bias among prosecutors, lawyers, police officers and judges, and recommended trainings to eliminate prejudices (such as considering women responsible for the violence which they suffer.<sup>1716</sup> It appears that the specific provisions on gender stereotyping contained in the CEDAW have led the CEDAWCee to be more alert and critical on gender stereotyping, not only in society, but also among actors of State.

Interestingly, none of the treaty bodies pay attention to the – especially legislative – role of parliamentarians, while they are key actors in relation to ‘contentious issues’ or cultural obstacles to amending legislation, and their and their constituencies’ cultural values seem to matter. This may relate to the fact that the obligations of the Covenant are binding on every State party as a whole, and that States parties ‘*may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State party from responsibility for the action and consequent incompatibility*’.<sup>1717</sup> As the legislative branch is a branch of government, and thus part of the State party as a whole, the Committees

<sup>1715</sup> 6 examples were found for the HRC, 2 examples for the CESCR, and 5 examples for the CEDAWCee (on a total of respectively 92 (HRC), 82 (CESCR) and 131 (CEDAWCee) State reporting cycles). Examples are not exhaustive, but still a good indication.

<sup>1716</sup> See, eg, CEDAWCee, CO Bolivia, CEDAW/C/BOL/CO/5–6 (2015), para 10; CO Maldives, CEDAW/C/MDV/CO/4–5 (2015), para 12.

<sup>1717</sup> HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para 4: The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. The executive branch that usually represents the State party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State

may not wish to make this distinction. But this reasoning is not entirely satisfactory: while the judiciary is also a branch of government, judges are explicitly addressed in the Committees' recommendations. There are numerous examples of Committee recommendations to train members of the judiciary with a view to overcoming (inherited) stereotypes, but none whatsoever of Committee recommendations to sensitize members of parliament view a view to overcoming cultural resistance to the adoption of laws. It is unclear why (members of) the judicial branch and the legislative branch are treated differently.<sup>1718</sup>

In general, the Committees point at the leading role of governments: if the State party (i.e., government) does not issue a clear signal regarding its position on cultural practices by passing specific laws, society is not likely to follow or evolve to a point that such practices are no longer accepted. Merely passing broad prohibitions is not sufficient, laws have to be *specific* and *explicitly criminalize* specified harmful practices. It is the Government's duty to make clear that certain rights cannot be sacrificed under pressure from specific groups.

While States parties appear to refer to culture in two ways, as an explanation for lack of progress or as an excuse for lack of compliance, it also appears that neither the States parties nor the Committees care about (the legal relevance of) this distinction. States parties seem to refer to resistance in parliament in exactly the same manner as to resistance in larger society. And, although often the Committees do not agree that the positive obligations have been fulfilled (and insist on *more specific* legislation, *increased* awareness-raising, etc.), also the Committees do not really make a difference between the two distinct arguments. This seems important for two (related) reasons: firstly, it provides insights in the nature of the State reporting procedure; secondly, it may discourage States parties' in their efforts to report, as it remains unclear whether and when a State party complies with its obligations. Regarding the nature of the procedure, it seems that the lack of distinction between alleged compliance with positive obligations but resilient culture (i.e., lack of progress), and non-compliance because of unwilling parliament, judiciary or other public officials (i.e., lack of compliance), indicates that the dialogue is not so much about compliance, but all about results and effectiveness. This would support the idea that the State reporting procedure is of a non-legal nature.<sup>1719</sup> Regarding the second issue: if States parties cannot simply deduce from the concluding observations whether they have complied with their obligations or not, the result is that it remains ambiguous and unclear what the State party is doing right,

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party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

<sup>1718</sup> The researcher cannot see any reason to treat the legislative branch differently than the judicial branch; nor to treat individual judges differently than individual parliamentarians. Under international law (taking the 'external perspective': responsibility for an act attaches to the State irrespective of the official committing it) they are actors of State by performing or failing to perform acts of State, whether law-applying or law-making.

<sup>1719</sup> See chapter 3, section 4.1: the State reporting procedure is not so much a mechanism to identify and sanction violations, but more a mechanism to help in assessing the stage of implementation of treaty obligations in a given country systematically and holistically.

what it has to do in addition, and where progress is lacking but the State may not be (completely) to blame. An increased ‘juridification’ of the (terminology used during the) dialogue could create more clarity in this regard. An explicit use of the ‘progressive realization’ principle, as suggested by Brems<sup>1720</sup>, could create clarity as to which cultural obstacles may be tackled ‘over a period of time’ (such as resilient cultural attitudes among the population), and which cultural obstacles must be tackled immediately (such as prohibitions of harmful practices which lack specificity).

## 2.2 STATE PARTY DEFENDS THE ROOM FOR CULTURE

Sometimes the States parties disregard the Committees’ criticism of culture, and defend the room for culture, i.e., the option for persons to enjoy rights in accordance with their religion and culture.<sup>1721</sup> States parties refuse to judge any particular culture or cultural practice, and defend a place for that culture in society. Personal autonomy is very important in this line of reasoning. It is argued that as long as people have a choice, there is no problem under the Convention. Individuals or communities choose to live according to the accepted cultural or religious norms, and they consent to the cultural or religious practice involved. In this respect, the Committees are repeatedly ‘reminded’ that they should respect freedom of religion.

The cultural argument here is not that culture is harmful and forms a barrier to the implementation or enjoyment of rights (section 6.2.1); it is also not that the culture is defended and imposed on subjects (section 6.2.3). The cultural argument is that people should be allowed to choose to adhere to a certain culture or cultural practice, and that room should be created for cultural differences, protected by laws which allow for cultural and religious differences between communities. There are similarities with the cultural arguments discussed in section 6.2.3 (‘State party defends the culture’), but here the State party takes a more neutral position.

Sometimes States parties argue that their implementation is in compliance with their obligations under the treaty, mostly with reference to the right to freedom of religion, or the right of minorities to enjoy their own culture and to profess and practise their own religion. Sometimes they acknowledge that the cultural practices which they are allowing, in fact violate international standards. Individuals who wish to follow their culture and subject themselves to laws or treatments which are not in conformity with their rights are allowed to ‘waive’ their non-discrimination and equality rights. The fact that this results in non-compliance is considered acceptable. While many of

<sup>1720</sup> See chapter 2, section 4. Brems argues that the principle of ‘progressive realization’, which reflects a recognition that the realization of rights can be hampered by contextual factors, and that these rights can occasionally be achieved only over a period of time, can also be applied to other contextual factors (than ‘lack of resources’), including cultural obstacles.

<sup>1721</sup> 5 examples were found for the HRC, 2 examples for the CESCR, and 7 examples for the CEDAWCee (on a total of respectively 92 (HRC), 82 (CESCR) and 131 (CEDAWCee) State reporting cycles). Examples are not exhaustive, but still a good indication.

the arguments relating to room for cultural differences between communities (i.e., freedom of choice on a community level) occur in the reporting cycle of States parties with a secular background (i.e., Sri Lanka, The Philippines, Botswana), this is different for arguments relating to freedom of choice on an individual level (i.e., the freedom to consent to a practice, the idea of ‘informed choice’, etc.). This argumentation is reflected in the reporting cycle of African States parties and States parties with an Islamic background.

### 2.2.1 HRC

A good example, combining references to freedom of religion, religious choice and free will, is seen in the HRC’s dialogue with the Philippines. The Philippines were urged to take measures to revise the Code of Muslim Personal Laws which, according to the HRC, discriminates on the basis of religion with regard to the age of marriage for girls, and also permits polygamy and arranged marriages.<sup>1722</sup> During the public session in Geneva, the delegation elaborated on the relationship between constitutional law, the Covenant and sharia, explaining that, as a matter of principle, the Philippine Constitution took precedence over sharia: ‘The Philippines was a secular State, not a religious State or an Islamic State. It allowed freedom of religion.’<sup>1723</sup> However, ‘the issue was not as simple as it sounded’:

Equality, non-discrimination and freedom of religion were all values protected by the Constitution, but striking a balance between those values was a difficult matter. It had been claimed that Islamic law was essentially a divine law with a validity of its own which was quite distinct from that of any human legislature or judiciary. The Philippines recognized and respected that branch of law, including sharia, under the freedom of religion clause in the Constitution. When determining whether sharia could curtail equality and non-discrimination, it would be necessary carefully to examine the alleged discriminatory practice at issue in its entire social context. A Muslim would argue that the perceived inequality in sharia was more apparent than real, because the principles of Islam also advocated equality and justice. The current Code of Muslim Personal Laws was a limited version of sharia. The presumption was that the Code was consistent with the Philippine Constitution.<sup>1724</sup>

The delegation also argued that ‘Muslim women who submitted to sharia provisions did so by religious choice’ and elaborated on this argument<sup>1725</sup>:

Technically it was possible for a Muslim woman to elect not to be covered by the provisions of sharia and invoke constitutional equality. A Muslim woman could go to the Supreme Court and file a petition to that end. It was, however, questionable whether a Muslim woman would

<sup>1722</sup> HRC, List of issues, CCPR/C/PHL/Q/4 (2012), para 7.

<sup>1723</sup> HRC, Summary Record of the 2925<sup>th</sup> meeting, CCPR/C/SR.2925 (2012), para 18.

<sup>1724</sup> Ibid, para 19.

<sup>1725</sup> HRC, Summary Record of the 2924<sup>th</sup> meeting, CCPR/C/SR.2924 (2012), para 34.

actually take such action and go against her religious beliefs. If a non-Muslim persuaded or induced her to adopt such a course, would the non-Muslim not be desecrating her religion? Would that not constitute a violation of religious freedom?<sup>1726</sup>

Allowing a person to choose to be governed by the provisions of sharia law would not necessarily signify that the State party was in effect suspending constitutional equality. The equal protection clause of the Constitution did not require the universal application of the laws to all persons without distinction. It simply required equality among the same group of persons according to a valid classification. The latter could not be predicated on superficial differences; it had to pass the test of reasonableness, rest on substantive distinctions and be germane to the purpose of the law. The Philippine Constitution expressly guaranteed the equality of men and women before the law, subject to reasonable classification.<sup>1727</sup>

This argument was addressed by the HRC:

(...) the State party was obliged to uphold the principle of non-discrimination. If sharia provisions were incompatible with the Covenant, the State party should bar their application, even where a woman had accepted them of her own free will.<sup>1728</sup>

In its Concluding Observations, the HRC did not address the ‘freedom of choice argument’, and expressed concern ‘that the Muslim Personal laws discriminate on the basis of religion regarding the minimum age for marriage for girls and also permits polygamy amongst Muslims, which undermine the principle of non-discrimination as provided under the Covenant’. The State party ‘should revise the Code of Muslim Personal laws to prohibit polygamous marriages and repeal the provisions that discriminate on the basis of religion regarding the minimum age for marriage for girls’.<sup>1729</sup>

Sri Lanka used its periodic report to defend its maintenance of personal and customary laws, with reference to the enjoyment of rights ‘in accordance with religion and culture’, and ‘community rights’. The State party also referred to article 27 of the ICCPR to justify the maintenance of its personal and customary laws:

Sri Lanka, in response to the observations of the Committee that the ‘provisions of article 16 paragraph 1 of the Constitution ... permits existing laws to remain valid and operative notwithstanding their incompatibility with the Constitution’s provisions relating to fundamental rights’, states as follows:

- The Supreme Court of Sri Lanka in the ICCPR Opinion examined the allegation that the continued validity of certain personal laws under article 16 (1) was inconsistent with the Constitution.

<sup>1726</sup> HRC, Summary Record of the 2925<sup>th</sup> meeting, CCPR/C/SR.2925 (2012), para 21.

<sup>1727</sup> Ibid, para 22.

<sup>1728</sup> HRC, Summary Record of the 2924<sup>th</sup> meeting, CCPR/C/SR.2924 (2012), para 42.

<sup>1729</sup> HRC, CO The Philippines, CCPR/C/PHL/CO/4 (2012), para 11.

- The Supreme Court opined that:  
 ‘These are customary and special laws that are deeply seated in the social milieu of the country. It is to be noted that article 27 of the Covenant makes a specific reservation that [... Court cites article 27]’  
 ‘In our view it could not be contended that the provisions of article 16 (1) of the Constitution (...) could be considered to be inconsistent with the Covenant only on the ground that there are certain aspects of Personal Laws which may discriminate women. The matter of Personal Law is one of great sensitivity. The Covenant should not be considered as an instrument which warrants the amendment of such Personal Laws. If at all there should be any amendment such request should emerge from the particular sector governed by the particular Personal Law’.<sup>1730</sup>

Sri Lanka’s personal laws are enriched by history, culture and sacred beliefs of the people who are subject to such laws. Accordingly, the GoSL [Government of Sri Lanka, VV] is of the view that *any amendments to personal laws must invariably come from within those sectors*.<sup>1731</sup> *This is an essential pre-requisite to ensure compliance with such changes and to protect the rights of those persons to enjoy such rights in accordance with their religion and culture*.<sup>1732</sup> (...)

Thus Sri Lanka’s legal system is a unique blend of customary and personal laws which are constantly being reviewed, but the call for change in any laws which are seen to be discriminatory require a circumspect approach from the legislators, in the long term, out of necessity, lest the communities to which the personal and customary laws apply consider it intrusive and a violation of their community rights.<sup>1733</sup>(...)

The individual right of choice was also addressed:

Regardless of the origins, race or religion, any Sri Lankan can enter into a marriage under the General Marriages Ordinance. Thus, *the application of personal laws are not automatic, but a matter of choice of the individual. As recognized in article 18 of the ICCPR*.<sup>1734</sup>

One Committee member used the public session to address the State party’s reference to article 27 of the Covenant:

(...) in regard to personal law, according to article 26 of the Covenant all persons were equal before the law and were entitled without discrimination to equal protection of the law. *The provisions of article 27 supplemented those of article 26 and focused on individual rather than collective rights*.<sup>1735</sup>

<sup>1730</sup> HRC, Sri Lanka periodic report, CCPR/C/LKA/5 (2014), para 129.

<sup>1731</sup> A similar remark was made during the constructive dialogue: ‘The question of legislation touching on personal rights was a very delicate one, and many changes were needed, *they should not be imposed by the Covenant, but rather be requested by the sector of the population affected*.’ HRC, Summary Record of the 3099<sup>th</sup> meeting, CCPR/C/SR.3099 (2014), para 24.

<sup>1732</sup> HRC, CO Sri Lanka, CCPR/C/LKA/5 (2012), para 130.

<sup>1733</sup> Ibid, para 132.

<sup>1734</sup> Ibid, para 136.

<sup>1735</sup> HRC, Summary Record of the 3099<sup>th</sup> meeting (2014), CCPR/C/SR.3099, para 32. (emphasis added, VV).

The HRC did not specifically address the argumentation relating to the application of personal status laws in combination with individual choice. In its Concluding Observations, it did not reject the application of personal laws per se, but focused on the discriminatory aspects, such as marital rape, minimum age of marriage under Muslim Personal law. Concerned about discriminatory provisions against women in domestic legislation, the State party is recommended to '[u]ndertake a comprehensive review of its domestic laws, (...) in order to bring them into full conformity with articles 3, 23 and 26 of the Covenant'.<sup>1736</sup>

The HRC seemed open towards the argument that traditional justice systems of indigenous peoples should take cultural differences and sensitivities into account. For example, in its periodic report, Bolivia explained:

(...) native indigenous campesino justice is recognized in the Constitution in accordance with international treaties on the self-determination of peoples, bearing in mind that *historically this type of restorative, oral and simple justice has been applied in the country in accordance with the peoples' own principles, cultural values, norms and procedures* and with respect for fundamental rights.<sup>1737</sup>

The indigenous justice system was viewed 'as the justice system of the first peoples of Bolivia and a means of respecting the rights of indigenous persons, rather than a system of traditional or customary justice'.<sup>1738</sup> The State party explained that indigenous *campesino* norms and judgements were required to comply with the Constitution<sup>1739</sup>, and that 'indigenous justice was being strengthened in accordance with the fundamental rights set out in the Constitution and in international law'.<sup>1740</sup> The HRC does not seem to reject the *campesino* justice system per se. In the Concluding Observations, the HRC expresses concern about the lack of information on mechanisms for ensuring the compatibility of the native indigenous *campesino* justice system with the Covenant. The State party is urged to set up such mechanisms in order to ensure that the native indigenous *campesino* justice system is at all times compliant with due process and other guarantees established in the Covenant.<sup>1741</sup> A main concern relates to the fact that corporal punishment continues to be used as a punishment in the community-based justice system.<sup>1742</sup>

Sudan stressed both the freedom of choice and the freedom of religion. It denied that the principles of Islam run counter to the Covenant, and argued that people *choose* to abide by Sharia, that the Islamic religion should be understood in its totality, and

<sup>1736</sup> HRC, CO Sri Lanka, CCPR/C/LKA/5 (2012), para 7.

<sup>1737</sup> HRC, Bolivia periodic report, CCPR/C/BOL/3 (2011), para 118. (emphasis added, VV).

<sup>1738</sup> HRC, Summary Record of the 3011<sup>th</sup> meeting, CCPR/C/SR.3011 (2013), para 23.

<sup>1739</sup> Ibid, para 23.

<sup>1740</sup> Ibid, para 24.

<sup>1741</sup> HRC, CO Bolivia, CCPR/C/BOL/CO/3 (2013), para 24.

<sup>1742</sup> Ibid, para 16.

provisions not taken out of context, and points out that the HRC should respect the Islamic religion and beliefs of the people of Sudan. In its replies to the list of issues, when asked to indicate ‘what mechanisms are used to prevent Sharia law from being applied in a manner that would be incompatible with the Covenant’, Sudan reacted very agitated:

Firstly; it is to the surprise of the Government of the Sudan that the Committee, which is tasked, inter alia, with the protection of the right to religion as one of the rights stipulated for by the International Covenant on Civil and Political Rights including Sharia law, is raising this point in a degrading way.

Secondly; the Government of the Sudan believes that there is no contradiction between the Sharia law and this Covenant otherwise; a reservation could have been made, which is not the case.

Thirdly; Islam is the choice of over 97% of the people of the Sudan as a way of life, which includes the choice to abide by the Sharia laws and legislation.

Fourthly; please note that *Sharia laws and provisions do not apply to non-Muslim citizens* as such exemptions are inherent in all legislations and provisions derived from Sharia.

Fifthly; given the sensitivity of this issue we expected a different approach from the Human Rights Committee.

Sixthly; the Personal Code derived from Sharia laws does not apply to any non-Muslim as there is a separate Personal Code for the Christians and other faith including tribal customs.<sup>1743</sup>

Sudan also stressed that the HRC should ‘respect the religious belief provided for in the Covenant’, and that the Islamic religion should be understood ‘in its totality’, when it was criticised for its prohibition of apostasy:

No process in relation to the abolishment of apostasy is taken so far and in this respect the Human Rights Committee is kindly invited, while calling on States parties to respect religious belief provided for in the Covenant and the Universal Declaration of Human Rights, not to demean but to respect, likewise, the Islamic religion and beliefs of the people of the Sudan in this regard. The Committee should really make attempts to understand the Islamic religion in its totality and not to take Islamic provisions out of context or judge it by or through the eyes of other religions, faiths or preconceived ideas.<sup>1744</sup>

<sup>1743</sup> HRC, Replies of the Sudan to the list of issues, CCPR/C/SDN/Q/4/Add.1 (2014), para 1. (emphasis added, VV).

<sup>1744</sup> Ibid, para 24.

Likewise, when confronted with the HRC's recommendation to abolish all forms of punishment in breach of articles 7 and 10 of the Covenant<sup>1745</sup>, including flogging and amputation<sup>1746</sup>, Sudan argued that '[t]he punishments referred to (...) stem from the national belief and creed which is recognized in the Universal Declaration of Human Rights and the Covenant'.<sup>1747</sup> When a Committee member stressed that this argument was not acceptable, and that by ratifying the Covenant, the State party had undertaken to change cultural or traditional practices which were in violation of the human rights provided for in the Covenant<sup>1748</sup>, the State party delegation replied:

*Standardized values and principles throughout the world were surely undesirable. In that connection, Mr. Ben Achour [Committee member from Tunisia, VV] had talked about the incidence of amputation and flogging in the Sudan. He understood the point but questioned whether the Covenant should really take precedence over the State party's beliefs and religion. He also questioned whether an innovative, reformist approach was preferable to the certainties of sharia. However, sharia was a broad-based system and, if it was possible to be flexible, the Government would opt for flexibility.*<sup>1749</sup>

This argumentation led several Committee members to react. One member rejected the reference to 'national belief and creed' outright:

(...) the argument that forms of punishment that were in breach of articles 7 and 10 of the Covenant, such as flogging and amputation, stemmed from the national belief and creed was not acceptable. By ratifying the Covenant, the State party had undertaken to change cultural or traditional practices that were in violation of the human rights provided for in the Covenant. He cited the example of a number of Islamic States that had amended their national legislation to bring it in line with the Covenant, with the support of their religious leaders. He invited the delegation to comment on why the State party continued to make such a narrow interpretation of sharia law.<sup>1750</sup>

Another argument related to the 'reputation' and 'interests' of Islam:

It was of the utmost importance that Islam should enjoy a good reputation throughout the world and matters such as apostasy and excessive punishment were therefore not in the interests of Islam.<sup>1751</sup>

<sup>1745</sup> Article 7 ICCPR: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'; article 10 ICCPR: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'

<sup>1746</sup> HRC, List of issues, CCPR/C/SDN/Q/4 (2013), para 18.

<sup>1747</sup> HRC, Replies of the Sudan to the list of issues, CCPR/C/SDN/Q/4/Add.1 (2014), para 18. (emphasis added, VV).

<sup>1748</sup> HRC, Summary Record of the 3071<sup>st</sup> meeting, CCPR/C/SR.3071, para 12.

<sup>1749</sup> Ibid, para 25. (emphasis added, VV).

<sup>1750</sup> Ibid, para 12.

<sup>1751</sup> Ibid, para 39.

And yet another argument:

It was disturbing that religious freedom was used as a ground for the non-alignment of domestic legislation with the Covenant. While article 18 provided for religious freedom, no article allowed the contravention of the Covenant on grounds of religion. Under general comment No. 31, States parties were required to harmonize their domestic legislation with the Covenant.<sup>1752</sup>

In his closing remarks, the Chairperson was very critical of apostasy being a capital offence:

The issues of the death penalty and other cruel punishments had been central to the discussions and were connected to religion. The Committee's objective did not lie in interpreting sharia but rather in considering the application of national law. In the light of article 6 of the Covenant, which stipulated that the death penalty could be imposed only for the most serious crimes and not contrary to the provisions of the Covenant, the Committee could not accept that the definition of serious crimes could be determined by individual States. It was also unacceptable to consider apostasy a criminal offence, much less a capital offence, since it was incompatible with the right to freedom of religion. The application of corporal punishment also required conformity with an objective standard.<sup>1753</sup>

In the Concluding Observations, the HRC is concerned by the persistence of discriminatory provisions against women in legislation, including in the areas of family and personal status. The State party should 'speed up the review of its domestic laws, including those governing the family and personal status (...), in order to bring them into full conformity with articles 3, 23 and 26 of the Covenant'.<sup>1754</sup> In addition, the HRC 'regrets that the State party's legislation still provides for several forms of corporal punishment, such as flogging and amputation, that violate article 7 of the Covenant'<sup>1755</sup>, and is concerned 'that apostasy is still criminalised in the State party'.<sup>1756</sup>

Sierra Leone suggested that female genital mutilation of women of 18 years and older would be acceptable. The delegation 'considered the legal age of consent for female genital mutilation to be 18, which allowed the women in question to make an informed choice'.<sup>1757</sup> It later elaborated on the rationale:

[A] long legislative process would be needed before a law on female genital mutilation could be adopted, as Members of Parliament would have to be sensitized to the issue in advance. Sierra Leone was determined to eradicate the practice but had chosen to do so at what it judged to be the most appropriate pace. Given that 90 per cent of women who had undergone

<sup>1752</sup> Ibid, para 40.

<sup>1753</sup> Ibid, para 43.

<sup>1754</sup> HRC, CO Sudan, CCPR/C/SDN/CO/4 (2014), para 10.

<sup>1755</sup> Ibid, para 16.

<sup>1756</sup> Ibid, para 20.

<sup>1757</sup> HRC, Summary Record of the 3041<sup>st</sup> meeting, CCPR/C/SR.3041 (2014), para 5.

the procedure had done so during childhood, the Government hoped to introduce a ban on female genital mutilation of minors as a matter of priority. *However, it did not intend to prohibit the practice for women over 18, as it considered that such women were free to make an informed decision*; it was also preferable to raise public awareness of the practice rather than to ban it.<sup>1758</sup>

This rationale was immediately criticised by a member of the Committee:

(...) while she appreciated the State party's frank response concerning the practice of female genital mutilation, she wished to know what steps had been taken to change societal attitudes and to prohibit the practice in law. *The risks to the life and health of women subjected to FGM did not lessen with age, and the 18-year minimum age for FGM was therefore ineffectual.*<sup>1759</sup>

The argument of personal consent is not addressed by the HRC in its Concluding Observations. The Committee 'is concerned by the continuing reports of harmful traditional practices, especially female genital mutilation', and 'notes with serious concern the rejection of a proposed provision to criminalize female genital mutilation'. The State party is urged to explicitly prohibit FGM, and 'to develop a common perception on the issue of FGM', in order to 'ensure that communities where the practice is widespread are targeted in order to bring about a change in mind-set'.<sup>1760</sup> Interestingly, the Committee did not expressly call for a prohibition of FGM *for all ages* in order to include girls aged over 18, thus leaving its views or interpretation somewhat ambiguous in this regard.<sup>1761</sup>

### 2.2.2 CESCR

Two examples were found in the dialogues before the CESCR. Sri Lanka explained in its periodic report that 'some discrimination against women still exists in certain personal laws, entrenched in the customs, traditions and culture of the various ethnic groups of Sri Lanka'.<sup>1762</sup> Throughout the dialogue between the CESCR and Sri Lanka, there was disagreement about two issues in particular, marital rape and minimum age of marriage, both falling under marriage law. Sri Lanka argued that regarding marriage law it had chosen to not directly get involved in the decisions made by certain cultural and religious practices. Sri Lanka respected a number of cultural laws and article 16 of

<sup>1758</sup> Ibid, para 12. (emphasis added, VV).

<sup>1759</sup> HRC, Summary Record of the 3042<sup>nd</sup> meeting, CCPR/C/SR.3042 (2014), para 36. (emphasis added, VV).

<sup>1760</sup> HRC, CO Sierra Leone, CCPR/C/SLE/CO/1 (2014), para 12.

<sup>1761</sup> Compare this with, for example, the HRC's Concluding Observations on Tanzania (2009), where it – explicitly – declared it was 'still concerned about (...) the fact that the law does not protect women above the age of 18'. The authorities of Tanzania were subsequently urged to 'amend its legislation with a view to criminalizing female genital mutilation regarding women above the age of 18'. Possible reason for this: Sierra Leone has not adopted any law whatsoever, unlike Tanzania, where apparently a law had been adopted prohibiting the practice below 18 years.

<sup>1762</sup> CESCR, Sri Lanka periodic report, E/C.12/LKA/2-4 (2008), para 69.

the Constitution enforced the protection of cultural norms and religious-based legal structures.<sup>1763</sup> These laws have existed for several centuries and could not be changed without consulting the affected communities.<sup>1764</sup> Earlier, in its replies to the list of issues, the State party requested ‘that the Committee appreciate that there are *cultural sensitivities* relating to the criminalization of “marital rape” in all circumstances within Sri Lankan society’.<sup>1765</sup> A Committee member expressed disappointment at the request that it remain culturally sensitive, and considered that ‘this was inexcusable’:

Culture should have nothing to do with marital rape and harming another human being could not be culturally excusable. Although it may be socially complex, the State had an immediate obligation to eradicate domestic violence.<sup>1766</sup>

The State party’s response:

When the delegation said that there were cultural sensitivities, it did not excuse or validate this position but explained some of the challenges in effectuating change’.<sup>1767</sup>

In its Concluding Observations, the CESCR ‘notes with serious concern that *the State party relies on the communities themselves to amend their personal status laws*’, and ‘reminds the State party that the equal right of men and women to the enjoyment of all economic, social and cultural rights is an immediate obligation of the States parties *which cannot be conditioned to willingness of concerned communities to amend their laws*’. The CESCR calls upon the State party to take immediate action to repeal all statutory laws which discriminate against women and to amend the Muslim Personal Law and to put it in conformity with its national legislation.<sup>1768</sup> The CESCR further expressed ‘*serious concern that cultural sensitivities are used as a justification by the State party not to criminalize marital rape in all circumstances*’.<sup>1769</sup>

Tanzania pointed out to the CESCR that polygamy was justified because it was optional:

Polygamy was a religious practice that had existed well before the advent of human rights. Nonetheless, no one was forced to practise it, all individuals being free to choose between a civil marriage or a Muslim marriage.<sup>1770</sup>

<sup>1763</sup> UNOG, Committee on Economic, Social and Cultural Rights considers report of Sri Lanka (n 119), under questions on arts 1 to 5.

<sup>1764</sup> CESCR, Summary Record of the 40<sup>th</sup> meeting, E/C.12/2010/SR.40 (2011), para 43. (available in Spanish only).

<sup>1765</sup> CESCR, Replies of Sri Lanka to the list of issues, E/C.12/LKA/Q/2–4/Add.1 (2010), para 104.

<sup>1766</sup> UNOG, Committee on Economic, Social and Cultural Rights considers report of Sri Lanka (n 119).

<sup>1767</sup> CESCR, Summary Record of the 41<sup>st</sup> meeting, E/C.12/2010/SR.41 (2010), para 60.

<sup>1768</sup> CESCR, CO Sri Lanka, E/C.12/LKA/CO/2–4 (2010), para 15. (emphasis added, VV).

<sup>1769</sup> Ibid, para 25. (emphasis added, VV).

<sup>1770</sup> CESCR, Summary Record of the 32<sup>nd</sup> meeting, E/C.12/2012/SR.32 (2012), para 23.

This argument about individual consent was not specifically addressed by the CESCR, although it was implicitly rejected, as it expressed concern ‘that the State party invokes traditional values to explain practices that are not in line with obligations flowing from international human rights law, such as polygamy’.<sup>1771</sup>

### 2.2.3 CEDAWCee

In the dialogue with Botswana, the CEDAWCee was concerned about section 15(4) of their Constitution which exempted marriage, divorce and other personal matters from the prohibition of discrimination. The State party ‘acknowledged that customary law continued to discriminate against women in some situations’, but said ‘that it was difficult to pass legislation that went against the entrenched beliefs of the various tribes, each of which had its own customary law’.<sup>1772</sup> The State party explained that ‘the intention of Section 15(4)(c) was, (...) to ensure that the customs of the people, including their religious beliefs, continue to be applied by people who choose to apply them, without any restrictions’, and that ‘it should be noted that people can expressly opt out of customary law or this can be implied by their mode of life’.<sup>1773</sup> Hence, Botswana’s justification relies very much on personal autonomy:

In essence, Section 15(4) (c) provides for a reasonable and justifiable discrimination where it will only be fair to an individual to exercise their freewill and their freedom of choice. Thus, it recognizes customary and religious rights of people and hence allowing them to practice their customs and religion freely, as long as they are not contrary to morality, humanity or natural justice.<sup>1774</sup>

In conclusion, Section 15(4) (c) is a provision of reasonable or positive discrimination that the legislators included with an intention to protect individuals rather than incite discrimination. *It recognizes the freedom of the people to choose a regime that regulates their rights*, be it on issues relating to adoption, marriage, divorce, burial, devolution of property on death or any other matters of personal law. Essentially, the Constitution entitles people to fundamental rights and freedoms which should be respected by the State and the inhabitants of that particular State.<sup>1775</sup>

A Committee member addressed this argument during the public session:

She was well aware that deep-rooted traditions existed in Botswana, as in all countries, but even *while such traditions were to be respected, it was important to eliminate their negative*

<sup>1771</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1–3 (2012), para 4.

