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## Article 5 CEDAW

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# Article 5

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States parties shall take all appropriate measures

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

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

## A. Introduction

### I. The Place and Function of Article 5 in the Convention

#### 1. *Gender Stereotypes and Fixed Parental Gender Roles*

The drafters of the Convention stressed the need to see maternity as a positive value instead of a ground to discriminate against women, and were fully aware that a change in the traditional role of men and women in society and in the family is a prerequisite for achieving full equality between men and women.<sup>1</sup> While Article 5(a) obliges States parties to eliminate all harmful practices ‘based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’, sub-section (b) concerns ‘the most universal traditionalist cultural norm that disadvantages women, which is the stereotypical assignment of sole or major responsibility for childcare to women’.<sup>2</sup> Negative and detrimental traditional, cultural, customary, or religious beliefs, ideas, rules, and practices concerning women’s role in private and public life, should be replaced by a positive appreciation of women’s contribution to society and by a practice of sharing parental roles. The sub-sections of Article 5, therefore, are two sides of the same coin.

The social and cultural patterns of conduct, prejudices, customary, and all other practices, and ideas about the inferiority or superiority of either of the sexes, mentioned in Article 5(a) may be comprised in the single term gender stereotypes. Similarly, the core

<sup>1</sup> CEDAW, Preamble paras 13–14.

<sup>2</sup> F Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’ in HB Schöpp-Schilling and C Flinterman (eds), *The Circle of Empowerment: Twenty-Five Years of The UN Committee on The Elimination of Discrimination against Women* (2007) 74.

concern of Article 5(b), ie the recognition of the common responsibilities of men and women in the upbringing and development of their children, is parental gender roles. The content and scope of Article 5 can therefore be summarized as the obligation to modify gender stereotypes and fixed parental gender roles.

## 2. *The Place of Article 5 in the Convention*

As a general provision, the norms of Article 5 should be regarded along with the other articles in Part I and on their own merits. They also lay a framework for the interpretation and implementation of the Convention as a whole. The Committee explicitly recognized the article's cross-cutting relevance, describing, for example, the discriminatory situation in a State party 'in which extremely stereotyped social, economic, political and cultural roles were assigned to men and women; that situation resulted in subordination of... women in virtually all the areas and at all the levels covered by the articles of the Convention'.<sup>3</sup> Article 5 is especially connected to Articles 2(f) and 10(c), which respectively refer to 'existing laws, regulations, customs and practices' and to 'stereotyped concept of the roles of men and women'.<sup>4</sup> These two provisions specify particular methods States parties should employ to reach the overall goal of the modification of gender stereotypes and fixed parental gender roles.

## 3. *Transformative Equality and Structural Discrimination*

Article 5 exemplifies that the Convention is a living instrument and that its provisions are subject to a continuous dynamic and progressive interpretation.<sup>5</sup> It appears that originally its meaning and scope were widely underestimated. Although many States parties entered reservations (in particular to Articles 2 and 16) with the argument that their religion or tradition(s) was at odds with the principle of full (legal) equality of women, few States parties reserved Article 5.<sup>6</sup> The language of Article 5 provides no clarity as to how it might be implemented. The wording suggests that the Article is solely directed at modifying the social and cultural patterns of conduct of men and women and to ensure family education, which would obligate States parties only to launch information and education campaigns.<sup>7</sup> This restrictive reading of Article 5 was prevalent in the legal literature until the end of the 1990s.<sup>8</sup> The Convention as a whole was criticized for not being progressive enough, precisely because it supposedly only addressed gender ideology, not systemic or structural discrimination against women.<sup>9</sup>

The Committee's interpretation of the content and scope of Article 5, and the way this article co-determines the scope of the whole Convention, refutes these criticisms. As early as its fifth session in 1986, the Committee appealed to the States parties to consider the

<sup>3</sup> CO Guatemala, A/49/38, 13th Session (1994) para 78.

<sup>4</sup> See the discussion in ch on arts 2 and 10. <sup>5</sup> GR 25 para 3.

<sup>6</sup> Raday (n 2 above); E Sepper, 'Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty' (2008) 30 *University of Pennsylvania J Intl L* 585, 596. See also the discussion in ch on art 28.

<sup>7</sup> eg L Lijnzaad, 'Over rollenpatronen en de rol van het Verdrag' in A W Heringa, J Hes, and L Lijnzaad (eds), *Het Vrouwenverdrag. Een beeld van een verdrag* (1994) 43–57; M Wadstein, 'Implementation of the UN Convention on the Elimination of all Forms of Discrimination Against Women' (1988) 10 *Human Rights Quarterly* 5–21.

<sup>8</sup> R Holtmaat, *Towards Different Law and Public Policy: The significance of Article 5a CEDAW for the elimination of structural gender discrimination* (2004) 61–8; Sepper (n 6 above) 589 n 13.

<sup>9</sup> H Charlesworth, C Chinkin, and S Wright, 'Feminist Approaches to International Law' (1991) 85 *American J of Intl L* 613, 634.

introduction of appropriate measures to implement Article 5(a).<sup>10</sup> One of its first general recommendations was on Article 5.<sup>11</sup> Over the years, the Committee continuously stressed that gender stereotypes and fixed parental gender roles have a 'pronounced impact' on women's human rights.<sup>12</sup> This process found its culmination in General Recommendation 25, where Article 5 was characterized as the pillar under the third objective of the Convention, ie to 'address prevailing gender relations and the persistence of gender-based stereotypes'.<sup>13</sup> These phenomena, according to the Committee, 'affect women not only through individual acts by individuals but also in the law, and legal and societal structures and institutions'.<sup>14</sup> Through the inclusion of Article 5, the Convention therefore not only addresses gender ideology, but also the systemic and structural inequality of women, and—in order to overcome the discrimination resulting from it—calls for understanding equality as a transformative principle.<sup>15</sup>

#### 4. *The Relationship between Article 5 and Discrimination against Women*

Although Article 5 does not speak of discrimination, and although the definition of discrimination in Article 1 does not mention gender stereotypes or fixed parental gender roles, these phenomena are closely related to discrimination against women. In the first place, Article 5 acknowledges that gender stereotypes and fixed parental gender roles lie at the basis of discrimination against women. The elimination of all forms of discrimination against women is impossible without eradicating these causes.<sup>16</sup> In the second place, prejudices and all customs and practices which are based on the inferiority of women and on stereotyped roles for men and women are discriminatory in themselves.<sup>17</sup> The Committee has adopted both approaches, stating that it

continues to be concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the role and responsibilities of men and women in society, which discriminate against women. The Committee is also concerned that the preservation of negative cultural practices and traditional attitudes serves to perpetuate women's subordination in the family and society and constitutes a serious obstacle to women's enjoyment of their fundamental rights.<sup>18</sup>

The Committee uses various terms to express the nature of the relationship between gender stereotyping and discriminating against women. For example, it states that

<sup>10</sup> UN Doc A/41/45 para 365, as cited by M Wadstein (n 7 above) 13.

<sup>11</sup> GR 3 was adopted in 1987. <sup>12</sup> eg CO Korea, CEDAW/C/PRK/CO/1 (2005) para 35.

<sup>13</sup> GR 25 para 7. This interpretation was first developed in an independent expert report for the Dutch Government; L Groenman, T van Vleuten, R Holtmaat, I van Dijk, and J de Wildt Groenman, *Het Vrouwenverdrag in Nederland anno 1997*, The Hague: Ministerie van SZW (1997).

<sup>14</sup> GR 25 para 7; eg CO Luxembourg, A/55/38, 22nd Session (2000) para 404.

<sup>15</sup> S Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards New Definitions of Equal Rights' in I Boerefijn, F Coomans, J Goldschmidt, R Holtmaat, and R Wolleswinkel (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of all Forms of Discrimination Against Women* (2003) 116; D Otto, 'Rethinking the 'Universality' of Human Rights Law' (1997–1998) 29 *Columbia Human Rights L Rev* 1–46.

<sup>16</sup> The Committee sometimes speaks of 'adverse cultural norms', eg CO Madagascar, CEDAW/C/MDG/CO/5 (2008) para 16.

<sup>17</sup> Confirmed in art 2(f) and CESC, 'General Comment 20' (2009) UN Doc E/C.12/GC/20 para 20. The discriminatory nature of gender stereotypes has been acknowledged in some important court cases, eg in US Supreme Court in *Price Waterhouse v Hopkins*, 490 US 228 (1989). RJ Cook and S Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (2010).

<sup>18</sup> CO Burundi, CEDAW/C/BDI/CO/4 (2008) para 17.

stereotypes 'constitute barriers',<sup>19</sup> that they 'constitute the most serious obstacles',<sup>20</sup> or that they 'present impediments to . . . and are a root cause of' the disadvantaged position of women.<sup>21</sup> Sometimes, stereotypes are described as discriminatory in themselves.<sup>22</sup>

### 5. *Equality, Dignity, and Diversity*

The Convention Preamble mentions the principles of equality of rights and respect for human dignity.<sup>23</sup> This refers to UDHR Article 1, where the same principles are mentioned. The underlying presumption is that all human beings, irrespective of national or ethnic origin, class or caste, race, sex, sexual orientation, or any other classification that human beings can possibly construct between themselves, are potentially rational and morally responsible beings with an authentic desire to control their own lives. The social and cultural patterns of conduct and stereotyped roles that are addressed by Article 5, which are based on prejudice and on traditional or customary ideas about the inferiority of women, deny individual women the possibility to be a person in their own right and to employ all of their human capacities and capabilities to lead a meaningful life as a human being.<sup>24</sup> Gender stereotypes and fixed parental gender roles therefore not only deny women the right to be treated respectfully as an equal and dignified human being; they also deny women the autonomy to live their lives according to their own choice and convictions about their personal and unique contribution to sustaining and developing humanity.

Women and men have a fundamental right not to be confined to culturally defined constructions of femininity or masculinity, or to pre-fixed (and fixated) female and male parental roles that are entrenched in their 'culture'<sup>25</sup> as well as in primary social and legal institutions.<sup>26</sup> The Committee has made it clear that implementation of the Convention requires 'the recognition that women can have various roles in society, not only the important role of mother and wife, exclusively responsible for children and the family, but also as an individual person and actor in her community and in the society in general'.<sup>27</sup> All human beings are equal and have equal rights and deserve equal respect for their human dignity, but at the same time they may have very diverse ideas and wishes about what they actually want to do with their lives.<sup>28</sup> Therefore, the principles of individual autonomy and diversity are essential to a proper understanding of the content and scope of Article 5 and of the Convention as a whole.<sup>29</sup>

<sup>19</sup> CO Cook Islands, CEDAW/C/COK/CO/1 (2007) para 28.

<sup>20</sup> CO Cyprus, A/51/38, 15th Session (1996) para 45.

<sup>21</sup> CO New Zealand, CEDAW/C/NZL/CO/6 (2007) para 22.

