

# Consultancy Report on Maryland's Obligations under the Convention on the Elimination of All Forms of Discrimination of Women

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## Introduction

The Convention on the Elimination of all Forms of Discrimination against women (CEDAW) was ratified by Maryland without reservations in 2008. The new government of Maryland, elected in 2022, has expressed the overall aim for its reform program being to promote gender equality by improving women's and girl's sexual and reproductive health and take measures to end domestic gender violence. This report will address the CEDAW Committee's concerns regarding law and practice in Maryland, and assess what measures Maryland can implement in order to fulfill its obligations under the Convention.

### The CEDAW Committee's three-pronged approach to equality

*1) What is the CEDAW Committee's three pronged approach to equality and why is it relevant for the new Maryland Government's reform program?*

In order to eliminate discrimination against women in all its forms, the Committee sets out a holistic strategy of simultaneously targeting three categories of objectives. The CEDAW Committee's three-pronged approach is that of formal, substantive and transformative equality.<sup>1</sup> Articles 1-5 and 24, read in conjunction with the preamble provides the threefold object of the Convention and is the legal basis instructing state parties to adopt this approach.<sup>2</sup>

The principle of formal equality entails "to ensure full equality of women before the law and protection against discrimination in the public as well as the private sphere".<sup>3</sup> It is based on principles of Aristotelian philosophy proclaiming that equals should be treated equally.<sup>4</sup> Formal equality is also referred to as an "identical treatment" or "equal opportunity" approach and assumes that a failure to treat everyone the same with respect to formal opportunities and treatment would amount to discrimination. The formal equality approach to gender equality has as starting point that women and men should be treated equally, however differential treatment may be justified as reasonable. This approach is reflected in several international human rights instruments, such as the European Court of Human Rights.<sup>5</sup>

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<sup>1</sup> Holtmaat, «The CEDAW: a holistic approach», 110.

<sup>2</sup> Groenman et al. Het vrouwenverdrag in Nederland anno 1997 & GR 25, para. 6.

<sup>3</sup> Holtmaat, «The CEDAW: a holistic approach», 106.

<sup>4</sup> Freeman & Chinkin, "Article 1", 54.

<sup>5</sup> Freeman & Chinkin, "Article 1", 55.

Substantive equality is based on the notion that equality will sometimes demand the different treatment of persons who are differently situated in order to obtain a version of equality of results.<sup>6</sup> In relation to CEDAW, it means to improve the de facto position of women. Articles 3, 4 and 24 clarify state parties' obligation to take all appropriate measures to improve de facto equality with men. In order for existing inequalities resulting from historical and structural patterns not to be perpetuated, a formal equality approach is not sufficient.<sup>7</sup> Rather, the substantive equality approach calls for the assessment of laws and policies against the goals they aim to pursue.<sup>8</sup>

The transformative equality approach aims at a society where those features of existing legal, social, economic structures as well as cultures, religions and traditions that perpetuate inequality for women are fundamentally changed.<sup>9</sup> To achieve this, prevailing gender relations and the persistence of gender-based stereotypes needs to be addressed. The inclusion of the transformative equality approach is based on the fact that most pervasive forms of discrimination against women does not rest in law as such but are legally tolerated practices of national institutions and of private persons.<sup>10</sup> Article 5, read together with the preamble acknowledge that gender stereotypes and fixed parental roles is a root cause of discrimination against women. Article 5 read in conjunction with art. 2(f) means that discrimination, as defined in art. 1, also covers "prejudices and all customs and practices that are based on the inferiority of women and of stereotyped roles of men and women".<sup>11</sup> The Committee has thus addressed stereotypes as both a root cause for gender-based discrimination and discrimination of itself.

In reaching the aim of the reform program of the new Maryland Government, the Committee wishes to advance three strategies connected to the objectives of the Convention. These approaches are not meant to be applied separately but simultaneously as part of the holistic approach towards eliminating discrimination against women.

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<sup>6</sup> Fredman, "Substantive equality revisited".

<sup>7</sup> Holtmaat, «The CEDAW: a holistic approach», 106.

<sup>8</sup> Freeman & Chinkin "Article 1", p. 55.

<sup>9</sup> Holtmaat, «The CEDAW: a holistic approach», 111.

<sup>10</sup> Cook «State accountability under the CEDAW». 239-240.

<sup>11</sup> Holtmaat, «The CEDAW: a holistic approach», 109.