<sup>1772</sup> CEDAWCee, Summary Record of the 920<sup>th</sup> meeting, CEDAW/C/SR.920 (2010), para 25.

<sup>1773</sup> CEDAWCee, State Party report on Follow-up to Concluding Observations, CEDAW/C/BOT/CO/3/Add.1 (2012), paras 18–19.

<sup>1774</sup> Ibid, para 20.

<sup>1775</sup> Ibid, para 21. (emphasis added, VV).

*aspects* and to ensure that women enjoyed all their rights and participated fully in the development of society.<sup>1776</sup>

In its Concluding Observations, the CEDAWCee submits it is ‘deeply concerned that section 15 (4) of the Constitution exempts adoption, marriage, divorce, burial and devolution of property on death and other matters of personal law from the constitutional provision of non-discrimination, indicating violations by the State party of rights set forth in the Convention, in particular articles 2 and 16 of the Convention’, and urges the State party ‘to repeal urgently and without delay section 15 (4) of the Constitution’.<sup>1777</sup>

Gambia used its periodic report to respond to the CEDAWCee’s concerns (in the previous concluding comments) regarding the widespread practice of polygamy, as well as the (constitutional) exemption of personal matters, particularly with regard to adoption, marriage, divorce, burial and devolution of property on death, from its anti-discrimination provisions. The State party considered that these concerns ‘[do] not take into consideration the socio-cultural realities of Gambian life’<sup>1778</sup>, followed by a ‘freedom of religion’ type of argument:

In setting standards and norms care must be taken not to infringe on the religious beliefs of people as this would not only be an infringement of their rights but could also result in a backlash and the rejection of the instruments.<sup>1779</sup>

During the public session, when the State party was asked to indicate ‘whether the State party envisaged amending the Constitution to eliminate the exemption of personal law from its anti-discrimination provisions *and follow the best practices of other Muslim countries* in such areas as the minimum age for marriage, divorce and polygamy’<sup>1780</sup>, the Gambian delegation used a ‘freedom of choice’ type of argument:

(...) *polygamy was an accepted aspect of Gambia’s cultural diversity that would not soon change*. While she did not exclude the possibility of discussing an amendment of (...) the Constitution to eliminate the exception of personal matters from its anti-discrimination provisions, she pointed out that (...) women already enjoyed equality to men in most areas, (...). She understood the Committee’s concerns but reiterated that *in the Gambian context*

<sup>1776</sup> CEDAWCee, Summary Record of the 920<sup>th</sup> meeting, CEDAW/C/SR.920 (2010), para 60. (emphasis added, VV).

<sup>1777</sup> CEDAWCee, CO Botswana, CEDAW/C/BOT/CO/3 (2010), paras 11–12; Later, in its follow-up letter to the State party, the CEDAWCee decided, not convinced by State party arguments, that ‘the State party failed to bring women’s rights with respect to matters of personal law in line with articles 2 and 16 of the Convention and general recommendation number 28. The Committee considers that the recommendation has not been implemented’. Follow-up letter sent to the State party, AA/Follow-up/Botswana/54 (2013).

<sup>1778</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), para 6.

<sup>1779</sup> Ibid.

<sup>1780</sup> CEDAWCee, Summary Record of the 1312<sup>th</sup> meeting, CEDAW/C/SR.1312 (2015), para 32. (emphasis added, VV).

*personal matters were a matter of choice.* Some religious leaders were more liberal and there might come a time when the religious community would recommend amending the Constitution, a recommendation the Government would surely implement.<sup>1781</sup>

In response, a Committee member said:

[C]ulture [is] a man-made thing that changed and evolved; cultural diversity could not be invoked as an excuse for violating human rights. She herself was from a Muslim country that had a secular legal system. The Convention was an international agreement that the State party must implement to protect the rights of women. The State party should prevail upon religious and traditional leaders to adopt a more flexible stance.<sup>1782</sup>

When closing the public session, a Committee member expressed hopes ‘that in the future the State party and the Committee would have closer views on cultural diversity’.<sup>1783</sup> In the Concluding Observations, the CEDAWCee ‘remains concerned about the constitutional provision under which the prohibition of discrimination does not apply in respect of adoption, marriage, divorce, burial and devolution of property upon death and the fact that these issues are regulated under personal law, which contains discriminatory provisions’, and ‘recommends that the State party (...) [h]armonize national legislation, including the Constitution (...) and personal laws (sharia and customary law), with the Convention by repealing all discriminatory provisions to ensure that women and girls enjoy the same rights as men in all areas of life’. Gambia is urged to repeal the constitutional exemption of personal matters, particularly with regard to adoption, marriage, divorce, burial and devolution of property on death, from its anti-discrimination provisions.<sup>1784</sup>

Another example can be found in the dialogue with Indonesia on its decision to allow medical personnel to perform female circumcision. The CEDAWCee was concerned about the incidence of FGM in Indonesia, the reported medicalisation of FGM, and the lack of legislation prohibiting or penalising it.<sup>1785</sup> 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’.<sup>1786</sup> In 2008 the influential Indonesian *Ulema Council* issued a fatwa to the effect that the abolition of female circumcision was against *Sharia* provisions. In the 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 party stressed, however, that ‘this regulation should not in any way be construed as

<sup>1781</sup> Ibid, para 34. (emphasis added, VV).

<sup>1782</sup> Ibid, para 36.

<sup>1783</sup> Ibid, para 41.

<sup>1784</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4–5 (2015), paras 8–9.

<sup>1785</sup> CEDAWCee, CO Indonesia, CEDAW/C/IDN/CO/5 (2007), para 20.

<sup>1786</sup> CEDAWCee, Indonesia periodic report, CEDAW/C/IDN/6–7 (2011), para 131.

encouraging or promoting the practice of female circumcision'.<sup>1787</sup> Indonesia justified its policy as follows:

Indonesia pays attention to the dynamic of the implementation of rights and freedom of its citizen, particularly with regards to *the freedom to practice their religions and beliefs in a democratic society*.<sup>1788</sup>

Nevertheless, the CEDAWCee expressed its concern about the serious regression with regard to FGM, and *in particular the State party's authorization 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 criminalising the practice.<sup>1789</sup>

Senegal justified several cultural practices with arguments relying on 'freedom of choice'. The following passages are from its replies to the list of issues:

The sociocultural and religious environment in Senegalese society still favours certain practices such as polygamy, levirate and sororate. Nevertheless, Senegalese law is very supportive of protection for women and of respect for their rights.<sup>1790</sup>

Thus, while polygamy is still practised, the law imposes restrictions by limiting the number of wives and rendering the choice of monogamy irreversible, even in the event of divorce and remarriage.<sup>1791</sup>

*Regarding levirate and sororate* [Tr. A custom by which a dead man's brother was obliged to marry the widow if there were no sons and the custom of marrying the younger sister of one's deceased wife, respectively]: *these are cultural and religious issues that are not binding by law. A woman can reject them and, if coerced, can go to court*. As a reminder, the law requires each future spouse to give his and her personal, free, and enlightened consent to marriage.<sup>1792</sup> (...)

With respect to dietary taboos, in fact there are no legal prohibitions but, rather, personal choices.<sup>1793</sup>

At the public dialogue, a Committee member focused on the practice of polygamy, and argued that 'freedom of choice' was no justification for maintaining the traditional practice of polygamy:

<sup>1787</sup> CEDAWCee, Replies of Indonesia to the list of issues, CEDAW/C/IDN/6-7/Add.1 (2012), para 36.

<sup>1788</sup> Ibid, para 37. (emphasis added, VV).

<sup>1789</sup> CEDAWCee, CO Indonesia, CEDAW/C/IDN/CO/6-7 (2012), para 22.

<sup>1790</sup> CEDAWCee, Replies of Senegal to the list of issues, CEDAW/C/SEN/Q/3-7/Add.1 (2015), para 46.

<sup>1791</sup> Ibid, para 47.

<sup>1792</sup> Ibid, para 48.

<sup>1793</sup> Ibid, para 51. (emphasis added, VV).

[T]he reference to women's free choice when opting for polygamy was (...) an oxymoron. Polygamy was forced on women and could not be presented as a free choice.<sup>1794</sup>

The delegation of Senegal disagreed:

[I]t must be borne in mind that the population of Senegal was 95 per cent Muslim. When a couple was being married, the civil registrar gave both parties *the option of choosing either a polygamous or monogamous marital regime. The wife was not obliged to sign the contract if she did not agree with the option of polygamy.* Once the couple had opted for polygamy, it was no longer possible to apply a shared property regime, as the husband could not leave his property to just one wife if he had three or four wives.<sup>1795</sup>

(...) *Women were not forced to enter into polygamous marriages and had the option of refusing to marry if they objected.* However, it was true that women in rural and urban areas did not necessarily have the same capacity of discernment, and in rural areas many women did not see polygamy as a problem. Such deep-rooted traditions survived but Senegalese society was gradually evolving.<sup>1796</sup>

In its Concluding Observations, the CEDAWCee did not specifically address the 'choice' argument, and merely expressed concern about the very long delays in revising the discriminatory provisions contained in national law, in particular the discriminatory provisions contained in the Family Code.<sup>1797</sup> The State party is recommended to review existing discriminatory provisions relating to marriage and family relations, and repeal all discriminatory provisions in the Family Code.<sup>1798</sup>

A similar defence can be discerned in the argumentation of Gabon:

Turning to the issue of deep-rooted cultural practices, she said that polygamy was recognized in the Civil Code: it was not a type of forced marriage, but rather a type of marriage that women entered into voluntarily. Even so, public awareness-raising and education campaigns were being run to promote monogamous marriage and discourage polygamy.<sup>1799</sup>

The CEDAWCee did not specifically address this argument, expressing concern about the existence in the Civil Code of numerous discriminatory provisions, including those relating to polygamy, and the persistent practice of polygamy. Discriminatory provisions relating to marriage and family relations in the Civil Code, including those relating to polygamy, should be repealed and legal provisions which prohibit polygamy, adopted.<sup>1800</sup>

<sup>1794</sup> CEDAWCee, Summary Record of the 1308<sup>th</sup> meeting, CEDAW/C/SR.1308 (2015), para 41.

<sup>1795</sup> Ibid, para 43.

<sup>1796</sup> Ibid, para 44. (emphasis added, VV).

<sup>1797</sup> CEDAWCee, CO Senegal, CEDAW/C/SEN/CO/3-7 (2015), paras 8-9.

<sup>1798</sup> Ibid, paras 38-39.

<sup>1799</sup> CEDAWCee, Summary record of the 1277<sup>th</sup> meeting, CEDAW/C/SR.1277 (2015), para 25.

<sup>1800</sup> CEDAWCee, CO Gabon, CEDAW/C/GAB/CO/6 (2015), paras 44-45.

Bahrain, which has an article in the Penal Code exempting perpetrators of rape from prosecution and punishment if they marry their victims (art 353), argued that such marriages between rapists and victims can be entered into only with the consent of both parties:

Article 353 of the Penal Code realizes an important social benefit for women in a society such as Bahraini society. The goal of this provision is to spare women rape victims greater harm and to protect the interests of women who wish to accept marriage to the perpetrator. In such a case, the woman's personal interest takes precedence over the public interest in punishing the perpetrator. A woman's acceptance of marriage to a perpetrator may take place solely with her consent and may not [be] imposed upon her, as stipulated in the Family Law (...), which requires a woman's consent for the conclusion of a marriage contract.<sup>1801</sup>

One Committee member *questioned* the argument:

Regarding article 353 of the Criminal Code, which allowed rapists to avoid prosecution by marrying their victims, *she questioned whether the victim truly had a free choice in the matter.*<sup>1802</sup>

In its Concluding Observations, the CEDAWCee regrets that article 353 of the Penal Code exempts perpetrators of rape from prosecution and punishment if they marry their victims, and urges the State party to repeal provisions which condone acts of violence against women, such as article 353.<sup>1803</sup>

In the dialogue with Eritrea, the CEDAWCee expressed concerns that sharia law governed inheritance rights, 'leaving Muslim women vulnerable to discrimination, since they were usually eligible to inherit only half as much property as male heirs'.<sup>1804</sup> Eritrea's justification was plain and simple:

(...) sharia law, which governed marriage, divorce and inheritance, was recognized by the Government, *in keeping with the will of the people.*<sup>1805</sup>

(...) *it was the policy of the Government to respect religious belief* and that inheritance for Muslims fell within sharia law.<sup>1806</sup>

<sup>1801</sup> CEDAWCee, Replies of Bahrain to the list of issues, CEDAW/C/BHR/Q/3/Add.1 (2013), question 11; this line of argumentation was reiterated during the public dialogue. Summary Record of the 1187<sup>th</sup> meeting, CEDAW/C/SR.1187 (2014), paras 23, 25, 58–59.

<sup>1802</sup> CEDAWCee, Summary Record of the 1187<sup>th</sup> meeting, CEDAW/C/SR.1187 (2014), para 23. (emphasis added, VV).

<sup>1803</sup> CEDAWCee, CO Bahrain, CEDAW/C/BHR/CO/3 (2014), paras 21–22.

<sup>1804</sup> CEDAWCee, Summary Record of the 1292<sup>nd</sup> meeting, CEDAW/C/SR.1292 (2015), paras 10, 28.

<sup>1805</sup> Ibid, para 14.

<sup>1806</sup> Ibid, para 29. (emphasis added, VV).

The CEDAWCee recommends that the State party ‘[h]armonize the implementation of family law with the Convention to ensure that Muslim women and girls enjoy the same rights as men in marriage, divorce and inheritance’.<sup>1807</sup>

In the dialogue with Cameroon, the State party seemed to be more neutral than its population on the issue of homosexuality, but asked the CEDAWCee to respect their ‘traditions’ nonetheless, until society evolved:

*(...) homosexuality was a sensitive issue in Cameroon and was generally not accepted. However, people were not persecuted because of their sexual orientation. The common consensus was to move forward on the issue gradually. She wished to appeal to the Committee to respect the Cameroonian people’s religions and traditions and to allow matters to evolve over time. Homosexuality would surely come to be accepted eventually.*<sup>1808</sup>

This argumentation is ignored by the CEDAWCee, which is concerned about the lack of adequate protection and assistance for lesbian, bisexual and transgender women who are victims of discrimination as well as criminalisation, and recommends the State party to raise awareness among political, traditional and religious leaders, as well as members of civil society, about the possible withdrawal of provisions criminalising sexual relations with a person of the same sex.<sup>1809</sup>

In the CEDAWCee’s dialogue with Brunei, the freedom of choice argument also made an appearance in relation to education choices. When the CEDAWCee expressed concern that women and girls continue to choose traditionally female-dominated fields of education and remain underrepresented in technical and vocational education, the State party delegation said:

*(...) the issue of enrolment in particular courses came down to choice: boys could not be forced to take subjects that did not interest them. Priority was therefore given to providing options.*<sup>1810</sup>

The CEDAWCee tackled this argument immediately:

*(...) education choices were often dictated by tradition and culture rather than personal freedom. That meant that Governments sometimes needed to actively promote women in certain fields (...).*<sup>1811</sup>

The State party is recommended to ‘[g]ive priority to eliminating negative stereotypes and structural barriers to the enrolment of girls in non-traditional fields of education at the secondary and tertiary levels, and provide career counselling for girls on non-

<sup>1807</sup> CEDAWCee, CO Eritrea, CEDAW/C/ERI/CO/5 (2015), paras 42–43.

<sup>1808</sup> CEDAWCee, Summary Record of the 1189<sup>th</sup> meeting, CEDAW/C/SR.1189 (2014), para 9. (emphasis added, VV).

<sup>1809</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4–5 (2014), paras 36–37.

<sup>1810</sup> CEDAWCee, Summary Record of the 1259<sup>th</sup> meeting, CEDAW/C/SR.1259 (2014), para 8.

<sup>1811</sup> Ibid, para 9. (emphasis added, VV).

traditional career paths that ensures a corresponding transition into the labour market'.<sup>1812</sup>

#### 2.2.4 Concluding Remarks

States parties regularly disregard Committees' criticism of cultural or religious practices, because they choose to first and foremost respect and protect people's enjoyment of rights in accordance with their religion and culture. Religious and cultural rights are given more weight than the rights to non-discrimination and equality. States parties may refer to human rights provisions protecting the right to freedom of religion (art 18 ICCPR) or the right to enjoy one's own culture (art 27 ICCPR) or merely to those principles, often in combination with notions like 'personal autonomy', 'individual choice', 'freewill', 'freedom of choice' and/or the possibility to 'opt out' or 'refuse'. Some States parties present their implementation as being in compliance with obligations<sup>1813</sup>, while others acknowledge that discriminatory provisions still exist in their laws, but that they have chosen to not directly get involved in the decisions made by certain cultural and religious practices.<sup>1814</sup> Several authors (Donnelly<sup>1815</sup>, Ignatieff<sup>1816</sup>) discussed in chapter 2 have supported such a call for 'personal autonomy' and 'individual choice' in combination with the possibility to 'opt out': those who choose freely to live by and to be treated in accordance with their traditional cultures are welcome to do so, provided others who wish to be free are not oppressed in the name of a culture they (wish to) renounce.

Such State party arguments are sometimes directly addressed by the Committees during the public sessions. Committee members have pointed out that States parties are obliged to uphold the principle of non-discrimination, and that cultural or religious practices or provisions which were incompatible with the Covenant should be barred, *even if a person had accepted them of his or her own free will*. Other Committee members have argued that harming another human being can never be culturally excusable, and that the State has an immediate obligation to eradicate harmful practices. While traditions should be respected, their negative aspects should be eliminated. Cultural diversity cannot be invoked as an excuse for violating human rights.<sup>1817</sup> Arguments

<sup>1812</sup> CEDAWCee, CO Brunei Darussalam, CEDAW/C/BRN/CO/1-2 (2014), para 31.

<sup>1813</sup> See, eg, the above example of the Philippines, which argued that equal protection does not require universal application of the laws to all persons without distinction; it simply requires 'equality among the same group of persons according to a valid classification'. See section 2.2.1.

<sup>1814</sup> See, eg, the above examples of Sri Lanka (sections 2.2.1 and 2.2.2) and Botswana (section 2.2.3).

<sup>1815</sup> See chapter 2, section 2, where it is explained that Donnelly advocates a 'guaranteed right' of individuals to opt out of certain practices. This solution, he believes, would permit individuals and families to, in effect, 'choose the terms on which they participate in the cultures that are of value to their lives'.

<sup>1816</sup> See chapter 2, section 2. Ignatieff argues that while cultural communities (should) have some freedom to arrange their internal structure and institutions and may also put limited pressure on their members to follow the cultural norms of the community, they should be based on non-coercive membership and respect the individual's right and freedom to leave the community.

<sup>1817</sup> See, eg, CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009, para 18 and UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001, art 4: 'No one may

relating to freedom of choice in relation to polygamous marriages are dismissed by Committee members, but without reasoning. Generally, the Committees did not use their concluding observations to address cultural arguments referring to the enjoyment of rights in accordance with religion and culture or to freedom of choice. The application of personal status laws is not rejected per se, Committees focus on the discriminatory aspects of such laws, and recall that all legislation should be in conformity with the Covenant or Convention. Constitutional exemptions of personal matters from anti-discrimination provisions should therefore be repealed. Likewise, the indigenous *campesino* justice system was not rejected per se, but mechanisms should be in place to ensure that such a system is at all times compliant with due process and other guarantees established in the Covenant. Overall, there seem to be no differences between the three Committees in how they deal with these arguments. However, the discussions about the recognition and maintenance of personal and customary laws in Sri Lanka show that similar argumentation and dialogue can lead to significantly different concluding observations. In its dialogue with both the HRC and the CESCR, the State party argued that it did not wish to interfere with personal laws of communities, and that amendments to personal laws must come from within those sectors. This argumentation was completely ignored by the HRC in its Concluding Observations, while the CESCR used its Concluding Observations to expressly note ‘with serious concern that the State party relies on the communities themselves to amend their personal status laws’, and reminded the State party that the equal right of men and women to the enjoyment of all ESC-rights are ‘an immediate obligation of the States parties which cannot be conditioned to willingness of concerned communities to amend their laws’. While the HRC focused exclusively on the results (repeal discriminatory legislation, bring in line with Convention), the CESCR also challenged the motivation of the State party for not intervening.

### 2.3 STATE PARTY DEFENDS THE CULTURE

As the foregoing examples have shown, States parties use cultural arguments even if they accept the need to change culture or cultural practice. Culture is used to explain lack of progress or to excuse the lack of compliance. States parties may also defend the room for culture, and allow room for cultural differences. States parties defend this room for culture as ‘a matter of choice’. It is argued that as long as people have choice, there is no problem under the Convention. The current section will discuss a third mode of engagement, where States parties defend their culture, or at least argue that their religious obligations outweigh their human rights obligations. While in the examples of section 2.2 the State does not (necessarily) share the cultural belief but wants to create space for it, in the present section the State actively supports the (disputed) cultural

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invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’.

belief. States parties defend the culture under scrutiny, and use cultural arguments to justify their lack of compliance or to explain that their interpretation perhaps departs from the Committees' reading, but that *in their view* there is no contradiction with universally recognised human rights. Such cultural argumentation occurred quite often in the State reporting procedure.<sup>1818</sup>

Below, a distinction is made between arguments which defend the culture categorically, and arguments which try to balance interests. Under the former, most arguments are specifically religious, based on authoritative sources and on the interpretation of their content, while some are about cultural values/morality. Under the latter, States try to balance interests, respecting human rights on the one hand, and culture on the other. Ultimately, however, human rights obligations are subservient to religious obligations.

### 2.3.1 HRC

#### 2.3.1.1 Culture is defended categorically

##### A. RELIGIOUS ARGUMENTS

Quite often, the cultural arguments which feature in the dialogues between the HRC and States parties, are of a religious nature. The reasoning that limitations on human rights are imposed by religion, that religion is a higher power and it is not up to the State to question religious doctrines, i.e., that they are 'not up for debate', occurs rather frequently. This can vary from simple references to religious sources as a justification for lack of compliance, to rather elaborate discussions of its interpretations. States parties regularly try to convince the HRC that religious principles are not incompatible with international treaties, or that they are trying to harmonize religious principles with international treaties. In their argumentation international human rights obligations are ultimately, however, subservient to their religious obligations.

An example of a State party relying on a religious source to justify its non-compliance is Iraq. When asked by the HRC to elaborate on the reference in the periodic report to the 'right to change one's religion, but only to Islam'<sup>1819</sup>, and to comment on this in the light of article 18 of the Covenant, Iraq answered briefly but unambiguously:

The State's official religion is Islam and most of its legislative enactments, and particularly those regulating the social life of citizens, are derived therefrom. *The teachings of the Islamic religion do not permit a Muslim to convert to another religion.*<sup>1820</sup>

<sup>1818</sup> 12 examples were found for the HRC, 10 examples for the CESCR, and 9 examples for the CEDAWCee (on a total of respectively 92 (HRC), 82 (CESCR) and 131 (CEDAWCee) State reporting cycles). Examples are not exhaustive, but still a good indication.

<sup>1819</sup> HRC, List of issues, CCPR/C/IRQ/Q/5 (2015), para 20.

<sup>1820</sup> HRC, Replies of Iraq to the list of issues, CCPR/C/IRQ/Q/5/Add.1 (2015), para 62; reference to Iraq periodic report, CCPR/C/IRQ/5 (2013), para 155. (emphasis added, VV).

One Committee member ‘wondered how the State party could reconcile that prohibition [to convert from Islam to another religion, VV] with article 18 of the Covenant, the Committee’s general comment No. 22 and the principles of democracy’.<sup>1821</sup> In the Concluding Observations, the HRC states that ‘it is concerned about the affirmation by the State party that persons in Iraq have the right to change their religion “but only to Islam”’. The State party should eliminate discriminatory legislation and practices which violate the right to freedom of religion or belief.<sup>1822</sup>

Kuwait addressed the question about steps taken to prohibit polygamy by referring to the relevant Koranic verse, hence rejecting the HRC’s request to prohibit the practice.<sup>1823</sup> During the public dialogue, Kuwait added:

As an Islamic State, *Kuwait did not view polygamy as discrimination against women because it was part of divine law*. The women involved consented to a polygamous marriage, which indicated that they too did not consider it discriminatory.<sup>1824</sup>

Elaborating on the status of Islam in Kuwait, the delegation also said:

Islam was not only a religion but also a way of life. *As an Islamic State, Kuwait had no choice but to follow the major tenets of Islam*, but whenever possible it also sought solutions combining both sharia and the international treaties to which it was a party, as those treaties were also part of the national legal system. *In any case, Islam and the Covenant both sought the equality and dignity of human beings, so there was no contradiction between the two*.<sup>1825</sup>

Two Committee members with a Muslim background, Mr Amor (Tunisia) and Mr Fathalla (Egypt), challenged the Kuwaiti interpretation of the Koran. Mr Amor argued as follows:

<sup>1821</sup> HRC, Summary Record of the 3214<sup>th</sup> meeting, CCPR/C/SR.3214 (2015), para 37.

<sup>1822</sup> HRC, CO Iraq, CCPR/C/IRQ/CO/5 (2015), paras 37–38.

<sup>1823</sup> HRC, Replies of Kuwait to the list of issues, CCPR/C/KWT/Q/2/Add.1 (2011), para 10. Kuwait’s reply: ‘The words of God Almighty are evidence of the prohibition on more than four wives: “If you fear that you cannot treat orphan girls with fairness, then you may marry other women who seem good to you, two, three or four. But if you fear that you cannot maintain equality among them, marry one only or any slave girls you may own. This will make it easier for you to avoid injustice.” (chapter of the Koran entitled “Women”, verse 3). Islamic jurisprudence deals with questions of marriage on that basis and regulates marriages as legal transactions in the State religion, in accordance with the provision of article 2 of the Constitution, which states that: “The religion of the State is Islam and Islamic law is a principal source of legislation”.’

<sup>1824</sup> HRC, Summary Record of the 2840<sup>th</sup> meeting, CCPR/C/SR.2840 (2011), para 47. (emphasis added, VV).

<sup>1825</sup> Ibid, para 49. Other relevant remarks by the Kuwaiti delegation: ‘*international treaties took precedence over Kuwaiti legislation* and were fully incorporated into domestic law. Kuwait was committed to fulfilling its international obligations. However, some areas *were covered by sharia law and change would take time*’ (Summary Record of the 2841<sup>st</sup> meeting, CCPR/C/SR.2841 (2011), para 43); ‘there were reservations to certain Arts of the Covenant that were incompatible with sharia law. *Sharia was the only source for legislation covering family matters*, such as marriage, divorce and inheritance’ (Summary Record of the 2842<sup>nd</sup> meeting, CCPR/C/SR.2842, para 15). (emphasis added, VV).

A distinction should also be drawn between the Koran itself and how it was interpreted. The Koran did not at all authorize polygamy but made it conditional on the man being able to treat his wives equally, a task it conceded was impossible, hence making polygamy unworkable. The State party should reconsider its position on the issue and recognize the primacy of the Covenant.<sup>1826</sup>

Agreeing with his colleague, Mr Fathalla added:

(...) the Koran, by making polygamy conditional on equitable treatment, unambiguously implied that no one could be polygamous because it was impossible to treat several wives fairly. There should therefore be a legal limit on the number of wives one could have.<sup>1827</sup>

The Kuwaiti delegation, nevertheless, stressed the supremacy of Islam, and addressed the criticism of its interpretation:

Firstly, *it must be emphasized that the Koran was, without the shadow of a doubt, the supreme instrument in Kuwait*. That did not mean that the authorities did not endeavour to reconcile, as far as possible, national traditions and culture with the provisions of international instruments to which the country was a party, including the Covenant. (...) <sup>1828</sup>

He took note of Mr. Amor's comments regarding verses of the Koran on polygamy but noted that the Koran had, happily, always been subject to a variety of interpretations, none of which was exclusively valid. Mr. Amor's interpretation was thus in no way superior to that of Kuwait, which advocated a moderate form of Islam, far removed from some extremist interpretations of the Koran. The fact that sharia was a fundamental source of Kuwaiti law in no way hindered Kuwait's capacity to respect human rights or its international obligations, as had been demonstrated, for instance, by amendments made to adoption legislation.<sup>1829</sup>

In the Concluding Observations, the Committee 'recalls its view that polygamy violates the dignity of women (...) and constitutes a violation of article 3 of the Covenant'.<sup>1830</sup> The State party should 'undertake a comprehensive review of existing laws to repeal all discriminatory provisions that affect gender equality', and 'engage in official and systematic awareness-raising campaigns in order to eradicate polygamy, which is a form of discrimination against women'.<sup>1831</sup>

The Maldives, taking the position that Islam is basically 'a religion of equality and equity, and of social justice and rights for all'<sup>1832</sup>, seemed very forthcoming when it said it 'looked forward to learning from fellow Muslim countries about progressive, modern and forward-looking interpretations of Islam that would ensure human rights for all

<sup>1826</sup> HRC, Summary Record of the 2841<sup>st</sup> meeting, CCPR/C/SR.2841 (2011), para 11.

<sup>1827</sup> Ibid, para 13.

<sup>1828</sup> Ibid, para 19. (emphasis added, VV).

<sup>1829</sup> Ibid, para 20.

<sup>1830</sup> HRC, CO Kuwait, CCPR/C/KWT/CO/2 (2011), para 9.

<sup>1831</sup> Ibid, para 9.

<sup>1832</sup> HRC, Summary Record of the 2902<sup>nd</sup> meeting, CCPR/C/SR.2902 (2012), para 42.

without discrimination<sup>1833</sup>, and that it was ‘considering ways of bringing Islamic law into line with the values of modern democracy while preserving the main features of Islamic law, Islam being the cornerstone of all laws’.<sup>1834</sup> But then the disclaimers turned up: ‘any incorporation of international law was *subject to the limits imposed by the Islamic faith and sharia*’<sup>1835</sup>, and ‘no law contrary to any tenet of Islam shall be enacted in the Maldives’.<sup>1836</sup> After the HRC expressed concern that human rights appeared to be subordinate to religious tenets, which would challenge their universality, the State party delegation stuck with its view:

[T]here was no contradiction between the rights and freedoms contained in the (...) Constitution, and universally recognized human rights. The question of whether the tenets of Islam were compatible with the universal concept of human rights was an old debate, but Muslim scholars and jurists generally agreed that the aspects and characteristics of what was currently defined as universal human rights were present in the tenets of Islam.<sup>1837</sup>

The Maldives also upheld the criminalisation of homosexuality, reiterating its position that it could not enact any law contrary to any tenets of Islam: ‘Homosexuality was prohibited by law because it was proscribed by sharia law’<sup>1838</sup>, and ‘this excludes the possibility of enacting any law protecting the rights of persons based on their sexual orientation’.<sup>1839</sup>

The HRC did not enter into discussions on whether the tenets of Islam were compatible with the universal concept of human rights, but warned the State party that ‘if the civil and political rights enshrined in the Constitution were subordinate to religious tenets, the universality of those rights, as established under the Covenant, could be called into question’.<sup>1840</sup> Another Committee member added:

(...) the Maldivian Constitution, drafted in 2008, contained provisions that were similar to those in the constitutions of almost all Muslim countries. Chapter 2 set forth universally recognized fundamental rights and freedoms. However, article 2 stated that Maldives was a republic based on the principles of Islam. *Freedoms and rights were guaranteed, provided that they were compatible with the precepts of Islam.* The status of religion in the Constitution thus had a direct impact on issues pertaining to the family, women, citizenship, criminal law and many other matters. *He urged the State party to draw inspiration from the modernist*

<sup>1833</sup> Ibid. This was said after one of the Committee members (Mr Ben Achour) urged the State party ‘to draw inspiration from the modernist interpretation of Islam, which went a long way towards reconciling religious precepts with universally recognized human rights’.