<sup>22</sup> CO Guinea, CEDAW/C/EST/GIN/CO/6 (2007) para 23.

<sup>23</sup> Preamble para 7. See the discussion in ch on Preamble.

<sup>24</sup> M Nussbaum, *Women and Human Development. The Capabilities Approach* (2000).

<sup>25</sup> In this chapter, unless otherwise indicated, 'culture' is used in the broad sense, including cultural expressions, language, custom, religion, tradition, institutional settings, etc.

<sup>26</sup> Cook and Cusack (n 17 above) 68.

<sup>27</sup> CO Suriname, A/57/38, 27th Session (2002) para 48. Similar CO Uzbekistan, A/56/38, 24th Session (2001) para 169.

<sup>28</sup> Lijnzaad (n 7 above) 57.

<sup>29</sup> A similar position is taken in South African Supreme Court 1999 1 SA 6 (CC), *National Coalition for Gay and Lesbian Equality v Ministry of Justice*, para 143.

## II. Gender Stereotypes and Fixed Parental Gender Roles

### 1. *Ideas about the Inferiority or Superiority of either of the Sexes*

Article 5 addresses ideas about the inferiority or superiority of either of the sexes. The drafters exhibited a fundamental insight about the persistent unequal nature of relations between men and women. A woman, according to patriarchal traditions, is destined to be a species whose very existence is derived from and depends upon that of a man. During the long history of humanity—with the rare exception of a few matriarchal cultures—‘woman’ has always been and is persistently constructed as ‘the other’, that is: not-a-man.<sup>30</sup> At the basis of this binary construction lies a hierarchy of the two sexes: ‘woman’ being the negative or inferior side of the two poles, thereby justifying male domination. Patriarchy and misogyny are of all times and places, including the twenty-first century and the world’s most ‘emancipated’ societies. The crucial question is not whether societies or cultures are patriarchal, but how they are differently so.<sup>31</sup> There exists a close link between patriarchy and ideas about what it means to be a ‘real man’ and the persistence of violence against women.<sup>32</sup>

In many patriarchal narratives about gender, women are described not as inferior, but as inherently different from men. The leading principle is that men and women are equal in worth and in dignity. This is often expressed by using the word equity instead of equality. Statements to this effect can be found in some States parties’ contributions in the constructive dialogue with the Committee, where they stress ‘that the notions of the role of women in the family should not be changed. A misunderstanding of equality would not benefit any society. It is said to be more important to encourage the idea of the complementarity of men and women’.<sup>33</sup> Occasionally, ‘woman’ is characterized as superior to ‘man’, especially with respect to her caring or nurturing capacities. ‘Woman’ thus is put on a pedestal, deserving a special degree of respect and concern from men, from civil society and/or from the government. However, women occupy this sacred position only when and in as far as they fulfil the traditionally, customary, or religiously determined duties that come along with primarily or exclusively being a mother/care-giver. The other side of celebrating women’s ‘relational orientation’ or her ‘special nurturing capacities’ is that any transgression of her traditional gender identity or gender role is legally impossible or inconceivable and/or may be severely punished in the society or in the family, even to the point of murder. In many States a form of secular and state controlled reproduction of the patriarchal system exists, in which women are conceived of as needing protection under special legal and policy measures, mainly relating to reproduction and motherhood. This protection is often constructed to restrict women’s human rights, most significantly the right to be economically active and financially independent and the right to choose an education or a spouse. Men, in such systems, are seen as head of the household or breadwinner and on that ground are regarded as deserving special rights in the area of economic subsistence and have control of family members’ actions.

<sup>30</sup> S de Beauvoir, *The Second Sex* (1949), various editions and translations.

<sup>31</sup> L Volpp, ‘Feminism versus Multiculturalism’ (2001) 101 *Columbia L Rev* 1181, 1217.

<sup>32</sup> Human Rights Council, ‘Intersections Between Culture and Violence Against Women, Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences’ Y Ertürk (17 January 2007) UN Doc A/HRC/4/34.

<sup>33</sup> eg CO Guatemala, A/49/38, 13th Session (1994) para 68.



## 2. Gender and Gender Stereotypes

The term gender refers to 'the social construction of differences between women and men and ideas of "femininity" and "masculinity"—the excess cultural baggage associated with biological sex'.<sup>34</sup> Gender is constantly produced and reproduced and is more a process than a fixed condition with static content. Gender is active; every person and every existing social structure contributes to it,<sup>35</sup> including the law.<sup>36</sup> Male and female gender identities are experienced as real but are imposed by society in the same way as (*inter alia*) a national, racial, ethnic, or a sexual orientation identity may take on an appearance of reality or truth.<sup>37</sup> The Committee stresses that gender is a product of culture and society, but it immediately adds that it 'can likewise be changed by culture, society and community'.<sup>38</sup>

A stereotype is 'a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group'.<sup>39</sup> Gender stereotypes tend to freeze gender identities and gender roles and make them appear as real, universal, eternal, natural, essential, and/or unchangeable. Gender stereotypes can be about differences between the biological sexes, assumed or real psychological characteristics, male and female sexuality, sex roles, or they can be a compound of these factors.<sup>40</sup> They come in two main forms: descriptive and prescriptive (or normative).<sup>41</sup> The line between descriptive and prescriptive stereotypes is very thin since many descriptions of what women are, also function as prescriptions of how they should behave.<sup>42</sup>

Stereotypes, including gender stereotypes, play a positive role in shaping people's personal identity. However, not all gender stereotypes are useful instruments in the shaping of a dignified personal identity.<sup>43</sup> According to the language of Article 5 only stereotyped representations of 'woman', or 'femaleness' that play a role in the construction of social, economic, cultural, and legal deprivation or inequality between men and women or leads to subordination of women should be modified.<sup>44</sup> Stereotypes which are favourable for women—sometimes called benevolent stereotypes<sup>45</sup>—should also be questioned, such as those in which women are put on a pedestal of celebrated motherhood.

## 3. Fixed Parental Gender Roles

In most cultures a woman's sexuality, her reproductive capacity, and her nurturing and caring role as regards her children, her husband, and the wider family are crucial in the

<sup>34</sup> The Committee has defined gender in GR 28 para 5, as discussed in the Introduction. H Charlesworth, 'Feminist methods in international law' (1999) 93 *Am J Intl L* 379, 379; UN Department of Economic and Social Affairs, Division for the Advancement of Women, '1999 World Survey on the Role of Women in Development' (1999) UN Doc ST/ESA/326, ix.

<sup>35</sup> S Gherardi, 'The Gender We Think, the Gender We Do in our Everyday Organizational Lives' (1994) 6 *Human Relations* 591–610.

<sup>36</sup> C Smart, 'The Women in Legal Discourse' (1992) 1 *Social and Legal Studies* 29–44; R Holtmaat, 'The Power of Legal Concepts: the Development of a Feminist Theory of Law' (1989) 5 *Intl J of the Sociology of L* 481–502.

<sup>37</sup> AM Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' (2008) 21 *Leiden J of Intl L* 235, 251.

<sup>38</sup> GR 28 para 5.

<sup>39</sup> Cook and Cusack (n 17 above) 9.

<sup>40</sup> Ibid 25.

<sup>41</sup> ST Fiske et al, 'Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v Hopkins' (1991) 46 *American Psychologist* 1049–60; Descriptive stereotypes are often subdivided into 'statistical' and 'false' stereotypes.

<sup>42</sup> KA Appiah, 'Stereotypes and the Shaping of Identity' (2000) 88 *Californian L Rev* 41, 49.

<sup>43</sup> Appiah (n 42 above) 52.

<sup>44</sup> Ibid 43.

<sup>45</sup> M Baretto and N Ellemers, 'The Burden of Benevolent Sexism: How it Contributes to the Maintenance of Gender Inequalities' (2005) 35 *European J of Social Psychology* 633–42.

construction of her inferiority, subordination, and/or her difference from men.<sup>46</sup> Women are not only the birth mothers of the next generations, but they are also in charge of reproducing the group's culture; they feed their children with the meals they prepare, but also with the norms, practices, values, beliefs, and traditions that are crucial for the group's or nation's identity. Gender relations are thus seen as constituting the essence of a particular culture, to be passed by women from generation to generation.<sup>47</sup> This 'natural female role' serves as the ultimate excuse to keep women in the 'safe haven' of the male-controlled family.<sup>48</sup> The gender identity or role of 'man' in the patriarchal system of unequal gender relations is that of the person in charge of maintaining and preserving the 'natural family order' and preventing 'his' woman (wife, sister, daughter, or any other female relative) from casting a shade of shame on the family. Gender stereotypes and fixed parental gender roles are also oppressive for men; those who do not live up to them bring shame upon the family and may be punished socially and/or legally.

#### 4. *The Persistence of Gender Stereotypes*

It is sometimes argued that when discrimination against women has been eliminated, or when women participate in social and economic or political life in equal numbers with men, gender stereotypes and fixed parental gender roles will automatically disappear.<sup>49</sup> The history of women's legal emancipation and their increased participation in public and economic life, for example in northern American and European countries, shows that gender stereotyping and the unequal sharing of family responsibilities between men and women remain as persistent obstacles to women's *de facto* equality.

Abolishing, eradicating, or eliminating<sup>50</sup> gender stereotypes, or even modifying them, is a long and slow process.<sup>51</sup> Gender stereotypes fulfil an important cognitive function because they 'provide structure and meaning, and they shape perceptions most when the data themselves are open to multiple interpretations'.<sup>52</sup> In turn, this function is based on the basic cognitive structure of the human mind, in which it is easiest to learn things when they fit into pairs of concepts that are opposed to each other. A system of fixed gender stereotypes of 'female' and 'male' characteristics and behaviour helps to construct such pairs. This construction of differences between 'man' and 'woman' is also closely related to sexuality or sexual attractiveness (to the other or to the same sex).<sup>53</sup> Because gender stereotypes play an important role in the construction of identity, of individuals, communities, and

<sup>46</sup> eg N Chodorow, *Feminism and Psychoanalytic Theory* (1989).

<sup>47</sup> M van den Brink, 'Gendered Sovereignty? In Search of Gender Bias in the International Law Concept of State Sovereignty' in I Boerefijn, J Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights. Essays in Honour of Cees Flinterman* (2008) 77.

<sup>48</sup> Raday (n 2 above) 69.

<sup>49</sup> eg N Burrows, 'The 1979 Convention on the Elimination of all forms of Discrimination Against Women' (1985) 32 *Netherlands Intl L Rev* 419, 248; C Jolls, 'Antidiscrimination's Law's Effects on Implicit Bias' Working Paper No 148, 16, <<http://ssrn.com/abstract=959228>> accessed 31 December 2010; Cook and Cusack (n 17 above) 174.

<sup>50</sup> This language was used in first drafts of art 5.

<sup>51</sup> J Wyttenbach, 'Violence against Women, Culture/Religious Traditions and the International Standard of Due Diligence' in C Benninger-Budel (ed), *Due Diligence and its Application to Protect Women from Violence* (2008) 225, 237; R Holtmaat and J Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (2010) 68 ff.