The first is an individual rights strategy, meaning to grant individuals a legal right to equal treatment before the law. The second is a social support strategy of providing social support to groups or individuals who suffer from less opportunities in life compared to others. At last, to reach the objective of transformative equality, there is a need to remove the structural causes of discrimination against women through a process of social and cultural change. This can be called a strategy of social and cultural change.<sup>12</sup> Article 5(a) of the Convention provides, not only the legal basis for this strategy, but also a legal *obligation* for state parties to invoke such a strategy.<sup>13</sup> In order to fully obtain equality with men in the areas of women's sexual and reproductive health and ending domestic gender violence, these issues must be approached at different levels in, and aspects of, society. This means targeting root causes for discrimination, acting to prevent discrimination from occurring and reacting when it does occur, in all levels with a range of measures.

## **Legal, religious and customary norms and the principle of gender equality**

*2) How does the CEDAW address conflicts between the principle of gender equality and legal, religious, customary and social norms? What must the state do to ensure that the CEDAW takes effect in national law?*

On the one hand, the right to freedom of religion is guaranteed in several Human Rights treaties.<sup>14</sup> On the other, the very concept of gender equality and the equal enjoyment of human rights may be challenged by mainstream ideologies such as religious orthodoxy and cultural conservatism.<sup>15</sup> In relation to this conflict, the CEDAW has taken a clear stance, creating a hierarchy of rights. Reading Art. 5(a) in conjunction with 2(f), the principle of gender equality is given superior force in case of a clash between cultural practices including religion. Although religion is not expressly mentioned in the Convention, it is encompassed in the macro-concept of culture.<sup>16</sup> The CEDAW Committee has in its concluding comments highlighted state parties obligation to forbid by law cultural practices that are discriminatory against women.<sup>17</sup> Further, aspects of life which are not mentioned in the convention may be covered by it.<sup>18</sup> As a dynamic instrument, the CEDAW anticipates the emergence of new

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<sup>12</sup> Holtmaat, «The CEDAW: a holistic approach», 110.

<sup>13</sup> Holtmaat, «Preventing violence against women», 72.

<sup>14</sup> ICCPR art. 18, ECHR art. 9.

<sup>15</sup> Raday, «Traitoralist religious and cultural challengers», 597.

<sup>16</sup> Raday, «Traitoralist religious and cultural challengers», 596.

<sup>17</sup> Raday, «Traitoralist religious and cultural challengers», 597.

<sup>18</sup> GR 28, par. 7 and par. 25.

forms of discrimination against women and thus the continued enforcement and revision of measures by State Parties to achieve gender equality.<sup>19</sup> Although the CEDAW has created a hierarchy of rights, the Committee stresses the need for dialogue with the civil society in the implementation of policies or programs aimed at cultural change.<sup>20</sup>

Ensuring that the Convention takes effect in national law, the State Party should implement the Convention in national law and give the provisions of the Convention precedence over any conflicting statutes. In this manner, the provisions of the Convention can be invoked in national courts, assuming a dualist system.<sup>21</sup> The state party is responsible for its obligations under the Convention regardless if it is part of national law.

### **Women's protection against domestic violence**

3) Analyze the relationship between women's protection against domestic violence under Maryland's Constitution, the Tribal Leadership Act, the Criminal Procedure Act and the CEDAW Committee's interpretation of the prohibition against discrimination in Article 1. What changes are required to ensure that Maryland's laws, practices and procedures concerning domestic violence are in consonance with the CEDAW's three pronged approach to transformative equality?

#### **Article 1 in the CEDAW:**

The Convention only refers to discrimination on the basis sex. The term "sex" refers to biological differences between men and women. However, the convention recognizes that society's cultural meaning for what it is to be a man or a woman, and the roles and identities attributed to women and men is socially constructed. The term "gender" refers to these socially constructed identities. Reading art. 1 in conjunction with 5(a) and 2(f) makes it clear that gender-based discrimination of women is also covered by the convention.<sup>22</sup>

The definition of discrimination laid out in article 1 of the Convention includes gender-based violence.<sup>23</sup> Gender-based violence is violence "directed against a woman because she is a woman or that affects women disproportionately".<sup>24</sup> Violence against women impairs or

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<sup>19</sup> GR 28, para. 8.

<sup>20</sup> Holtmaat, «The CEDAW: a holistic approach», 110.

<sup>21</sup> CEDAW/C/NOR/5 and CEDAW/C/NOR/6.

<sup>22</sup> GR 28, para. 5.

<sup>23</sup> GR 12, 19 & GR 35.