<sup>1834</sup> HRC, Summary Record of the 2901<sup>st</sup> meeting, CCPR/C/SR.2901 (2012), para 45.

<sup>1835</sup> HRC, Summary Record of the 2902<sup>nd</sup> meeting, CCPR/C/SR.2902 (2012), para 42. (emphasis added, VV).

<sup>1836</sup> HRC, Replies of Maldives to the list of issues, CCPR/C/MDV/Q/1/Add.1 (2012), paras 30, 39.

<sup>1837</sup> HRC, Summary Record of the 2901<sup>st</sup> meeting, CCPR/C/SR.2901 (2012), para 3.

<sup>1838</sup> Ibid, para 44.

<sup>1839</sup> HRC, Replies of Maldives to the list of issues, CCPR/C/MDV/Q/1/Add.1 (2012), para 30.

<sup>1840</sup> HRC, Summary Record of the 2900<sup>th</sup> meeting, CCPR/C/SR.2900 (2012), para 35.

*interpretation of Islam, which went a long way towards reconciling religious precepts with universally recognized human rights.*<sup>1841</sup>

The HRC suggested that '[i]n some Muslim countries, there was separation of religion and the State, allowing them to respect their international obligations; Maldives could follow their example'.<sup>1842</sup> Finally, the HRC noted that 'the delegation had invoked constitutional provisions to justify the enforcement of sharia law', and stressed that 'a State party could not invoke its domestic law to justify its failure to implement a rule of international law'.<sup>1843</sup> This was reiterated in the Concluding Observations, where the HRC considered that 'the State party should take all measures to give full and unimpeded effect to the provisions of the Covenant in its domestic legal order and ensure that the provisions of [its] Constitution are not invoked to justify the failure by the State party to fulfil its obligations under the Covenant'.<sup>1844</sup> The HRC was further concerned about discrimination against people on the basis of their sexual orientation as well as the social stigmatisation and social exclusion of these groups, and reminded the State party in this respect of the following:

While the Committee observes the diversity of morality and cultures internationally, it recalls that they must always be subject to the principles of universality of human rights and non-discrimination. Accordingly, the State party has the duty to protect the individual's liberty and privacy, including in the context of same sex sexual activities among consenting adults (...).

The State party should decriminalize sexual relations between consenting adults of the same sex. It should also combat the stigmatization and marginalization of homosexuals in society.<sup>1845</sup>

Regarding inheritance, the same State party went beyond a mere reference to the religious source, and tried to explain the rationale behind the religious duties and proscriptions. According to the Maldives, estate inheritance is governed by sharia, granting male heirs twice the share of female heirs. The State party considers this justified: 'the Islamic concept on the division of property is that men bear the responsibility of sustaining a home financially and their counterparts, females, are not required to bear any financial responsibilities even if they do inherit property'.<sup>1846</sup> The State party promised it was 'exploring possibilities to find a solution of equal treatment with regard to inheritance *within the context of Islamic Sharia*'.<sup>1847</sup> The HRC, 'concerned that women in the Maldives continue to be discriminated against in the State party with

<sup>1841</sup> Ibid, para 53. (emphasis added, VV).

<sup>1842</sup> HRC, Summary Record of the 2901<sup>st</sup> meeting, CCPR/C/SR.2901 (2012), para 30.

<sup>1843</sup> Ibid, para 34.

<sup>1844</sup> HRC, CO Maldives, CCPR/C/MDV/CO/1 (2012), para 6.

<sup>1845</sup> Ibid, para 8.

<sup>1846</sup> HRC, Maldives periodic report, CCPR/C/MDV/1 (2010), para 208.

<sup>1847</sup> HRC, Replies of Maldives to the list of issues, CCPR/C/MDV/Q/1/Add.1 (2012), para 39.

regard to inheritance', urged the State party to 'guarantee equality between men and women in matters relating to family law, in particular by ensuring, *de jure* and *de facto*, the right of women to inherit property on an equal footing with men'.<sup>1848</sup>

Likewise, when asked 'to revise family and other laws relating to marriage taking into account progressive interpretations of Islamic law that is in line with the provisions of the Covenant'<sup>1849</sup>, Djibouti explained in its replies (to the list of issues) the rationale for these provisions, in particular the fact that the husband is the head of the family: according to sharia law, the responsibility for the maintenance of his family is assigned to him. In terms of succession, the difference between the share of men (twice that of women) is based on the same principle. All expenses incurred for marriage and family maintenance are normally borne by him.<sup>1850</sup> This principle was also referred to during the public session:

(...) regarding inheritance, *sharia law provided* for women to receive less than half of what men received because it was the man who was responsible for the upkeep of the family.<sup>1851</sup>

This argument was not specifically addressed during the public session. In its conclusions, the HRC is concerned that, despite the adoption of the Family Code in 2002, a number of its provisions still discriminate against women, and is concerned by the continuing inequality between men and women with regard to inheritance. The State party should expedite the revision of the Family Code in order to repeal or amend provisions which are inconsistent with the Covenant.<sup>1852</sup>

Finally, the dialogue around the so-called 'sharia reservations' are also an illustration of categorically defending the culture with reference to authoritative (religious) sources. For example, consider the dialogue with the delegation of Mauritania, where the delegation contended that 'all the provisions of the Covenant – except articles 18 and 23, paragraph 4 – were reflected in the Constitution and national legislation and were duly implemented'.<sup>1853</sup> It also explained that 'Mauritania had entered reservations to article 18 and article 23, paragraph 4, of the Covenant, because those articles contained

<sup>1848</sup> Ibid, para 12.

<sup>1849</sup> HRC, List of issues, CCPR/C/DJI/Q/1 (2013), question 4. Likewise, a Committee member used the public session to point at a recommendation of the CEDAWCee (from 2011) that 'the State party should emulate other countries in the region in their progressive interpretation of the Koran in order to revise the Code and bring it into line with human rights instruments', and asked what obstacles prevented the State party from following that recommendation. HRC, Summary Records of the 3012<sup>th</sup> and 3013<sup>th</sup> meetings, CCPR/C/SR.3012 and 3013 (2013).

<sup>1850</sup> HRC, Replies of Djibouti to the list of issues, CCPR/C/DJI/Q/1/Add.1 (2013), question 4; translated from French: 'L'époux est le chef de famille parce que selon le droit charien la responsabilité de l'entretien de sa famille (femme et enfants mais également sa propre mère ainsi que ses sœurs non mariées) lui incombe. En termes de succession, la différence entre la part de l'homme (double de celle de la femme) répond au même principe. Toutes les dépenses engagées pour le mariage et l'entretien de la famille sont en principe supportées par lui.'

<sup>1851</sup> HRC, Summary Record of the 3012<sup>th</sup> meeting, CCPR/C/SR.3012 (2013), para 17.

<sup>1852</sup> HRC, CO Djibouti, CCPR/C/DJI/CO/1 (2013), para 7.

<sup>1853</sup> HRC, Summary Record of the 3018<sup>th</sup> meeting, CCPR/C/SR.3018 (2013), para 4.

provisions that ran counter to Islamic beliefs'.<sup>1854</sup> A Committee member (Mr Bouzid, Algeria) asked for clarification:

Mr. Bouzid commended Mauritania for its obvious determination to fulfil its obligations under the Covenant. Pointing out that the preamble to the Constitution stipulated that Islam was the sole source of law, he wondered about potential contradictions between sharia texts and the Covenant on issues such as polygamy, adoption and apostasy. He asked whether the State party was open to *ijtihad* (exegesis of Islamic law), which might lead to progressive interpretations of sharia law that were more in line with international human rights law. According to civil society organizations, *the country's reservations to articles 18 and 23, paragraph 4, were ideological and hindered the enjoyment of freedom of religion*. He invited the delegation to clarify the Government's position on that topic.<sup>1855</sup>

In its replies, the delegation said that 'the Government had no plans to withdraw its reservations to those provisions of the Covenant that were contrary to Islam, the main source of law in Mauritania', adding that '[e]fforts were under way to align national law with the international instruments ratified by Mauritania, including the Covenant, (...)'.<sup>1856</sup>

#### B. MORALS OR TRADITIONAL VALUES ARGUMENTS

Other cultural arguments which feature in the dialogue, are more of a moral or traditional values nature, even though religion may also be involved.

When Ethiopia was asked to indicate whether it had plans to repeal articles criminalising 'homosexual and other indecent acts' in order to comply with its obligations under (arts 2, 17 and 26 of) the Covenant, the State party's response was very defensive:

Homosexual and other indecent acts are contrary to and do not go in line with Ethiopian cultures, social norms and religions; are in conflict with public morals. These deeds do not go in line with the social order and day to day interactions of the society and are contrary to the public morality. Thus, the Government does not see enough and convincing reasons to repeal article 629 of the revised Criminal code.<sup>1857</sup>

During the public session, the HRC rejected the argument, first by asking the delegation to 'explain how reasons relating to morals, cultural traditions or social norms could justify a situation in which individuals were driven to suicide, stigmatized and victims of violence'<sup>1858</sup>, and subsequently as a statement:

<sup>1854</sup> HRC, Summary Record of the 3019<sup>th</sup> meeting, CCPR/C/SR.3019 (2013), para 2.

<sup>1855</sup> HRC, Summary Record of the 3018<sup>th</sup> meeting, CCPR/C/SR.3018 (2013), para 9. (emphasis added, VV).

<sup>1856</sup> Ibid, para 15.

<sup>1857</sup> HRC, Replies of Ethiopia to the list of issues, CCPR/C/ETH/Q/1/ADD.1 (2011), para 25.

<sup>1858</sup> HRC, Summary Record of the 2804<sup>th</sup> meeting, CCPR/C/SR.2804 (2011), para 17.

The protection of morals used by the State party to justify its refusal to decriminalize homosexuality was an unacceptable argument, not least because article 17 of the Covenant did not provide for restriction of the right to respect for privacy on moral grounds.<sup>1859</sup>

When the delegation answered that it was ‘unaware of any proceedings having been brought for homosexuality’, the HRC responded that this fact did not eliminate the question, since ‘the deterrent effect that the very existence of that law might have constituted in itself a violation of the Covenant’.<sup>1860</sup> The HRC expressly reiterated – and rejected – the State party’s reasoning, in its Concluding Observations:

The Committee’s concerns are not allayed by the information furnished by the State party that the provision in question is not applied in practice or by its statement that it is important to change mind-sets before modifying the law in this regard.<sup>1861</sup>

The State party is recommended to take steps to decriminalize sexual relations between consenting adults of the same sex.<sup>1862</sup>

Such a defensive reaction is rather frequently observed in dialogues with States parties regarding LGBT+ rights, and more particularly regarding the criminalisation of same sex unions and/or sexual activities. For example, Kenya declared in its periodic report:

Kenya may not decriminalize same sex unions at this stage as such acts are considered as taboo and offences against the order of nature which are repugnant to cultural values and morality. Indeed the public gave overwhelming presentations to the Committee of Experts against the inclusion of same sex rights under the new constitution.<sup>1863</sup>

During the public session, the HRC tried to convince the State party of the need to decriminalize with the following argument:

Prohibiting and criminalizing such relations forced people to hide and pushed them to the margins of society, which had repercussions on public health. The more a community was marginalized, the greater its exposure to risks such as HIV infection. Decriminalization would therefore be in the interests of society as a whole and would help overcome prejudice, intolerance, violence and discrimination, in particular against homosexuals. Governments sometimes had to take difficult decisions, even if they were unpopular, in the interests of protecting the rights of their people.<sup>1864</sup>

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<sup>1859</sup> Ibid, para 27.

<sup>1860</sup> Ibid, para 61.

<sup>1861</sup> HRC, CO Ethiopia, CCPR/C/ETH/CO/1 (2011), para 14.

<sup>1862</sup> Ibid, para 14.

<sup>1863</sup> HRC, Kenya periodic report, CCPR/C/KEN/3 (2010), para 86.

<sup>1864</sup> HRC, Summary Record of the 2907<sup>th</sup> meeting, CCPR/C/SR.2907 (2012), para 56.

This argument was dismissed by the State party:

(...) no measures had been taken to decriminalize either same-sex unions or sexual relations between persons of the same sex. Kenya did not intend to legalize homosexuality, be it between men or women. (...) there had been many developments in the country, but *the State's position on that issue remained unchanged and in all likelihood would not change in the near future.*<sup>1865</sup>

The HRC, in the end, 'regrets that the Penal Code continues to criminalize sexual relations between consenting adults of the same sex'.<sup>1866</sup> The State party is recommended to 'decriminalize sexual relations between consenting adults of the same sex in order to bring its legislation in line with the Covenant', and to 'put an end to the social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity'.<sup>1867</sup>

Uzbekistan also had no intention of decriminalising consensual sexual relations between men, partially for the same reason:

With regard to the repeal of article 120 of the Criminal Code, it is important to note that, as research shows, sexual relations between men are one of the reasons for the spread of HIV/AIDS, which poses a serious threat to public safety. Many countries (79 in all) have introduced legislation to make consensual same-sex relations a crime in order to combat HIV. *Moreover, such relations between men run counter to the moral and spiritual values of society.*<sup>1868</sup>

During the constructive dialogue, Uzbekistan repeated its position on the issue:

With regard to same-sex marriage and article 120 of the Criminal Code concerning sexual intercourse between men, Uzbekistan did not intend to legalize same-sex marriage or to repeal article 120 because it shared the position of Muslim countries concerning LGBT issues. More than 28 million of the country's population of over 31 million were Muslims.<sup>1869</sup>

In its conclusions, the HRC was concerned that consensual sexual activities between adult males continue to be criminalised.<sup>1870</sup> The State party should combat any form of social stigmatisation and discrimination against persons based on their sexual orientation or gender identity, and is told to 'repeal article 120 of the Criminal Code in line with its obligations under the Covenant'.<sup>1871</sup>

<sup>1865</sup> Ibid, para 60. (emphasis added, VV).

<sup>1866</sup> HRC, CO Kenya, CCPR/C/KEN/CO/3 (2012), para 8.

<sup>1867</sup> Ibid, para 8.

<sup>1868</sup> HRC, Replies of Uzbekistan to the list of issues, CCPR/C/UBZ/Q/4/Add.1 (2015), para 23. (emphasis added, VV).

<sup>1869</sup> HRC, Uzbekistan, Summary Record of the 3180<sup>th</sup> meeting, CCPR/C/SR.3180 (2015), para 15.

<sup>1870</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/4 (2015), para 7.

<sup>1871</sup> Ibid, para 7.

In Russia, homosexuality in and of itself is not criminalised. Homosexual propaganda, however, has been prohibited. The State party found the legitimisation for this prohibition in the Russian culture:

While there was legislation prohibiting homosexual propaganda, that law was based on provisions of the European Convention on Human Rights under which certain rights could be restricted in order to protect the health and rights of other citizens. It was important to protect young people's health and social values, as *the preservation of traditional values was essential in order to ensure the continued existence of Russian culture*.<sup>1872</sup>

This reasoning is not addressed. The HRC simply concludes 'that the laws adopted at the regional and federal levels banning "promotion of non-traditional sexual relations to minors", although upheld by the Constitutional Court (...), exacerbate the negative stereotypes against LGBT individuals and represent a disproportionate restriction of their rights under the Covenant'. The State party 'should clearly and officially state that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transsexuality', and repeal the respective laws.<sup>1873</sup>

### 2.3.1.2 Balancing of interests

Another line of argumentation is that, although a cultural practice is in principle discriminatory, the practice can be adapted so that it is no longer *considered* to be incompatible with human rights, or at least a step towards the full eradication of the practice. This may for instance result in a highly regulated practice (polygamy with economic safeguards; medicalisation of female circumcision) or in a symbolic variation of a practice (symbolic dowry).

Djibouti acknowledged in its (initial) periodic report that its Family Code is based on the tenets of Islam and 'introduces inequality between men and women'. Polygamy is still retained in the Family Code, but – by way of justification – 'is highly regulated and the wife has the right to express her views on her husband's subsequent marriages'. Thus, 'she may refer the matter to the courts, which issue a marriage certificate only after an assessment is made of the man's socioeconomic situation and the wife's views have been recorded'. According to the State party, 'this new requirement of the husband to inform his wife before entering into another marriage constitutes a revolution contributing to a strengthening of women's role in the matrimonial home'.<sup>1874</sup> Responding to the HRC's question about the use of Sharia law and its consistency with the provisions of the Covenant, the State party acknowledged that points of difference remain between the sharia law in force in Djibouti and the Covenant, particularly with regard to polygamy, but adds that a committee was established in 2013 *to mitigate the*

<sup>1872</sup> HRC, Summary Record of the 3136<sup>th</sup> meeting, CCPR/C/SR.3136 (2015), para 27. (emphasis added, VV).

<sup>1873</sup> HRC, CO Russian Federation, CCPR/C/RUS/CO/7 (2015), para 10.

<sup>1874</sup> HRC, Djibouti periodic report, CCPR/C/DJI/1 (2012), paras 220–222;

*persistent differences*.<sup>1875</sup> Polygamy is, according to the State party, not widespread enough to require the implementation of programs and campaigns to be abolished, and for reasons related to changing attitudes and economic reasons (it is difficult to support a second or third family), polygamy is already disappearing.<sup>1876</sup> These remarks were subsequently addressed by a Committee member during the public session:

(...) the conflicts that persisted between sharia law and the Covenant provisions on (...) polygamy (...) were not irremediable; he hoped that the committee set up in 2013 to resolve them would succeed. (...) Lastly, with regard to polygamy, he would like to know whether public information campaigns were carried out to communicate to the population that the conditions imposed by sharia law were such as to render the practice of polygamy almost impossible, which would encourage its disappearance.<sup>1877</sup>

The State party's response:

The Family Code authorized, and also regularized, polygamy. It provided, in particular, that at the time of marriage the celebrant was required to inform the woman of any other spouses, which had not previously been an obligation.<sup>1878</sup>

While 'welcoming the information provided by the State party that a committee was established to discuss and possibly harmonize interpretations of Sharia law with the Covenant', the HRC is concerned by the continuing inequality between men and women with regard to polygamy, and 'reaffirms that polygamy violates the dignity of women and expresses its concern that it is still lawful in the State party'. The State party 'should organize awareness-raising programmes and campaigns to change traditional attitudes detrimental to the enjoyment by women of their human rights, and to show the negative effects of polygamy on women'. The Committee 'encourages the State party's current work on harmonizing interpretations of Sharia law with the Covenant'.<sup>1879</sup>

Indonesia, following a fatwa ruling by the *Ulema Council* opposing the prohibition of female circumcision<sup>1880</sup>, authorised certain medical professionals to perform it: another manifestation of a 'highly regulated' cultural/religious practice. When the HRC queried 'how the medicalisation of the practice of FGM is compatible with the rights provided for under the Covenant', the State party argued:

<sup>1875</sup> HRC, Replies of Djibouti to the list of issues, CCPR/C/DJI/Q/1/Add.1 (2013), para 20; translated from French.

<sup>1876</sup> Ibid, para 24.

<sup>1877</sup> HRC, Summary Record of the 3012<sup>th</sup> meeting, CCPR/C/SR.3012 (2013), para 7.

<sup>1878</sup> Ibid, para 17.

<sup>1879</sup> HRC, CO Djibouti, CCPR/C/DJI/CO/1 (2013), para 7.

<sup>1880</sup> In November 2010, the government gave in to the pressure by Muslim organizations and lifted the ban. Instead the Ministry of Health issued regulations concerning FGM. The new regulation authorises certain medical professionals, such as doctors, midwives and nurses, to perform it and defines the practice as 'the act of scratching the skin covering the front of the clitoris, without hurting the clitoris'. The procedure includes 'a scratch on the skin covering the front of the clitoris, using the head of a single use sterile needle' (art 4.2 (g)).

In responding to questions regarding the ‘medicalization’ of female genital mutilation (FGM), it is important to understand the background of the issuance of the regulation of 2010. In 2006, the Government had issued a ban on health-care professionals performing female circumcision through a circular letter referring to the agreement of the International Conference on Population and Development (ICPD) and the World Health Organization (WHO) in 1994 forbidding female circumcision, which in most cases, is associated with FGM. *However, on the ground, this ban leads to the increase of female circumcision conducted by non-medical practitioners. This puts women back in a more vulnerable situation as it was performed by non-medical personnel in various forms, some of which are very harmful.*<sup>1881</sup>

Because of this development, the Government then issued regulation number 1636 of 2010 with the sole purpose *to protect women and girls from unsafe and harmful procedures of female circumcision*, with an end goal to eliminate FGM practices throughout the country. *The regulation serves as a temporary measure to assure a safe procedure and protection for women and girls*, and should not by any means, be construed as encouraging or promoting the practice of FGM.<sup>1882</sup>

Although these arguments were not addressed during the public session, the HRC was clear in the Concluding Observations:

The Committee regrets the State party’s issuance of Regulation No. 1636 of 2010, following a fatwa (ruling) by the Ulema Council, which permits medical practitioners to perform female genital mutilation (FGM), including on 6-month-old babies. *The Committee regrets the State party’s explanation that a previous ban against FGM led to an increase in its practice by non-medical practitioners, exposing women to grave risks of harmful forms of FGM and that the current regulation would better protect women.*<sup>1883</sup>

The State party is recommended to repeal the regulation, which authorizes the performance of FGM by medical practitioners, and to enact a law which prohibits any form of FGM and ensure that it provides adequate penalties which reflect the gravity of this offence. Finally, the State party should ensure that communities where the practice is widespread, are targeted in order to bring a change in mind-set.<sup>1884</sup>

Cote d’Ivoire used its periodic report to make an argument for a (temporary) symbolic variation on the practice of dowry:

There are numerous factors holding back the effective enforcement of certain legal provisions on marriage, including sociocultural inertia. The use of dowries is a centuries old tradition that is found in all the cultural zones of the country. Faced with this difficulty, successive Governments, in coordination with civil society organizations, have given priority to communication with a view to changing perceptions and thence behaviour. Nonetheless, the use of dowries is a criminal offence in Côte d’Ivoire.<sup>1885</sup>

<sup>1881</sup> HRC, Replies of Indonesia to the list of issues, CCPR/C/IDN/Q/1/Add.1 (2013), para 134.

<sup>1882</sup> Ibid, para 135 (emphasis added, VV).

<sup>1883</sup> HRC, CO Indonesia, CCPR/C/IDN/CO/1 (2013), para 12. (emphasis added, VV).

<sup>1884</sup> Ibid.

<sup>1885</sup> HRC, Côte d’Ivoire periodic report, CCPR/C/CIV/1 (2013), para 178.

The different awareness-raising programmes have yielded conclusive results, with *dowries now reduced to a symbolic function in almost all the country's regions*. The State means to pursue its efforts to bring the different populations into compliance with the law.<sup>1886</sup>

The HRC did not address the issue of dowry, let alone the reference to symbolic dowry, during the public session, nor in its Concluding Observations, although it did recommend the State party to 'expedite the amendment of its Personal and Family Code and all relevant legislation with a view to guaranteeing equality between men and women' and to 'step up its public awareness campaigns to help bring about a change in traditional attitudes that impede women's ability to exercise their fundamental human rights'. Whether this means that the symbolic function of dowries is accepted by the HRC: it is not possible to draw any conclusions to that effect.

### 2.3.2 CESCR

#### 2.3.2.1 Culture is defended categorically

##### A. RELIGIOUS ARGUMENTS

Religious arguments are also used rather frequently before the CESCR. The argument that limitations or restrictions on human rights are imposed by religion, and therefore beyond the State party's influence, can be found in submissions by Algeria, Kuwait and Mauritania. These arguments point first and foremost to the supremacy of the source.

In its periodic report, Algeria explained the position of Islam in society:

Concerning the point on gender discrimination with regard to inheritance, it may be recalled in that respect that inheritance laws are derived from Muslim law (Chariah) and are therefore mandatory. These are divinely prescribed laws which can in no way be opposed by positive law.<sup>1887</sup>

Later, in its replies to the list of issues, the State party reiterated its position on this issue:

With respect to inheritance, it is true that women are not treated on the same basis as men regarding the share to which they are entitled; *this difference of treatment is based on Islamic law and particularly the immutable provisions of the Holy Koran*.<sup>1888</sup>

The CESCR did not specifically address these arguments, and expressed concern about discrimination against women, in particular regarding inheritance rights.

<sup>1886</sup> Ibid, para 179. (emphasis added, VV).

<sup>1887</sup> CESCR, Algeria periodic report, E/C.12/DZA/4 (2007), para 81.

<sup>1888</sup> CESCR, Replies of Algeria to the list of issues, E/C.12/DZA/Q/4/Add.1 (2010), para 82. (emphasis added, VV).

Algeria should ‘introduce further legislative amendments to eliminate all forms of discrimination against women’.<sup>1889</sup>

Kuwait claimed that the freedom of belief is absolute in the State party, and that ‘the beliefs of the majority in Kuwait were not imposed on others living there’.<sup>1890</sup> However, ‘religious practices that contravened sharia and offended others could not be tolerated’.<sup>1891</sup> When the Committee inquired ‘who determined the public ethics that occasionally restricted that right and whether restrictions were the same for all denominations’, the delegation replied:

(...) public ethics were determined by Islam, the Constitution and legislation, which provided guidance in cases of rights violations. Islam provided a stable and well-established reference for morality, without room for personal opinions. Moral restrictions and article 95 of the Constitution, stipulating freedom of belief, applied to both Muslims and non-Muslims, and religious practices were protected in accordance with public order and ethics.<sup>1892</sup>

This argument was specifically addressed by the CESCR in the Concluding Observations:

The Committee is concerned at measures taken by the State party which may constitute censorship of the enjoyment of the right to take part in cultural life (art. 15).

The Committee recommends that the State party ensure that the exercise of rights such as freedom of thought, conscience and religion, freedom of opinion and expression are not unduly limited by censorship in the context of the right to take part in cultural life. Moreover, *in view of the absence of specific criteria of what is understood as ‘public ethics and morals,’ the Committee recommends that censorship decisions be made by courts so as to avoid arbitrary decisions.*<sup>1893</sup>

Mauritania also pointed at the position of Islam in its society:

*It was the will of God that the husband should be the leader of the family. Islamic law was very clear about the fact that a Muslim man could marry a woman from a different monotheistic religion while a Muslim woman could only marry a Muslim man. Those issues were not up for debate in Mauritanian society. While the Government did believe in human rights principles and the universality of human rights, given that Islam was the official State religion it was not the Government’s place to discourage its citizens from acting in accordance with Islamic law. (...) the Government must conform to the limitations imposed by Islam, the State religion. Nevertheless, the form of Islam practised in Mauritania was very tolerant and respected universal human rights principles.*<sup>1894</sup>

<sup>1889</sup> CESCR, CO Algeria, E/C.12/DZA/CO/4 (2010), para 8.

<sup>1890</sup> CESCR, Summary Record of the 32<sup>nd</sup> meeting, E/C.12/2013/SR.32 (2013), para 14.

<sup>1891</sup> Ibid.

<sup>1892</sup> Ibid, para 22.

<sup>1893</sup> CESCR, CO Kuwait, E/C.12/KWT/CO/2 (2013), para 32. (emphasis added, VV).

<sup>1894</sup> CESCR, Summary Record of the 37<sup>th</sup> meeting, E/C.12/2012/SR.37 (2012), para 38, 40. (emphasis added, VV).

It later added:

Mauritania respected Islamic values, but was also a party to the Covenant and intended to come as close as possible to the universal values it enshrined. The Government was working to change attitudes in order to achieve that purpose, but doing so was a slow process. Each Muslim country had its own distinctive features and its own interpretation of Islam. With regard to the situation of women, his delegation had explained the interpretation of Islam followed by part of the population, but the Government itself had not taken any measures opposed to women's freedoms. The Family Code reflected the complexity of Mauritanian society. It was the result of a consensus reached between the State, civil society, religious leaders and women's representatives. It was the Government's policy to move towards equality between men and women on all issues on which the various stakeholders could reach consensus.<sup>1895</sup>

These statements induced several reactions and counter-arguments from the side of the CESCR. One member said:

(...) he was surprised to note the delegation's position that nothing could be done to change certain aspects of Mauritanian society because they stemmed from Islamic beliefs. Many Islamic countries took a different view of the matter, and in any case Mauritania had voluntarily committed to the obligations set out in the Covenant and was therefore required to develop policies and legislation to implement those obligations.<sup>1896</sup>

Another Committee member reasoned along the same lines:

(...) it was questionable to argue that a whole series of practices harmful to women were justified on religious grounds. The people of Mauritania were rights holders, and as a party to the Covenant the State had an obligation to respect those rights. The Government should consider whether it was fulfilling that obligation, given the many obstacles to its citizens' enjoyment of their rights as discussed during the dialogue with the Committee.<sup>1897</sup>

Another argument considered that this whole debate had been settled with the Vienna Declaration:

(...) the issue of the universality of human rights in the face of different countries' specific cultural characteristics had been addressed at the World Conference on Human Rights held in Vienna in 1993. There were many interpretations of Islam, some of which were consistent with international human rights instruments. Those religious practices in Mauritania that were not in line with those instruments and that had a harmful effect on the lives of women and children should be changed.<sup>1898</sup>

<sup>1895</sup> CESCR, Summary Record of the 38<sup>th</sup> meeting, E/C.12/2012/SR.38 (2012), para 4.

<sup>1896</sup> CESCR, Summary Record of the 37<sup>th</sup> meeting, E/C.12/2012/SR.37 (2012), para 42.

<sup>1897</sup> Ibid, para 43.

<sup>1898</sup> Ibid, para 44.

In this respect, the CESCR also contended that ‘it was essential to find a balance between the universal nature of human rights and a society’s fundamental values’.<sup>1899</sup> In the Concluding Observations, the CESCR expressed concern ‘at the State party’s reluctance, *invoking religious grounds*, to take steps to amend the 2001 Code’ and ‘recalling the reaffirmation in the Vienna Declaration of *the obligation of States to counter religion or belief-based practices of discrimination* on the ground of gender (...), urges the State party to take steps towards the amendment of the provisions of the 2001 Personal Status Code which are discriminatory on the ground of sex, especially against women’.<sup>1900</sup>

On other occasions, States parties’ arguments were less focused on the source, and more on the content.

For example, in its replies to the list of issues, Iran admits that ‘with regard to inheritance cases, there are differences between men and women’, and continues with what reads as an elaborate justification for these differences:

The rulings on inheritance are made in light of duties, responsibilities and social and family status of men and women. Meanwhile, not in all cases the share of men from inheritance is more than women. (...) Moreover, taking a more profound look at the economic system of Islam indicates that women have no economic obligation in the family, and alimony and cost of living are the responsibility of father or husband. Alimony covers costs of housing, food, clothing, health and medical treatment from the time of marriage to the end of life, and even during the Eddeh period (4 months and 10 days of restraint during which a divorced or widowed woman shall not remarry) is the responsibility of husband. The cost of child support from birth to self-reliance is the responsibility of father. Besides, getting inheritance is once in a lifetime event, and a person may not even receive any inheritance in his lifetime. Moreover, whatever owned as the result of buying, personal efforts, gift, and inheritance by women belong to them and no one has the right to interfere in their ownership. Women are not required to pay for the financial needs of their husband or children. While men, given their responsibilities for the economic life of the family, should spend what they own and even part of their inheritance to meet the needs and costs of living. Therefore, the economic system of the Islamic Republic of Iran which is based on Islamic system is designed to support women.<sup>1901</sup>

The State party subsequently provides a list of examples where the share of women from inheritance is more than or equal to that of men.<sup>1902</sup>

Oddly enough, the CESCR did not address the issue of inheritance at all, let alone the argumentation of the State party in this regard. It did not address inheritance rights

<sup>1899</sup> CESCR, Summary Record of the 38<sup>th</sup> meeting, E/C.12/2012/SR.38 (2012), para 2.

