

SUBSTANTIVE EQUALITY, AUTONOMY, AND REPRODUCTIVE RIGHTS

Reproductive rights lie at the heart of human rights for women. Because reproductive health services are services that primarily women need, due to their different reproductive capacities, ensuring access to reproductive health services such as contraception, abortion, and maternal health care is essential to ensuring that women can equally exercise their human rights.¹

This factsheet provides background information on how the Committee on the Elimination of Discrimination against Women (CEDAW) and the Human Rights Committee (HRC) can fully utilize two important principles, substantive equality and autonomy, to analyze reproductive rights violations and provide states with the most comprehensive set of recommendations. These principles are central to the mandates of both Committees and using them more thoroughly and explicitly in concluding observations and other jurisprudence will increase clarity for states on their obligations to ensure women's reproductive rights.

Substantive Equality and Autonomy in Brief

A. SUBSTANTIVE EQUALITY

Both the Convention on the Elimination of Discrimination against Women (CEDAW Convention) and the International Covenant on Civil and Political Rights (ICCPR) recognize that equality is essential to ensuring women's human rights.² However, traditional models of equality have failed to address the historical gender discrimination, prevailing gender stereotypes, and traditional roles of women that perpetuate discrimination and inequality.

The principle of substantive equality seeks to remedy entrenched discrimination by requiring states to take positive measures to address the inequalities that women still face. Substantive equality seeks to address inequalities by requiring states to take the following steps:

- **Power Structures:** States should examine and address current societal power structures and analyse the role that gender plays within them;
- **Potentially Different Treatment:** States should recognize that equal treatment may not be sufficient to overcome inequalities, particularly when equal treatment disadvantages women;
- **Structural Change:** States should change institutions in order to address the inequalities experienced by women, rather than requiring women to change to conform to a male norm;
- **Equal Outcomes:** States should focus on equal outcomes for women, including different groups of women, which may require positive measures, including affirmative action and different treatment of men and women, to overcome historical discrimination and ensure that institutions uphold women's rights.³

Several treaty monitoring bodies have utilized a substantive equality analysis in assessing state compliance with women's rights:

- The HRC has urged states to address both de jure and de facto discrimination in private and public spheres, take efforts to eliminate gender stereotypes about women in family and society, and address practices such as cutting funds to social programs that disproportionately impact women.⁴ The HRC has noted that ensuring equality requires not only removing barriers but also taking positive measures "to achieve the effective and equal empowerment of women"⁵ and has urged states to take affirmative measures to ameliorate social conditions such as poverty and unemployment that impact women's right to equality in healthcare.⁶

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- CEDAW has noted that “the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results” and that “[t]he position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed.”⁷ CEDAW has called on states to not only ensure access to reproductive health services but to also ensure positive reproductive health outcomes, such as meeting the need for contraceptives and lowering rates of maternal mortality and adolescent pregnancy.⁸
- The Committee on Economic, Social, and Cultural Rights (CESCR) has called on states to recognize historical discrimination, finding that “[e]liminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.”⁹

B. AUTONOMY AND EQUALITY

Ensuring women’s right to non-discrimination and substantive equality requires that women are able to exercise autonomy and make important life decisions without undue influence or coercion. Full exercise of autonomy requires that choices are meaningful, not limited by discrimination or lack of opportunities or possible results.¹⁰

The principle of autonomy is reinforced by a number of rights outlined in the ICCPR and CEDAW Convention. The ICCPR reinforces the need for autonomy when it enumerates rights to equal recognition and equality before the law, marriage only with free and full consent, freedom of information and expression, freedom from forced or compulsory labor, and freedom from torture or ill-treatment.¹¹ The CEDAW Convention also outlines the need for autonomy throughout its articles, including in the areas of legal capacity, political participation, and family planning.¹²

The Convention on the Rights of Persons with Disabilities (CRPD) also enumerates that autonomy, including the freedom to make one’s own choices, is one of the guiding principles of the convention.¹³ The CRPD Committee has consistently called on states to ensure that persons with disabilities can make decisions for themselves by eliminating substituted decision-making regimes, such as guardianship, and replacing them with systems of accessible information and decision-making support.¹⁴

Applying Substantive Equality and Autonomy to Reproductive Rights

Substantive equality and autonomy can play an important role in analyzing and addressing reproductive rights violations, because they require that states empower women to make choices about their own reproductive health and lives while also requiring states to address the historical causes of health-related inequalities for women.