<sup>52</sup> Fiske et al (n 41 above) 1050.

<sup>53</sup> Appiah (n 42 above) 43.

States,<sup>54</sup> eradicating or abolishing them would remove the basis of this gender identity, which would most probably lead to uncertainty and anxiety.

Gender stereotypes are so deeply inscribed in our language, images, practices, norms, and values, that we are not aware that we continuously use them. They only become visible when certain 'natural' practices or beliefs are confronted with other practices and beliefs in other communities or in other parts of the world. A final obstacle to change is that gender stereotypes—and the practices that are based upon them—are embedded in strong social norms. A characteristic of such norms is that it is very difficult for an individual or even for one family, to adopt practices or behaviour that contravenes them. Change can only be brought about when a whole community is involved in the process.<sup>55</sup>

Because stereotyping is so fundamental to human thought and action, the purpose of the Convention cannot be to eradicate or abolish all gender stereotypes, but only to transform or modify those stereotypes that are detrimental to the realization of women's human rights. The text of Article 5(a) speaks of the elimination of prejudices and customary and all other practices which lead to discrimination. This is not the same as requiring the elimination of all gender stereotypes.

### 5. *Gender Stereotypes and Intersectional Discrimination*

The construction of gender stereotypes and fixed parental gender roles ultimately rests upon the assumption that there are two opposite and mutually exclusive biological sexes. This means that intersexual people by definition do not fit into the picture.<sup>56</sup> Heterosexual sexuality takes a central place in this construction.<sup>57</sup> The most blatant transgression of the patriarchal female gender identity and her fixed gender (motherly) role is the lesbian woman who chooses to renounce a male sexual partner and thereby also rejects the protection of the male head of household and all other forms of male supervision on and control of her life. Lesbian women experience severe forms of violence, including (gang) rape in order to 'cure' their 'abnormal' sexual preference.<sup>58</sup> Through the mechanism of gender stereotyping, discrimination on the ground of sexual orientation and discrimination against transsexual and intersexual people intersects<sup>59</sup> with discrimination on the basis of sex and—from the perspective of Article 5—should be eliminated and combated by all States parties.

Gender stereotyping may also intersect with a wide range of other identities that are constructed in the social, legal, and cultural order, such as the identity of a divorcee, a single woman, a childless woman, a housewife, a working mother, a welfare mother, a widow, a battered woman, an immigrant woman, an indigenous woman, a rural woman,

<sup>54</sup> Ibid 52.

<sup>55</sup> G Mackie and J LeJeune, 'Social Dynamics of Abandonment of Harmful Practices' UNICEF Innocenti Working Papers Series, IWP-2009-06 (2009) V and 10.

<sup>56</sup> J Butler, 'Gender Trouble: Feminism and the Subversion of Identity' (1990) 1–34 and 110–28.

<sup>57</sup> Gross (n 37 above) 251, summarizing the work of Judith Butler.

<sup>58</sup> eg UN Commission on Human Rights 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur M Nowak' (March 2006) UN Doc E/CN.4/2006/6/Add.1 paras 180 and 183.

<sup>59</sup> K Crenshaw 'Demarginalizing the Intersection of Race and Sex, a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139–67: Related terms are 'compounded discrimination' or 'multiple discrimination'.

a woman of colour, a prostitute, or a criminal woman. Economic position, class or caste, religion, sexual orientation, legal status, health, age, social status, nationality, ethnic origin or race, all lie at the basis of discrimination sustained by descriptive and prescriptive stereotypes that combine and intersect with gender stereotypes.<sup>60</sup> The Committee acknowledges that certain groups of women 'in addition to being affected by gender stereotypes, face multiple forms of discrimination, on grounds such as their ethnicity or their sexual orientation'.<sup>61</sup>

### III. The Concept of Culture in the Context of Article 5

Article 5 addresses culture in terms of 'patterns of conduct' and 'customary practices', but it does not mention the words tradition or religion. In practice, the Committee uses the terms religion, culture, tradition, and customs in the context of Article 5. Religious beliefs and practices are seen as a specimen of social, cultural, or traditional practices and customs that (when damaging for women's rights) must all be modified. Included in this wide concept of culture are also social and economic arrangements, political structures, and legal regulations.

Culture may be an important positive (re)source for the construction of gender identities.<sup>62</sup> However, most often it contributes to damaging or negative gender stereotypes or fixed parental gender roles that stand in the way of women's equality and dignity and lead to discrimination against them. Article 5 does not address only 'exotic', 'backward', 'traditionalist', or 'oppressive' cultures, but all human relations and institutions or structures in which gender stereotypes and fixed parental gender roles are used in a way that is detrimental to the full realization of women's human rights. Culture is intrinsic to human existence; exoticizing it should be avoided.<sup>63</sup> In the same vein, culture should not be seen as having a particular essence which is monolithic, static, and unchangeable.<sup>64</sup> Since the content of each culture is constructed by human beings, its structure and content is subject to continuous change.<sup>65</sup> 'The expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.'<sup>66</sup> Not only is cultural change possible, according to Article 5, it is also obligatory.

<sup>60</sup> eg *Yilmaz-Dogan v the Netherlands*, CERD Committee (29 September 1988) CERD/C/36/D/1/1984, for a clear case of intersection between gender and racial/ethnic stereotyping.

<sup>61</sup> The Committee mentions sexuality: CO Guatemala, CEDAW/C/GUA/CO/7 (2009) para 19; sexual orientation and gender identity: CO Panama, CEDAW/C/PAN/CO/7 (2010) para 22; minority or immigrant status: eg CO New Zealand, CEDAW/C/NZL/CO/6 (2007) para 22; CO France, CEDAW/C/FRA/CO/6 (2008) para 18, CO The Netherlands, CEDAW/C/NLD/CO/5 (2010) para 24; CO Cyprus, CEDAW/C/CYP/CO/5 (2006) para 31; Roma women: eg CO Hungary, CEDAW/C/EST/HUN/CO/6 (2007) para 31; CO Romania, CEDAW/C/ROM/06 (2006) para 26, 27; widows: eg CO Nepal, A/59/38, 31st Session (2004) para 206; and rural women: eg CO Cameroon, CEDAW/C/CMR/CO/3 (2009) para 42.

<sup>62</sup> Recognized by the Committee in eg CO Antigua and Barbuda, A/52/38, 17th Session (1997) para 270.

<sup>63</sup> Generally, UN Human Rights Council, 'Intersections Between Culture and Violence Against Women' (n 32 above); L Volpp, 'Blaming Culture for Bad Behaviour' (2000) 12 *Yale J of the Humanities* 89–115; SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006).

<sup>64</sup> Essentialist approaches to culture may not only be found with defenders of the values of a certain culture, but also with advocates for human rights. R Holtmaat and J Naber (n 51 above).

<sup>65</sup> M Sunder, 'Piercing the Veil' (2002–2003) 112 *Yale L J* 1399, 1423, discussing this stance in relation to religion.

<sup>66</sup> CESCR, 'General Comment 21' (2009) UN Doc E/C.12/GC/21 para 11.

## IV. Related Provisions in Other Human Rights Documents

The necessity of modifying gender stereotypes and of fixed parental gender roles can be found in many international human rights documents.<sup>67</sup> A most clear example is included in CESCR General Comment 16, acknowledging that gender stereotypes and fixed parental gender roles stand in the way of the fulfilment of all of women's human rights.<sup>68</sup> The CESCR calls gender stereotyping a form of discrimination against women,<sup>69</sup> thereby reflecting a wide acceptance of the CEDAW Committee's analysis of the causes and consequences of discrimination against women. Some international documents use wording similar to that of Article 5.<sup>70</sup> A wide range of documents express the recognition of maternity as a positive social function and the sharing of responsibilities of parents as important values and approaches.<sup>71</sup> Traditional gender roles, prejudices, and stereotypes are seen as important obstacles to the full enjoyment of women's social and economic rights.<sup>72</sup> Other international human rights documents recognize that stereotypes lie at the root of many different forms of discrimination, most notably racial and ethnic discrimination,<sup>73</sup> and discrimination on the ground of disability.<sup>74</sup>

## B. The Travaux Préparatoires

### I. The Basis for the Article

Article 5 has its origins in DEDAW Article 3:<sup>75</sup>

All appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of inferiority of women.<sup>76</sup>

A combination of the proposals of the Philippines and the USSR resulted in the following draft:

1. States parties shall adopt all necessary measures with a view to educating public opinion for the complete eradication of prejudices, customs and all other practices based on the concept of women and for the recognition that the protection of motherhood is a common interest of the entire society which should bear responsibility for it.
2. Any advocacy of the superiority of one sex over the other and of discrimination on the basis of sex shall be prohibited by law.<sup>77</sup>

<sup>67</sup> Cook and Cusack (n 17 above) 145, 146, and 174 n 2.

<sup>68</sup> CESCR, 'General Comment 16' (2005) UN Doc E/C.12/2005/4 para 14.

<sup>69</sup> CESCR, 'General Comment 20' (2009) UN Doc E/C.12/GC/20 para 20.

<sup>70</sup> eg the Convention of Belém do Para: arts 7(e) and 8(b); the Protocol to the Banjul Charter on the Rights of Women in Africa, arts 2(2) and 4(d) and arts 6 and 13.

<sup>71</sup> eg CRC Preamble and art 18(1); ACHR art 17; CCPR, 'General Comment 19' (1990) UN Doc HRI/GEN/1/Rev.1 para 8.

<sup>72</sup> eg CESCR, 'General Comment 16' (2005) UN Doc E/C.12/2005/4 para 14; CCPR 'General Comment 28' (2000) UN Doc CCPR/C/21/Rev.1/Add.10 paras 5 and 25.

<sup>73</sup> CERD Preamble and arts 4 and 7; CERD, 'General Recommendation XXVII' (2000) Doc UN A/55/18, 57th Session and CERD, 'General Recommendation 30' (2004) UN Doc A/59/18, 64th Session.

<sup>74</sup> CRPD art 8(1)(b).

<sup>75</sup> LA Rehof, *Guide to the Travaux préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (1993) 79–88 for references to the relevant UN documents.

<sup>76</sup> DEDAW; Rehof (n 75 above) 78.

<sup>77</sup> Art 6, later renumbered to art 5; Rehof (n 75 above) 79.