<sup>1900</sup> CESCR, CO Mauritania, E/C.12/MRT/CO/1 (2012), para 10.

<sup>1901</sup> CESCR, Replies of the Islamic Republic of Iran to the list of issues, E/C.12/IRN/Q/2/Add.1 (2013), para 65.

<sup>1902</sup> Ibid, paras 67–68. For example: when deceased has a father and a daughter, then the daughter of the deceased inherits 1/2 of the inheritance, the father of the deceased receives 1/6 of the inheritance; where the deceased has no heir but grandchildren, if the grandchild from his son is a girl, the girl receives two times more than the grandchild from the daughter who is a boy.

or discrimination against women more generally in its Concluding Observations<sup>1903</sup>, and only indirectly during the public session, when asking about fundamental discrimination regarding the rights of women in law and practice. It remains ambiguous what the State party should conclude from this. As it seems unlikely that its inheritance policies are suddenly accepted by the CESCR, it may imply that other issues have priority.

The delegation of Djibouti justified the differences in inheritance rights between men and women with rather similar arguments:

(...) the provisions of the Family Code pertaining to inheritance rights were based on sharia. It should be noted that the husband, as head of the household, held more responsibilities than the wife, including the responsibility to provide for his family and to educate his children.<sup>1904</sup>

The CESCR did not address the argumentation, but it did express concern that discriminatory provisions had been retained in the Family Code of 2002. The State party was recommended to repeal those provisions, ‘as part of its efforts to bring national legislation into line with the conventions and treaties that the State party has ratified’.<sup>1905</sup>

#### B. MORALS OR TRADITIONAL VALUES ARGUMENTS

The dialogues before the CESCR revealed few instances of States parties calling for cultural sensitivity and respect for cultural values and morals.

A member of the Tanzanian delegation, when asked about the criminalisation of homosexuality<sup>1906</sup>, stated that ‘her Government continued to view same-sex relationships as immoral’.<sup>1907</sup> The CESCR ignored this remark during the public session, recommending the State party in its Concluding Observations to amend the Penal Code to decriminalize homosexuality.<sup>1908</sup>

In the dialogue with Uganda, a Committee member stressed that, while LGBT+ persons might be unpopular, ‘it was often the purpose of human rights legislation to protect individuals against the prejudice of the majority’.<sup>1909</sup> Uganda responded:

[T]he bill against homosexuality had been a private member’s bill. The Government itself had been in no hurry to enact the law, since it believed that the provisions of the Constitution were sufficient. However, it had no power to prevent the introduction of a private member’s

<sup>1903</sup> The CESCR did address more specific issues of discrimination against women, such as participation of women in the labour force, domestic violence, including marital rape, and the minimum age of marriage. But *not* discrimination against women in general, nor inheritance rights.

<sup>1904</sup> CESCR, Summary Record of the 41<sup>st</sup> meeting, E/C.12/2013/SR.41 (2014), paras 2, 4.

<sup>1905</sup> CESCR, CO Djibouti, E/C.12/DJI/CO/1-2 (2013), para 13.

<sup>1906</sup> CESCR, Summary Record of the 31<sup>st</sup> meeting, E/C.12/2012/SR.31 (2012), para 42.

<sup>1907</sup> *Ibid*, para 50.

<sup>1908</sup> CESCR, CO Tanzania, E/C.12/TZA/CO/1-3 (2012), para 6.

<sup>1909</sup> CESCR, Summary Record of the 36<sup>th</sup> meeting, E/C.12/2015/SR.36 (2015), para 46.

bill. As for the question of consulting the public, he noted that sometimes rights could be in conflict with each other. *Universality was not uniformity, and there could be different approaches.*<sup>1910</sup>

The ‘universality is not uniformity’ argument was ignored by the CESCR. In the end, the State party is urged to withdraw the discriminatory legislation and to decriminalize consensual same-sex sexual conduct.<sup>1911</sup>

The Iranian delegation, responding to questions such as ‘who decided to what extent [ICESCR] was in line with the tenets of Islam’, and ‘how was Sharia law implemented in relation to the Covenant’, said that ‘achieving the aims set out in the Covenant required a collective commitment and mutual understanding, *based on respect for all cultures.*’<sup>1912</sup>

A major point of contention was the fact that Iran recognizes only four religions under the Constitution, contradicting the principle of non-discrimination on the grounds of religion set out in the Covenant.<sup>1913</sup> Iran refuses to recognize Baha’ism as a religion, and considers it a ‘sect’ instead.<sup>1914</sup> This provoked some reactions from the side of the CESCR:

(...) the State party’s description of the Baha’i community as a sect could be considered a violation of the international human rights standard of freedom of religion and religious practice. *It was not for States to decide what was a religion and what was a sect. (...)*<sup>1915</sup>

(...) the Committee was working on a general comment on article 15, paragraph 1 (a), of the Covenant, which established the right to participate in cultural life. The Committee had defined neither the concept of culture nor that of religion, which in its view was inseparable from culture and encompassed all forms of religious expression – beliefs, rites, and ceremonies. He stressed that *there would be no point in protecting the rights of minorities without also protecting their rights in terms of religious beliefs. Recalling the Vienna Declaration and Programme of Action, he underlined that, regardless of national particularities, it was the duty of States to protect all human rights and fundamental freedoms.*<sup>1916</sup>

This was without success. The State party’s reaction was very dismissive:

[T]he State party’s position on the issue of religions and sects had been clearly and comprehensively explained and had not changed.<sup>1917</sup>

<sup>1910</sup> Ibid, para 47. (emphasis added, VV).

<sup>1911</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 16.

<sup>1912</sup> CESCR, Summary Record of the 5<sup>th</sup>, E/C.12/2013/SR.5 (2013), para 25. (emphasis added, VV).

<sup>1913</sup> Ibid, paras 10, 37.

<sup>1914</sup> CESCR, Summary Record of the 6<sup>th</sup>, E/C.12/2013/SR.6 (2013), para 9.

<sup>1915</sup> Ibid, para 16.

<sup>1916</sup> Ibid, para 17. (emphasis added, VV).

<sup>1917</sup> Ibid, para 18.

(...) Baha'i and Buddhists were free to exercise their cultural rights provided that in so doing they did not disrupt public order and security, in which case they would be subject to legal proceedings. There was no justification for them receiving special protection, which was something not even Muslims received. *Nor was there any justification for a country in which 98 per cent of the people had opted for an Islamic system to have to change its cultural policies and traditions (...). The Iranian Government respected diverse views – to which it listened with interest – but did not intend to deviate from its current path.*<sup>1918</sup>

(...) Under the Constitution, all citizens – men and women – enjoyed the same privileges. He was aware that the opinions of the Iranian Government might contradict those of the Committee members on some societal matters, but the Islamic Republic of Iran had no intention of imposing its point of view, and expected the same from the international community.<sup>1919</sup>

Iran is urged to 'ensure that people with beliefs other than the religions recognized by the State party can fully enjoy all aspects of economic, social and cultural rights, without any discrimination'.<sup>1920</sup>

### 2.3.2.2 Balancing of interests

A different line of argumentation by States parties is to point out that practices have been adapted so that they are no longer *considered* to be incompatible with human rights, or at least a step towards the full eradication of those practices. This may for instance result in the practice of *donations inter vivos* to compensate for discrimination in inheritance or in a symbolic variation of a practice (symbolic guardian or 'wali').

For example, in its periodic report, Algeria suggested some ways to address the CESCR's concerns on gender discrimination with regard to inheritance. After it explained that its laws are derived from Sharia and therefore mandatory, it added:

There are other ways, nevertheless, of *restoring a suspected imbalance*, if necessary, through *donations inter vivos* or by testament.<sup>1921</sup>

However, when a Committee member used the public dialogue to ask for 'clarification of the practice of making gifts *inter vivos*, which, according to the State party's replies, was becoming more common as a way of compensating for inequalities in inheritance'<sup>1922</sup>, the State party refused to answer and said it would discuss the issue in its periodic

<sup>1918</sup> Ibid, para 22.

<sup>1919</sup> Ibid, para 25. (emphasis added, VV).

<sup>1920</sup> CESCR, CO Iran, E/C.12/IRN/CO/2 (2013), para 6.

<sup>1921</sup> CESCR, Algeria periodic report, E/C.12/DZA/4 (2009), para 81. (emphasis added, VV); this position was reiterated in its replies to the list of issues, para 82; Muslim jurists developed the concept of gifts *inter vivos* ('gifts between the living'), under which property may be transferred at any time before death, with no restrictions whatsoever.

<sup>1922</sup> CESCR, Summary Record of the 6<sup>th</sup> meeting, E/C.12/2010/SR.6 (2010), para 19.

report to the Committee on the Elimination of Discrimination against Women.<sup>1923</sup> The CESCR is concerned by discrimination against women, ‘in particular regarding inheritance rights’, and recommends that the State party introduce further legislative amendments to eliminate all forms of discrimination against women.<sup>1924</sup>

Algeria also contended in its periodic report that it had amended the Family Code regarding the rules of guardianship.<sup>1925</sup> The State party explained that there cannot be any such thing as a forced marriage, since the marriage contract is concluded as a voluntary contract requiring mutual consent between the two spouses. Regarding the role of the guardian, it said:

(...) the requirement of a guardian’s consent to the marriage does not appear among the provisions of the Family Code, since the purpose of the wali’s presence is merely to add solemnity to this important act. It is out of the question that the wali should give his consent in lieu of the future spouse.<sup>1926</sup>

The CESCR did not directly address this reasoning, although it recalled ‘the importance of combating customs and traditions, which were portrayed as cultural practices but were in fact harmful’.<sup>1927</sup> In the Concluding Observations, the State party is recommended to ‘further revise the Family Code to ensure that (...) the legal requirement of the institution of the marital guardian is abolished’.<sup>1928</sup>

### 2.3.3 CEDAWCee

#### 2.3.3.1 Culture is defended categorically

##### A. RELIGIOUS ARGUMENTS

The different religious arguments which were visible in the dialogues with the HRC and CESCR, also feature in the State party argumentation the CEDAWCee is faced with.

Sometimes States parties simply rely on a reference to the religious source. In its replies to the list of issues, Senegal addressed the issue of discrimination against Muslim women with respect to their right to inherit very briefly: ‘This is a very delicate issue having to do with prescriptions in the Koran’.<sup>1929</sup>

In its periodic report, Bahrain contended – in relation to its reservation to article 2 – that it would implement the principle of equality ‘within the parameters of the sharia’ and that ‘Koranic verses and Prophetic traditions are decisive in this regard’.

<sup>1923</sup> CESCR, Summary Record of the 7<sup>th</sup> meeting, E/C.12/2010/SR.7 (2010), para 5.

<sup>1924</sup> CESCR, CO Algeria, E/C.12/DZA/CO/4 (2010), para 8.

<sup>1925</sup> CESCR, Algeria periodic report, E/C.12/DZA/4 (2009), para 69.

<sup>1926</sup> *Ibid*, para 70.

<sup>1927</sup> CESCR, Summary Record of the 8<sup>th</sup> meeting, E/C.12/2010/SR.8 (2010), para 23.

<sup>1928</sup> CESCR, CO Algeria, E/C.12/DZA/CO/4 (2010), para 14.

<sup>1929</sup> CEDAWCee, Replies of Senegal to the list of issues, CEDAW/C/SEN/Q/3–7/Add.1 (2015), para 171.

Iraq explained the personal status law stipulating that it is permissible for a Muslim man to marry a woman belonging to one of the scriptural religions but not permissible for a Muslim woman to marry a non-Muslim man as follows:

This permission and prohibition here are based upon Islamic Shariah law, the provisions of which are derived from the Koran and the practice (sunnah) of the Prophet and are immutable.

The CEDAWCee did not specifically address these arguments.

The argument that limitations are imposed by religion, and out of the State party's sphere of influence, is for example submitted by Algeria:

(...) personal status is governed by the Shariah, including matters of inheritance in particular. These issues are subject to laws of divine origin which apply to all Muslims. Those laws are peremptory and unalterable.<sup>1930</sup>

This argumentation by Algeria stresses the supremacy of the source, and that these laws are therefore unalterable. The State party also provided some justification based on the content, however:

(...) difficulties surrounding efforts to modernize Islamic law sometimes lay not in the content of the law but rather in mistaken or narrow interpretations of it. Some people considered that, because Algeria was not in a position to withdraw some of its reservations, it condoned discrimination. Such conclusions overlooked the finer points of the law. For example, sharia rules concerning inheritance were often characterized as unfair to women. Yet the distribution of an estate under Islamic law, in some cases, afforded even more rights and a more substantial share to women than to the men concerned because men had financial responsibilities towards their unmarried sisters and widowed mothers that diminished their own share. The same situation prevailed in the case of a divorce.<sup>1931</sup>

Later on, however, during the same session, the State party seemed to acknowledge that the issue of inheritance was complicated from a human rights point of view:

(...) the delegation had taken note of [the Committee's] suggestion that the Government might work with other Islamic countries (...). *Aligning domestic law with international women's rights obligations was a challenge common to Islamic countries (...)*.<sup>1932</sup>

(...) the articles concerning inheritance were a sensitive subject. The issue of women's inheritance under sharia law was problematic in all Muslim countries, as the relevant provisions were imperative and it was very difficult to depart from them.<sup>1933</sup>

<sup>1930</sup> CEDAWCee, Algeria periodic report, CEDAW/C/DZA/3-4 (2009), under *Reply to recommendations 23-24*.

<sup>1931</sup> CEDAWCee, Summary Record of the 1031<sup>st</sup> meeting, CEDAW/C/SR.1031 (2012), para 24.

<sup>1932</sup> Ibid, para 39.

<sup>1933</sup> Ibid, para 57. (emphasis added, VV).

The counterargument of a Committee member:

Sharia law and women's rights were not mutually exclusive, as demonstrated by the varying ways in which sharia law was applied in different Muslim countries. Referring to the examples provided by the delegation in which women were at an advantage because men bore the brunt of, in particular, financial responsibilities, she asked whether men who did not fulfil such obligations could be brought to justice.<sup>1934</sup>

Another Committee member argued that sharia law should be distinguished from culture:

Although she was keenly aware of how delicate a task it was to harmonize Islamic law with international norms on women's rights, it was the Committee's job to verify States parties' compliance with the Convention, and the only criterion that it could use in doing so was equality, both formal and substantive. *Much of what passed for sharia law was actually simply a justification of patriarchal structures and stereotypical gender roles. (...) She would suggest that the focus in combating discrimination against women should be shifted from conflicts with Islamic law to the question of what could be done in respect of patriarchal traditions.*<sup>1935</sup>

In the Concluding Observations, the CEDAWCee noted the continued application of the discriminatory provisions contained in the State party's Family Code, enshrining the inferior legal status of women in several areas, including inheritance, 'as sons are entitled to receive two shares of an inheritance while daughters receive only one share'. The State party is told to review and amend the discriminatory provisions in the Family Code, and to '[s]tudy the inheritance law, *taking into consideration the experience of other countries with similar cultural backgrounds and legal systems that have revised their laws so that women are able to inherit on terms of equality with men.*'<sup>1936</sup>

Likewise, Gambia referred not only to the source, but also tried to provide some context:

Some 95 per cent of Gambians were Muslims for whom it was important that the distribution of property should be equitable, which did not necessarily mean equal. That approach was in accordance with sharia, which called for male heirs to receive twice as much as female ones. The principle was an entrenched tradition among Muslims and an integral part of sharia. She had not heard of a single court case brought by a Muslim woman or a civil society organization complaining of discrimination in that regard. The practice was not at all perceived as an imposition, but rather as an expression of the faith, following the inheritance rules set out by sharia.<sup>1937</sup>

<sup>1934</sup> Ibid, para 34.

<sup>1935</sup> Ibid, para 35. (emphasis added, VV).

<sup>1936</sup> CEDAWCee, CO Algeria, CEDAW/C/DZA/CO/3-4 (2012), paras 46-47. (emphasis added, VV).

<sup>1937</sup> CEDAWCee, Summary Record of the 1311<sup>th</sup> meeting, CEDAW/C/SR.1311 (2015), para 44.

Again, the a Committee member referred to other countries with a similar background:

(...) as a fellow Muslim, she was aware that there was ample scope in Islam for interpreting sharia in non-discriminatory ways and that there was no contradiction between Islam and the concept of equal rights. Many Muslim countries had adopted flexible approaches to ensure equal rights for women without compromising the essence of the religion. She encouraged the Gambia to follow best practices in that regard.<sup>1938</sup>

Another Committee member elaborated on this argument, and provided a concrete example of a country which could serve as a model:

Ms. Haidar invited the Government to follow best practices in the application of sharia law. Morocco and other countries applying the Maliki school of thought had made tremendous progress. The Moroccan population, like that of the Gambia, was over 95 per cent Muslim, and the country had already gone through two stages of revision of its family law. In any country, women could opt to marry persons of faiths different from theirs. Gambian law should include provisions to cover such cases.<sup>1939</sup>

In response, Gambia's delegation said it 'would welcome advice from different Islamic schools of thought on the issue'.<sup>1940</sup> Some other Committee members inquired after the meaning of 'equitable share of property', and whether 'equitable' was the same as 'equal'.<sup>1941</sup> That is not the case:

(...) 'equitable share' meant the share of the matrimonial property to which the woman was entitled, which, under Islamic law, was one third.<sup>1942</sup>

Both the reference to other countries as role models and the discussion on the meaning of 'equitable' are reflected in the Concluding Observations:

While noting the delegation's statement that the State party will consider good practices in other countries with Muslim populations that have non-discriminatory personal status laws that are in line with the Convention, the Committee remains deeply concerned:

- a) That issues relating to marriage, divorce, inheritance, marital property, adoption, burial and devolution of property on death are still regulated under personal laws (sharia and customary law), which contains provisions that discriminate against women;
- b) That the Women's Act provides only for women's 'equitable' access to property, which is not compliant with the Committee's standard of equality. (...) the Committee is concerned that standards of equity were followed, rather than equality, as required by the Convention; (...).

<sup>1938</sup> Ibid, para 51.

<sup>1939</sup> Ibid, para 56.

<sup>1940</sup> Ibid, para 58.

<sup>1941</sup> CEDAWCee, Summary Record of the 1312<sup>th</sup> meeting, CEDAW/C/SR.1312 (2015), para 31.

<sup>1942</sup> Ibid, para 35.

(...) the Committee recommends that the State party:

- a) Undertake a study on good practices in other countries with Muslim populations that have non-discriminatory personal status laws that are in line with the Convention, and organize an expert meeting on the issue in which religious and traditional leaders of the State party participate;
- b) Harmonize national legislation, including the Constitution, the Women's Act and personal laws (sharia and customary law), with the Convention, repealing all discriminatory provisions to ensure that women enjoy the same rights as men in marriage, divorce, inheritance, marital property, adoption, burial and devolution of property on death (...);
- c) Replace the term 'equitable' with 'equal' in references in the Women's Act to women's access to property and ensure that judges interpret the Act accordingly in their judgements; (...).<sup>1943</sup>

The use of the term 'equitable' is thus explicitly rejected. The CEDAWCee is, also here, very dismissive of State party arguments, but appears more sensitive, simply by repeating some of the State party's statements and arguments in its Concluding Observations.

In its replies to the list of issues, Brunei Darussalam explained that its Family Law is governed by 'Syariah Law'<sup>1944</sup>, and that '[t]he objective of the Syariah Law is to create a society where religion, life, intellect, property and lineage are preserved and protected'.<sup>1945</sup> It also argues that '[t]he Syariah Law aims among others, at the protection of women'.<sup>1946</sup> Later, at the public dialogue, the delegation tried to provide some context:

Islam permitted the equal division of inheritance, on the condition that there was a consensus among the parties. Furthermore, Islam encouraged the making of gifts to women, and men were expected to fulfil the role of breadwinner. Therefore, men were entitled to a greater share of inheritance than women.<sup>1947</sup>

The argument was not specifically addressed during the public session or in the Concluding Observations, although it was implicitly rejected by the CEDAWCee as it expressed concern at the persistence of a significant number of discriminatory laws relating to divorce, property relations and inheritance which are not fully compatible with the provisions of the Convention. The State party is advised to '[r]eform the Islamic Family Law Act, *taking into consideration the experiences of countries with similar religious backgrounds and legal systems that have successfully harmonized their national*

<sup>1943</sup> CEDAWCee, CO Gambia, CEDAW/C/GMB/CO/4-5 (2015), paras 48-49.

<sup>1944</sup> CEDAWCee, Replies of Brunei Darussalam to the list of issues, CEDAW/C/BRN/Q/1-2/Add.1 (2014), para 9.

<sup>1945</sup> Ibid.

<sup>1946</sup> Ibid.

<sup>1947</sup> CEDAWCee, Summary Record of the 1260<sup>th</sup> meeting, CEDAW/C/SR.1260 (2014), para 34.

*legislation with their legally binding obligations under the Convention, specifically with regard to matters of property, divorce, inheritance*.<sup>1948</sup>

The United Arab Emirates (UAE) used a different, more elaborate justification for the differentiation between men and women in respect of inheritance:

Generally, Emirati personal status law guarantees the rights of women based on the sharia, which treats women without discrimination. It stipulates a woman's inheritance share, whether large or small, depending on her degree of kinship to the deceased. Islam safeguards the rights of women based on justice, fairness and balance. It considers the women's duties and man's obligations. Men, not women, are required to bear the financial burdens. Thus, a man is responsible for covering the expenses of his wife and children. A male does not necessarily have precedence over a female regarding inheritance in all cases. In some cases, males and females are equal. In other cases, a female has precedence, while in others a female inherits, but a male does not.<sup>1949</sup>

In its conclusions, the CEDAWCee again recommends that the State party 'undertake a comprehensive legislative review of its Personal Status Law, *taking into account the experience of other countries with similar cultural backgrounds and legal norms*, to provide women with equal rights in (...) property relations'.<sup>1950</sup>

A similar argument features in the dialogue with Egypt. In Egypt, inheritance 'is in accordance with Islamic law which is a settled matter'.<sup>1951</sup> According to the State party:

There is no discrimination against women as they inherit just like men and sometimes inherit more than men. Sometimes women inherit and men do not. In the case of siblings, females inherit half the amount inherited by males. This is the counterpart to the obligation of male siblings towards females.<sup>1952</sup>

The CEDAWCee does not directly address this argument, and only indirectly in its Concluding Observations, calling upon the State party 'to undertake a comprehensive review of its personal status laws, ensuring that women and men have equal rights to (...) inheritance'.<sup>1953</sup>

Qatar used its periodic report to explain Qatari law, with sharia as the main source of law<sup>1954</sup>, in detail. The State party explained that as a rule, the principle of gender equality is recognised in Qatari law.<sup>1955</sup> However, there are some exceptions to

<sup>1948</sup> CEDAWCee, CO Brunei Darussalam, CEDAW/C/BRN/CO/1-2 (2014), paras 38-39. (emphasis added, VV).

<sup>1949</sup> CEDAWCee, United Arab Emirates periodic report, CEDAW/C/ARE/CO/2-3 (2014), para 91.

<sup>1950</sup> CEDAWCee, CO United Arab Emirates, CEDAW/C/ARE/CO/2-3 (2015), paras 45-46. (emphasis added, VV).

<sup>1951</sup> CEDAWCee, Replies of Egypt to the list of issues, CEDAW/C/EGY/Q/7/Add.1 (2010), under *Questions 27 and 28*.

<sup>1952</sup> Ibid.

<sup>1953</sup> CEDAWCee, CO Egypt, CEDAW/C/EGY/CO/7 (2010), para 48.

<sup>1954</sup> CEDAWCee, Qatar periodic report, CEDAW/C/QAT/1 (2012), para 32.

<sup>1955</sup> Ibid, para 102.

the rule for reasons which have to do with ensuring consistency with the sharia law provisions<sup>1956</sup>:

Since the sharia establishes rules on gender equality, these rights and responsibilities may not be the same in all circumstances. However, they do complement each other as this is in the interests of the family and society.<sup>1957</sup>

This is also reflected in its deliberations under article 5:

*The way that roles are assigned in families is based on the sharia. The husband is the head of household and is responsible for protecting and maintaining the family, while both parents are jointly responsible for rearing their children. This system for organizing the family's private life is not intended to detract from the status of women; it is more akin to an internal system of management designed to safeguard the family's interests. In public life, men and women have equal rights and duties and are subject to the same laws without any discrimination.*<sup>1958</sup>

The State party then acknowledges the existence of negative stereotyping, immediately disconnecting this from the sphere of religion, and framing it as cultural:

It is true, however, that there are certain negative ideas in the local culture about the status and role of women. These ideas are held both by men and women. Some families view men's and women's roles as rigidly stereotyped, going beyond the proper construction established in the sharia. Some women help to perpetuate these stereotypes, including through the messages that they transmit to their children.<sup>1959</sup> It is no easy matter to change these ideas, as cultural change is a time-consuming and lengthy process.<sup>1960</sup>

With reference to sharia, Qatar also justifies its maintenance of certain gender roles:

The State is committed to ensuring that the role of mothers continues to be honoured, together with the contribution of women to family care, and this in keeping with the sharia. Hence, the process of modifying female stereotypes must not be such as to downplay the role of women as wives and mothers.<sup>1961</sup>

Under article 15 (equality before the law), justifications are provided for differentiation in testimonies and inheritance, both with reference to sharia. First, on testimony:

It is not true that women's testimony is devalued or rejected out of hand. It is true that, in the sharia, women's testimony is preferred to men's in some matters and men's to women's in others. This belies the claims about there being discrimination against women, just as the requirement for more than one man to give testimony in certain cases does not amount to

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<sup>1956</sup> Ibid.

<sup>1957</sup> Ibid.

<sup>1958</sup> Ibid, para 143. (emphasis added, VV).

<sup>1959</sup> Ibid, para 144.

<sup>1960</sup> Ibid, para 145.

<sup>1961</sup> Ibid, para 160.

discrimination against men. Where a man and a woman provide conflicting testimony in a case, their testimony is accorded equal value.<sup>1962</sup>

Then, regarding inheritance:

The subject of inheritance under the sharia is one of the areas where the greatest misunderstandings occur, owing to a superficial interpretation of Islamic law that suggests that the sharia discriminates against women by giving them half the inheritance that a man receives. The truth is that women receive half of what a man receives only in given circumstances that are specified in the sharia. In other circumstances, they receive an equal share. For example, both parents each receive one sixth of an offspring's estate, without any discrimination between the father and the mother. In other cases, the woman receives more than the man. For example, if a person dies and is survived by a daughter and the parents, the daughter will receive one half of the estate, which is more than her grandfather will receive (one sixth). There are cases where daughters (two or more) will receive two thirds of an estate, while the brothers of the deceased will receive only the remaining third. Hence, the reasons why women receive less than men in certain cases have nothing to do with discrimination against women but rather with ensuring that an inheritance is distributed based on the criteria of social equity, the degree of kinship and the number of heirs. (...)<sup>1963</sup>

Under article 16, the State party returns to the issue of gender roles, explaining with specific quotes from the Koran the reasoning behind the custodianship arrangement:

*According to the sharia, husbands have the right to look after their wives' affairs. The role of the man in the family is not that of a supervisor but rather a responsibility that must be borne by one of the marriage partners. Under the sharia this role is assigned to the husband in keeping with the verses of the Holy Koran, which explicitly states: 'And they (women) have rights similar to those (of men) over them in kindness, and men are a degree above them. God is Mighty, Wise' (Koran, verse 208 of the chapter entitled Al-Baqrah (The Cow), and "Men are custodians of women, because God hath made the one of them to excel the other, and because they spend of their property (for the support of women)' (Koran, verse 34 of the chapter entitled Al-Nisa' (Women). Thus, men are responsible for protecting and maintaining the family. The custodianship arrangement does not imply that men can rule over women or dictate to them, nor does it mean that a wife or a woman can be denied her family role. A relationship based on respect, which is what the sharia seeks to foster, must be based on balanced and equal rights and obligations and on consultation in married life.<sup>1964</sup>*

The State party acknowledges, however, that there are misguided interpretations:

Some men mistakenly believe that custodianship means that they have the right to rule over their wives and to decide what kind of work their wives can and cannot do or what

<sup>1962</sup> Ibid, para 405.

<sup>1963</sup> Ibid, para 406. This argument was briefly repeated during the public session: 'Ms. Al-Thani (Qatar) said that there were 10 circumstances in which women could inherit the same amount as their brothers, and they occasionally inherited more' (CEDAW/C/SR.1192, para 39).

<sup>1964</sup> Ibid, para 427. (emphasis added, VV).

occupation they may pursue. This is to misunderstand what custodianship means and is a misconception that the authorities responsible for dealing with Islamic and family affairs are attempting to rectify.<sup>1965</sup>

According to Qatar, there are no problems with women's rights, only with women's awareness of their rights:

Islamic law and the laws in force in Qatar afford women equitable treatment in marriage and in family relations. However, women have little awareness of their legal rights, particularly in regard to personal status matters, and this leaves them vulnerable to discrimination and poses a challenge to the efforts being made at the governmental and non-governmental levels to achieve gender equality.<sup>1966</sup>

All these explanations were found in the periodic report. They are not used during the public session, where the dialogue was on a much more general level. When the CEDAWCee asked 'what was being done to address the socially accepted culture of discrimination against women that appeared to exist in Qatar'<sup>1967</sup>, and 'what actions the State party planned to take in order to counter existing stereotypes and to remove cultural obstacles to the realization of women's rights'<sup>1968</sup>, Qatar answered that '[a] special committee had been set up to review the Family Code and bring it into line with international standards'.<sup>1969</sup> And when asked to look at gender equality measures in other Islamic countries<sup>1970</sup>, the delegation answered that 'the Government of Qatar was willing to examine the best practices of other Islamic countries with a view to possible reforms'.<sup>1971</sup> Concluding the session, the Chairperson 'hoped that it would follow the lead of other Islamic countries'.<sup>1972</sup> In the Concluding Observations, the CEDAWCee welcomed the State party's efforts to review and repeal or amend discriminatory legislation, including the Family Law, but still had concerns about the many discriminatory provisions in laws. Qatar is called upon 'to systematically review its laws and regulations, *taking into consideration the practice of other countries in the region that have successfully done so*', and to modify or repeal discriminatory legislation.<sup>1973</sup> While this last recommendation was made under 'discriminatory provisions', the CEDAWCee made rather similar recommendations under 'marriage and family relations', where it expressed concern that women continue to be denied equal rights with men with regard to family relations.<sup>1974</sup> Its recommendation to Qatar:

<sup>1965</sup> Ibid.

<sup>1966</sup> Ibid, para 454.

<sup>1967</sup> CEDAWCee, Summary Record of the 1191<sup>st</sup> meeting, CEDAW/C/SR.1191 (2014), para 51.

<sup>1968</sup> Ibid, para 54.

<sup>1969</sup> Ibid, para 64.

<sup>1970</sup> CEDAWCee, Summary Record of the 1192<sup>nd</sup> meeting, CEDAW/C/SR.1192 (2014), para 41.

<sup>1971</sup> Ibid, para 47.