<sup>24</sup> GR No. 19, para. 6. & GR 35 No. 35 para. 1.

eradicates women's enjoyment of human rights under international law, and acts of violence may further constitute a breach of other provision in the Convention even if they do not mention violence explicitly.<sup>25</sup>

### **Responsibilities of the state**

According to the due diligence principle presented in art. 2(e) in the Convention, states are responsible to take all appropriate measures to eliminate discrimination against women also by any person, organization or enterprise.<sup>26</sup> It is by this principle, established in the *Goecke case*, the state may be held accountable for its actions or inactions in cases of domestic violence.<sup>27</sup> In order to be in line with the due diligence principle, the State party must adopt a wide variety of measures to end gender-based violence against women, which includes domestic violence. It is required to have laws, institutions and a structure in place to tackle gender-based violence and to ensure that they function effectively in practice.<sup>28</sup>

### **Required changes to the legislation and practices of Maryland**

Maryland has already a provision in its Constitution paragraph 2(1) prohibiting discrimination on the grounds of sex. However, the practical realization of this principle is not ensured through law and other appropriate means, and the prohibition against sex discrimination does not take precedence when coming into conflict with customary norms in the matters of marriage and family life. In order for Maryland's legislation to be in consonance with the Convention and its three-pronged approach to equality there is need for changes in the Constitution, the Tribal Leadership Act and the Criminal Procedure Act of Maryland.

Articles 2 (b), (c), (e), (f) and (g) and article 5 (a) of the Convention, require the State party to adopt legislation prohibiting all forms of gender-based violence against women and girls.<sup>29</sup>

Due to the precedence of the prohibition against gender discrimination, paragraph 2(3) of the Constitution must be repealed. By repealing art. 2(3) of the Constitution, the legal basis for the Tribal Leadership Act section 1, and the Criminal Procedure Act section 3 is removed.

Section 3 of the Criminal Procedure Act constitutes discrimination against women as defined

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<sup>25</sup> GR No. 19, para. 6.

<sup>26</sup> GR 19, para. 9.

<sup>27</sup> *Goecke v. Austria* (2007), Communication No.5/2005.

<sup>28</sup> GR 35, para. 24 b.

<sup>29</sup> GR 35, para. 26 a.

in art. 1, by exempting family conflicts from the power of the police and courts.<sup>30</sup> It must therefore be repealed.

Regardless of what type of legal system Maryland will continue to have, the State party must ensure that survivors of gender-based violence against women are protected and that they have access to justice.<sup>31</sup> Concerning section 1 in the Tribal Leadership Act, the Committee expresses its concern that the plural legal system of Maryland will not be able to provide the necessary access to justice as demanded by the Convention, but instead in practice perpetuate customary norms and traditions that are discriminatory against women. Following article 2(c) of the Convention, the Committee sees it necessary to transfer the judicial powers of the Tribal leaders in matters of family conflicts to national tribunals.

To facilitate the State party in developing a strategy for social and cultural change as means to achieve transformative equality, it is necessary to clarify the legal obligations of article 5(a) of the CEDAW in relation to combating domestic violence. Article 5(a) encompasses a duty to ban stereotypes from public life and a duty to ban stereotypes from law and public policy.<sup>32</sup>

To ban negative gender stereotypes from cultural and social life means the state has to intervene in the institutions and social relations where harmful stereotypes of women are used or expressed. This can entail presentations of female and male roles in advertising, the media or pornography that that may inspire violence against women.<sup>33</sup> The committee urges the state party to establish a system at the highest political level to co-ordinate and guide action in favor of women and for the prevention of the persistence of stereotypes that discriminate against women.<sup>34</sup> Further, a revision of article 2(2) of the Constitution is needed.

Article 5(a) read in conjunction with 2(f) implies the duty to track down and eliminate law and public policy in which gender stereotypes are at the basis. Regarding article 2(2) of the Constitution, the Committee pays attention to its limited practical impact but recognizes that it embodies gravely stereotypical assumptions about the role of women in the society of Maryland. The provision is not compatible with article 5(a) and (b) in the Convention. In

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<sup>30</sup> GR 35, para. 31.

<sup>31</sup> GR 33, para. 1.

<sup>32</sup> Holtmaat, «Preventing violence against women», p. 73.

<sup>33</sup> Holtmaat, «Preventing violence against women», p. 73.

<sup>34</sup> Building on Concluding Comment Morocco (1997), UN Docs A/51/38, CEDAW/C/SR. 312,313 and 320 para. 72.

order for the Constitution to be in consonance with article 2(a) and 5(a) and (b) of the Convention, paragraph 2(2) of the Constitution must be amended or repealed.<sup>35</sup>

Further, indirect discrimination in law shall be addressed by positive measures to make judges, lawyers and law enforcement personnel aware of and sensitive to discrimination perpetuated by stereotypes in existing legislation.<sup>36</sup> The *Vertido case* highlighted the consequences for women being met with stereotyped assumptions in relation to cases of sexual violence. The state obligation to prevent indirect discrimination due to stereotypes in law enforcement can be accommodated by education of law enforcement personnel on this issue.<sup>37</sup> This must, however, not hamper measures taken on the basis of existing inequalities or biological differences between women and men with the effect of improving the de facto position of women.<sup>38</sup>