## II. Developments during the Drafting Process

The scope of what finally became Article 5(a) is both broader and narrower than DEDAW Article 3. The element ‘to direct national aspirations’ disappeared from the text. The element of the education of public opinion was moved to Article 5(b); consequently this part of Article 5 became directed (positively) towards informing the public about the ‘proper’ understanding of maternity as a social function and the shared responsibility of men and women for the upbringing of the children. The duty to eliminate prejudices remained in Article 5(a), but the original verb ‘to educate’ was replaced by ‘to modify’. An obligation to modify human behaviour, based in social and cultural patterns of conduct, is a very compelling and difficult one. In this respect, one could disagree with Rehof, who concludes that the final text is weaker at this point.<sup>78</sup> Rehof also points out that the final text ‘replaced “eradication of prejudice” with the weaker “elimination of prejudices”’. It mentioned stereotyped roles for both men and women and not only women’s stereotyped roles.<sup>79</sup> Instead of explicitly naming the problem of customary ideas about the inferiority of women, the final text mentions the inferiority or superiority of either of the sexes. It thereby recognizes that sometimes women (mainly as mothers) are put on a pedestal; this however does not mean that they are seen as full members of society and can equally participate in all aspects of public life.

In the first (joint) drafts a prohibition of ‘any advocacy of hatred for the feminine sex that constitutes incitement to discrimination against women’ was included.<sup>80</sup> This proposal was removed from the draft, because it was argued that such a prohibition would be problematic in the view of freedom of speech. The discussions on this issue do not seem to have been very thorough or deep. For example, it is not clear why a similar prohibition was deemed possible in CERD (Article 4) and not in the context of this Convention.

The USSR proposal included three aspects concerning the protection of motherhood: a duty ‘to enable women to combine the fulfilment of their maternal obligations and participation in all spheres of national life’, an obligation to ensure the ‘protection of mothers and children’, and ‘the special protection of women workers’. In fact the last two elements—in a different form—have been included in Article 11(2).<sup>81</sup> In the framework of Article 5(b) the element of protection by the State through social laws, was changed into a duty to educate the general public about the positive social value of maternity and about the responsibilities of both parents towards their children. The effect is that States parties are given a duty to educate instead of a duty to make appropriate laws. The observation made by many State delegations that protection of motherhood all too often leads to undermining women’s rights or to stigmatization and stereotyping was honoured in two ways: the word ‘protection’ was taken out altogether and the word ‘motherhood’ was consequently replaced by ‘maternity’. The choice of the word maternity indicates that the drafters exclusively wanted to protect the biological aspects of giving birth to children,<sup>82</sup> and were aware of the fact that protection of the social and cultural construction of the motherly role all too often leads to fixed parental gender roles, which according to Article 5(b) should be subjected to change.

<sup>78</sup> Rehof (n 75 above) 84.

<sup>79</sup> Ibid.

<sup>80</sup> Para 2 of both the Philippines and the joint USSR/Philippine proposal.

<sup>81</sup> See the discussion in ch on art 11.

<sup>82</sup> This is reflected in art 4(2). See the discussion in ch on art 4.



The phrase about the best interest of the child, added at the very last stage of the drafting process, seems like an afterthought, one that from a perspective of improving women's rights could in fact weaken the provision when it leads to the interpretation that the primary purpose of Article 5(b) is to serve the best interests of children. However, this concept should be interpreted and implemented in a manner that does not reinforce gender stereotypes or fixed parental gender roles.<sup>83</sup>

## C. The Committee's Interpretation of Article 5

### I. References in Committee Documents

In its sixth session (1987), the Committee adopted General Recommendation 3, in which it emphasizes the importance of implementing Article 5(a). In many other general recommendations the Committee directly or indirectly refers to Article 5<sup>84</sup> and voices 'its concerns regarding gender stereotyping and States parties' failure to adequately address this phenomenon'.<sup>85</sup> Authors of several communications under the Optional Protocol based their claims on (*inter alia*) Article 5.<sup>86</sup> The Committee concluded that Article 5(a) was violated in the Hungarian case concerning protection against domestic violence.<sup>87</sup> In the two other cases, both involving Austria's lack of protection against domestic violence, the Committee recognized the linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence.<sup>88</sup> Violation of Articles 2(f) and 5(a) were the main issue in the Philippines case, in which the Committee found that criminal court judgments concerning rape reflected gender stereotypes and myths about male and female sexuality and sexual behaviour.<sup>89</sup> In one case in which the claim was not based on Article 5, one of the dissenters none the less extensively discussed the provision.<sup>90</sup> Article 5 was also discussed in the report of the Committee's inquiry into the rapes and murders of women in and around Ciudad Juárez, Mexico under the Optional Protocol.<sup>91</sup>

<sup>83</sup> See the discussion in ch on art 16. M van den Brink, *Moeders in de Mainstream; Een genderanalyse van het werk van het VN-kindercomité*, dissertation Utrecht University with a summary in English: *Mothers in the Mainstream—A Gender Analysis of the Work of the UN Committee on the Rights of the Child* (2006).

<sup>84</sup> GR 12, Preamble, consideration 1; GR 14, Preamble, considerations 2, 5, and 6 and Recommendations (a)(iii), (a)(iv), and (b); GR 19, Comments and Recommendations 11, 12, 21–3, and 24(d), (e), (f), (t)(ii); GR 21, Consideration 3 and Comments 11, 12, 14, 16–21, 32, 41–4, 46, 48(b), and 50; GR 23, Comments 8, 10–12, 20(c), and 44; GR 24, Comments 12(b) and 28; GR 25, Considerations 6, 7, 10, and 38.

<sup>85</sup> Cook and Cusack (n 17 above) 134.

<sup>86</sup> eg CEDAW OP decisions/views in cases *Ms B-J v Germany*, CEDAW Communication No 1/2003 (2004) Excerpt from UN Doc A/59/38, 31st Session; *Ms AT v Hungary* CEDAW Communication No 2/2003(2005), CEDAW/C/32/D/2003; CEDAW Communication No 2/2003(2005) CEDAW/C/32/D/2003; *Şahide Goekce v Austria*, CEDAW Communication No 5/2005 (2007) CEDAW/C/39/D/5/2005; *Fatma Yildirim (deceased) v Austria*, CEDAW Communication No 6/2005 (2007) CEDAW/C/39/D/6/2005; *Vertido v the Philippines*, CEDAW Communication No 18/2008 (2010) CEDAW/C/46/D/18/2008; Cook and Cusack (n 17 above) 135–7.

<sup>87</sup> *Ms AT v Hungary* (n 86 above).

<sup>88</sup> *Şahide Goekce v Austria* and *Fatma Yildirim (deceased) v Austria* (n 86 above) para 12.2; these cases were decided on the basis of other provisions in the Convention.

<sup>89</sup> *Vertido v the Philippines* (n 86 above).

<sup>90</sup> S Dairam dissenting in *Cristina Muñoz-Vargas y Sainz de Vicuña v Spain*, CEDAW Communication No 7/2005, CEDAW/C/39/D/7/2005 paras 13.5 and 13.7.

<sup>91</sup> Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under art 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/Mexico (2005). See also VAW discussion in ch on art 9.

The Committee's concluding observations exemplify the role of Article 5 as co-determining the content and scope of all other substantive articles in the Convention. Occasionally the Committee expresses its general concerns about 'the pervasiveness of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family, in the workplace, in political life and society'.<sup>92</sup> Most often, it discusses the issues of gender stereotyping and fixed parental gender roles in comments and observations concerning the various substantive rights that are guaranteed under the Convention.<sup>93</sup>

## II. Article 5 in Relation to the Prohibition of Discrimination against Women

### 1. *Direct Discrimination*

Often, official laws and policies attribute different (unequal) rights and responsibilities to men and women on the basis of gender stereotypes and fixed parental gender roles.<sup>94</sup> Instances of such direct discrimination are sometimes justified with a call upon the preservation of culture, or with the argument that women need special protection because of their roles as mothers or care-givers.<sup>95</sup> Men in such systems have special rights as breadwinners or heads of households. The Committee recommends that States parties undertake 'changes in laws and administrative regulations to recognize women as heads of households, and the concept of shared economic contribution and household responsibilities'.<sup>96</sup> In other instances it has expressed concerns about 'stereotypes, including the State party's explicit recognition of women's alleged primary responsibility in rearing children, providing care to family members and providing moral advice in the community'<sup>97</sup> or about discriminatory provisions in national law 'which perpetuate stereotypes by providing that men are the heads of households and women are relegated to domestic roles, allow polygamy and set a legal minimum age of marriage of 16 for girls'.<sup>98</sup>

Many States parties, although not allowing sex discrimination in their own laws and policies, officially recognize the validity of customary or religious laws in the constitution and/or state (federal) laws, even when such laws are contrary to the principle of sex equality.<sup>99</sup> This issue touches upon the general question of how far a State party can justify violations of human rights on its territory on the basis of legally guaranteed autonomy of certain cultural or religious groups (often ethnic and religious minorities).<sup>100</sup> On the basis of Articles 5 and/or 2(f), the Committee rejects direct discrimination against women

<sup>92</sup> CO Guatemala, CEDAW/C/GUA/CO7 (2009) para 19.

<sup>93</sup> As a consequence the issues of gender stereotyping and fixed parental gender roles are also discussed in most other chapters in this Commentary.

<sup>94</sup> This issue is closely related to the obligations under art 2(f), see the discussion in ch on art 2.

<sup>95</sup> This argument is also rejected by the European Court of Human Rights: 'To the extent that the difference [in treatment] was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation.' *Konstantin Markin v Russia*, 7-10-2010, ECHR, Appl n 30078/06 para 58.

<sup>96</sup> CO Fiji Islands, A/57/38, 26th Session (2002) para 32.

<sup>97</sup> CO Uzbekistan, CEDAW/C/UZB/CO/3 (2006) para 19.

<sup>98</sup> CO Indonesia, CEDAW/C/EST/IDN/CO/5 (2007) para 18.

<sup>99</sup> eg CO Botswana, CEDAW/C/BOT/CO/3 (2010) para 23.

<sup>100</sup> See also the discussion in ch on art 2.



that flows from the official recognition of religious or customary laws.<sup>101</sup> The Committee makes the same point as to reservations on the ground of respect for religious or customary law<sup>102</sup>

Direct discrimination against women sometimes results from the State party's *de facto* recognition of customary, traditional, or religious laws and practices. State authorities, including the judiciary, often do not stand up against religious authorities or community leaders who argue that their customs or religious prescriptions do not allow for women's equality. The Committee 'notes with great concern that, although the national laws guaranteed the equal status of women, the continued existence of and adherence to customary laws perpetuated discrimination against women, particularly in the context of the family'.<sup>103</sup>

## 2. Indirect Discrimination

The Committee clearly states that providing formal equal rights by law or making laws formally sex neutral, is not enough; the gender stereotypes that underlie these laws must be questioned.<sup>104</sup> Sex neutral categorizations in law which in fact reflect and/or sustain existing unequal gender relations and gender stereotypes, may lead to indirect discrimination. For example, the Committee connects the persistence of stereotypical and traditional attitudes to the prevalence of women among part-time workers and to their differential treatment in social laws and policies.<sup>105</sup>

## 3. Structural Discrimination

In General Recommendation 25<sup>106</sup> and in many concluding observations the Committee points out that traditional and stereotypical attitudes 'are reflected in people's behaviour and in legislation and policy, and limit women's full enjoyment of all their rights guaranteed under the Convention'.<sup>107</sup> This expands the effect of Article 5 far beyond a mere transformation of certain 'ideas' or 'ideologies' about men's and women's different (and inherently inferior or unequal) characteristics or roles and includes the obligation to put an end to structural discrimination and to aim for transformative equality.