<sup>1972</sup> Ibid, para 51.

<sup>1973</sup> CEDAWCee, CO Qatar, CEDAW/C/QAT/CO/1 (2014), paras 15–16 (under 'discriminatory laws'). (emphasis added, VV).

<sup>1974</sup> Ibid, para 41 (under 'Marriage and family relations').

(...) the Committee recommends that the State party:

- a) Finalize the review process of the Family Law (...) without further delay and repeal discriminatory provisions in that law and ensure that it protects the equal rights of women and men in all matters relating to marriage and family relations (...);
- b) Draw on the examples of other countries with similar religious backgrounds and legal systems that have reconciled their national legislation with the legally binding international instruments that they have ratified, specifically regarding equal rights for women and men concerning marriage, divorce, child custody and inheritance; (...).<sup>1975</sup>

Oman explained in its periodic report, under article 16 (equality in marriage and family law), that the personal status laws regulating family relations ‘are derived from the precepts of the Islamic sharia, which is the fundamental source of legislation’.<sup>1976</sup> The State party subsequently provided its justification for the maintenance of dower:

*The dower is the right of the wife, not the husband. It is a sum of money or whatever may be acceptable to the wife or her guardian as her dower. It is one of the elements of the marriage contract, in accordance with (...) the Personal Status Law, and is paid to the woman in exchange for her consent to the marriage. In Omani Islamic culture, the dower is not considered as an affront or disrespectful to the woman but is seen as a right or a gift.*<sup>1977</sup>

There are also certain safeguards in place:

The amount of the dower is left to the man and the woman, or her guardian, to agree. *There are royal instructions stating that the dower must not be inflated and setting a maximum amount which may not be exceeded.* Usually the two parties come to terms that are commensurate with the economic circumstances of both. *The dower is not an impediment to the husband and wife and does not affect their equal status in the marriage relationship.*<sup>1978</sup>

Questions as to ‘what action the Government was taking to prevent parents from putting undue pressure on their daughters to marry suitors offering high dowries [sic]’<sup>1979</sup>, remained unaddressed, however. In the Concluding Observations, the CEDAWCee was clear on the issue:

The Committee is concerned that, despite efforts such as the Royal Decree No. 55/2010 to prevent the practice of dowry from limiting women’s rights to choose their husbands freely, *this custom continues to negatively impact on the rights of women.* (...).

<sup>1975</sup> Ibid, para 42 (under ‘Marriage and family relations’).

<sup>1976</sup> CEDAWCee, Oman periodic report, CEDAW/C/OMN/1 (2010), para 235.

<sup>1977</sup> Ibid, para 241. (emphasis added, VV).

<sup>1978</sup> Ibid, para 242. (emphasis added, VV).

<sup>1979</sup> CEDAWCee, Summary Record of the 999<sup>th</sup> meeting, CEDAW/C/SR.999 (2011), para 30; The CEDAWCee speaks of ‘dowries’ during the constructive dialogue and in its Concluding Observations, while the Omani reports speak of ‘dower’. Dowry and dowries are not the same. Property brought to the marriage by the bride is called a dowry. Dower is property brought to the marriage by a husband or his family. Dower is more typical for traditional Islamic marriages, and is considered the wife’s insurance in case of divorce or death of the husband.

The Committee recommends that the State party: (...) Continue with efforts to ensure that the practice of dowry does not negate or curtail women's fundamental human right to freely choose their spouse.<sup>1980</sup>

#### B. MORALS OR TRADITIONAL VALUES ARGUMENTS

The dialogues before the CEDAWCee revealed few instances of States parties calling for cultural sensitivity and respect for cultural values and morals.

One example: in the dialogue with Cameroon, a member of the delegation said:

(...) homosexuality was a sensitive issue in Cameroon and was generally not accepted. (...) The common consensus was to move forward on the issue gradually. She wished to appeal to the Committee *to respect the Cameroonian people's religions and traditions* and to allow matters to evolve over time.<sup>1981</sup>

The CEDAWCee did not address the appeal in the dialogue. In its Concluding Observations, the CEDAWCee expressed concern about the discrimination and criminalisation of lesbian, bisexual and transgender women (art 347 bis of the Penal Code) and recommended awareness raising with a view to the possible withdrawal of the law.<sup>1982</sup>

#### 2.3.3.2 Balancing of interests

States parties may also suggest ways to come as close as (they consider) possible to aligning religion or religious practices with human rights. An example is the dialogue between the CEDAWCee and Tunisia on inheritance and the practice of dowry.

On inheritance, Tunisia argued as follows:

The inheritance status of women has improved considerably mainly thanks to enlightened doctrine on the subject. This desire to improve their situation has now run into another problem, however, which is complex and will be difficult to resolve: *inheritance law is based entirely on the Koran, and the Koran's provisions on the subject are very clear, which prevents any interpretation or alteration of its content.*<sup>1983</sup>

Nevertheless:

(...) *great strides had been made towards aligning inheritance law with the principle of gender equality.* Four changes in the law were particularly noteworthy: a daughter could now inherit

<sup>1980</sup> CEDAWCee, CO Oman, CEDAW/C/OMN/CO/1 (2011), para 44. (emphasis added, VV).

<sup>1981</sup> CEDAWCee, Summary Record of the 1189<sup>th</sup> meeting, CEDAW/C/SR.1189 (2014), para 9. (emphasis added, VV).

<sup>1982</sup> CEDAWCee, CO Cameroon, CEDAW/C/CMR/CO/4-5 (2014), paras 36-37.

<sup>1983</sup> CEDAWCee, Replies of Tunisia to the list of issues, CEDAW/C/TUN/Q/6/Add.1 (2010), para 364. (emphasis added, VV).

her parents' full estate if she was the sole heir; under the obligatory inheritance regime, the child of a predeceased son or daughter could inherit his or her share of the bequest; community property provisions had been introduced in 1998; close relatives no longer had to pay death duties. Furthermore, Tunisia's case law upheld the constitutional principle whereby international treaties took precedence over domestic law in inheritance-related and other matters.<sup>1984</sup>

One Committee member addressed this argumentation during the public session:

The State party's exclusive focus on the provisions of the Koran on women's inheritance rights had been characterized as preventing any other interpretation or change. Yet there were other views to consider. Islam was not monolithic, and there was more than one school of Muslim jurisprudence. Tunisia had served, and continued to serve, as a model in the region owing to its position on various issues, such as the prohibition and criminalization of polygamy. She therefore urged the State party to lift its reservation to article 16 (h), especially as the lack of inheritance rights was a major cause of poverty among women in Tunisia.<sup>1985</sup>

Tunisia also took measures to guarantee equality between men and women with regard to dowries:

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 United States dollars), and is therefore not discriminatory.*<sup>1986</sup>

But also this reasoning was rejected during the public dialogue:

(...) Traditional practices that undermined women's rights, such as the use of dowries, although now only symbolic, nonetheless represented continuing inequality between spouses. She questioned whether current Tunisian legislation truly ensured equality and suggested that a review of family law provisions might be appropriate.<sup>1987</sup>

In the end, both reconciliation attempts were rejected by the CEDAWCee:

While commending the State party for recent legislative amendments, (...) the Committee remains concerned about the persistence of discrimination with regard to personal status, in particular concerning marriage, child custody and guardianship, as well as inheritance.

<sup>1984</sup> CEDAWCee, Summary Record of the 950<sup>th</sup> meeting, CEDAW/C/SR.950 (2010), para 28. (emphasis added, VV).

<sup>1985</sup> Ibid, para 24.

<sup>1986</sup> CEDAWCee, Replies of Tunisia to the list of issues, CEDAW/C/TUN/Q/6/Add.1 (2010), para 366. (emphasis added, VV).

<sup>1987</sup> CEDAWCee, Summary Record of the 950<sup>th</sup> meeting, CEDAW/C/SR.950 (2010), para 27.

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. (...)

The Committee also notes that, notwithstanding the February 2009 landmark decision of the High Court of Appeal, and the 'retour mechanism' introduced in the law of succession, discrimination in inheritance still persists.<sup>1988</sup>

The Committee calls upon the State party to ensure equality between women and men in marriage and family relations and to withdraw its reservations to article 16. *The Committee urges the State party to amend without delay all remaining discriminatory provisions and administrative regulations, including provisions or regulations relating to marriage, dowry, custody and legal guardianship of children and inheritance.*<sup>1989</sup>

Algeria decided not to abolish women's legal (matrimonial) guardianship when making amendments to the Family Code, despite repeatedly expressed concerns by the CEDAWCee.<sup>1990</sup> When asked whether it was contemplating the possibility of abolishing women's matrimonial guardianship, the State party replied with an explanation of the role of the *wali* or guardian: '[t]he role of the legal guardian of an adult woman contracting a marriage is simply to be present. This does not affect the woman's legal capacity to contract the marriage'.<sup>1991</sup> During the public session, the State party's wish not to comply with the CEDAWCee's recommendation was further substantiated with the following argument:

(...) the presence of a wali for the conclusion of the marriage contract was *simply a formality* and a daughter could not be obliged to marry anyone against her will. (...) Women had the right to choose their own wali and *it was a tradition that people were keen to maintain.*<sup>1992</sup>

The CEDAWCee was nevertheless concerned about 'the continued application of the discriminatory provisions contained in the State party's Family Code, enshrining the inferior legal status of women in several areas, including [t]he requirement of a matrimonial guardian (*wali*) as a condition to enter marriage by adult women'. In what seems to be a more open and sensitive recommendation, it subsequently advised the State party to '[r]eview the impact of the requirement for a *wali* (matrimonial guardian) to be present at a marriage of a woman who has obtained the age of majority'.<sup>1993</sup>

<sup>1988</sup> CEDAWCee, CO Tunisia, CEDAW/C/TUN/CO/6 (2010), para 60.

<sup>1989</sup> Ibid, para 61. (emphasis added, VV).

<sup>1990</sup> CEDAWCee, CO Algeria, CEDAW/C/DZA/CO/2 (2005), para 143; CO Algeria, CEDAW/C/DZA/CO/3-4 (2012), paras 46-47.

<sup>1991</sup> CEDAWCee, Replies of Algeria to the list of issues, CEDAW/C/DZA/Q/3-4/Add.1 (2012), paras 19-20.

<sup>1992</sup> CEDAWCee, Summary Record of the 1032<sup>nd</sup> meeting, CEDAW/C/SR.1032 (2012), para 53. (emphasis added, VV).

<sup>1993</sup> CEDAWCee, CO Algeria, CEDAW/C/DZA/CO/3-4 (2012), paras 46-47.

### 2.3.4 Concluding Remarks

When States parties reject the Committees' criticism, and defend the culture or cultural practice under scrutiny, they often do so categorically, without exceptions or conditions.<sup>1994</sup> Their argumentation often concerns religion; sometimes morals or values. Most arguments on religion point to the supremacy of the religious source, and/or provide an interpretation of that source. Since – by far – most of the examples are from the State reporting procedures of countries with a (majority) Muslim population, that source is often the Sharia, the Islamic law based on the Koran and the Sunna. When a State party merely refers to a religious source to explain or justify its divergent interpretation, it is not so much an argument, but more a 'notification' or 'statement': those issues are not up for debate, also the Government must conform to the limitations imposed by Islam. States parties explain what the teachings of Islamic religion do and do not permit, argue that they have no choice but to follow the major tenets of Islam, that they are divine or divinely prescribed laws and thus mandatory, and that these laws are peremptory, unalterable, imperative, and very difficult to depart from. States parties make clear that international law is subject to limits imposed by Islamic faith and Sharia, and that – at best – they intend to come as close as possible to the universal values enshrined in the Covenant. When the State party argument does not go beyond a mere reference to the religious source, generally the Committees tend to ignore this, both during the public dialogue and in their concluding observations. The Committees simply focus on the need to eliminate discriminatory legislation and practices. More often, however, States parties do go beyond a simple reference to the source and also try to explain the rationale behind it, sometimes even arguing that the disputed differentiation is nevertheless justified and/or not discriminatory. The main example which often leads to elaborate discussion is the difference of treatment between women and men regarding inheritance. States parties argue that this differentiation is justified because of the financial responsibilities of men, or 'in light of duties, responsibilities and social and family status of men and women'. It is argued that the Islamic economic system is designed to support women, or that 'Islam safeguards rights of women based on justice, fairness and balance', considering women's duties and men's obligations. The problem – in their view – is not the content of the law, but the Committees' mistaken or narrow interpretation of it: while sharia rules concerning inheritance are often characterised as unfair, women had in some cases even more rights. It is argued that sharia rules are based on complementarity, and that the system is not intended to detract from the status of women, but designed to safeguard the family's interests. Problems are sometimes acknowledged, but not considered the result of sharia or religion: they are the result of mistaken beliefs about the status and role of women in local culture. There are no problems with women's rights, only with women's awareness of their rights.

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<sup>1994</sup> This comes close to the more extreme forms of cultural relativism, possibly even 'cultural absolutism', as discussed in chapter 2, section 4.

During the public dialogue these arguments are occasionally addressed by the Committees. Four types of replies can be distinguished. First, Committees may point out that if human rights were subordinate to religious tenets, the universality of those rights, as established under the Covenant, could be called into question. The issue of universality of human rights in the face of different countries' specific cultural characteristics had been settled at the World Conference in Vienna 1993: those religious practices that were not in line with international human rights instruments and which had a harmful effect on the lives of women and children should be changed. Second, and this is the most frequent (counter)argument applied by the Committees, States parties can and should draw inspiration from 'the modernist interpretation of Islam', and follow best practices of other Muslim countries which have adopted flexible approaches to ensure equal rights of women without compromising the essence of religion. Third, States parties are reminded that they voluntarily committed to the obligations set out in the Covenant/Convention and are therefore required to develop policies and legislation to implement those obligations. Fourth, and finally, Committees distinguish religion from culture: much of what passed for sharia law was actually a justification of patriarchal structures and stereotypical gender roles. In the concluding observations the State party arguments are generally not (specifically) addressed. Unlike the HRC and the CESCR, the CEDAWCee consistently recommends States parties to take the experience of other countries with similar backgrounds and legal systems into account, or to study the practices of other countries with Muslim populations which have non-discriminatory personal status laws which are in line with the Convention.

States parties also use arguments concerning morals or values. States parties may argue that certain (e.g. homosexual) acts are contrary to their culture or social norms, that such acts are in conflict with public morals, that they are offences against the order of nature, repugnant to cultural values and morality, counter to moral and spiritual values of society, or a threat to the preservation of traditional values. States parties also argue that 'universality is not uniformity' and that every society has 'its own particular characteristics', they 'did not all have to be the same'. The Committees have regularly addressed such arguments during the public dialogues, for example by pointing out that 'the protection of morals' was an unacceptable argument for criminalizing homosexuality, as 'article 17 of the Covenant [ICCPR] did not provide for restriction of the right to respect for privacy on moral grounds'. Another argument aimed to convince States parties that it was in their own interest: prohibiting and criminalizing such relations forced people to hide and pushed them to the margins of society, which had repercussions on public health. And it was argued that States sometimes had to take difficult decisions, even if they were unpopular, in the interests of protecting the rights of their people. In the concluding observations, State party arguments appealing to morals were generally ignored, although occasionally it was recalled that morality and culture are always subject to the principles of universality and non-discrimination.

Sometimes, States parties do not defend their culture or religion categorically, and instead aim to strike a balance of interests, between respecting the universal values enshrined in the treaties on the one hand, and their (cultural or) religious observance

requirements on the other.<sup>1995</sup> The suggested solutions are, however, always within the limits imposed by the religion. In this regard, States parties have come up with ‘solutions’ such as highly regulated polygamy, medicalisation of (light forms of) female circumcision, symbolic dowry, donations *inter vivos* to compensate for differences in inheritance shares, and symbolic guardianship during marriage. The Committees accepted none of these solutions. In general, the States parties’ argumentation for these solutions was ignored during the public dialogue, and (implicitly or explicitly) rejected in the concluding observations. The HRC and the CESCR did not provide any rationale or motivation for their reasoning. The CEDAWCee appeared slightly more ‘sensitive’. It reacted to the idea of ‘symbolic dowry’, and rejected it with the following reasoning: ‘traditional practices that undermined women’s rights, such as the use of dowries, although now only symbolic, nonetheless represented continuing inequality between spouses’. And even though the CEDAWCee expressed concern about the requirement of a matrimonial guardian to be present as a condition to enter marriage by adult women, ‘simply a formality’ and ‘a tradition that people were keen to maintain’ according to the State party, it did not reject the practice outright, and advised the State party to ‘review the impact of the requirement for a *wali* to be present at a marriage of a woman who has obtained the age of majority’. In the next section (section 3) it will be argued that when States parties use a ‘balancing of interests’ type of argumentation, this requires more elaborate motivation and dialogue from the side of the Committees.

In short, States parties defend their culture, and reject the Committees’ criticism, rather frequently, and most argumentation is of a religious nature. Committees regularly address such arguments, almost exclusively during the public dialogue. In the concluding observations, such arguments are ignored. The CEDAWCee appears slightly more sensitive to cultural argumentation than the HRC and the CESCR, as it is more elaborate in addressing the argumentation, and appears less prejudiced due to its recommendations to undertake studies on countries with similar backgrounds, or because it does not reject a particular practice per se, but only certain aspects of it.

### 3 ‘CONSTRUCTIVE DIALOGUE’ OR ‘DESTRUCTIVE CONTESTATION’?

Especially when it comes to culture and its interrelation with human rights, dialogue can be important. Culture is a fluid and dynamic concept which gets meaning through local interpretation. It is important for the Committees to understand the local culture, even if they do not approve of it, and dialogue may enhance such understanding.

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<sup>1995</sup> This comes close to (an attempt at) so-called ‘relative universality’, a term used by Donnelly to explain that human rights are (relatively) universal at the level of the *concept*, but that particular rights concepts (may) have multiple defensible *interpretations*, which in turn (may) have many defensible *implementations*. See chapter 2, section 4.

In the introductory paragraphs of their concluding observations, the Committees usually note their appreciation of the ‘constructive dialogue’ which took place between the delegation and the members of the respective Committee.<sup>1996</sup> How constructive are these dialogues between Committees and States parties really?

Arguably, the interaction between Committees 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*. These are often lacking, especially and most importantly in relation to situations where States parties attempt to balance interests.

### 3.1 ILLUSTRATIVE CASES

The following cases, on dowry, FGM/C and polygamy, illustrate this lack of dialogue. Without arguing that the Committees should have come to different conclusions, it is contended here that the Committees could have adopted a more flexible and culturally sensitive approach, if not in their decisions, then at least by accounting for their decisions: explaining how the arguments made by the State party have been considered and why they have been rejected.<sup>1997</sup>

#### 3.1.1 Dowry

Consider, for example, the dialogue and Concluding Observations regarding symbolic dowry in Tunisia<sup>1998</sup>, as discussed in the previous section. The State party had reduced the dowry to a symbolic sum (of one dinar), and argued that it was therefore not discriminatory. The CEDAWCee rejected this reasoning, with a brief motivation during the public dialogue: ‘traditional practices that undermined women’s rights, such as the use of dowries, although now only symbolic, nonetheless represented continuing inequality between spouses’. In the Concluding Observations, the CEDAWCee *noted* the efforts of the State party to reduce the value of the dowry to one dinar, expressed concern ‘that it remains a condition for the validity of the marriage’, and urged Tunisia to amend all remaining discriminatory provisions, including those on dowry. But does a symbolic dowry, of such a negligible amount of money, really *undermine*

<sup>1996</sup> The Committees use this term mainly in direct relation to the meeting with the State party in Geneva. For this chapter, however, 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 meetings between the Committee and States parties, are considered as being part of the constructive dialogue.

<sup>1997</sup> See chapter 2, section 6 on legitimacy and procedural justice.

<sup>1998</sup> This example has also been discussed in YM Donders and VW Vleugel, *Universality, Diversity and Legal Certainty: Cultural Diversity in the Dialogue between the CEDAW and States Parties*, in: M Kanetake and A Nollkaemper (eds.), *The Rule of Law at the national and international levels: contestations and deference*, Oxford: Hart Publishing, Studies in International Law No. 56, 2016, pp 321–351.

women's rights? Does it really *represent inequality* between spouses? This seems to be a very unsatisfactory explanation. In some cultures, dowry is a way of honouring the bride's parents for raising their daughter well. A Koranic verse is proof that paying the dowry is an obligation for Muslims. When the people in a certain culture are keen on maintaining a tradition, and the Committee does not even accept a *symbolic version* of that tradition, that does no real harm, does this not reflect a certain 'cultural insensitivity'? There is a risk to such intransigence: if States feel they are not heard, and that their culture is not taken seriously, there is a risk that States disengage.<sup>1999</sup> In the same year, the CEDAWCee appeared more accommodating towards the practice of dowry in its Concluding Observations on Oman. In this case, the State party was recommended to '[c]ontinue with efforts to ensure that the practice of dowry does not negate or curtail women's fundamental human right to freely choose their spouse'. In other words: the CEDAWCee did, in this case, not reject the practice of dowry per se, but only its negative effects in terms of the right to freely choose a spouse. It seems that a symbolic dowry as proposed by Tunisia could as such be accommodated.

### 3.1.2 FGM/C

Indonesia came up with a very comprehensive – and what seems to be defensible – justification for its decision to medicalize female circumcision. Following a fatwa ruling by the influential *Ulema Council* opposing the prohibition of female circumcision, it felt forced to medicalize the practice in order to protect women and girls from unsafe and harmful procedures of female circumcision. The State party said it was 'a temporary measure to assure a safe procedure and protection for women and girls, and should not by any means, be construed as encouraging or promoting the practice of FGM', and that its only aim was to ensure that female circumcision was done in a safe environment and without danger for the girls' health. The issue was not addressed during the public dialogue. In the Concluding Observations, the HRC expressed regrets about the State party's issuance of a regulation permitting medical practitioners to perform the practice, as well as about 'the State party's explanation that a previous ban against FGM led to an increase in its practice by non-medical practitioners, exposing women to grave risks of harmful forms of FGM and that the current regulation would better protect women'. Indonesia was subsequently recommended to repeal the regulation and to enact a law which prohibits any form of FGM. The lack of explanation by the HRC is unsatisfying. It *regrets* the State party's explanation, but it does not explain why. The State party's concern that the prohibition in combination with the fatwa might force the practice underground and lead to very unsafe and harmful forms of female circumcision seems valid. Simply 'regretting' this explanation does not do justice to this concern. The HRC should explain *why* it disagrees with the (temporary) solution presented by the State

<sup>1999</sup> If one does not see procedures as fair, they will not accord them legitimacy, will avoid them if possible, and if forced to use them, will not readily accept the outcomes. N Vidmar, *The Origins and Consequences of Procedural Fairness, Law and Social Inquiry*, vol 15, pp 877–892.

party. It needs to make clear that it has listened to and considered the arguments made by accounting for its decisions. It does not suffice to merely repeat the arguments made (and regretting them), it needs to explain how those arguments have been considered and why they have been rejected. Without such motivated reasoning and accountability, States parties may question the Committees' sensitivity to context, and – ultimately – may not perceive procedures as fair and legitimate.<sup>2000</sup>

In fact, the HRC's choice of terminology could also be explained as 'culturally insensitive'. It has been argued that, in relation to female circumcision, one should use the term 'cutting' rather than 'mutilation', which sounds derogatory and can complicate conversations with those who practice FGM/C.<sup>2001</sup>

A rather frequently used argument by States parties is that it is considered better to sensitize the population before legislating (often on FGM/C), as outright prohibition would be counterproductive. Sierra Leone provides a case in point. Before the HRC, the delegation of Sierra Leone argued that the enactment of laws was insufficient, as FGM was an entrenched practice which took place voluntarily in the context of 'initiation' into women secret societies. Since this initiation is instrumental in women's education and empowerment, 'simply prohibiting FGM in law would not stop it in practice'. The solution, according to the delegation, is to change attitudes and to develop new types

<sup>2000</sup> In addition, the opposition to all forms of medicalization can be questioned. As *The Economist* put it: '...it is better to have a symbolic nick from a trained health worker than to be butchered in a back room by a village elder'. *The Economist*, An agonising choice, <<https://www.economist.com/leaders/2016/06/18/an-agonising-choice?frsc=dg%7Ca>> accessed 8 September 2019. While there are good arguments for a blanket ban on FGM, some researchers question the evidence for opposing all forms of medicalization. For example, B Shell-Duncan, The medicalization of female "circumcision": harm reduction or promotion of a dangerous practice?, *Social Science and Medicine*, vol 52, 2001, pp 1013–1028: 'The firm stance against the medicalization is taken without consideration of the degree to which medical support actually improves safety, or hampers efforts to eliminate various forms of the practice. The only study (in 2000) that has reported an evaluation of the impact of medicalization (...) showed that excisions performed by traditional circumcisers using sterile razors, anti-tetanus injections, and prophylactic antibiotics are associated with a nearly 70% lower risk of immediate complications, demonstrating that even minimal medical interventions markedly reduce health risks. However, whether medicalization counteracts efforts to eliminate FGC is an empirical question that remains to be carefully considered. (...). Rather than staunchly opposing medicalization of FGC, it is necessary to carefully consider the consequences of various forms of medicalization, and evaluate whether medicalization has the potential to reduce harm and serve as an engine of change. (...) Given the limitations in current knowledge, several important questions (...) remain unanswered. First, are communities in which FGC is practiced less likely to abandon the practice if it is medicalized? Would the existence and support of medicalization slow the process of changing attitudes of supporters of FGC, or might it act as an engine of change? Would implementing medicalization encourage others to adopt the practice? (...) *With such questions remaining, we do not, at this juncture, have the grounds to advocate staunch opposition to medicalization of FGC. Indeed (...) medicalization may represent an important avenue for reducing risk and promoting health among those who currently view abandonment as an unacceptable option. If improvement in women's health is truly targeted as a priority, the harm reducing potential of medicalization of FGC warrants careful investigation.*' (emphasis added, VV).

<sup>2001</sup> *The Atlantic*, Why Some Women Choose to Get Circumcised, <<https://www.theatlantic.com/international/archive/2015/04/female-genital-mutilation-cutting-anthropologist/389640/>> accessed 8 September 2019. Interview with B Shell-Duncan.

of initiation so that women could belong to these societies without being subjected to genital cutting.<sup>2002</sup> Similar arguments were presented before the CEDAWCee:

(...) it was important to understand the sociocultural context within which female genital mutilation took place and that outright prohibition would be counterproductive. The strong influence of the Soweï, members of the women's societies who carried out the practice, as well as of the members of men's secret societies, had to be taken into consideration. The Government had been accused by practitioners of discriminating against the very women it was trying to help. By taking a gradual approach, raising awareness and starting with the prohibition of female genital mutilation in the case of girls under 18, the practitioners had been brought on board, and there had already been a drastic reduction in the practice. A sustainable strategy would eventually lead to eradication.<sup>2003</sup>

Such arguments are consistently rejected by all three Committees, while there may be some merit to them. Research has shown that sometimes a law can come too early because the population is not ready to accept the law, as they do not know or understand why the law is adopted.<sup>2004</sup> A problem which the Committees seem to be facing is that States parties which follow the proper process by involving and consulting the relevant communities are likely to face much dissent and opposition to the new legislation and may not be able to adopt the law (yet), while States parties which minimize dissent by not consulting the population may be able to adopt a law, but are unable to enforce that law because the population is not ready to accept it. The constant pressure of the Committees on States parties to adopt laws may thus be counterproductive. States parties which argue for sensitisation before legislation may have a legitimate argument, and it seems that the Committees would be wise to accommodate this to some extent. Perhaps a more sensitive and flexible approach could be to no longer recommend the adoption of laws without delay, but to advise States parties to start an inclusive process, involving all relevant stakeholders including religious and traditional leaders and representatives of the communities themselves, with the aim or end goal ('progressive realization') of developing a law which prohibits the harmful practice. Intermediate steps, such as developing alternatives for the social value or importance of such practices should also be accommodated. The Committees may want to be a catalyst for change by keeping the pressure on, but they may risk disengagement if they put too much pressure on willing States parties. The process may benefit more from a constructive and accommodating, though actively monitoring, Committee instead.

### 3.1.3 Polygamy

The concluding observations show that all three treaty bodies are concerned by the persistence of (*de jure* and/or *de facto*) polygamy, and wish to abolish and eliminate

<sup>2002</sup> HRC, Summary Record of the 3040<sup>th</sup> meeting, CCPR/C/SR.3040 (2014), para 29.

<sup>2003</sup> CEDAWCee, Summary Record of the 1199<sup>th</sup> meeting, CEDAW/C/SR.1199 (2014), para 30.

<sup>2004</sup> A Middelburg, Empty Promises? Compliance with the Human Rights Framework in relation to Female Genital Mutilation/Cutting in Senegal, Middelburg, 2016, p 282.

all forms of polygamy.<sup>2005</sup> States parties are generally recommended to repeal or amend provisions allowing polygamy<sup>2006</sup>, to abolish or eliminate polygamy<sup>2007</sup>, and to effectively enforce legislation which prohibits polygamy.<sup>2008</sup> According to the CEDAWCee ‘polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited’.<sup>2009</sup> However, it has also been argued that ‘the better way to protect the rights of women in polygamous marriages is not by outlawing the practice but providing for it in law and regulating it’.<sup>2010</sup> This argument was substantiated with reference to article 6 (c) of the African Women’s Rights Protocol to the African Charter on Human and Peoples’ Rights, which unlike other international and regional human rights instruments requires States to enact legislation which ensures that ‘monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, *including in polygamous marital relationships* are promoted and protected’.<sup>2011</sup> It is argued that:

(...) outlawing polygamy without dealing with the cultural, socio-economic and religious factors will not result in the eradication of the practice. In the journey to conforming to international best practice by outlawing polygamy, African States should enact laws that regulate polygamy and protect the rights of women in polygamous marriages.<sup>2012</sup>

This argumentation seems to conform to a more culturally sensitive approach, by not recommending a criminalisation / prohibition without delay, but instead advising States parties to raise awareness of harmful effects, involving all relevant stakeholders including religious and traditional leaders and representatives of the communities themselves, with the aim or end goal (‘progressive realization’) of outlawing the practice. Intermediate steps should also be accommodated, such as regulating the practice, protecting the rights of women in (existing) polygamous marital relationships.

<sup>2005</sup> HRC, CO Uzbekistan, CCPR/C/UZB/CO/3 (2010), para 8; CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 26; CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), paras 50–51.

<sup>2006</sup> HRC, CO Djibouti, CCPR/C/DJI/CO/1 (2013), para 7.

<sup>2007</sup> CESCR, CO Morocco, E/C.12/MAR/CO/4 (2015), para 18; CEDAWCee, CO Timor-Leste, CEDAW/C/TLS/CO/2–3 (2015), para 14–15.

<sup>2008</sup> HRC, CO Cote d’Ivoire, CCPR/C/CIV/CO/1 (2015), para 12.

<sup>2009</sup> CEDAWCee, General Recommendation No. 21: Equality in Marriage and Family Relations, A/49/38, 1994, para 14; CEDAWCee, General Recommendation No. 29: article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29, 30 October 2013, para 27.

<sup>2010</sup> P Oyugi, Protection of the rights of women in polygamous marriages: A case against Prohibition of Polygamy, International Law in 21<sup>st</sup> Century Africa, <[www.internationalallawin21stcenturyafrica.com/2017/01/16/protection-of-the-rights-of-women-in-polygamous-marriages-a-case-against-prohibition-of-polygamy/](http://www.internationalallawin21stcenturyafrica.com/2017/01/16/protection-of-the-rights-of-women-in-polygamous-marriages-a-case-against-prohibition-of-polygamy/)> accessed 15 September 2019.