The Committee at last argues the state party must take measures to enable women and men to take on different roles than those that are stereotypically and traditionally attributed to them. In relation to domestic violence, restructuring family law or social law in a way that promotes diversity in gender roles is encouraged.<sup>39</sup>

## **Jurisprudence on abortion**

*4) How has the CEDAW through its jurisprudence dealt with abortion? What changes are required to ensure that Maryland's legislation and procedures regarding abortion are in consonance with the CEDAW's three pronged approach to transformative equality?*

The equal right to health can be found in CEDAW art. 12. Abortion was first included in General Recommendation 24, advising that legislation criminalizing abortion should be amended when possible.<sup>40</sup> The *LC v. Peru case* was the first case before the Committee regarding abortion, providing a benchmark by holding the state accountable for a lack of effective procedures able to provide the medical services required by the girl's

<sup>35</sup> The Committee made its advice in a similar case on the Irish constitution: *Concluding Comments: Ireland*, CEDAW/C/IRL/CO/4-5, 2005, paras. 24–25

<sup>36</sup> Concluding comment on Italy (1997), UN Docs A/52/38, CEDAW/C/SR. 346 and 347, para. 357.

<sup>37</sup> *Karen Tayag v. Phillipines*, CEDAW/C/46/D/18/2008.

<sup>38</sup> Holtmaat, «Preventing violence against women», 75.

<sup>39</sup> Holtmaat, «Preventing violence against women», 76.

<sup>40</sup> GR 24, para. 14.



physical and mental condition. Further the lack of an opportunity to appeal the decision constituted a breach of the Convention.<sup>41</sup>

General recommendation 35 defines criminalization of abortion, denial or delay of safe abortion and post-abortion care as forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.<sup>42</sup> Following this approach, the Committee found that the UK and Northern Ireland were violating the Convention by maintenance of criminal laws disproportionately affecting women and girls.<sup>43</sup> In a concluding observation to Denmark, the Committee advised the state to remove punitive measures for women seeking abortion and consider amending the abortion law in the Faroe Islands.<sup>44</sup>

### **Required changes to Maryland's legislation and procedures**

To ensure that the state of Maryland's legislation and procedures are in consonance with the CEDAW's three-pronged approach to transformative equality, the state should grant individual rights to women and girls in regard to abortion, it should design and implement effective support systems and implement a social and cultural change strategy.

In order for Maryland's legislation to be in consonance with the Convention, amendments need to be made to section 5 in the health act and section 6 of the Responsible Parenthood and Reproductive Health Act. The criminalization of abortion in all other circumstances except when the life of the mother is at risk is a violation of art. 1 and 2 read together with 5(a), 12 and 16, constituting violence against women.<sup>45</sup> Maryland should adopt legislation granting accessible therapeutic abortion to women and girls in need for this procedure due to their physical or mental health. This includes women and girls experiencing rape and incest.<sup>46</sup>

The Committee highlights the importance that the procedural system is effective and accessible, and that the services legal by law are actually provided. Information must be accessible. It is also necessary that a system for appeal of an eventual refusal of therapeutic abortion is put in place and that post-abortion care is granted and of quality.

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<sup>41</sup> LC. v. Peru, CEDAW/C/50/D/22/2009.

<sup>42</sup> GR 35, para. 18.

<sup>43</sup> CEDAW/C/OP.8/GBR/1, para 72.

<sup>44</sup> Concluding Observations on the 9th State Report from Denmark (09/03/2021).

<sup>45</sup> GR 35, para. 18 & CEDAW/C/OP.8/GBR/1, para 72.

<sup>46</sup> LC. V. Peru CEDAW/C/50/D/22/2009.

Recalling the concerns of the CEDAW committee's concluding observations on Maryland from 2020 about the lack of access for single women and girls to family planning, the committee recommends amendments to section Section 6 of the Responsible Parenthood and Reproductive Health Act to be in consonance with the Convention. Allowing only married women and men access to information about reproductive health constitutes discrimination against women as it impairs or nullifies their enjoyment of other human rights, such as the right to education. Section 6 thus constitutes a breach of art. 10 (a), (g) and (h) of the Convention.

Further, the social and cultural change strategy implies that traditional gender values and stereotypes perpetuated in public and private institutions are met with effective countering remedies. Recalling that the state party is responsible to ban stereotypes from laws and policies and from public life according to art 5(a), the health system and the school system requires financial support and programs for education of health staff and other measures aimed at the empowerment of women.

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