# III. The Committee's Approach to Culture

## 1. The Committee's Response to Cultural Essentialism

The conception of culture as having a fixed and eternal essence regarding the relationships between the sexes obstructs implementation of Article 5.<sup>108</sup> Time and again, the Committee 'urges the State party to view culture as a dynamic aspect of the country's

<sup>101</sup> eg CO Burundi, CEDAW/C/BDI/CO/4 (2008) para 13; CO Vanuatu, CEDAW/C/VUT/CO/3 (2007) para 10; CO Namibia, CEDAW/C/NAM/CO/3 (2007) para 16; CO Niger, CEDAW/C/NER/CO/2 (2007) para 15; CO Indonesia, CEDAW/C/EST/IDN/CO/5 (2007) para 12.

<sup>102</sup> eg CO Israel, CEDAW/C/ISR/CO/3 (2005) para 25; CO India, CEDAW/C/IND/CO/3 (2007) para 10.

<sup>103</sup> CO Zimbabwe, A/53/38, 18th Session (1998) para 139; CO Albania, A/58/38, 28th Session (2003) para 68.

<sup>104</sup> CO Slovenia, A/52/38, 16th Session (1997) para 89.

<sup>105</sup> CO Germany, A/55/38, 22nd Session (2000) para 313 and 314; similar in CO UK and Northern Ireland, A/54/38, 21st Session (1999) para 308; CO Slovakia, A/53/38, 19th Session (1998) para 74.

<sup>106</sup> GR 25 para 7. <sup>107</sup> CO Luxembourg, A/55/38, 17th Session (1997) para 404.

<sup>108</sup> The term essentialism refers to an epistemological approach in which it is presumed that we are able to capture the essence of 'beings' by means of giving a fixed description of them. This is opposed to the

social fabric and life and therefore subject to change'.<sup>109</sup> The Committee in its early days at some points went rather far in suggesting that a culture or religion could or should be changed or even abolished.<sup>110</sup> It now phrases these concerns more cautiously, but it is still quite firm about the necessity of intervention by the State party when women's rights are violated based on culture, including religious practices or beliefs.<sup>111</sup> The Committee sees that a change of culture requires the strong political will of a State party.<sup>112</sup> It often stresses the desirability of engaging in a dialogue with civil society about the necessary cultural changes, urging the State party 'to intensify co-operation in this regard with civil society organizations, women's groups and community leaders, traditional and religious leaders, as well as teachers and the media'<sup>113</sup> in order 'to facilitate social and cultural change and the creation of an enabling environment that is supportive of gender equality'.<sup>114</sup>

## 2. *Cultural Practices and Beliefs under the Scope of Article 5*

The Committee acknowledges that all human societies suffer from gender stereotypes and fixed parental gender roles.<sup>115</sup> In its constructive dialogue with States parties and in drafting its concluding observations, the Committee to a large extent depends upon the issues that are raised by the States parties' reports or by NGOs in their shadow reports.<sup>116</sup> Based on this input, the Committee most often refers to harmful practices that result from gender stereotyping in relation to culture in the context of Article 5(a) as to the situation of women in economically developing States, and mainly discusses the damaging effects of fixed parental gender roles and the implementation of Article 5(b) with respect to Eastern European, former Soviet Union, and Western States.<sup>117</sup> By not often expressly naming certain practices in the latter States (such as pornography, sexist advertising, or cosmetic surgery) as 'cultural', the process runs the risk of exoticizing or orientализing culture.<sup>118</sup>

### a) *Traditional Harmful Practices and Beliefs*

Apart from frequently expressing a general concern about the discriminatory effects of gender stereotypes and damaging cultural practices (including violence against women) which are based upon them,<sup>119</sup> the Committee has commented on a great variety of particular harmful customary, traditional, or religious laws and practices. It discusses *inter alia* polygamy, inhumane rites undergone by widows, female circumcision and similar customs,<sup>120</sup> son-preference and illegal sex-selective abortion,<sup>121</sup> traditional practices

understanding of culture and gender as something that not 'is', but that is constantly being produced and reproduced, as being fluid and a process. Holtmaat and Naber (n 51 above) 68.

<sup>109</sup> eg CO Angola, A/59/38, 31st Session (2004) para 147; CO Jordan, CEDAW/C/EST/JOR/CO/4 (2007) para 20; CO Mozambique, CEDAW/C/MOZ/CO/2 (2007) paras 20–1; CO Madagascar, CEDAW/C/MDG/CO/5 (2008) para 17.

<sup>110</sup> eg CO Libyan Arab Jamahiriya, A/49/38, 13th Session (1994) para 130; CO Morocco, A/52/38, 16th Session (1997) para 71.

<sup>111</sup> eg CO Pakistan, CEDAW/C/PAK/CO/3 (2007) para 29.

<sup>112</sup> CO Ecuador, A/49/38, 13th Session (1994) para 524.

<sup>113</sup> CO Nigeria, CEDAW/C/NGA/6 (2008) para 323.

<sup>114</sup> CO Nicaragua, CEDAW/C/NIC/CO/6 (2007) para 12. <sup>115</sup> eg GR 23 para 10.

<sup>116</sup> Merry (n 63 above) 90 ff. <sup>117</sup> Holtmaat and Naber (n 51 above).

<sup>118</sup> UN Human Rights Council, 'Intersections between Culture and Violence against Women' (n 32 above) ch 3.

<sup>119</sup> eg CO Mozambique, CEDAW/C/MOZ/CO/2 (2007) paras 20 and 21. S Koukoulis-Spiiotopoulos, 'The Limits of Cultural Traditions' (2008) *Annuaire International des Droits de l'Homme* III 412, 420 n 33.

<sup>120</sup> CO Nigeria, A/53/38, 19th Session (1998) para 153.

<sup>121</sup> CO China, CEDAW/C/CHN/CO/6 (2006) para 17.

related to dowries, adultery and the practice of pre-marriage,<sup>122</sup> bride price and dowry,<sup>123</sup> forced and early marriage and female genital mutilation, ritual bondage, levirate, and repudiation,<sup>124</sup> widowhood rites and food taboos,<sup>125</sup> *trokosi* (ritual slavery),<sup>126</sup> and the customary right of married men to treat their wives in the same way as minor children.<sup>127</sup> Also, the Committee frequently notices that cultural barriers may exist which prevent women from owning land and participating in the decision-making process.<sup>128</sup> It expresses concerns about customary law that has a detrimental impact on the rights of women with regard to inheritance, matrimonial regimes, and gifts,<sup>129</sup> and on the concept of male guardianship over women (*mehrem*).<sup>130</sup>

#### b) Machismo

The Committee has expressed concern about the effects of a Latin American and Caribbean machismo culture which encourages adolescent and young males to engage in high-risk sexual behaviour as a proof of manhood. The Committee makes clear that 'as long as stereotyped roles persisted in education and mothers encouraged their sons to adopt macho attitudes whereas girls were brought up to be docile and obedient, no change was imminent'.<sup>131</sup> And it notes 'that the prevailing gender stereotypes and patriarchal culture attitude of machismo, affected women in all walks of life and expressed itself also in violence against women, which was largely accepted'.<sup>132</sup>

#### c) Protective Maternity Laws

The Committee forcefully criticizes the persistence of protective maternity laws which stretch beyond the mere protection of the biological or physical consequences of pregnancy and childbirth, and thereby perpetuate the stereotype of women's primary role as mothers and childminders.<sup>133</sup> It notes 'that protective labour laws had the sole effect of restricting women's economic opportunities, and were neither legitimate nor effective as a measure for promoting women's reproductive health. Women should have a right to free choice as to their employment'.<sup>134</sup> The overemphasis on legislative protection and cultural promotion of motherhood and family roles for women, rather than on women as

<sup>122</sup> CO Congo, A/58/38, 28th Session (2003) para 180; CO Bhutan, A/59/38, 31st Session (2004) paras 31 and 32.

<sup>123</sup> CO Timor Leste, CEDAW/C/TLS/CO/1 (2009) para 29; CO Botswana, CEDAW/C/BOT/CO/3 (2010) para 23; CO Albania, A/58/38, 28th Session (2003) para 69.

<sup>124</sup> CO Togo, CEDAW/C/TGO/CO/5 (2006) para 14.

<sup>125</sup> CO Guinea Bissau, CEDAW/C/GNB/CO/6 (2009) para 23.

<sup>126</sup> CO Ghana, CEDAW/C/GHA/CO/5 (2006) para 21.

<sup>127</sup> CO Botswana, CEDAW/C/BOT/CO/3 (2010) para 23.

<sup>128</sup> eg CO Paraguay, A/51/38, 15th Session (1996) para 126; CO Kyrgyzstan, A/59/38, 31st Session (2004) para 171.

<sup>129</sup> CO Burundi, CEDAW/C/BDI/CO/4 (2008) para 13.

<sup>130</sup> CO Saudi Arabia, CEDAW/C/SAU/CO/4 (2008) para 15.

<sup>131</sup> CO Ecuador, A/49/38, 13th Session (1994) para 523. Similar eg CO Dominican Republic, A/53/38, 18th Session (1998) para 334; and CO Nicaragua, A/56/38, 25th Session (2001) para 294.

<sup>132</sup> CO Ecuador, A/49/38, 13th Session (1994) para 524; similarly CO Cuba, A/55/38, 23rd Session (2000) para 261; CO Jamaica, CEDAW/C/JAM/CO/5 (2006) para 15.

<sup>133</sup> This issue is also discussed in chs on arts 4 and 11.