<sup>2011</sup> P Oyugi, Article 6 of the African Women’s Rights Protocol: towards the protection of the rights of women in polygamous marriages, *African Human Rights Yearbook*, vol 1, 2017, p 293. (emphasis added by Oyugi).

<sup>2012</sup> Ibid.

It is interesting to see that, while in general all three treaty bodies recommend a mere prohibition of the practice, in some exceptional instances, the CESCR and the CEDAWCee used an approach with such more culturally sensitive elements. For example, the CESCR recommended Uganda to '[a]dopt effective measures aimed at abolishing the practice of polygamy, including by conducting a nation-wide sensitization campaign targeting all components of society and in collaboration with civil society with the aim of fostering a culture of equality between women and men *that creates the necessary conditions for the adoption of a legal provision criminalizing polygamy*'.<sup>2013</sup> This recommendation clearly acknowledges the need for dealing with cultural, socio-economic and religious factors, and for creating the right conditions *before* adopting a law to abolish polygamy. The CEDAWCee, in its recommendations to Malawi, paid attention to the rights of women already in polygamous marriages:

The State party should also take steps to discourage and prohibit polygamy and ensure that the rights of women in existing polygamous unions are protected, in accordance with the Committee's general recommendations no. 21 (1994) on equality in marriage and family relations and no. 29 (2013) on economic consequences of marriage, family relations and their dissolution.<sup>2014</sup>

Until now, however, it seems that such recognition of (1) creating the necessary conditions for the adoption of a legal provision criminalizing polygamy and (2) ensuring that the rights of women in existing polygamous unions are protected (ie, regulating the practice), are not systematically included in recommendations dealing with the practice. Doing so would arguably benefit the cultural embedding of these recommendations.

### 3.2 LACK OF EXPLANATION AND DUE CONSIDERATION

The examples throughout this chapter show that the interaction does not really go both ways, or at least the documentation does not show it. 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 treaty. Nevertheless, what seems to be missing is *discussion*. The Committees sometimes 'note' or 'welcome' measures taken by the State, but other than that, the Committees do not show much responsiveness to the explanations or input from the State. The Committees, time and again, reiterate their concerns and recommendations, no matter what efforts or measures the State party has employed. There is not much motivation or reasoning behind the Committees' observations and recommendations to the State party, or at least these are not explicitly stated.<sup>2015</sup>

<sup>2013</sup> CESCR, CO Uganda, E/C.12/UGA/CO/1 (2015), para 26. (emphasis added, VV).

<sup>2014</sup> CEDAWCee, CO Malawi, CEDAW/C/MWI/CO/7 (2015), para 51; see also CO Cape Verde, CEDAW/C/CPV/CO/7-8 (2013), para 35.

<sup>2015</sup> This section is based on an earlier discussion in Donders and Vleugel (n 452), pp 347-350.

A telling example is the statement given by the Algerian delegation after their public dialogue in Geneva:

Regarding the work of the treaty bodies and the practical value it should have for Governments, those bodies did not take the replies provided by delegations to their questions into account in their concluding observations. The pedagogical value of the decisions of treaty bodies was diminished by the lack of explanation as to why certain replies were considered inadequate. Such information would help Governments identify errors and adjust their actions so as to comply as fully as possible with their international obligations.<sup>2016</sup>

Likewise, Morocco was not pleased with the observations and recommendations of the CESCR, which it felt did not take into consideration ‘the substantial elements conveyed by the Moroccan delegations on the enjoyment of ESCR’. According to Morocco, ‘[t]he advanced and unedited version gives the impression, or the certainty, that the observations and recommendations were drafted ahead of the debates’, and ‘[t]hese observations do not reflect in any way the content or the quality of the debates held with the Committee, deemed by the rapporteur as “very productive and candid (...)”’. As a result, Morocco questioned ‘the end of these statements that are mere slogans’ as well as ‘the relevance and usefulness of such interactive debate sessions involving significant efforts, including the mobilization and travel of a high level delegation’.

Looking back at the four criteria for procedural justice – representation, neutrality, respect and trustworthiness – discussed in chapter 3<sup>2017</sup>, the treaty bodies fail in at least two respects: representation and trustworthiness. In relation to *representation*, the treaty bodies fail to accurately represent the arguments of States parties in their decisions (ie, the concluding observations). When it comes to *trustworthiness*, the treaty bodies fail to motivate their decisions. They do not explain how the arguments have been considered, and why they have been accepted or rejected. There is little discussion, motivation or reasoning involved, even when the decision is not ‘evident’, such as in the illustrative cases discussed above. This lack of (perceived) procedural justice could negatively affect the compliance of States parties with the treaties. For starters, the treaty bodies should be encouraged to adopt concluding observations ‘that reflect the dialogue with the relevant State party’, in line with the ambitions in the UN treaty body reform.<sup>2018</sup>

## 4 CONCLUDING REMARKS

In chapter 2 it was concluded that all (of the most authoritative) theories which argue that the dichotomy between universalism and cultural relativism can be overcome build

<sup>2016</sup> CESCR, Summary Record of the 8<sup>th</sup> meeting, E/C.12/2010/SR.8 (2010), para 37.

<sup>2017</sup> See chapter 3, section 6.

<sup>2018</sup> General Assembly Resolution 68/268, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, A/RES/68/268, 21 April 2014.

on two basic principles: (1) flexibility in interpretation and implementation; (2) internal debate and cross-cultural dialogue. This chapter set out to examine the applicability of the second principle to the work of the treaty bodies, ie, how the treaty bodies (and States parties) make use of the interactive dialogue which is part of the State reporting procedure to create a platform for so-called ‘constructive cross-cultural dialogue’ with a view to reconciling universal rights with cultural specificities.

The first section looked into the types of cultural arguments used by States parties, and at how the treaty bodies deal with these arguments. There are three modes of engagement: when States parties accept the need to change culture, cultural arguments are generally used to *explain* the lack of progress or to *excuse* the lack of compliance. Neither the States parties nor the Committees pay much attention to the difference between the two. This may be inherent in the reporting procedure, where non-compliance or violations are not often made explicit. States parties are also not complimented for the positive obligations which they have fulfilled. It is argued here that the Committees should explicitly differentiate between lack of progress due to cultural resistance and lack of compliance due to shortcomings in legislation and prosecution/implementation. As a consequence, concluding observations show the steps that States parties have taken, and acknowledge that cultural change takes time. Such recognition would motivate States parties to take these steps, and they can no longer ‘hide’ behind the cultural attitudes of their population.

When States parties defend the room for culture, cultural arguments relate to ‘identity’ and ‘freedom of choice’, ie, individuals are free to choose to follow cultural or religious rules, even if those rules are harmful to them and not in compliance with the covenant or convention (a ‘waiver of rights’). This is not a matter of different interpretations of a right, but a matter of the State party prioritizing one right over another. The right to give expression to cultural or religious identity or beliefs is considered to (potentially) outweigh the right to equality and non-discrimination.

When States parties reject the Committees’ criticism, cultural arguments are used to *defend* their culture and *justify* their – alternative – interpretation. The Committees sometimes use the public dialogue to engage with States parties, and challenge their argumentation or reasoning. The dialogue is not reflected in the concluding observations, however, and the Committees show no flexibility, not during the public dialogue nor in their concluding observations; they do not change their stance or position one inch. ‘Reconciliation’ is only achieved when States parties move their position towards that of the treaty bodies.<sup>2019</sup>

In chapter 3 it was contended that the State reporting procedure is particularly suitable for the purpose of a ‘reservations dialogue’. It was suggested that the examination of State reports would provide treaty monitoring bodies with ‘the opportunity to enter into a dialogue with the State party, allowing them to ask for

<sup>2019</sup> The Committees’ choice not to change position would find support with Ignatieff, who warned for the desire ‘to make human rights more palatable to less individualistic cultures in the non-Western world’. See Chapter 2, section 4.

explanation and clarification of reservations (...). The example of the dialogue with Mauritania regarding their reservations has shown that treaty bodies (occasionally) indeed use the dialogue to ask a State party to clarify its position on that topic.<sup>2020</sup>

This lack of exchange, argumentation and motivation is especially missing in situations where States parties appear to balance their interests to respect human rights and to respect their culture or religion. In the interest of procedural justice<sup>2021</sup>, these situations require a proper dialogue, with due consideration given to the arguments presented. Renteln, discussing the importance of argumentation in reconciling universalism and cultural relativism, noted that 'the failure to build arguments, *attributable possibly to the fear that acknowledging relativism would undermine the entire human rights movement*, has wasted valuable time'.<sup>2022</sup> To link this back to the State reporting procedure, a simple first step would be to have the dialogue reflected in the concluding observations.

While none of the Committees show any flexibility in terms of changing its position, the CEDAWCee stands out as it is not only the most outspoken treaty body *against* (harmful) culture, but also more culturally sensitive than the other two treaty bodies, in the sense that it is more elaborate in addressing the argumentation (at the public session), and appears more nuanced in its concluding observations.

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<sup>2020</sup> See chapter 6, section 2.3.1.

<sup>2021</sup> See chapter 3, section 6 and chapter 6, section 3.2.

<sup>2022</sup> See chapter 2, section 4. (emphasis added, VV).

# CHAPTER 7

## CONCLUSIONS

### How the Treaty Bodies Universalise Human Rights

#### 1 INTRODUCTION

The overarching research objective of this study was *to map and analyse the ways in which culture features in the UN treaty bodies' State reporting procedure*.

This research has taken place in a time of increasing challenges to the universality of human rights. According to the Special Rapporteur in the field of cultural rights at the time of writing, Karima Bennouna:

(...) universality is currently under sustained attack from many directions, including from some Governments, from some on the political right and left, from some non-State actors, including extremists, fundamentalists and populists around the world, and even from some quarters in academia, including those who misuse culture and cultural rights justifications.<sup>2023</sup>

This indicates a revival of the universalism versus cultural relativism debate, which has been ongoing ever since the adoption of the Universal Declaration of Human Rights in 1948. In general, however, the conclusion can be drawn that, nowadays, this debate has given way to theories which try to reconcile universal human rights and cultural diversity. As chapter 2 has shown, broad consensus exists on that respect for cultural diversity can very well be consistent with the notion of the universality of human rights. In fact, cultural diversity and universal respect for human rights complement and reinforce each other: respect for cultural diversity is 'an ethical imperative, inseparable from respect for human dignity'.<sup>2024</sup> There are positive and negative aspects to culture and cultural diversity in relation to human rights. Culture can be positive, strengthening a community's identity and cohesion; it can also be negative, leading to stigmatisation, marginalisation and harm.

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<sup>2023</sup> Report of the Special Rapporteur in the field of cultural rights, *Universality, cultural diversity and cultural rights*, A/73/227, 25 July 2018, para 3.

<sup>2024</sup> UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001), art 4.

In existing research, scholars have suggested two possible avenues for reconciling universality and cultural diversity, and thereby enhancing the universal legitimacy of human rights: (1) Flexibility in interpretation and implementation of rights, ie, cultural differences can legitimately be taken into account by States when fulfilling their obligations under international human rights law; (2) the process of genuine internal discourse<sup>2025</sup> and cross-cultural dialogue about the meaning and implications of basic human values and norms.

When it comes to the universal rights embodied in the UN human rights treaties, the treaty monitoring bodies have an important role in ensuring that a proper balance is struck between safeguarding the universality of these rights with profound cultural diversity. Yet, thus far, limited research has been done on the practice of the UN treaty bodies in striking that balance. This dissertation aims to clarify how the UN treaty bodies have performed their role in reconciling universality and cultural diversity.

In this concluding chapter, the findings of the study are presented. The four sub-questions formulated in the introductory chapter will be discussed, after which some overall conclusions and recommendations will be formulated.

## 2 UN TREATY BODIES' ROLE IN PROTECTING AND PROMOTING POSITIVE ASPECTS OF CULTURAL DIVERSITY

The first sub-question for this research was: *how do the UN treaty bodies use their mandate to protect positive aspects of cultures and promote cultural diversity?*<sup>2026</sup>

The HRC and the CESCR use explicit cultural rights to promote and protect *cultural exclusivity*. Essentially, these cultural rights aim to sustain the distinctiveness, uniqueness and exclusivity of a community's beliefs and traditions. Cultural rights include the right to enjoy culture of members of minorities (art 27 ICCPR), the right

<sup>2025</sup> The State reporting procedure is considered a platform for 'cross-cultural dialogue', and as such the focus of this research. 'Internal discourse', ie, the debate which seeks to promote consensus within a society about human rights norms, falls outside the scope of the study. However, the treaty bodies have – and take – a role in stimulating internal discourse. See, eg, the Concluding Observations on Saudi Arabia:

The Committee draws the attention of the State party to its obligation to ensure that traditions, religion and culture are not used to justify discrimination against women and violations of the rights enshrined in the Convention. It recommends that the State party: (a) *Open a participatory national dialogue, engaging women, on women's human rights in Islam, with a view to examining existing laws and regulations in order to dissociate the provisions deriving from religion from those falling within the scope of traditions and customs, and develop jurisprudence allowing for Islamic legislation to be adapted to the current context of women.*

CEDAW/Cee, CO Saudi Arabia, CEDAW/C/SAU/CO/3–4 (2018), para 16. (emphasis added, VV).

<sup>2026</sup> This sub-question was mostly dealt with in chapter 4.

to participate in cultural life (art 15 ICESCR), and the right to self-determination (art 1 ICCPR/ICESCR). The main measures/policies under the explicit cultural rights include (1) the (official legal or political) recognition of minorities; (2) eliminating restrictions and conditions on the enjoyment of cultural, linguistic and religious freedoms of minorities, such as their opportunities to use their own (minority) languages and to have media, journals and newspapers in their own (minority) languages; (3) respecting the rights of these groups to their traditional land and resources and ensuring their traditional livelihood which is inextricably linked to their lands. The CEDAWCee has occasionally addressed similar cultural issues, even if without reference to the explicit cultural right established in article 13(c) of the CEDAW (the right to participate in all aspects of cultural life).

Cultural diversity is also protected by the overarching equality and non-discrimination principle. States parties do not only have obligations to preserve cultural diversity as an end in itself, they are also obliged to ensure the inclusion and participation of persons and groups from varied cultural backgrounds: *cultural inclusivity*. Two separate types of obligations can be identified here: (1) obligations to ensure equality by *accommodating* differences in treatment; (2) obligations to ensure equality by *eliminating* differences in treatment. The first type of obligations consists of permanent special measures ensuring the inclusion and participation of persons and groups from varied cultural backgrounds by means of allowing them their cultural specificities – on a permanent basis. As a case in point, education and health care must be ‘culturally appropriate’. The second type of obligations consists of adopting or amending legislation in combination with temporary special measures to redress inequalities. States parties should ensure the inclusion and participation of persons and groups from varied cultural backgrounds through both comprehensive non-discrimination legislation and affirmative action. Among others, States parties are recommended to adopt (temporary special) measures to improve the rights of (members of) ethnic minority groups with regard to access to employment, housing, health, education, social services, personal documents, and participation in political life.

Whereas the HRC does not use (permanent) special measures to protect and promote cultural inclusivity, the CESCR refers to ‘culturally adequate’, ‘culturally appropriate’ or ‘culturally acceptable’ implementation of rights, especially in its general comments. It does not provide any further clarification as to what the implementation of a certain right in a culturally adequate, appropriate or acceptable manner entails, leaving it for the State party to determine. The CEDAWCee only sporadically requires States parties to adopt (permanent) special measures. All three Committees oblige States parties to enact comprehensive non-discrimination legislation, and to take affirmative action in order to promote equal participation of all groups in society.

Overall, the conclusion can be that the HRC and the CESCR have more eye for positive cultural diversity – for promoting cultural diversity *within* States – than the CEDAWCee, which is more focused on harmful aspects of culture by its very nature.

### 3 UN TREATY BODIES' ROLE IN CHANGING, CHALLENGING AND ERADICATING NEGATIVE ASPECTS OF CULTURAL DIVERSITY

The next sub-question was: *how do the UN treaty bodies use their mandate to promote changes in, and elimination of, negative, adverse or harmful aspects of cultures?*<sup>2027</sup>

All three treaty bodies identified similar issues and aspects of culture as harmful. The vast majority of such negative or harmful aspects of culture relates to discrimination against women, but culture was also identified as problematic in connection to discrimination against LGBT+ persons and other vulnerable or disadvantaged groups of people, such as persons with HIV/AIDS; persons with albinism or (other) disabilities; migrants, refugees, and ethnic, religious, or other minorities (ie, Roma, Muslims, and etc.); rural and older women (ie, intersectional discrimination).

Instances of *de facto* discrimination, or discrimination in practice, are more often *explicitly* linked to culture. Instances of *de jure* discrimination, or discrimination in law, especially in matters relating to marriage and family relations, are sometimes *implicitly* linked to culture, but *usually not at all*. The most likely explanation is that there are differences in the nature of the obligations. Eliminating *de jure* discrimination is an immediate obligation, a rigid and immediate obligation of result. The State party must change the law, whether it is grounded in culture or not. Eliminating *de facto* discrimination is an obligation of progressive realisation, a weaker obligation of conduct, for instance to change culturally entrenched attitudes and stereotypes which are a barrier to the equal enjoyment of rights.

The CEDAW is the only treaty which includes a provision explicitly obliging States parties to address culture: article 5 requires States parties to 'modify the social and cultural patterns of conduct of men and women'. This could explain the fact that the CEDAWCee is the treaty body which pays (by far) most attention to the harmful role of culture. Nevertheless, all three treaty bodies take an active role in obliging States parties to change, challenge and eradicate harmful aspects of culture. Once a link between (harmful) culture and a problematic situation of implementation has been identified, an obligation to try to change that culture arises automatically.

As such, treaty bodies cannot be said to take an active role in mediating, reconciling or balancing between universality and cultural diversity. The analysis shows which manifestations and expressions of culture treaty bodies identify as problematic or even harmful, and how the treaty bodies apply human rights to make States parties eliminate and change those aspects of culture. The limits of acceptable diversity are thereby revealed. If anything, the treaty bodies act as guardians of universality: they monitor the interpretation and implementation of the treaties with a view to safeguarding against unacceptable cultural variations.

<sup>2027</sup> This sub-question was mostly dealt with in chapter 5.

## 4 CULTURAL ARGUMENTS IN THE DIALOGUE

The third sub-question was: *what kind of cultural arguments are invoked by States parties in the dialogue preceding the concluding observations, and how do the treaty bodies deal with these arguments?*<sup>2028</sup>

In dealing with cultural arguments, it is helpful to recognize who defines the dominant values of a culture. The State reporting procedure is pre-eminently a forum in which the State determines how its culture is defined and presented. For the treaty bodies, it is important to keep this in mind, and to investigate whether, and to what extent, minorities and other vulnerable and disadvantaged groups, civil society and other relevant stakeholders have been consulted in for example the preparation of the State's periodic report.<sup>2029</sup>

The cultural arguments used by States parties are categorised depending on the State party's acceptance – or lack thereof – of the need to alter cultural attitudes, values or practices at stake. When States parties accept the need to change culture, cultural arguments are generally used to explain the lack of progress or to excuse the lack of compliance. State parties may argue that they are doing what needs to be done, but the lack of progress can be blamed on ineffectivity because of cultural resistance among the population. To illustrate, lack of progress can be reflected in arguments pointing out that certain practices persist on account of their social importance or long-held cultural beliefs, because these practices are so deeply-rooted that it is difficult to change perceptions, etcetera. Failure to comply means that, while the State party may accept the need to change culture, certain State actors – ie, public officials, such as judges, members of the police force or legislators – do not comply with obligations due to persistent cultural values. Alternatively, States parties point to the legislative process and the importance of taking the majority opinions or opinions and traditions of communities and constituents into account when adopting new laws. Therefore, States parties often use the phrases 'contentious issues', 'sensitive issues', or 'contentious clauses'. A recurring argument is that a failure to take local customs or traditions into account could lead to conflict or an impasse, and that compromising on those issues was the better option to ensure that other amendments be passed.

In general, while the HRC and the CESCR do pay attention to the role of public officials, and to the need to train them on for example women's rights or the criminal nature of gender-based violence, they tend to overlook the importance of cultural awareness in this context, and fail to address the cultural attitudes and stereotypes among public officials in their recommendations. In contrast, the CEDAWCee has repeatedly expressed concerns about (the persistence of) gender stereotypes and

<sup>2028</sup> This sub-question was mostly dealt with in chapter 6.

<sup>2029</sup> This makes the so-called 'shadow reporting' by NGOs (and national human rights institutions, NHRIs) so valuable. It provides the civil society of a State with the opportunity to submit a shadow report to the treaty bodies, highlighting issues which are not at all, or misleadingly presented by their government.

bias among prosecutors, lawyers, police officers and judges, and has recommended trainings to eliminate prejudices, such as holding women themselves responsible for the violence that they suffer from. The specific provisions on gender stereotyping in the CEDAW appear to have led the CEDAWCee not only to be critical of societal gender stereotyping, but also of such stereotyping among State actors. Interestingly, none of the treaty bodies pays attention to the – especially legislative – role of parliamentarians, even though they are key actors in relation to ‘contentious issues’ or ‘cultural obstacles’ to amending legislation, and their (and their constituencies’) cultural values would seem to be relevant.

When States parties defend *the space for culture*, their argumentation is usually to protect the option for persons to enjoy rights in accordance with their religion and culture. States parties refuse to judge any particular culture or cultural practice, and defend a place for that culture in society. Personal autonomy is very important in this line of reasoning: cultural arguments relate to ‘identity’ and ‘freedom of choice’, ie, individuals are free to choose to follow cultural or religious rules, even if those rules are harmful to them and not in compliance with the covenant or convention. The argument is made that, as long as people have a choice, there is no problem under the Convention. Individuals or communities choose to live according to the accepted cultural or religious norms, and they consent to the cultural or religious practice involved.

Overall, there seem to be no differences between the three Committees in how they deal with these arguments. Cultural diversity cannot be invoked as an excuse for violating human rights. Harming another human being can never be excusable. While traditions should be respected, their negative aspects should be eliminated. Cultural or religious practices or provisions which are incompatible with the Covenant, should be barred, *even if a person has accepted them out of his or her own free will*. The application of personal status laws is not rejected per se; The Committees focus on the discriminatory aspects of such laws, and they reiterate that all legislation should be in conformity with the Covenant or Convention. Exemptions of personal matters from constitutional anti-discrimination provisions should therefore be repealed. Likewise, the indigenous campesino justice system was not rejected per se, but mechanisms were to be put in place to ensure that such a system would be compliant with due process and other guarantees established in the Covenant at all times. It seems safe to conclude that the treaty bodies do not consider (cultural) regimes which permit individuals to ‘opt out’ of the culture or cultural practice – if they wish to do so – as less harmful than obligatory (cultural) regimes. While authors such as Donnelly and Ignatieff support the idea of ‘personal autonomy’ and ‘free choice’ in combination with the possibility to ‘opt out’<sup>2030</sup>, the treaty bodies seem to consider it an oxymoron, ie, an ostensible self-contradiction and a false choice.

States parties which reject the Committees’ criticism, use cultural arguments to defend their culture and justify their – alternative – interpretation. When they defend the culture or cultural practice under scrutiny, they often do so *categorically*, without

<sup>2030</sup> See chapter 2, sections 2 and 4, and chapter 6, section 2.2.4.

exceptions or conditions. Their argumentation is often of a religious nature, and sometimes of a (more) moral nature.

Most religious arguments indicate the supremacy of the religious source, and/or provide an interpretation of that source. When the State party argument fails to go beyond a mere reference to the religious source, the Committees generally tend to ignore this, both during the public dialogue and in the concluding observations. More often, however, States parties also try to explain the rationale behind it, sometimes even arguing that the disputed differentiation is justified and/or not discriminatory. During the public dialogue, these arguments are occasionally addressed by the Committees. Four types of replies have been distinguished. Firstly, Committees may point out that, should human rights be subordinated to religious tenets, the universality of those rights, as established under the Covenant, could be called into question. Secondly, States parties are encouraged to draw inspiration from ‘the modernist interpretation of Islam’, and follow best practices of other Muslim countries which have adopted flexible approaches to ensure equal rights of women without compromising the essence of religion. Thirdly, States parties may be reminded that they voluntarily committed to the obligations set out in the treaty, and that they are therefore required to develop policies and legislation to implement those obligations. Fourthly, and finally, Committees may distinguish between religion and culture: much of what passed for sharia law was actually seen as a justification of patriarchal structures and stereotypical gender roles. In the concluding observations, the State party’s arguments are generally not (specifically) addressed. Unlike the HRC and the CESCR, the CEDAWCee consistently recommends States parties to take into account the experience of other countries with similar backgrounds and legal systems, or to study the practices of other countries with Muslim populations having created non-discriminatory personal status laws which are in line with the Convention.

States parties also use arguments of a more cultural or moral nature. They may argue that certain (e.g., homosexual) acts are contrary to their culture, social norms or religion, that such acts are in conflict with public morals, that they are offences against the order of nature, repugnant to cultural values and morality, counter to moral and spiritual values of society, or a threat to the preservation of traditional values. Furthermore, States parties contend that ‘universality is not uniformity’, and that every society has ‘its own particular characteristics’, they do ‘not all have to be the same’. The Committees have regularly addressed such arguments during the public dialogues. In relation to the criminalisation of homosexuality, it would explain to States parties that the right to privacy could not be restricted on moral grounds, that it would be in their own interest, since criminalizing homosexual relations would have repercussions for public health; and that they sometimes have to take difficult, unpopular decisions in the interests of protecting the rights of their people. In the concluding observations, State party’s arguments appealing to morals were generally ignored, although it was recalled occasionally that morality and culture are always subject to the principles of universality and non-discrimination.

Sometimes, States parties refrain from defending their culture or religion categorically, and instead *aim to strike a balance of interests* between respecting the universal standards enshrined in the treaties on the one hand, and their cultural or religious observance requirements on the other. They suggest ‘solutions’ to the Committees, such as *highly regulated polygamy*, *medicalisation* of (light forms of) female circumcision, *symbolic dowry*, *donations inter vivos* to compensate for differences in inheritance shares, and *symbolic guardianship* during marriage. These ‘solutions’ remain within the limits imposed by the religion, but they are rejected as insufficient by the Committees. In general, the States parties’ argumentation for these solutions was ignored during the public dialogue, and (implicitly or explicitly) rejected in the concluding observations. The HRC and the CESCR did not provide any rationale or motivation for their reasoning. The CEDAWCee appears slightly more sensitive to cultural argumentation, being more elaborate in addressing the argumentation, and appearing to be more nuanced and less prejudiced.<sup>2031</sup>

## 5 UN TREATY BODIES’ ROLE IN ENHANCING UNIVERSAL LEGITIMACY OF HUMAN RIGHTS

The fourth sub-question was: *to what extent does the treaty bodies’ practice reflect the use of cross-cultural dialogue to overcome cultural challenges/resistance and enhance the universal legitimacy/acceptance of human rights?*<sup>2032</sup>

Treaty bodies establish their interpretation of the meaning of rights in their general comments, views and concluding observations. These documents provide guidance as to the content of the rights in question. Ultimately, the States parties have to implement the treaty, and they have discretion to do so in a way which fits their culture and context. Universality and diversity are already being balanced as a result of this degree of deference to national authorities. This has to be taken into account as the treaty body system works in such a way that it does not aim to show the many legitimate interpretations and implementations of rights, but only the problematic ones. Treaty bodies only intervene when the interpretation is not legitimate in their view, thereby showing and elaborating on the limits (rather than the precise content) of acceptable diversity. Notwithstanding all the (invisible) legitimate variation, many (culture-specific) interpretations and implementations are not acceptable to the Committees, as they continuously present tradition and culture as a problem or a barrier for universal human rights.

Harris-Short already considered that the UN treaty bodies’ State reporting procedure provides ‘a public forum for the exchange of information and ideas’, and wondered whether this is ‘the kind of forum (...) in which An-Na’im’s call for

<sup>2031</sup> As a case in point, it could not reject a particular practice categorically, but only certain aspects of it. Moreover, it offers a more sensitive recommendation to look at the practice of other countries with similar backgrounds.

<sup>2032</sup> This sub-question was mostly dealt with in chapters 4, 5 and 6.

constructive cross-cultural dialogue at the international level can be realized'. Chapter 6 examined whether, and if so, how the treaty bodies make use of the interactive dialogue which is part of the State reporting procedure to create such a public forum for 'constructive cross-cultural dialogue', and to what extent this dialogue facilitates the reconciliation of universality and diversity, ultimately to enhance the universal legitimacy of human rights.

While the Committees occasionally use the constructive dialogue to engage with States parties, and challenge their argumentation or reasoning, in general, it appears not to be so much a public forum for the *exchange* of information and ideas, but more for questioning and interrogation. In reality, the so-called 'constructive dialogue' means that Committee members express concerns and ask for clarifications. There is no exchange of ideas. The Committees generally fail to motivate why they consider an issue to be problematic, and why the State party's interpretation is rejected. Not once has any of the Committees changed its stance on a certain interpretation or implementation after the dialogue. 'Reconciliation' is only achieved when States parties change their position towards that of the treaty bodies.

This lack of exchange, argumentation and motivation is especially unfortunate in situations where States parties appear to balance respect for human rights with respect for their culture or religion. In the interest of procedural justice and outcome acceptance, these situations require a genuine dialogue, with due consideration given to the arguments presented. It is not enough to reject a symbolic dowry by saying that it represents continuing inequality between spouses: the Committee must explain *why* even symbolic inequality between spouses undermines the rights of women, and why it does not accept alternative interpretations of dowry, which is a religious duty for Muslims and may be a way of honouring the bride's parents. The Committee should be able to explain and motivate this, and if it cannot, it should reconsider its position. The same holds true for symbolic FGM/C: simply rejecting Indonesia's temporary solution in light of the practice otherwise going to be continued underground and doing even more harm, does not suffice. The Committee must explain *why* this prohibition must stand even in the light of the possibility that women could be saved from more harm by (temporarily) allowing safe, medicalised circumcision. If the Committee cannot motivate this decision, it should reconsider, or request a State party to monitor the effects and consequences of its policies closely and study alternative solutions. Finally, States parties which refer to 'free choice' in reaction to criticism not only should be told that cultural or religious practices which are incompatible with the treaty should be barred 'even if a person had accepted them of his or her own free will', but the Committee could also start a real dialogue about the dangers of relying on 'free choice', and how the 'free choice' of people in marginalised positions is doubtful. In addition, it could elaborate on the need to combine 'free choice' with the possibility to 'opt out' and exit the group when choice is denied, and especially on the obligation of the State to create the conditions under which marginalised and powerless individuals are free to assert their rights.<sup>2033</sup>

<sup>2033</sup> See, eg, Ignatieff, discussed in chapter 2, section 4.

The assumption can be made that treaty bodies are hesitant to present arguments to substantiate their decisions for fear of acknowledging relativism which undermines the human rights movement, or for fear of making human rights negotiable. However, if international human rights are to be truly universally legitimate, they will have to be explained and justified, not imposed. If the constructive dialogue is to enhance the universal legitimacy of rights, it needs to (better) apply the principles of procedural justice, especially in relation to representation, ie, accurately representing the arguments, and carefully examining the merits of each of the arguments, and their trustworthiness, ie, explaining how those arguments have been considered and why they have been accepted or rejected.

## 6. OVERALL CONCLUSIONS AND RECOMMENDATIONS

Now that the four sub-questions have been answered, it is time to reflect on the overarching objective of this study, which is *to identify and understand the ways in which culture features in the UN treaty bodies' State reporting procedure*.

The treaty bodies are first and foremost guardians of the universality of human rights. As explained, cultural variation in the interpretation and implementation by States parties is often inherent to the system, given the primacy of State implementation. However, the treaty bodies use their monitoring role not so much (actively) to reconcile universality and cultural diversity or to accommodate cultural variation, but more to determine the limits of such cultural variation. This makes sense: monitoring and supervising is a more passive role, with action only being taken when the activities or measures by States parties do not stay within the range of acceptable alternatives. The fear of States parties that the treaty bodies create new obligations thus seems uncorroborated by practice.<sup>2034</sup>

Chapter 1 briefly discussed techniques used to accommodate culture: (1) flexibility in interpretation and implementation; (2) internal debate and cross-cultural dialogue.<sup>2035</sup> Cultural diversity may reflect in different meanings of (the content of) human rights across countries, regions, societies, and in differences in the concrete act of balancing between relevant rights. These techniques are applied in concrete cases of dispute resolution, however, and the research shows that this is not how the treaty bodies deal with the role of culture in their general comments or recommendations and concluding observations. Chapters 4 and 5 have shown how the treaty bodies accommodate cultural diversity by using human rights as a 'sword' to protect and promote cultural diversity, and simultaneously as a 'shield' to identify which manifestations and expressions of culture are problematic or even harmful in relation to the rights in question, thereby showing the limits of acceptable diversity. The treaty bodies do not so much use a

<sup>2034</sup> See chapter 3, section 6.

<sup>2035</sup> See chapter 1, section 2.

flexibility approach – ie, cultural-specific interpretation and implementation of rights – to promote the universal acceptance of rights. However, they ‘manage’ acceptable cultural variation with ‘sword’ and ‘shield’, using human rights to accommodate and limit cultural diversity in the interpretation and implementation of international human rights law by States parties. The inherent ‘grey zone’ which necessarily exists between contrasting aspects of culture (positive and negative), and the difficulty in demarcating it, is rarely recognised by the treaty bodies in practice.

The ‘constructive dialogue’ which is part of the State reporting procedure, could be identified as a possible platform for so-called ‘constructive cross-cultural dialogue’ with a view to reconcile universality and diversity, ultimately enhancing the universal legitimacy of human rights. The treaty bodies could use it to bring about a genuine dialogue with States parties, asking for clarifications, but also explaining *why* they accept or reject certain interpretations and implementations. The treaty bodies have not shaped and used the dialogue as such, however. Instead, the treaty bodies have used it as a platform for questioning and interrogation – also due to resources and time constraints. Cultural arguments are occasionally addressed during the dialogue, but overall the treaty bodies fail to explain the rationale underlying their decisions. This is a missed opportunity: The treaty bodies should be able to explain *why* they reject a certain interpretation. Following the principles of procedural justice, it would enhance their trustworthiness, improve compliance with their decisions, and enhance the universal legitimacy of human rights in the long run.

Having drawn these conclusions, this is an appropriate moment to return to the example introduced in chapter 1: the Dutch Sinterklaas (and Black Pete) tradition. It was used to illustrate the complex and dynamic relationship between culture and human rights. In this case, at stake were both positive aspects of culture, in the form of a Dutch tradition which is national cultural heritage, and negative aspects of culture, in the form of stereotyping and racial discrimination. The CERD abstained from using human rights as a sword to promote and protect Dutch cultural heritage and identity, and chose to use human rights as a shield instead, to protect a disadvantaged group (persons of African descent) against stereotyping and discrimination. This corroborates the conclusion of the research that treaty bodies are first and foremost guardians of universality. Of course, it is necessary to keep in mind here that it is the mandate of the CERD to protect against racial discrimination, which makes the Committee’s focus on discrimination rather than cultural heritage logical and explicable.

The constructive dialogue on the issue as presented in chapter 1 is somewhat atypical compared with the other research findings. The Committee members were shown to have different views on the issue: While several Committee members emphasised that discriminatory practices cannot be justified on the grounds of being cultural traditions, and even compared the tradition to ‘practices like female genital mutilation, and early or forced marriage’, other Committee members expressed the view that the tradition was not racist, and that a ban would be counterproductive. Such divergence of views among Committee members is very uncommon, and it was not discernible in the work

of the three treaty bodies examined. The Dutch delegation acknowledged the problem, yet insisted that a ban would not solve the problem. The matter should be for Dutch society to resolve. In its concluding observations, the CERD displayed a – in the author's view rather exceptional – sensitivity to the issue. Instead of calling for a ban on the tradition, it showed consideration and understanding for the views of the State party, allowing 'progressive realization' by leaving discretion to the State party in terms of stimulating internal dialogue, finding a reasonable balance, et cetera. Such sensitivity to cultural argumentation is often missing in the work of the HRC, the CESCR and the CEDAWCee.

In conclusion, all three treaty bodies use their mandate to safeguard universality, while trying to accommodate cultural diversity. Nevertheless, there are differences in emphasis: the HRC and the CESCR have more of an eye for positive aspects of cultural diversity than the CEDAWCee, while the CEDAWCee is more focused on the harmful aspects of cultural diversity than the HRC and the CESCR. The CEDAWCee is most outspoken against (negative) culture, rigid in its assessments, yet also the most sensitive and nuanced in its recommendations and willingness to help States comply. Perhaps an explanation for this can be found in the principle article of their respective treaties: the right to cultural autonomy or self-determination as expressed in article 1, common to the ICCPR and ICESCR, versus the definition of discrimination against women, including in the field of culture, as expressed in article 1 of the CEDAW. Moreover, and perhaps more importantly, the CEDAW is especially concerned with the impact of cultural factors on gender relations, unlike the ICCPR and the ICESCR, and it is explicitly designed to modify social and cultural patterns.

# BIBLIOGRAPHY

## ACADEMIC LITERATURE

- P Alston and R Goodman, *International Human Rights*, Oxford University Press, 2012
- AA An-Na'im, *Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights*, in: CE Welch and VA Leary (eds), *Asian Perspectives on Human Rights*, Boulder: Westview, 1990
- AA An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1991
- AA An-Na'im, in: W Twining (ed), *Human Rights, Southern Voices*, Cambridge University Press, 2009
- J Arato, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences, *The Law and Practice of International Courts and Tribunals*, vol 9, 2010
- JR Bauer, *The Challenge to International Human Rights*, in: Monshipouri et al (eds), *Constructing Human Rights in the Age of Globalization*, ME Sharpe, 2003
- DA Bell, Which rights are universal?, *Political Theory*, vol 27, no 6, 1999
- A Bijnaar, and C Maris, Zwart als Roet – Zwarte Piet in de liberale rechtsstaat, *Filosofie & Praktijk*, 35:3, 2014
- E Brems, *Human Rights: Universality and Diversity*, Leuven, 1999
- E Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, 2001
- E Brems, Inclusieve universaliteit. Een theoretisch en methodologisch kader om inzake mensenrechten universaliteit te verzoenen met diversiteit, *Netherlands Journal of Legal Philosophy*, vol 2, 2003
- E Brems, *The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe*, in: DP Forsythe and PC McMahon (eds), *Human Rights and Diversity: Area Studies Revisited*, University of Nebraska Press, 2003
- E Brems, Reconciling Universality and Diversity in International Human Rights Law, *Human Rights Review*, vol 5, no 3, 2004
- E Brems, *Reconciling Universality and Diversity in International Human Rights Law*, in: A Sajó (ed), *Human Rights with Modesty: The Problem of Universalism*, Springer Netherlands, 2004
- E Brems, *Accommodating Diversity in International Human Rights*, in: P Meerts (ed), *Culture and International Law*, Hague Academic Press, 2008
- E Brems (ed), *Diversity and European Human Rights. Rewriting Judgements of the ECHR*, Cambridge University Press, 2013
- E Brems and L Lavrysen, Procedural Justice in Human Rights Adjudication: The European Court of Human Rights, *Human Rights Quarterly*, vol 35, no 1, 2013
- CM Cerna, Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts, *Human Rights Quarterly*, vol 16, no 4, 1994

- RP Churchill, *Human Rights and Global Diversity*, Pearson/Prentice Hall, 2006
- YM Donders, Do cultural diversity and human rights make a good match?, *International Social Science Journal*, vol 61, no 199, 2010
- YM Donders, *Human Rights: eye for cultural diversity* (Oratiereeks), Universiteit van Amsterdam, 2012
- YM Donders, *Cultural Pluralism in International Human Rights Law: The Role of Reservations*, in: AF Vrdoljak (ed), *The cultural dimension of human rights*, Oxford University Press, 2013
- YM Donders and VW Vleugel, A New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart's Article in HRQ, *Human Rights Quarterly*, vol 36, no 3, 2014
- YM Donders, Exploring the cultural dimensions of the right to the highest attainable standard of health, *Potchefstroom Electronic Law Journal*, vol 18, no 2, 2015
- YM Donders, *Foundations of Collective Cultural Rights in International Human Rights Law*, in: A Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill, 2016
- YM Donders and VW Vleugel, *Universality, Diversity and Legal Certainty: Cultural Diversity in the Dialogue between the CEDAW and States Parties*, in: M Kanetake and A Nollkaemper (eds.), *The Rule of Law at the national and international levels: contestations and deference*, Oxford: Hart Publishing, Studies in International Law No. 56, 2016, pp 321–351.
- J Donnelly, *Human Rights, Individual Rights and Collective Rights*, in: J Berting et al (eds), *Human rights in a pluralist world: individuals and collectivities*, Praeger Publishers, 1990
- J Donnelly, The Relative Universality of Human Rights, *Human Rights Quarterly*, vol 29, no 2, 2007
- J Donnelly, *International Human Rights: Universal, Relative or Relatively Universal?*, in: Baderin and Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond*, Ashgate, 2010
- J Donnelly, *Universal Human Rights in Theory and Practice*, 3d edition, Cornell University Press, 2013
- DL Donoho, Relativism versus Universalism in Human Rights: The Search for Meaningful Standards, *Stanford Journal of International Law*, vol 27, 1991
- DL Donoho, Autonomy, self-governance and the margin of appreciation: developing a jurisprudence of diversity within universal human rights, *Emory International Law Review*, vol 15, no 2, 2001
- C Flinterman, The United Nations Human Rights Committee. Some Reflections of a Former Member, *Netherlands Quarterly of Human Rights*, vol 33, no 1, 2015
- F Francioni and M Scheinin (eds), *Cultural Human Rights*, International Studies in Human Rights, vol 95, Martinus Nijhoff Publishers, 2008
- M Freeman, *Human rights: an interdisciplinary approach*, 2<sup>nd</sup> edition, Polity Press, 2011
- J Gerards, Pluralism, Deference and the Margin of Appreciation Doctrine, *European Law Journal*, vol 17, no 1, 2011
- S Harris-Short, Listening to 'The Other'? The Convention of the Rights of the Child, *Melbourne Journal of International Law*, vol 13, no 2, 2001
- S Harris-Short, International Human Rights Law : Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Right of the Child, *Human Rights Quarterly*, vol 25, no 1, 2003

- S Harris-Short, *Children's Rights and Cultural Diversity*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007
- P Healy, Human rights and intercultural relations: a hermeneutico-dialogical approach, *Philosophy Social Criticism*, vol 32, no 4, 2006
- K Henrard, The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity, *European Diversity and Autonomy Paper*, No 5, 2004
- K Henrard, The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies, *International Journal on Minority and Group Rights*, vol 14, nos 2–3, 2007
- R Holtmaat and J Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue*, Intersentia, 2011
- RE Howard-Hassmann, Cultural Absolutism and the Nostalgia for Community, *Human Rights Quarterly*, vol 15, no 2, 1993
- B Ibhawoh, *Colonialism: Legacy for Human Rights*, in: DP Forsythe (ed), *Encyclopedia of Human Rights*, vol 1, Oxford University Press, 2009
- B Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, *Human Rights Quarterly*, vol 22, no 3
- M Ignatieff, The Attack on Human Rights, *Foreign Affairs*, vol 80, no 6, 2001
- T Inoue, *Liberal Democracy and Asian Orientalism*, in: JR Bauer and DA Bell, *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999
- S Joseph and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 2013
- W Kälin, *Examination of State Reports*, in: H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012
- M Kanetake, UN Human Rights Treaty Monitoring Bodies Before Domestic Courts, *International and Comparative Law Quarterly*, vol 67, no 1, 2018
- H Keller and L Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in: H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012
- D Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, in: B Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development – Scholars and Practitioners in Dialogue*, Cambridge University Press, 2012
- A Kiss, *International Human Rights Treaties: A Special Category of International Treaty?*, in: *The Status of International Treaties on Human Rights*, Council of Europe Publishing, 2006
- Y Khushalani, *Human Rights in Asia and Africa*, in: FE Snyder and S Sathirathai (eds), *Third World Attitudes Toward International Law*, Marinus Nijhoff Publishers, 1987
- K Lemmens, The dark side of 'Zwarte Piet': A misunderstood tradition or racism in disguise? A legal analysis, *The International Journal of Human Rights*, 21:2, 2017
- A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford University Press
- F Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014
- MY Mattar, Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional and International Standards, *Harvard Human Rights Journal*, vol 26, 2013
- AE Mayer, Clashing Human Rights Priorities: How the United States and Muslim Countries Selectively Use Provisions of International Human Rights Law, *Chennai Journal of Intercultural Philosophy*, vol 9, 2006

- KL McCall-Smith, *Chapter 2: Interpreting International Human Rights Standard. Treaty Body General Comments as a Chisel or a Hammer*, in: S Lagoutte, T Gammeltoft-Hansen and J Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, 2016
- SE Merry, *Constructing a Global Law-Violence against Women and the Human Rights System, Law and Social Inquiry*, vol 28, no 4, 2003
- SE Merry, *Human Rights and Transnational Culture: Regulating Gender Violence through Global Law, Osgoode Hall Law Journal*, vol 44, no 1, 2006
- SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, University Of Chicago Press, 2006
- A Middelburg, *Empty Promises? Compliance with the Human Rights Framework in relation to Female Genital Mutilation/Cutting in Senegal*, Middelburg, 2016
- D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2010
- E Neumayer, *Qualified Ratification: explaining reservations to international human rights treaties, The Journal of Legal Studies*, vol 36, no 2, 2007
- M Odello and F Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice*, Routledge, 2013
- E Okon, *Hudud punishments in Islamic criminal law, European Scientific Journal*, vol 10, no 14, 2014
- A Ostrovsky, *What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals, Hanse Law Review*, vol 1, 2005
- P Oyugi, *Article 6 of the African Women's Rights Protocol: towards the protection of the rights of women in polygamous marriages, African Human Rights Yearbook*, vol 1, 2017
- V Pergantis, *Reservations to Human Rights Treaties, Cultural Relativism and the Universal Protection of Human Rights*, in: K Koufa (ed), *Multiculturalism and International Law*, Sakkoulas Publishing, 2007
- N Petersen, *International Law, Cultural Diversity and Democratic Rule: Beyond the Divide Between Universalism and Relativism, Asian Journal of International Law*, vol 1, no 1, 2011
- AS Preis, *Human Rights as Cultural Practice: An Anthropological Critique, Human Rights Quarterly*, vol 18, no 2, 1996
- AD Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights, Human Rights Quarterly*, vol 7, no 4, 1985
- AD Renteln, *International Human Rights: Universalism versus Relativism*, Sage Publications, 1990
- B Rudolf, MA Freeman and CM Chinkin (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, Oxford University Press, 2012
- M Schmidt, *Chapter 18: United Nations*, in: D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, 2010
- Y Shany, *All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee, Journal of International Dispute Settlement*, vol 9, no 2, May 2018
- M Shaw, *International Law*, 8<sup>th</sup> edition, Cambridge University Press, 2017
- RKM Smith, *Text and Materials on International Human Rights*, Routledge, 2013
- B de Sousa Santos, *Toward a multicultural conception of human rights*, in: FG Isa and K de Feyter (eds), *International Human Rights Law in a Global Context*, University of Deusto, 2009

- JA Sweeney, Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era, *The International and Comparative Law Quarterly*, vol 54, no 2, 2005
- S Tharoor, Are Human Rights Universal?, *World Policy Journal*, vol XVI, no 4.
- C Tomuschat, *Human Rights: Between Idealism and Realism*, 2<sup>nd</sup> edition, Oxford University Press, 2008
- TR Tyler, Social Justice: Outcome and Procedure, *International Journal of Psychology*, vol 35, no 2, 2000
- TR Tyler, Procedural Justice and the Courts, *Court Review*, vol 44, nos 1–2, 2008
- TR Tyler, Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement, *Psychology, Public Policy, and Law*, vol 20, 2013
- G Ulfstein, *Individual complaints*, in: H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge University Press, 2012.
- G Ulfstein, *The Human Rights Treaty Bodies and Legitimacy Challenges*, in: N Grossman, H Cohen, A Follesdal and G Ulfstein (eds), *Legitimacy and International Courts*, Cambridge University Press, 2018
- W Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, 2005
- F De Varennes, The Fallacies in the ‘Universalism versus Cultural Relativism’ Debate in Human Rights Law, *Asia-Pacific Journal on Human Rights and the Law*, vol 7, no 1, 2006
- A Yupsanis, The Meaning of “Culture” in Art 15 (1) (a) of the ICESCR – Positive Aspects of CESCR’s General Comment No 21 for the Safeguarding of Minority Cultures, *German Yearbook of International Law*, vol 55, 2012
- O Yusuaki, *Toward an Intercivilizational Approach to Human Rights*, in JR Bauer and DA Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge University Press, 1999
- T Zwart, Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach, *Human Rights Quarterly*, vol 34, no 2, 2012
- T Zwart, Safeguarding the Universal Acceptance of Human Rights Through the Receptor Approach, *Human Rights Quarterly*, vol 36, no 4, 2014

## UN DOCUMENTS

Note: all documents relating to the State reporting procedure – ie periodic reports, (replies to) lists of issues and questions, lists of issues prior to reporting, summary records, concluding observations, etc. – have not been included in the bibliography, due to the large numbers of the respective documents.

## UN HUMAN RIGHTS COMMITTEE

- General Comment No 12: Art 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984.
- General Comment No. 18: Non-discrimination, 10 November 1989
- General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 1993

- General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1/Add.5, 1994
- General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, 1994
- General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, 2000
- General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004
- Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights*, CCPR/C/2009/1, 22 November 2010
- Focused Reports Based on Replies to Lists of Issues Prior to Reporting (LOIPR): Implementation of the New Optional Reporting Procedure (LOIPR Procedure)*, CCPR/C/99/4, 2010
- General Comment No. 34: Article 19, Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011
- Rules of procedure of the Human Rights Committee*, CCPR/C/3/Rev.10, 2012
- Note by the Human Rights Committee on the procedure for follow-up to COs*, CCPR/C/108/2, 2013

## UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- General Comment No 1: Reporting by States parties, E/1989/22, 1989
- General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23, 13 December 1991
- Rules of Procedure of the Committee*, E/C.12/1990/4/Rev.1, 1993
- General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, E/1996/22, 8 December 1995
- General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), E/C.12/1999/5, 12 May 1999
- General Comment No. 13: The Right to Education (Art. 13 of the Covenant), E/C.12/1999/10, 8 December 1999
- General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000
- General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11, 20 January 2003
- General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), E/C.12/2005/4, 11 August 2005
- General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19, 4 February 2008
- General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009
- General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 2009

*Report on the forty-eighth and forty-ninth sessions*, Ch II, Overview of the present working methods of the Committee, E/C.12/2010/3, 2012

General Comment No. 22: the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016

## UN COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

General Recommendation No. 19: Violence against women, A/47/38, 1992

General Recommendation No. 21: Equality in Marriage and Family Relations, A/49/38, 1994

General Recommendation No. 23: Political and Public Life, A/52/38, 1997

General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Ch I, 1999

General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 18 August 2004

*Rules of procedure of the Committee on the Elimination of Discrimination Against Women*, HRI/GEN/3/Rev.3, 2008

General Recommendation No. 26: women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008

General Recommendation No. 27 on older women and protection of their human rights, CEDAW/C/GC/27, 16 December 2010

General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010

General Recommendation No. 29: article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29, 30 October 2013

Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 4 November 2014

General Recommendation No. 33: women's access to justice, CEDAW/C/GC/33, 23 July 2015

General Recommendation No. 35: gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017

*Reporting guidelines of the Committee on the Elimination of Discrimination against Women*, Annex I, para A.4.2. Available at <<https://www2.ohchr.org/english/bodies/cedaw/docs/AnnexI.pdf>> accessed 3 November 2019

## REPORTS OF UN SPECIAL RAPPORTEURS

Report of the Special Rapporteur on Reservations to Treaties, *Seventeenth report on reservations to treaties*, A/CN.4/647 and Add.1, 2011

Report of the Special Rapporteur in the field of cultural rights, *Universality, cultural diversity and cultural rights*, A/73/227, 25 July 2018.

## OTHER UN DOCUMENTS

- 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.6, 2009
- ECOSOC, *Guidelines on treaty-specific documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2008/2, 2009
- General Assembly, *Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly*, A/RES/56/83, 2002
- General Assembly, *Report of the International Law Commission*, Sixty-first session, Supplement No 10 (A/64/10), 2009
- General Assembly, *Report of the International Law Commission*, Sixty-third session, A/66/10/Add.1, Annex Conclusions on the reservations dialogue, 2011
- General Assembly, 67<sup>th</sup> session, *Report of the Committee on the Elimination of Discrimination against Women on the forty-ninth, fiftieth and fifty-first session*, 2011–2012, A/67/38
- General Assembly Resolution 68/268, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, A/RES/68/268, 21 April 2014.
- Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Targeted Documents*, HRI/MC/2005/3, 2005
- Inter-Committee Meeting of the human rights treaty bodies, *The Practice of Human Rights Treaty Bodies with respect to Reservations to International Human Rights Treaties*, HRI/MC/2005/5, 13 June 2005
- Meeting of chairpersons of the human rights treaty bodies, *Other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process*, HRI/MC/2013/3, 2013
- OHCHR, *Strengthening the United Nations human rights treaty body system*, June 2012
- OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation*, HRI/PUB/12/5, 2012
- OHCHR, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, 2013
- OHCHR, *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, A/HRC/38/25, 2018
- N Pillay, *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights*, June 2012
- Report on the working methods of the human rights treaty bodies relating to the State reporting process*, HRI/MC/2009/4, 2009
- Report of the Secretary-General, *Status of the human rights treaty body system*, A/73/309 Annexes, 2018, Annex XVIII: Simplified reporting procedure.

## NEWS AND MEDIA SOURCES

- Council of Europe, *The Margin of Appreciation*, <[www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)> accessed 3 November 2019
- N Hoang, *The “Asian Values” Perspective of Human Rights: A Challenge to Universal Human Rights*, 2009. Available at <<http://ssrn.com/abstract=1405436>> accessed 3 November 2019

- International Service for Human Rights (ISHR), *A Simple Guide to the UN Treaty Bodies*. Available at <<https://ilga.org/wp-content/uploads/2016/02/The-Simple-Guide-to-Treaty-Bodies.pdf>> accessed 3 November 2019
- Kenniscentrum Immaterieel Erfgoed Nederland, *Sinterklaasfeest*, <[www.immaterieelerfgoed.nl/nl/sinterklaasfeest](http://www.immaterieelerfgoed.nl/nl/sinterklaasfeest)> accessed 3 November 2019
- New York Times, *Budget Cuts May Undercut the U.N.'s Human Rights Committees*, <<https://www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>> accessed 8 August 2019.
- OHCHR, Fact Sheet No 15 (Rev 1), *Civil and Political Rights: The Human Rights Committee*, May 2005, p 9. Available at <<https://www.refworld.org/docid/4794773c0.html>> accessed 3 November 2019
- OHCHR, Fact Sheet No 16 (Rev 1), *The Committee on Economic, Social and Cultural Rights*, 1996. Available at <<https://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>> accessed 3 November 2019
- OHCHR, Fact Sheet, *50<sup>th</sup> anniversary of the Human Rights Covenants. What are the Committees?* Available at <<https://2covenants.ohchr.org/downloads/Fact%20Sheet%20Committees.pdf>> accessed 3 November 2019
- OHCHR, An Open Letter from the Coordination Committee of the Special Procedures of the Human Rights Council on the draft ASEAN Human Rights Declaration. Available at <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14864&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14864&LangID=E)> accessed 3 November 2019
- OHCHR, Fact Sheet No 30 (Rev 1), *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, 2012. Available at <<https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>> accessed 3 November 2019
- OHCHR, HRC working methods, <[www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx](http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx)> accessed 3 November 2019
- OHCHR, CESCR working methods, <[www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx](http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx)> accessed 3 November 2019
- OHCHR, CEDAW Working Methods, <[www.ohchr.org/EN/HRBodies/CEDAW/Pages/WorkingMethods.aspx#ftn10](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/WorkingMethods.aspx#ftn10)> accessed 3 November 2019
- OHCHR, *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. Available at <[www2.ohchr.org/english/bodies/cedaw/docs/Working\\_methods\\_CEDAW\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/Working_methods_CEDAW_en.pdf)> accessed 3 November 2019
- OHCHR, CEDAW, *Simplified reporting procedure*, <[www.ohchr.org/EN/HRBodies/CEDAW/Pages/ReportingProcedures.aspx](http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ReportingProcedures.aspx)>
- OHCHR, CEDAW, *Assessment of the follow-up procedure*, adopted on 11 November 2016, p 2. Available at <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_FGD\\_8161\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_FGD_8161_E.pdf)> accessed 9 August 2019.
- OHCHR, CESCR, *Information Note for civil society and national human rights institutions*, <[www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx](http://www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx)> accessed 3 November 2019
- P Oyugi, *Protection of the rights of women in polygamous marriages: A case against Prohibition of Polygamy*, *International Law in 21<sup>st</sup> Century Africa*, <[www.internationallawin21stcenturyafrica.com/2017/01/16/protection-of-the-rights-of-women-in-polygamous-marriages-a-case-against-prohibition-of-polygamy/](http://www.internationallawin21stcenturyafrica.com/2017/01/16/protection-of-the-rights-of-women-in-polygamous-marriages-a-case-against-prohibition-of-polygamy/)> accessed 15 September 2019.

CS Renshaw, *The ASEAN Human Rights Declaration – Cause for Celebration?*, 25 January 2013. Available at <<https://asiapacific.anu.edu.au/regarding-rights/2013/01/25/the-asean-human-rights-declaration-cause-for-celebration/>>

Statements on reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women, A/53/38/Rev.1, para 22. Available at <<https://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/Reservations-English.pdf>> accessed 3 November 2019

The Atlantic, *Why Some Women Choose to Get Circumcised*, <<https://www.theatlantic.com/international/archive/2015/04/female-genital-mutilation-cutting-anthropologist/389640/>> accessed 8 September 2019.

UNESCO, *What is Intangible Cultural Heritage?*, <<https://ich.unesco.org/en/what-is-intangible-heritage-00003>> accessed 3 November 2019

## OTHER REPORTS AND DOCUMENTS

Advisory Council on International Affairs (AIV) of the Netherlands, Universality of Human Rights and Cultural Diversity, Advice No 4, June 1998

Advisory Council on International Affairs (AIV) of the Netherlands, *Universality of Human Rights. Principles, Practice and Prospects*, Advice No 63, November 2008

Council of Europe Research Division, *Cultural rights in the case-law of the European Court of Human Rights*, January 2011 (updated 17 January 2017), <[www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf)> accessed 3 November 2019

FIDH, *Demistifying Human Rights Protection in Asia*, background paper, 2015, p 8. Available at <<https://www.fidh.org/IMG/pdf/asia669anglaisbassdef.pdf>> accessed 3 November 2019

ILC, Guide to Practice on Reservations to Treaties, A/66/10, para 75, *Yearbook of the International Law Commission*, 2011, vol II, Part Two.

## CASES

Canadian Supreme Court, *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62

UN Human Rights Committee, Chief Bernard Ominayak and Lubicon Lake Band v Canada, Communication No 167/1984, CCPR/C/38/D/167/1984, 26 March 1990

International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), ICJ Reports (1951) 19, 28 May 1951

International Court of Justice, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgement of 30 November 2010, I.C.J. Reports 2010

*Jones v Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26

## DECLARATIONS AND TREATIES

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)
- Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)
- African Charter on Human and Peoples' Rights, 'Banjul Charter' (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 Rev 5
- Final Declaration of the Regional Meeting for Africa of the World Conference on Human Rights, 'Tunis Declaration' (adopted 24 November 1992)
- Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, 'Bangkok Declaration' (adopted after the regional meeting in Bangkok, March-April 1993)
- UN World Conference on Human Rights, Vienna Declaration and Programme of Action (adopted on 25 June 1993) A/CONF.157/23
- UNESCO Universal Declaration on Cultural Diversity (adopted 2 November 2001)
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005)
- Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008)
- ASEAN Human Rights Declaration (adopted 18 November 2012).



# SUMMARY

## CHAPTER 1. INTRODUCTION

The overarching research objective of this research is to map and analyse the ways in which culture features in the UN treaty bodies' State reporting procedure.

Ever since the adoption of the Universal Declaration of Human Rights in 1948 there has been a debate on the issue of universality of human rights and cultural diversity. In general, however, the conclusion can be drawn that, nowadays, this debate is not so much framed in terms of opposites, but more in terms of reconciling universal human rights and cultural diversity.

Under the international human rights' framework, States are allowed to take cultural particularities into account when implementing the treaties. The UN human rights treaty bodies which monitor the implementation of the treaties by States have the task to safeguard the universality of human rights against a background of profound cultural diversity. Little research has been done on how these bodies have dealt with this task in practice, and in particular the use of their main monitoring tool: the State reporting procedure.

Existing literature is to a large extent focused on the negative aspects of culture, while relatively little attention has been paid to the relationship between human rights and positive aspects of culture. In addition, previous research has mainly focused on the way in which culture is given a place in concrete cases of dispute resolution, such as in the case law of the European Court of Human Rights and in individual complaints at the UN treaty bodies. Less is known about the way in which this is done in the State reporting procedure, in which States are asked to explain their progress in complying with the relevant treaty, and discuss this with the relevant UN treaty body. The UN treaty bodies have an important role to play in ensuring a proper balance between safeguarding the universality of the rights in question, while at the same time leaving room for cultural particularities in the interpretation and implementation of those rights by States. The purpose of this study is to clarify how the UN treaty bodies fulfil this role.

The study is confined to the monitoring bodies of three of these UN treaties: the Human Rights Committee (HRC), which oversees the International Covenant on Civil and Political Rights (ICCPR); the Committee on Economic, Social and Cultural Rights (CESCR), which oversees the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAWCee), which oversees compliance with

the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The ICCPR and ICESCR were selected since they, together with the Universal Declaration of Human Rights, represent the International Bill of Rights, and they are the two principal human rights treaties. The CEDAW, also known as ‘the International Bill of Rights for women’, was selected because gender equality is among the most culturally sensitive issues, and considering the CEDAW is explicitly concerned with the impact of cultural factors, targeting culture and tradition as influential forces shaping gender roles and family relations. While it is among the most widely ratified UN treaties, it is also subject to many reservations relating to culture and religion at the same time.

## CHAPTER 2. HUMAN RIGHTS AND CULTURAL DIVERSITY

Chapter 2 provides the theoretical framework and sets the scene. It introduces the concepts of culture and cultural diversity, sketches the doctrinal debate of universalism versus cultural relativism, describes the different cultural claims and the theories about reconciling or balancing the two extremes.