<sup>134</sup> CO Ukraine, A/51/38, 15th Session (1996) para 286. Similarly CO Armenia, A/52/38, 17th Session (1997) para 58; CO Czech Republic, A/53/38, 18th Session (1998) para 196; CO China, A/54/38, 20th Session (1999) paras 280 & 296; CO Kazakhstan, A/56/38, 24th Session (2001) paras 101–2; CO Kuwait, A/59/38, 31st Session (2004) para 72.

individuals in their own right, limits women's possibilities and reinforces fathers' lack of participation in child care.<sup>135</sup>

#### **d) Breadwinner Models and Sharing Responsibilities within the Family**

The Committee is also concerned about the persistence of male breadwinner models and the lack of facilities that would stimulate the sharing of responsibilities within the family.<sup>136</sup> This situation is based on 'entrenched stereotypical attitudes to women in society, and the idea of an exclusively male head of household' and it 'encourages segregation in employment, and a denial of the economic contribution of women.'<sup>137</sup> The Committee connects this issue to 'women's predominance in part-time work, their main responsibility for family and caring work, occupational segregation, men's extremely low participation in parental leave... and the taxation of married couples'.<sup>138</sup> The Committee expressly rejects the encouragement of part-time work as a solution to the problem of the combination of paid work and care activities.<sup>139</sup> It sees the fact that mainly women work part-time as an indication of hidden or indirect discrimination.<sup>140</sup> Governments are urged to take measures allowing women to choose to work full time.<sup>141</sup> In the same vein, the Committee links gender stereotyping to the persistence of the gender pay gap<sup>142</sup> and warns that job evaluation and pay schemes may be based on gender stereotypes.<sup>143</sup> Gender stereotyping and fixed parental gender roles may lead to a lack of social arrangements, in both the private and the public sectors, that could facilitate the reconciliation of paid work and care obligations of both men and women. In this context, the Committee often mentions child care facilities and parental leave for both fathers and mothers.<sup>144</sup> Sometimes the Committee finds that a country is setting a good example in this respect, for example where it praised a State party 'for directing attention to the necessary changes in men's roles and tasks as an important element in achieving true gender equality, including men's encouragement to use their right to paternity leave and to increase their involvement as caretakers in the labour market'.<sup>145</sup>

<sup>135</sup> CO Slovakia, A/53/38, 19th Session (1998) para 74. Similarly CO Armenia, A/52/38, 17th Session (1997) para 58.

<sup>136</sup> CO Austria, CEDAW/C/AUT/CO/6 (2007) para 17. Similarly CO Greece, CEDAW/C/GRC/CO/6 (2007) para 13; CO Germany, A/59/38, 31st Session (2004) para 384; CO Cape Verde, CEDAW/C/CPV/CO/6 (2006) para 17; CO China, CEDAW/C/CHN/CO/6 (2006) para 17; CO Poland, CEDAW/C/POL/CO/6 (2007) para 16; CO Italy, CEDAW/C/ITA/CC/4-5 (2005) para 25; CO Estonia, A/57/38, 26th Session (2002) paras 25-6; CO Lithuania, A/55/38, 23rd Session (2000) paras 138-9; CO Egypt, A/56/38, 24th Session (2001) para 332.

<sup>137</sup> CO Fiji Islands, A/57/38, 26th Session (2002) para 31. Women's economic and social rights are further discussed in chs on arts 11 and 13.

<sup>138</sup> CO Germany, A/55/38, 22nd Session (2000) paras 313-14; similarly CO Germany, A/59/38, 31st Session (2004) para 384.

<sup>139</sup> CO Australia, A/50/38, 14th Session (1995) para 600.

<sup>140</sup> CO Belgium, A/51/38, 15th Session (1996) para 187; CO Iceland, A/51/38, 15th Session (1996) para 96; CO Germany, A/55/38, 22nd Session (2000) paras 313-14.

<sup>141</sup> eg CO the Netherlands, A/56/38, 25th Session (2001) para 214.

<sup>142</sup> eg CO UK and Northern Ireland, A/54/38, 21st Session (1999) para 308; CO Germany, A/55/38, 22nd Session (2000) paras 313-14; CO Norway, A/50/38, 14th Session (1995) para 491.

<sup>143</sup> CO Finland, A/56/38, 24th Session (2001) para 298.

<sup>144</sup> eg CO France, CEDAW/C/FRA/CO/6 (2008) para 27; CO Saudi Arabia, CEDAW/C/SAU/CO/4, (2008) para 32.

<sup>145</sup> CO Norway, A/50/38, 14th Session (1995) para 486; similarly CO Finland, A/50/38, 14th Session (1995) para 388.

### e) Gender Stereotyping in Education and the Media

Time and again, the Committee has stated that it is 'concerned about the consequences of gender stereotyping in curricula and the impact of the fact that girls take traditional "female" courses and boys traditional "male" courses on women's employment options and income',<sup>146</sup> and has drawn attention to stereotypical cultural attitudes which are reflected in the segregation of the labour market and in educational choices of girls and boys.<sup>147</sup> As a result, 'women continue to be concentrated in a narrow range of employment'.<sup>148</sup> In this context, the Committee has often urged the elimination of gender stereotypes in educational materials in order to facilitate 'the diversification of the educational choices of boys and girls'.<sup>149</sup>

The Committee also frequently makes comments on the way in which women are depicted in advertising and in the media as sex objects and in traditional roles.<sup>150</sup> On a few occasions it notes with concern 'that a process of mainstreaming pornography, also known as "sexualization of the public sphere", is occurring in the State party',<sup>151</sup> and that media and advertising 'are becoming increasingly pornographic, and that the over-sexualized depiction of women strengthens the existing stereotypes of women as sex object and girls' low self-esteem'.<sup>152</sup>

### 3. Culture and Religion Cannot Justify Discrimination against Women

The Committee acknowledges 'that culture is a positive vehicle for influencing the advancement of women, and suggested that cultural art forms be used as a vehicle to promote respect for women'.<sup>153</sup> However, such considerations are often followed by the Committee's serious concerns about the negative impact that the same culture may have on women's human rights.<sup>154</sup> When confronted with damaging cultural beliefs and practices, it always reminds States parties of Article 5, often in combination with Article 2(f), and argues that 'cultural characteristics could not be allowed to undermine the principle of the universality of human rights, which remained inalienable and non-negotiable, nor to prevent the adoption of appropriate measures in favour of women'.<sup>155</sup> With respect to religion, it has noticed that States parties do not make sufficient effort to counteract the damaging effects of some (fundamentalist) religious beliefs or practices.<sup>156</sup> It sees

<sup>146</sup> eg CO Trinidad and Tobago, A/57/38, 26th Session (2002) para 33. Also see the discussion in ch on art 10.

<sup>147</sup> CO Norway, CEDAW/C/NOR/CO/7 (2007) para 17.

<sup>148</sup> eg CO France, CEDAW/C/FRA/CO/6 (2008) para 18; CO Lebanon, CEDAW/C/LBN/CO/3 (2008) para 24; CO Belize, CEDAW/C/BLZ/CO/4 (2007) para 23.

<sup>149</sup> eg CO Estonia, CEDAW/C/EST/CO/4 (2007) para 13.

<sup>150</sup> CO Germany, A/59/38, 31st Session (2004) para 384; similarly CO Germany, CEDAW/C/DEU/CO/6 (2009) para 27; CO Italy, CEDAW/C/ITA/CC/4-5 (2005) para 25. In this context the Committee regularly uses the words 'sexist' or 'sexism', eg CO Ukraine, CEDAW/C/UKR/CO/7 (2010) para 24.

<sup>151</sup> CO Sweden, CEDAW/C/SWE/CO/7 (2008) para 22.

<sup>152</sup> CO Finland, CEDAW/C/FIN/5 and 6 (2008) para 177.

<sup>153</sup> CO Antigua and Barbuda, A/52/38, 17th Session (1997) para 270; similar CO Guyana, A/49/38, 13th Session (1994) para 101.

<sup>154</sup> CO Bhutan, A/59/38, 31st Session (2004) para 115; CO Cambodia, CEDAW/C/KHM/CO/3 (2006) para 17; CO Cook Islands, CEDAW/C/COK/CO/1 (2007) para 22.

<sup>155</sup> CO Morocco, A/52/38, 16th Session (1997) para 64. Similarly CO Indonesia, A/53/38, 18th Session (1998) para 282; CO Vanuatu, CEDAW/C/VUT/CO/3 (2007) para 10; CO Algeria, A/54/38, 20th Session (1999) para 71.

<sup>156</sup> CO Azerbaijan, A/53/38, 18th Session (1998) para 58; CO Turkey, A/52/38, 16th Session (1997) para 164; CO Indonesia, CEDAW/C/EST/IDN/CO/5 (2007) para 12.

traditionalism under the mask of preserving national identity as a cause of discrimination<sup>157</sup> and in a similar vein expresses concern 'that the concept of Asian values<sup>158</sup> regarding the family, including that of the husband having the legal status of head of household, might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women'.<sup>159</sup>

According to the Committee, the principles of equality and non-discrimination and respect for women's dignity clearly prevail over claims about the values of religion, culture, or tradition and the wish of States parties to preserve these values. This issue touches on the debate about the concept of the universality of human rights in the light of claims made by some cultures or religions that their (internal) norms should be respected, protected, and sustained, even when they contravene women's human rights.<sup>160</sup> The Committee frequently talks of a dialogue that it deems necessary in order to find solutions for the conflicts that may arise between norms and practices that are based in culture and the human rights standards that are set by the Convention.<sup>161</sup> In that context, the Committee urges States parties 'to create the conditions for a wide intercultural dialogue that would respect diversity while guaranteeing full compliance with the principles, values and international norms for the protection of human rights, including women's rights'.<sup>162</sup>

The Committee's position conforms to many other international legal instruments, which acknowledge the right of all human beings to live according to cultural traditions and a right to practise one's beliefs. These rights exist under the condition that the human rights of others, including women, are not in any way restricted or violated.<sup>163</sup> This position is reflected in *inter alia* the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), stating in Article 2 that 'no one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof'. Similarly the (1981) UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief stipulates in Article 5(5) that a child may not be injured under the pretext of religion or belief.<sup>164</sup>

Some international documents that guarantee the freedom of religion also contain clauses in which this freedom is restricted by the rights and freedoms of others.<sup>165</sup> Automatic preference of women's human rights over the freedom of religion cannot be

<sup>157</sup> CO Mozambique, CEDAW/C/MOZ/CO/2 (2007) para 22.

<sup>158</sup> Reference is made to the Bangkok Declaration (7 April 1993) UN Doc A/Conf.157/ASRM/8-A/CONF.157/PC/59.

<sup>159</sup> CO Singapore, A/56/38, 25th Session (2001) para 79.

<sup>160</sup> eg S Moller Okin, 'Is Multiculturalism Bad for Women?' (1997) *Boston Review* 22, 25–32; CI Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard Intl LJ* 381–418; Volpp (n 31 above) 1181–218; F Raday 'Culture, Religion, and Gender' (2003) 1 *Intl J of Constitutional L* 663–715; Sunder (n 65 above) 1393–472; A Phillips, *Multiculturalism Without Culture* (2007); D Otto, 'Rethinking the "Universality" of Human Rights Law' (1997–1998) 29 *Columbia Human Rights L Rev* 1–46; Holtmaat and Naber (n 51 above).

<sup>161</sup> eg CO Nigeria, CEDAW/C/NGA/6 (2008) para 323; CO Nicaragua, CEDAW/C/NIC/CO/6 (2007) para 12.

<sup>162</sup> eg CO Bolivia (2008) CEDAW/C/BOL/CO-4 para 23.

<sup>163</sup> Koukoulis-Spiiotopoulos (n 119 above) 418.

<sup>164</sup> UNGA Res 36/55 (25 November 1981) UN Doc A/RES/36/55. C Packer, *Using Human Rights to Change Tradition* (2002) 74.