In this book, ‘culture’ should be understood as having a broad meaning, as a ‘set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, not only art and literature, but lifestyles, ways of living together, value systems, traditions and beliefs’. In essence, human rights law is a cultural system in itself, in some ways dictating how people should live together. As such, it is only logical that tensions occur between international human rights and the different cultures in which they are (to be) applied. These tensions are often presented as a conflict between so-called African, Asian, or Islamic values and perspectives and the ‘Western bias’ of international human rights. Scholars have proposed different theories on how to reconcile the universality of human rights with these cultural values and perspectives. These theories were shown to introduce two main principles to promote this reconciliation: (1) flexibility in interpretation and implementation of rights, focusing on the content; (2) transformation of rights through internal and cross-cultural dialogue, focusing on the process and the actors involved in the process.

## CHAPTER 3. UN TREATY BODIES

Chapter 3 explains the functions and mandates of the treaty monitoring bodies. The three Committees share two main functions to monitor, guide and evaluate the implementation of the treaties and to keep track of progress: (1) they receive and review reports submitted periodically by States describing how they are applying the different rights in the treaties at the national level; (2) they issue explanations on the

meaning of different rights, known as general comments or general recommendations. Through their concluding observations and general comments or recommendations, the Committees clarify States parties' obligations under the treaties. Due to the 'strengthening process', the working methods of the treaty bodies are likely to be increasingly harmonised. Treaty bodies are often criticised for their lack of effectiveness, although many of the deficiencies are beyond their control, due to the limited mandate, legal powers, and human and financial resources. Despite their limitations, some authors argue that they may have a role to play in reconciling the universality of the rights covered in the treaties with cultural diversity between and within their member States. They have recognised the potential of the UN treaty bodies to accommodate diversity through flexibility in interpretation and implementation of rights, and to transform human rights and increase their cultural legitimacy through internal and cross-cultural dialogue.

## CHAPTER 4. HUMAN RIGHTS AS A SWORD

The aim of this chapter was to examine whether and how the UN treaty bodies use their mandate to protect positive aspects of cultures and promote cultural diversity. The treaty bodies protect cultures and promote cultural diversity through: (1) a number of explicit cultural rights which aim to sustain the distinctiveness, uniqueness and exclusivity of a community's way of life, beliefs and traditions, ie, to protect and promote cultural exclusivity; (2) the overarching equality and non-discrimination principle, guaranteeing the inclusion and participation of persons and groups from varied cultural backgrounds, ie, cultural inclusivity. Cultural inclusivity, in turn, is ensured through two distinct types of obligations: (a) obligations to ensure equality by accommodating differences in treatment through permanent special measures; (b) obligations to ensure equality by eliminating differences in treatment through temporary special measures.

The treaty bodies' measures to protect and promote cultural exclusivity concern in particular the official recognition of minorities, their enjoyment of traditional land and resources as well as cultural, linguistic and religious freedoms, and their meaningful consultation. Relevant recommendations are given to States parties with reference to article 1 ICCPR/ICESCR (the right to self-determination), article 27 ICCPR (the right to enjoy own culture), and article 15 ICESCR (the right to participate in cultural life). The CEDAWCee has occasionally addressed similar cultural issues, albeit without reference to the explicit cultural right established in article 13 (c) of the CEDAW.

Cultural diversity is also protected by the overarching equality and non-discrimination principle. States parties do not only have obligations to preserve cultural diversity as an end in itself, they are also obliged to ensure the inclusion and participation of persons and groups from varied cultural backgrounds: cultural inclusivity. Two separate types of obligations can be identified here: (1) obligations

to ensure equality by accommodating differences in treatment; (2) obligations to ensure equality by eliminating differences in treatment. The first type of obligations consists of permanent special measures ensuring the inclusion and participation of persons and groups from varied cultural backgrounds by means of allowing them their cultural specificities – on a permanent basis. As a case in point, education and health care must be ‘culturally appropriate’. The second type of obligations consists of adopting or amending legislation in combination with temporary special measures to redress inequalities. States parties should ensure the inclusion and participation of persons and groups from varied cultural backgrounds through both comprehensive non-discrimination legislation and affirmative action. Among others, States parties are recommended to adopt (temporary special) measures to improve the rights of (members of) ethnic minority groups with regard to access to employment, housing, health, education, social services, personal documents, and participation in political life.

Overall, the conclusion can be that the HRC and the CESCR have more eye for positive cultural diversity – for promoting cultural diversity within States – than the CEDAWCee, which is more focused on harmful aspects of culture by its very nature.

## CHAPTER 5. HUMAN RIGHTS AS A SHIELD

The aim of this chapter was to examine whether and how the UN treaty bodies use their mandate to promote changes in, and elimination of, negative, adverse or harmful aspects of culture. All three treaty bodies identified similar issues and aspects of culture as harmful. The vast majority of such negative or harmful aspects of culture relates to discrimination against women, but culture was also identified as problematic in connection to discrimination against LGBT+ persons and other vulnerable or disadvantaged groups of people, such as persons with HIV/AIDS; persons with albinism or (other) disabilities; migrants, refugees, and ethnic, religious, or other minorities (ie, Roma, Muslims, and etc); rural and older women (ie, intersectional discrimination).

Instances of *de facto* discrimination, or discrimination in practice, are more often explicitly linked to culture. Instances of *de jure* discrimination, or discrimination in law, especially in matters relating to marriage and family relations, are sometimes implicitly linked to culture, but usually not at all. The most likely explanation is that there are differences in the nature of the obligations. Eliminating *de jure* discrimination is an immediate obligation, a rigid and immediate obligation of result. The State party must change the law, whether it is grounded in culture or not. Eliminating *de facto* discrimination is an obligation of progressive realisation, a weaker obligation of conduct, for instance to change culturally entrenched attitudes and stereotypes which are a barrier to the equal enjoyment of rights.

The CEDAW is the only treaty which includes a provision explicitly obliging States parties to address culture: article 5 requires States parties to ‘modify the social and cultural patterns of conduct of men and women’. This could explain the fact that the

CEDAWCee is the treaty body which pays (by far) most attention to the harmful role of culture. Nevertheless, all three treaty bodies take an active role in obliging States parties to change, challenge and eradicate harmful aspects of culture. Once a link between (harmful) culture and a problematic situation of implementation has been identified, an obligation to try to change that culture arises automatically.

As such, treaty bodies cannot be said to take an active role in mediating, reconciling or balancing between universality and cultural diversity. The analysis shows which manifestations and expressions of culture treaty bodies identify as problematic or even harmful, and how the treaty bodies apply human rights to make States parties eliminate and change those aspects of culture. The limits of acceptable diversity are thereby revealed. If anything, the treaty bodies act as guardians of universality: they monitor the interpretation and implementation of the treaties with a view to safeguarding against unacceptable cultural variations.

## CHAPTER 6. CULTURAL ARGUMENTATION

Chapter 6 discusses whether and how the treaty monitoring bodies have performed their task of reconciling universality and diversity by (engaging in) cross-cultural dialogue, focusing on the process and the actors involved in the process.

The cultural arguments used by States parties are categorised depending on the State party's acceptance – or lack thereof – of the need to alter cultural attitudes, values or practices at stake. There are three modes of engagement: when States parties accept the need to change culture, cultural arguments are generally used to explain the lack of progress or to excuse the lack of compliance. States parties may argue that they are doing what needs to be done, but the lack of progress can be blamed on ineffectivity because of cultural resistance among the population. Lack of progress can be reflected in arguments pointing out that certain practices persist on account of their social importance or long-held cultural beliefs, because these practices are so deeply-rooted that it is difficult to change perceptions, etcetera. Lack of compliance means that, while the State party accepts the need to change culture, certain State actors – ie, public officials, such as judges, members of the police force or legislators – do not enforce obligations due to persistent cultural values.

When States parties defend the room for culture, cultural arguments relate to 'identity' and 'freedom of choice', ie, individuals are free to choose to follow cultural or religious rules, even if those rules are harmful to them and not in compliance with the covenant or convention. The argument is made that, as long as people have a choice, there is no problem under the Convention. Individuals or communities choose to live according to the accepted cultural or religious norms, and they consent to the cultural or religious practice involved. This is not a matter of different interpretations of a right, but a matter of the State party prioritizing one right over another. The right to give expression to cultural or religious identity or beliefs is considered to

(potentially) outweigh the right to equality and non-discrimination. The treaty bodies do not consider (cultural) regimes which permit individuals to 'opt out' of the culture or cultural practice – if they wish to do so – as less harmful than obligatory (cultural) regimes.

When States parties reject the Committees' criticism, cultural arguments are used to defend their culture and justify their – alternative – interpretation. Such argumentation usually relates to religion. Most arguments on religion point to the supremacy of the religious source, and/or provide an interpretation of that source. Sometimes this is in the form of a statement or notification, without any room for discussion. More often, however, it is accompanied by an explanation or even a justification. The Committees sometimes use the public dialogue to engage with States parties, and challenge their argumentation or reasoning. The dialogue is not reflected in the concluding observations, however, and the Committees show no flexibility, not during the public dialogue nor in their concluding observations. 'Reconciliation' is only achieved when States parties move their position towards that of the treaty bodies.

Sometimes, States parties aim to strike a balance of interests between respecting the universal standards enshrined in the treaties on the one hand, and their cultural or religious observance requirements on the other. They suggest 'solutions' to the Committees, such as *highly regulated* polygamy, *medicalisation* of (light forms of) female circumcision, *symbolic* dowry, donations *inter vivos* to compensate for differences in inheritance shares, and *symbolic* guardianship during marriage. These 'solutions' remain within the limits imposed by the religion, but they are rejected as insufficient by the Committees. In the interest of procedural justice, these situations require a proper dialogue, with due consideration given to the arguments presented. In reality, there is no such dialogue. The treaty bodies fail to motivate their decisions. They do not explain how the arguments have been considered, and why they have been accepted or rejected.

## CHAPTER 7. CONCLUSIONS

Chapter 7 forms the synthesis of the previous chapters. The research questions and analyses are reflected on, conclusions are drawn and recommendations are made.

The treaty bodies are first and foremost guardians of the universality of human rights. As explained, cultural variation in the interpretation and implementation by States parties is often inherent to the system, given the primacy of State implementation. However, the treaty bodies use their monitoring role not so much (actively) to reconcile universality and cultural diversity or to accommodate cultural variation, but more to determine the limits of such cultural variation.

The treaty bodies do not so much use a flexibility approach – ie, cultural-specific interpretation and implementation of rights – to promote the universal acceptance of rights. However, they 'manage' acceptable cultural variation with 'sword' and 'shield',

using human rights to accommodate and limit cultural diversity in the interpretation and implementation of international human rights law by States parties. The inherent 'grey zone' which necessarily exists between contrasting aspects of culture (positive and negative), and the difficulty in demarcating it, is rarely recognised by the treaty bodies in practice.

The 'constructive dialogue' which is part of the State reporting procedure, could be identified as a possible platform for so-called 'constructive cross-cultural dialogue' with a view to reconcile universality and diversity, ultimately enhancing the universal legitimacy of human rights. The treaty bodies could use it to bring about a genuine dialogue with States parties, asking for clarifications, but also explaining why they accept or reject certain interpretations and implementations. The treaty bodies have not shaped and used the dialogue as such, however. Instead, the treaty bodies have used it as a platform for questioning and interrogation – also due to resources and time constraints. Cultural arguments are occasionally addressed during the dialogue, but overall the treaty bodies fail to explain the rationale underlying their decisions. This is a missed opportunity: The treaty bodies should be able to explain why they reject a certain interpretation. Following the principles of procedural justice, it would enhance their trustworthiness, improve compliance with their decisions, and enhance the universal legitimacy of human rights in the long run.

In conclusion, all three treaty bodies use their mandate to safeguard universality, while trying to accommodate cultural diversity. Nevertheless, there are differences in emphasis: the HRC and the CESCR have more of an eye for positive aspects of cultural diversity than the CEDAWCee, while the CEDAWCee is more focused on the harmful aspects of cultural diversity than the HRC and the CESCR. The CEDAWCee is most outspoken against (negative) culture, rigid in its assessments, yet also the most sensitive and nuanced in its recommendations and willingness to help States comply. Perhaps an explanation for this can be found in the principle article of their respective treaties: the right to cultural autonomy or self-determination as expressed in article 1, common to the ICCPR and ICESCR, versus the definition of discrimination against women, including in the field of culture, as expressed in article 1 of the CEDAW. Moreover, and perhaps more importantly, the CEDAW is especially concerned with the impact of cultural factors on gender relations, unlike the ICCPR and the ICESCR, and it is explicitly designed to modify social and cultural patterns.



# SAMENVATTING

## HOOFDSTUK 1. INTRODUCTIE

Het debat over de universaliteit van mensenrechten in relatie tot culturele diversiteit duurt onverminderd voort, al vanaf de totstandkoming van de Universele Verklaring van de Rechten van de Mens in 1948. De laatste jaren is er zelfs sprake van een heropleving van dit debat. Tegelijkertijd wordt het debat steeds minder vaak gevat in termen van tegenstellingen, en steeds meer in termen van het verenigen van universele mensenrechtennormen en culturele verscheidenheid. Het internationale mensenrechtenkader biedt ruimte aan Staten om culturele eigenheden in acht te nemen bij het implementeren van de VN-mensenrechtenverdragen. De VN-verdragsorganen die toezicht houden op de implementatie van de verdragen door Staten hebben de taak om de universaliteit van mensenrechten te waarborgen tegen een achtergrond van grote culturele verscheidenheid.

Er is uitgebreid onderzoek gedaan naar deze spanning tussen universaliteit en culturele diversiteit. Dit heeft geleid tot veel aandacht voor negatieve aspecten van cultuur, en relatief weinig aandacht voor de relatie tussen mensenrechten en positieve aspecten van cultuur. Daarnaast heeft eerder onderzoek zich voornamelijk toegespitst op de wijze waarop cultuur een plek krijgt bij concrete gevallen van geschillenbeslechting, zoals in de jurisprudentie van het Europese Hof voor de Rechten van de Mens en in individuele klachten voor de VN-verdragsorganen. Er is minder bekend over de wijze waarop dit gebeurt in de Statenrapportageprocedure, waarbij Staten uitleg geven over hun vorderingen met de naleving van het betreffende VN-verdrag, en hierover met het betreffende VN-verdragsorgaan in discussie gaan.

De VN-verdragsorganen hebben een belangrijke rol bij het bewaken van een goed evenwicht tussen het waarborgen van de universaliteit van de betreffende rechten enerzijds, en het ruimte bieden voor culturele eigenheid in de invulling van die rechten door Staten anderzijds. Dit onderzoek beoogt te verduidelijken hoe de toezichhoudende VN-organen deze rol invullen.

De studie beperkt zich tot de toezichhouders van drie van deze VN-verdragen: het Mensenrechtencomité (MRC), dat toezicht houdt op het Internationaal Verdrag inzake Burger- en Politieke Rechten (IVBPR); het Comité voor Economische, Sociale en Culturele Rechten (CESCR), dat toezicht houdt op het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (IVESCR); en het Comité inzake de uitbanning van alle vormen van discriminatie van vrouwen (Vrouwenrechtencomité), dat toeziet op de naleving van het Verdrag inzake de uitbanning van alle vormen

van discriminatie tegen vrouwen (CEDAW). De eerste twee zijn gekozen omdat zij samen met de Universele Verklaring van de Rechten van de Mens de zogenaamde *International Bill of Rights* vormen. Het zijn de twee voornaamste internationale mensenrechtenverdragen. Het ‘Vrouwenrechtenverdrag’ is gekozen omdat gendergelijkheid een van de meest cultureel gevoelige onderwerpen is, en omdat het toezichthoudende Comité zich expliciet bezighoudt met de impact van culturele factoren.

## HOOFDSTUK 2. MENSENRECHTEN EN CULTURELE DIVERSITEIT

Hoofdstuk 2 beschrijft het theoretisch kader van dit onderzoek. Het introduceert de begrippen cultuur en culturele diversiteit, schetst het debat van universalisme versus cultuurrelativisme, beschrijft de verschillende culturele waarden en de theorieën over het verzoenen of verenigen van de twee uitersten.

In dit boek moet ‘cultuur’ – in lijn met de definitie gehanteerd door UNESCO – worden opgevat in de brede zin van het woord: een ‘geheel van onderscheidende spirituele, materiële, intellectuele en emotionele kenmerken van een samenleving of een sociale groep’; het omvat ‘niet alleen kunst en literatuur, maar ook levensstijlen, manieren van samenleven, waardesystemen, tradities en geloofsovertuigingen’. Het is dan ook niet vreemd dat mensenrechten soms op gespannen voet staan met de verschillende culturen waarin ze moeten worden toegepast. Deze spanningen worden vaak voorgesteld als een conflict tussen zogenaamde Afrikaanse, Aziatische of islamitische waarden en perspectieven en de ‘Westerse bias’ van de internationale mensenrechten. Wetenschappers hebben verschillende theorieën voorgesteld over hoe de universaliteit van mensenrechten kan worden gewaarborgd, terwijl ook deze culturele waarden en perspectieven gerespecteerd worden. Deze theorieën bleken twee belangrijke principes met elkaar gemeen te hebben: de spanningen tussen universaliteit en culturele diversiteit kunnen overbrugd worden door (1) flexibiliteit in de interpretatie en implementatie van rechten, waarbij de nadruk ligt op de inhoud; (2) transformatie van rechten door middel van intra- en interculturele dialoog, waarbij de nadruk ligt op het proces en de betrokken actoren.

## HOOFDSTUK 3. VN VERDRAGSORGANEN

De drie Comités hebben in grote lijnen dezelfde taken en bevoegdheden. Zij hebben dezelfde methoden tot hun beschikking om de uitvoering van de verdragen door Staten te monitoren, te sturen en te evalueren, en om de voortgang te controleren: (1) zij ontvangen en beoordelen periodieke rapportages waarin Staten uitleggen hoe zij de verschillende rechten uit de verdragen op nationaal niveau implementeren; (2) zij geven

uitleg over de betekenis van de verschillende rechten in zogenaamde *general comments* of *general recommendations*. Zo geven de Comités advies over de specifieke betekenis van de verplichtingen uit de verdragen, en verduidelijken zij de normatieve inhoud van breed geformuleerde mensenrechten.

De verdragsorganen worden vaak bekritiseerd om hun gebrek aan effectiviteit, hoewel veel van de tekortkomingen buiten hun macht liggen: een beperkt mandaat, beperkte rechtsmacht en rechtsbevoegdheid, en zeer beperkte personele en financiële middelen. Ondanks deze beperkingen ziet een aantal wetenschappers een rol voor de Comités bij het verzoenen van de universaliteit van de in de verdragen opgenomen rechten met culturele diversiteit tussen en binnen Staten. Zij erkennen het potentieel van de Comités om diversiteit te accommoderen door middel van flexibiliteit in de interpretatie en implementatie van rechten, en om de mensenrechten aan te passen en hun culturele legitimiteit te vergroten door middel van een intra- en interculturele dialoog.

## HOOFDSTUK 4. MENSENRECHTEN ALS ZWAARD

Om te begrijpen hoe de Comités de balans bewaken tussen universaliteit en culturele diversiteit, is het van belang om niet alleen oog te hebben voor de negatieve aspecten van cultuur, maar ook voor de wijze waarop de Comités hun mandaat gebruiken om cultuur en culturele diversiteit te beschermen en bevorderen. Dit doen zij met name in het monitoren van: (1) expliciete culturele rechten die tot doel hebben de eigenheid, het unieke karakter en de exclusieve levenswijze van een gemeenschap in stand te houden (culturele exclusiviteit); (2) het overkoepelende gelijkheids- en non-discriminatiebeginsel, dat de inclusie en participatie van personen en groepen met diverse culturele achtergronden garandeert (culturele inclusiviteit). Dit beginsel wordt gewaarborgd door twee verschillende soorten verplichtingen: (a) het waarborgen van gelijkheid door rekening te houden met verschillen; dit gebeurt met *permanente* bijzondere maatregelen; (b) het waarborgen van gelijkheid door verschillen weg te nemen; dit gebeurt met *tijdelijke* bijzondere maatregelen.

De conclusie kan worden getrokken dat het MRC en het CESCR meer oog hebben voor positieve aspecten van cultuur, ofwel het bevorderen van culturele diversiteit, terwijl het Vrouwenrechtencomité zich – van nature – meer richt op de negatieve of schadelijke aspecten van cultuur.

## HOOFDSTUK 5. MENSENRECHTEN ALS SCHILD

De drie Comités hebben in grote mate dezelfde culturele kwesties en aspecten als negatief en schadelijk aangemerkt. Het overgrote deel heeft betrekking op discriminatie van vrouwen, maar cultuur speelt ook een rol in relatie tot discriminatie van de

LHBT-gemeenschap en andere kwetsbare of achtergestelde groepen, zoals migranten, vluchtelingen, en religieuze, etnische of andere minderheden.

Gevalen van *de facto* discriminatie houden vaker expliciet verband met cultuur dan gevallen van *de jure* discriminatie. Discriminatie in de wet, met name op het gebied van rechten inzake huwelijks- en familiebetrekkingen, worden soms impliciet in verband gebracht met cultuur, maar meestal helemaal niet.

De meest waarschijnlijke verklaring is dat er verschillen zijn in de aard van de verplichtingen. Het uitbannen van *de jure* discriminatie is een onmiddellijke resultaatsverplichting; de Staat moet de wet wijzigen, ongeacht de cultuur. Het uitbannen van *de facto* discriminatie is een verplichting tot progressieve realisatie, een (minder vergaande) inspanningsverplichting, bijvoorbeeld om verandering teweeg te brengen in cultureel gewortelde opvattingen en stereotypen die een belemmering vormen voor gelijke rechten.

Het CEDAW is het enige verdrag met een bepaling die Staten expliciet oplegt om negatieve elementen van cultuur aan te pakken: artikel 5 verplicht Staten om ‘de sociale en culturele rolpatronen van mannen en vrouwen te veranderen’. Dit zou kunnen verklaren dat het Vrouwenrechtencomité het verdragsorgaan is dat veruit de meeste aandacht besteedt aan de schadelijke rol van cultuur. Hoe dan ook spelen alle drie de Comités een actieve rol in het verplichten van Staten om negatieve of schadelijke aspecten van cultuur te veranderen, te bestrijden en te elimineren. Zodra er een verband is vastgesteld tussen (schadelijke) cultuur en een problematische situatie van implementatie, ontstaat er automatisch een verplichting om te proberen die cultuur te veranderen.

Het is niet mogelijk te concluderen dat de Comités een actieve rol spelen in het verzoenen van universaliteit en culturele diversiteit. De analyse laat zien welke manifestaties en aspecten van cultuur de Comités als problematisch of zelfs schadelijk aanmerken, en hoe de Comités de in hun respectieve verdragen vastgelegde rechten gebruiken om Staten er toe aan te zetten om deze manifestaties te elimineren of de betreffende cultuur te veranderen. Zo worden de grenzen van aanvaardbare diversiteit vastgesteld. De Comités zijn in de eerste plaats hoeders van universaliteit: zij houden toezicht op de interpretatie en implementatie van de verdragen met als doel deze te beschermen tegen onaanvaardbare culturele verschillen.

## HOOFDSTUK 6. CULTURELE ARGUMENTATIE

Hoofdstuk 6 onderzoekt in welke mate de Comités gebruik maken van de mogelijkheid tot een interculturele dialoog met (vertegenwoordigers van) Staten om een goed evenwicht te vinden tussen het waarborgen van de universaliteit van de betreffende rechten enerzijds, en het ruimte bieden voor culturele eigenheid in de invulling van die rechten door Staten anderzijds.

De culturele argumenten die Staten gebruiken, zijn gecategoriseerd op grond van de mate waarin de Staat accepteert dat de betreffende culturele opvattingen, waarden of praktijken dienen te veranderen. Er worden drie categorieën onderscheiden:

(1) wanneer Staten de noodzaak van een cultuuromslag aanvaarden, worden culturele argumenten voornamelijk gebruikt als verklaring voor een gebrek aan vooruitgang of als excuus voor een gebrek aan naleving. Gebrek aan vooruitgang kan worden toegeschreven aan ineffectiviteit als gevolg van cultureel verzet onder de bevolking. Dit is bijvoorbeeld terug te zien in argumenten die erop wijzen dat bepaalde praktijken voortduren vanwege hun maatschappelijk belang of omdat deze praktijken diepgeworteld zijn en het moeilijk is om percepties te veranderen. Gebrek aan naleving betekent dat, hoewel de Staat de noodzaak van een cultuuromslag aanvaardt, bepaalde statelijke actoren – zoals rechters, leden van de politie of wetgevers – de verplichtingen niet handhaven vanwege hardnekkige culturele opvattingen.

(2) wanneer Staten een zekere ruimte voor cultuur verdedigen, hebben culturele argumenten betrekking op 'identiteit' en 'keuzevrijheid', d.w.z. individuen zijn vrij om te kiezen voor het volgen van culturele of religieuze regels, zelfs als die regels schadelijk voor hen zijn en niet in overeenstemming zijn met het verdrag. Het argument is dat, zolang mensen een keuze hebben, de betreffende praktijk niet in strijd is met het verdrag. Individuele of gemeenschappen kiezen ervoor om te leven volgens de aanvaarde culturele of religieuze normen, en zij stemmen in met de betrokken culturele of religieuze praktijk. Het gaat hier niet om verschillende interpretaties van een recht; de Staat stelt in dit geval het ene recht boven het andere. Het recht om uitdrukking te geven aan een culturele of religieuze identiteit of geloofsovertuiging wordt geacht (in potentie) zwaarder te wegen dan het recht op gelijkheid en non-discriminatie. De Comités beschouwen regimes die individuen een 'opt-out' mogelijkheid bieden (de keuzevrijheid om zich aan een culturele praktijk te onttrekken) niet als minder schadelijk dan regimes die een bepaalde cultuur of culturele praktijken onontkoombaar opleggen.

(3) wanneer Staten de kritiek van de Comités (en de noodzaak voor culturele verandering) afwijzen, worden culturele argumenten gebruikt om de eigen cultuur te verdedigen en een alternatieve interpretatie te rechtvaardigen. Deze argumentatie heeft meestal betrekking op religie. Vaak wordt gewezen op de hoogste autoriteit van de religieuze bron (in de praktijk vaak de Sharia). Soms is dit in de vorm van een mededeling, zonder enige ruimte voor discussie. Vaker gaat het echter gepaard met een toelichting of zelfs een rechtvaardiging. De Comités maken soms gebruik van de openbare *constructieve dialoog* (onderdeel van de Statenrapportageprocedure) om met Staten in gesprek te gaan en hun interpretatie of argumentatie te betwisten. De Comités tonen echter geen flexibiliteit in hun opvattingen, en de dialoog komt niet tot uiting in de *concluding observations* (conclusies en aanbevelingen aan het einde van de Statenrapportagecyclus).

Soms streven Staten ernaar een evenwicht te vinden tussen de eerbiediging van de universele normen die in de verdragen zijn vastgelegd enerzijds en hun culturele of religieuze verplichtingen anderzijds. Zij stellen 'oplossingen' voor aan de Comités, zoals *sterk gereguleerde* polygamie, *medicalisering* van (lichte vormen van) vrouwenbesnijdenis, *symbolische* bruidsschatten, schenkingen *inter vivos* ter compensatie van verschillen in erfdeel en *symbolische* aanwezigheid en toestemming van een 'wali' (voogd) bij de afsluiting van een huwelijk. Deze 'oplossingen' blijven

binnen de door de religie opgelegde grenzen, maar worden door de Comités als ontoereikend afgewezen. In het belang van procedurele rechtvaardigheid vereisen deze situaties een constructieve dialoog, waarbij rekening wordt gehouden met de door de Staat aangevoerde argumenten. In werkelijkheid is er geen sprake van een dergelijke dialoog. De Comités motiveren hun beslissingen niet. Zij leggen niet uit hoe de argumenten in overweging zijn genomen en waarom deze zijn aanvaard of verworpen.

## HOOFDSTUK 7. CONCLUSIES

Hoofdstuk 7 vormt de synthese van de voorgaande hoofdstukken. Er wordt gereflecteerd op de onderzoeksvragen en analyses, er worden conclusies getrokken en er worden aanbevelingen gedaan.

De Comités zijn in de eerste plaats bewakers van de universaliteit van de mensenrechten. Zoals uitgelegd is culturele variatie in de interpretatie en implementatie door Staten vaak inherent aan het systeem, gezien het uitgangspunt van 'primariteit': het is primair aan Staten om de in het verdrag beschermde rechten te respecteren en te garanderen. De verdragsorganen gebruiken hun controlerende rol echter niet zozeer (actief) om universaliteit en culturele diversiteit met elkaar te verzoenen of om culturele variatie te accommoderen, maar meer om de grenzen van die culturele variatie te bepalen.

De Comités gebruiken niet zozeer cultuurspecifieke interpretatie en implementatie van rechten om de universele aanvaarding van rechten te bevorderen. Zij 'controleren' acceptabele culturele variatie met 'zwaard' en 'schild', waarbij zij mensenrechten gebruiken om cultuur en culturele diversiteit in de interpretatie en implementatie van internationale mensenrechten door Staten te accommoderen en te begrenzen. Het inherente grijze gebied dat noodzakelijkerwijs bestaat tussen contrasterende aspecten van cultuur (positief en negatief) en de moeilijkheid om deze af te bakenen, wordt door de Comités in de praktijk zelden erkend.

De *constructieve dialoog* van de Statenrapportageprocedure zou een platform kunnen zijn voor interculturele dialoog, o.a. met als doel het verenigen van universaliteit en diversiteit, en uiteindelijk het versterken van de universele legitimiteit van de mensenrechten. De Comités zouden dit platform kunnen gebruiken om een echte dialoog met Staten tot stand te brengen, waarbij zij om uitleg kunnen vragen, maar ook kunnen uitleggen waarom zij bepaalde interpretaties en implementaties aanvaarden of verwerpen. De Comités hebben de dialoog echter niet als zodanig vormgegeven en gebruikt. In plaats daarvan hebben de Comités de dialoog gebruikt als een platform voor ondervraging – ook vanwege de beperkte middelen en tijd. Tijdens de dialoog worden af en toe culturele argumenten aangehaald, maar over het algemeen geven de Comités geen uitleg over de beweegredenen die aan hun beslissingen ten grondslag liggen. Dit is een gemiste kans: de Comités moeten kunnen uitleggen waarom zij een bepaalde interpretatie of argumentatie afwijzen. Volgens de beginselen

van procedurele rechtvaardigheid zou dit hun betrouwbaarheid vergroten, de naleving van hun besluiten verbeteren en de universele legitimiteit van de mensenrechten op de lange termijn vergroten.

Concluderend: alle drie de Comités gebruiken hun mandaat om de universaliteit te waarborgen en proberen tegelijkertijd culturele diversiteit te accommoderen. Toch zijn er accentverschillen: het MRC en het CESCR hebben meer oog voor positieve aspecten van cultuur en culturele diversiteit, terwijl het Vrouwenrechtencomité meer gericht is op de schadelijke aspecten. Het Vrouwenrechtencomité is het meest uitgesproken tegen (schadelijke) cultuur, rigide in zijn beoordelingen, maar ook het meest gevoelig en genuanceerd in zijn aanbevelingen en bereidheid om Staten te helpen zich aan te passen. Wellicht is een verklaring hiervoor te vinden in het hoofdartikel van hun respectieve verdragen: het recht op culturele autonomie of zelfbeschikking zoals verwoord in artikel 1, dat het IVBPR en het IVESCR gemeen hebben, versus de definitie van discriminatie van vrouwen, ook op het gebied van cultuur, zoals verwoord in artikel 1 van het CEDAW. Bovendien, en misschien nog wel belangrijker, houdt het CEDAW zich vooral bezig met de invloed van culturele factoren op de genderrelaties, in tegenstelling tot het IVBPR en het IVESCR, en is het expliciet bedoeld om sociale en culturele patronen te veranderen.



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