<sup>165</sup> eg ICCPR art 18(3).



induced from such exception clauses. When invoking such a provision, it needs to be demonstrated that a certain religious practice is indeed damaging for women's rights and interests and therefore justifies a restriction of religious freedom.<sup>166</sup> In its General Comment on ICCPR Article 18, the Human Rights Committee has stated 'that the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant.'<sup>167</sup> In a similar vein it was expressly stated that the rights that are guaranteed under Article 27 do not authorize any State, group, or person to violate women's human rights under the Covenant.<sup>168</sup>

## D. Issues of Implementation

### I. The Nature of the Obligations under Article 5

#### 1. *All Appropriate Measures to Modify Patterns of Conduct and to Ensure Education*

The drafters of the Convention left open what States parties should do to implement their obligations under Article 5.<sup>169</sup> The Chapeau of Article 5 speaks of taking 'all appropriate measures' to 'modify' (sub-section a) and to 'ensure' (sub-section b). States parties' obligations under international human rights law may be divided into obligations to respect, to protect and to fulfil.<sup>170</sup> The Committee does not use this typology when discussing obligations under Article 5.<sup>171</sup> It mentions first measures to modify stereotyped ideas or ideologies that are expressed in educational materials, in advertising and in the media, and second the obligation of States parties to scrutinize their own laws, policies, and practices and the structural features of society in order to reveal and redress the presence of gender stereotypes and fixed parental gender roles and to amend such laws and policies, including the removal of obstacles to the sharing of family responsibilities between men and women.

#### 2. *Measures to Modify Stereotyped Representations of Women in Educational Materials, in Advertising, and in the Media*

##### a) **The State Party's Obligation to Change Stereotypes**

States parties have a responsibility to eliminate damaging gender stereotypes.<sup>172</sup> This may be done through extensive information campaigns that promote an image of women that is different from the traditional stereotypes.<sup>173</sup> The Committee mentions

<sup>166</sup> F Raday, 'Traditionalist Religious and Cultural Challengers—International and Constitutional Human Rights Responses' (2008) 41 *Israel L Rev* 596, 600.

<sup>167</sup> HRC GC 22, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) para 9.

<sup>168</sup> CCPR, 'General Comment 28' (2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 32; UN Commission on Human Rights, 'Study on Freedom of Religion or Belief and the Status of Women in the Light of Religion, Report submitted by Mr A Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2001/42' (2002) UN Doc E/CN.4/2002/73/Add.2 paras 58 and 64.

<sup>169</sup> Rehof (n 75 above) 77 ff; Holtmaat (n 8 above) 64 ff.

<sup>170</sup> See the discussion in ch on art 1 and Introduction.

<sup>171</sup> Cook and Cusack (n 17 above) 76 ff analyze the obligations following from art 5(a) along these lines.

<sup>172</sup> GR 3.

<sup>173</sup> CO Czech Republic, A/53/38, 18th Session (1998) para 206; CO Estonia, A/57/38, 26th Session (2002) paras 25–6. See for a positive appraisal of such campaigns CO Cyprus, A/51/38, 15th Session (1996) para 51.

(mass) media and education as the two most important sectors in this respect.<sup>174</sup> States parties have a special responsibility with respect to educational materials, as is also stressed in Article 10(c). They have the obligation to put an end to gender segregation in professional education and employment by changing the content of educational curricula and materials and providing gender-sensitive teacher training programmes.<sup>175</sup>

#### **b) The State Party's Obligation to Intervene in Public Expressions of Gender Stereotypes**

Although a proposal to make it obligatory for States to prohibit incitement to discrimination against women was rejected during the drafting process, States parties have duties concerning the protection of women against damaging gender stereotypes produced by non-State (private) actors. Under Article 5, States parties are obliged to ensure that there are no damaging stereotypes in the media, in educational materials, and similar forms of expression, even when these are presented by private actors.<sup>176</sup> The Committee commends legislative measures (such as a legal obligation to install a Code of Ethics),<sup>177</sup> but a State party may also take measures that stimulate voluntary cooperation by private actors.<sup>178</sup> With regard to pornography, the Committee has welcomed new censorship laws, which 'would place greater restrictions on the availability of violent and pornographic material, introduce new controls on the displaying of the material and set penalties for the possession of banned materials'.<sup>179</sup> Where the Government does not have the authority to intervene directly because it would risk violating freedom of expression, the freedom of religion, and/or the freedom of education,<sup>180</sup> the Committee 'urges the State party to encourage the mass media to promote cultural changes with regard to the roles and tasks attributed to women and men, as required by article 5 of the Convention'.<sup>181</sup> Incidentally it 'calls upon the State party to strengthen its strategies to combat sexualization of the public sphere and to take proactive measures to ensure that media production and coverage are non-discriminatory and increase awareness of these issues among media proprietors and other relevant actors in the industry'.<sup>182</sup>

<sup>174</sup> CO Lithuania, A/55/38, 23rd Session (2000) para 139. Similarly CO Romania, A/55/38, 23rd Session (2000) para 303; CO Egypt, A/56/38, 24th Session (2001) paras 334, 335; CO Vietnam, A/56/38, 25th Session (2001) para 251; CO Estonia, A/57/38, 26th Session (2002) paras 25–6.

<sup>175</sup> eg CO France, CEDAW/C/FRA/CO/6 (2008) para 18; CO Lebanon, CEDAW/C/LBN/CO/3 (2008) para 24; CO Belize, CEDAW/C/BLZ/CO/4 (2007) para 23; CO Estonia, CEDAW/C/EST/CO/4 (2007) para 13; CO Belgium (2008) CEDAW/C/BEL/CO/6, para 24; CO Guinea Bissau, CEDAW/C/GNB/CO/6 (2009) para 23.

<sup>176</sup> This can be seen as the obligation to protect.

<sup>177</sup> CO Lithuania, A/55/38, 23rd Session (2000) para 139; CO Romania, A/55/38, 23rd Session (2000) para 303; CO Egypt, A/56/38, 24th Session (2001) paras 334–5; CO Vietnam, A/56/38, 25th Session (2001) para 251; CO Estonia, A/57/38, 26th Session (2002) paras 25–6.

<sup>178</sup> CO France, CEDAW/C/FRA/CO/6 (2008) para 18.

<sup>179</sup> CO New Zealand, A/49/38, 13th Session (1994) para 641.

<sup>180</sup> The Committee recognizes this constitutional limitation in CO Germany, CEDAW/C/DEU/CO/6 (2009) para 28.

<sup>181</sup> CO Ukraine, A/57/38, 27th Session (2002) para 296; similarly CO El Salvador, CEDAW/C/SLV/CO/7 (2008) para 23; CO Bahrain, CEDAW/C/BHR/CO/2 (2008) para 23.

<sup>182</sup> CO Sweden, CEDAW/C/SWE/CO/7 (2008) para 23; similarly CO Japan, CEDAW/C/JPN/CO/6 (2009) para 29.



### 3. Measures to Eliminate Structural Discrimination and to Promote the Sharing of Family Responsibilities

#### a) Revealing Structural Discrimination

Article 5 requires that the systemic or structural nature of discrimination against women be brought to the surface.<sup>183</sup> Stereotypical gender identities and fixed parental gender roles are very deeply entrenched in all cultures.<sup>184</sup> They are reflected in and sustained by State laws.<sup>185</sup> Revealing the way gender stereotypes and fixed parental gender roles are entrenched in laws and in government practices and policies requires education and training of lawyers and civil servants on the issue of gender stereotypes.<sup>186</sup> States parties must undertake gender impact assessments and integrate gender perspectives in all areas of government action, such as 'legal provisions on the taxation of married couples ("splitting") and its impact on the perpetuation of stereotypical expectations for married women'.<sup>187</sup> This requires gender expertise at a high government level and commitment of the leading political and administrative stakeholders. NGOs should be involved as a resource and not as holders of the obligation. The Committee 'recommends that the Government take advantage of existing bodies of knowledge relating to indirect and structural patterns of discrimination. It emphasizes that the Government, rather than women themselves, have primary responsibility for implementing strategies to eliminate these forms of discrimination'.<sup>188</sup> In order to fulfil the obligations under Article 5(a) and 2(f), the Committee has recommended 'that the State party further clarify the causes of persistent inequality between women and men, including through studies on the institutional rules that reinforce gender-role stereotyping, [and] the specific manifestations of stereotypical ideology in the State party'.<sup>189</sup>

#### b) Abolishing and Amending Laws and Policies that Sustain Structural Discrimination

Article 5 calls for transformative equality, including the abolition of all forms of direct, indirect, or structural discrimination that exists as a consequence of gender stereotypes and fixed gender parental roles.<sup>190</sup> The Committee regularly has urged States parties to 'review and reform personal laws of different ethnic and religious groups to ensure *de jure* gender equality and compliance with the Convention'.<sup>191</sup> The Committee has offered a far-reaching warning that a State party's constitution reflected a stereotyped image of the roles of women 'in the home and as mothers', and urged the Parliamentary Committee

<sup>183</sup> This could be seen as a duty to fulfil. In Holtmaat (n 8 above) ch 15 a methodology of revealing and abolishing instances of structural discrimination is included. Cook and Cusack (n 17 above) 45 ff.

<sup>184</sup> Cook and Cusack (n 17 above) in ch 2, emphasize that for the elimination of gender stereotypes it is crucial to reveal them.

<sup>185</sup> CO Ecuador, A/49/38, 13th Session (1994) para 523.

<sup>186</sup> CO Italy, A/52/38, 17th Session (1997) para 357; CO Cook Islands, CEDAW/C/COK/CO/1 (2007) para 15.

<sup>187</sup> CO Germany, A/55/38, 22nd Session (2000) para 314; similarly CO Germany, CEDAW/C/DEU/CO/6 (2009) para 30.

<sup>188</sup> CO Croatia, UN Doc A/53/38, 18th Session (1998) para 113; similarly CO Equatorial Guinea, A/59/38, 31st Session (2004) para 195; CO Togo, CEDAW/C/TGO/CO/5 (2006) para 14.

<sup>189</sup> CO Greece, CEDAW/C/GRC/CO/6 (2007) para 14; similar CO Morocco, A/52/38, 16th Session (1997) para 72.

<sup>190</sup> This can be seen as an obligation to respect.

<sup>191</sup> eg CO India, CEDAW/C/IND/CO/3 (2007) para 11; CO Fiji Islands, A/57/38, 26th Session (2002) para 32; CO Indonesia, CEDAW/C/EST/IDN/CO/5 (2007) para 18.

working on a revision of the constitution to be fully aware of the ‘obligations under the Convention, including article 5’.<sup>192</sup> In that regard the Committee suggested ‘that the State party consider replacing male-oriented language with gender-sensitive language in the Constitution to convey the concept of gender equality more clearly’.<sup>193</sup>

### c) Adopting New Laws and Public Policies

The Committee also calls for the enactment of new laws and policies in the areas of economic and social rights, including the right to child care and the right to parental leave, for example where it asks a State party to ensure that ‘legislation and policies create the structural and systemic framework that will lead to women’s long-term participation in the labour force on a basis of equality with men’.<sup>194</sup> The Committee, in the context of discussing Article 5 and/or Article 11, repeatedly insists that concrete measures are needed to promote the role of men in unpaid care activities.<sup>195</sup> The enactment of pregnancy leave and/or parental leave is not deemed sufficient for that purpose, as it cannot be guaranteed that they will lead to a substantial change in (fixed) gender roles.<sup>196</sup> In fact, such policies may ‘continue to place primary responsibility for family work and childcare on women, rather than emphasizing the shared responsibility of men and women’.<sup>197</sup>

### 4. *Temporary Special Measures to Implement Article 5*

The obligation to modify gender stereotypes and fixed parental gender roles cannot be fulfilled without the States parties undertaking measures to bring about the necessary changes in attitudes, beliefs, and practices, both at the level of individuals and private parties and at State level.<sup>198</sup> In General Recommendation 25, the Committee reminds 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>199</sup> Occasionally, the Committee has stated that it is concerned about the lack of ‘temporary special measures in order to eliminate these stereotypes’.<sup>200</sup> Temporary special measures are also mentioned in relation to changing men’s roles in the family.<sup>201</sup> Measures that are presented by States parties as a positive measure for women may be stereotypical themselves, for example when a programme concerns ‘non-academic training such as embroidery, industrial sewing, etc., conducted as a positive discrimination programme’, which ‘would only contribute to keeping women to the feminized sector of the economy’.<sup>202</sup>

<sup>192</sup> CO Ireland, A/54/38, 21st Session (1999) paras 193–4. The Committee here refers to art 41(2) of the Irish Constitution.

<sup>193</sup> CO Ireland, CEDAW/C/IRL/CO/4-5 (2005) para 25.

<sup>194</sup> CO Ireland, A/54/38, 21st Session (1999) para 182.

<sup>195</sup> eg CO Ukraine, A/51/38, 15th Session (1996) para 300; CO Iceland, A/57/38, 26th Session (2002) para 28.

<sup>196</sup> CO Iceland, A/51/38, 15th Session (1996) paras 94–5; CO Sweden, CEDAW/C/SWE/CO/7 (2008) para 26.

<sup>197</sup> CO Ireland, A/54/38, 21st Session (1999) para 183. Similarly CO Finland, A/56/38, 24th Session (2001) para 298.

<sup>198</sup> Cook and Cusack (n 17 above) 82. <sup>199</sup> GR 25 para 38.

<sup>200</sup> CO Estonia, A/57/38, 26th Session (2002) paras 25–6; CO Lithuania, A/55/38, 23rd Session (2000) paras 138–9; CO Ireland, A/54/38, 21st Session (1999) para 190.

<sup>201</sup> CO Czech Republic, A/53/38, 18th Session (1998) para 206.

<sup>202</sup> CO Mauritius, A/50/38, 14th Session (1995) para 213.

## II. The Extent of the Obligations

### 1. Immediate or Gradual Implementation

States parties are under all circumstances required to implement Convention obligations (including Article 5) in a timely fashion and in good faith.<sup>203</sup> The subject matter of Article 5 suggests that this Article obliges States parties to start implementing its provisions immediately after ratification. On several occasions the Committee has ‘emphasized the fact that, despite the country’s current economic problems, initiatives could be developed in favour of equality at minimal expense, and indeed must be developed’.<sup>204</sup> The Committee regularly stresses that a State party should implement its obligations under this Article ‘without delay’.<sup>205</sup> Sometimes, the Committee adds to this that the State party is urged ‘to put in place, without delay, a comprehensive strategy, including clear goals and timetables, to modify and eliminate negative cultural attitudes and practices and deep-rooted stereotypes that discriminate against women, in conformity with articles 2(f) and 5(a) of the Convention’.<sup>206</sup> The obligation to eliminate structural discrimination requires that States parties (re-)examine and amend their laws and policies. This requires gender expertise and the existence of an adequate machinery to fulfil the obligations in this respect, which may take some time to develop.

In 2002, the Committee decided that its concluding observations would include a section on ‘factors and difficulties’ affecting the implementation of the Convention only in the most exceptional circumstances. ‘The persistence of stereotypical attitudes relating to the roles of women and men would not be categorized as such a factor or difficulty’.<sup>207</sup> The Committee has confirmed that position by declining to accept a State party’s claim of societal support for discriminatory practices as a rationale for failing to deal with them.<sup>208</sup>

Gender stereotypes and ideas about the inferiority of women, as well as traditional (fixed) gender roles concerning fatherhood and motherhood, are deeply entrenched in all cultures and societies. Gradual implementation of Article 5 and support from the population<sup>209</sup> may be required to avoid backlash.<sup>210</sup> The Committee has indicated that it ‘recognizes that changing mentality is a long-term endeavour and calls upon the State party to continue, in a comprehensive manner, its efforts until these gender-role stereotypes are eliminated’.<sup>211</sup>

<sup>203</sup> RJ Cook, ‘State Accountability under the Convention on the Elimination of All Forms of Discrimination Against Women’ in RJ Cook (ed), *Human Rights of Women. National and International Perspectives* (1994) 229 ff.

<sup>204</sup> CO Ecuador, A/49/38, 13th Session (1994) para 540. Similarly CO Morocco, A/52/38, 16th Session (1997) para 71.

<sup>205</sup> eg CO Gabon, CEDAW/C/GAB/CC 2-5 (2005) para 31; CO Niger, CEDAW/C/NER/CO/2 (2007) para 18; CO Malawi, CEDAW/C/MW1/CO/5 (2006) para 20.

<sup>206</sup> eg CO Nicaragua, CEDAW/C/NIC/CO/6 (2007) para 12.

<sup>207</sup> UN Doc A/57/38 (Part II) ch VI: ‘Ways and Means of Expediting the Work of the Committee’ para 374.

<sup>208</sup> CO Gabon, CEDAW/C/GAB/CC 2-5 (2005) para 30.

<sup>209</sup> CO Morocco, A/52/38, 16th Session (1997) para 71.

<sup>210</sup> Raday (n 166 above) 596–634, concerning backlash caused by some judgments of constitutional courts condemning traditional or religious practices as violations of women’s human rights.

<sup>211</sup> CO Luxembourg, CEDAW/C/LUX/CO/5 (2008) para 16.

## 2. *Public and Private Life*

From the wording of Article 5(a) it appears that it is directed in first instance at the sphere of (open or covert) expressions of negative and damaging stereotypes about the roles of men and women in public, both in vertical and horizontal relationships.<sup>212</sup> In addition, Article 5(b) addresses the issue of education, which also is generally an aspect of public life. However, measures to combat damaging stereotyped expressions and to educate the public about the proper understanding of the shared responsibilities of both parents can have an impact on the private or intimate relationships between men and women and the way they organize their family life. The Committee has recognized that a State party that bans gender stereotypes from its laws and policies and tries to transform fixed parental gender roles will thereby influence the private relations within the family, observing that it is 'difficult for the Government to promote new concepts of men's and women's roles without appearing to interfere, once again, with individual choices and desires'.<sup>213</sup>

Even if a State party limits its actions to implement Article 5 to the public sphere, the question may arise as to how far other constitutionally guaranteed human rights (such as freedom of speech or freedom of religion or education) may be curtailed. In relation to Article 5(b) and 10(c) the issue may arise whether and in how far a State party has the liberty to prescribe certain educational materials or programmes, especially when the school belongs to a particular religious denomination or is funded privately. Nevertheless, such freedoms could not prevent the application or implementation of Article 5. In theory and practice they can be limited by other rights, such as the right not to be discriminated against on grounds of sex.<sup>214</sup> The Convention protects women against gender stereotyping and advocating women's inferiority. A State party that really wants to put an end to this type of discrimination and takes measures to that effect, must argue that such measures are justifiable on the ground that Article 5 requires them to be taken.<sup>215</sup>

## 3. *Justiciability*

Article 5(a) has been invoked by the authors of several communications under the Optional Protocol. The Committee has held States parties accountable for violating their obligations under this provision. This means that, within the framework of the individual complaints procedure, Article 5 is conceived of as a right that an individual can invoke against her own government. The justiciability of Article 5 on the domestic level (in individual court cases) is a subject of debate. According to some commentators, the provision lacks determinacy as there is no definition of key concepts such as stereotyped roles and the inferiority or superiority of either of the sexes<sup>216</sup> and the article encompasses 'the objective of eradicating role models, and thereby enlarging the freedom of choice of women, [which] is an extra-legal objective and that its realization is outside the scope of the law'.<sup>217</sup> However, the function of Article 5 may be of a different nature, providing both a basis on which to evaluate the norms and customs of one's society and to modify its social and cultural behaviours and beliefs which cause or sustain human rights violations. The emphasis therefore is on States parties' obligations to be proactive in implementing

<sup>212</sup> The fact that the Convention may have horizontal effect also follows from art 2(e), see the discussion in ch on art 2.

<sup>213</sup> CO Bulgaria, A/53/38, 18th Session (1998) para 233.

<sup>215</sup> Lijnzaad (n 7 above) 55.

<sup>216</sup> Ibid 45 and 57.

<sup>214</sup> Cook (n 17 above) 241.

<sup>217</sup> Ibid 46.

Article 5 concretely. Therefore, it seems incorrect to describe Article 5 as soft law.<sup>218</sup> In addition, Article 5 may very well play a role in determining in individual domestic cases what should qualify as direct or indirect discrimination against women.<sup>219</sup> In that sense the article helps to strengthen women's legal and *de facto* position in terms of their right not to be subjected to any form of discrimination, including gender stereotyping.

#### 4. Reservations

A remarkably small number of States parties have entered reservations to Article 5, considering its far-reaching content and scope.<sup>220</sup> Article 5, in combination with Article 2(f), belongs to the very core of the Convention.<sup>221</sup> These reservations are therefore incompatible with the object and purpose of the Convention under Article 28(2), as has been argued by several objecting States parties, including Mexico, Norway, France, and the Netherlands. The Committee has noted that reservations to the Convention cannot be justified with reference to traditions and religion.<sup>222</sup> This point of view has also been laid down in a general statement about the acceptability of reservations: 'Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention.'<sup>223</sup>

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<sup>218</sup> Packer (n 164 above) 54, stating that 'the undertaking is of a softer character than a legal claim'.

<sup>219</sup> Cook and Cusack (n 17 above) discuss a range of judgments of national and international or regional courts which directly or indirectly refer to the standards of art 5.

<sup>220</sup> Also see the discussion in ch on art 28.

<sup>221</sup> Cusack and Cook, 'Combating Discrimination on Sex and Gender' in C Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (2009) 223.

<sup>222</sup> eg CEDAW CO Israel, A/52/38, 17th Session (1997) para 157.

<sup>223</sup> CEDAW, 'General Statement on the Impact of Reservations' UN Doc A/53/38, 19th session (1998) part II para 17.

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