Both CEDAW and the HRC have recognized that reproductive rights are essential parts of their mandates, including as matters of the right to health, to privacy, to decide on the number of spacing of children, to life, to equality, and to be free from ill-treatment.¹⁵ As the Committees have noted, **reproductive equality** requires states to not only address barriers to accessing reproductive health services but also take positive measures to ensure women’s access, including by using all appropriate means.¹⁶

- The HRC, through its decision in *KL v. Peru*, recognized that girls may be more susceptible to mental suffering as a result of reproductive rights violations because of their age and thus require special protection from ill-treatment as a result of those violations.¹⁷

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- In its *Alyne v. Brazil* decision, CEDAW outlined that in the realm of reproductive health, “policies of the State party must be action- and result-oriented as well as adequately funded” and that “[t]he lack of appropriate maternal health services in the State party that clearly fails to meet the specific, distinctive health needs and interests of women” violates not only the right to health and life for women but also the rights to equality and non-discrimination.¹⁸

At its core, **reproductive autonomy** requires that women have access to reproductive health services, and that those services can be accessed with their consent alone.¹⁹ As the CEDAW Committee and HRC have noted, women should not be barred from accessing reproductive health services that only they need, including abortion, and as CEDAW has stated, they should not have to obtain the authorization of spouses, parents, or judges to access those services.²⁰ Additionally, CEDAW has noted that ensuring adequate information is an important part of health, while both CEDAW and the HRC have recognized the importance of facilitating informed consent and guaranteeing freedom from coercion.²¹ CEDAW has then recommended that states “[r]equire all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice.”²²

Based on the mandates of CEDAW and the HRC to address violations of reproductive rights in the context of autonomy and substantive equality, the Committees may wish to adopt the following standards when addressing issues related to reproductive rights:

- States need to adopt policies and practices that specifically address the barriers that women face to accessing reproductive health services, which are services that women primarily require, and also proactively facilitate that access, recognizing that failure to do so is a violation of women’s right to equality. These policies and practices should recognize the marginalized situation of women and seek to transcend historical discrimination, gender stereotypes, and the traditional roles of women in the family and in society.
- The guarantee of equality for women and girls requires states to take “all necessary measures”²³ to ensure that women are able to access reproductive health services, including contraception, abortion, and maternal health services, and to facilitate that access.
- Women’s equality requires that women can exercise full reproductive autonomy. As such, women should not face any legal or practical barriers to accessing reproductive health services. They should be provided with the information they need to make informed decisions, be allowed to make decisions on their own without the need for a third party to consent, and should not face criminal penalties or stigma when making reproductive decisions. Women should also be protected from violence, which can effectively strip them of their sexual and reproductive decision-making power.
- To ensure targeted and effective concluding observations and recommendations, the HRC and CEDAW should place the particular circumstances of the woman, or group of women, experiencing human rights violations at the center of its analysis, including by recognizing women’s intersectional identities and existing structural and socio-economic conditions. Doing this will increase the usefulness of concluding observations and recommendations by providing guidance for states in changing and remedying those laws, policies, or practices which give rise to the violations experienced.

Endnotes

¹ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess., 1999), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, paras. 11-12 U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].

² Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, art. 1, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW]; International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

(endnotes continued)

- ³ CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, (30th Sess., 2004), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, paras. 8-10, U.N. Doc. HRI/GEN/1/Rev.7 (2004) [hereinafter CEDAW Committee, *Gen. Recommendation No. 25*]; Committee on Economic, Social and Cultural Rights (ESCR Committee), *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, para. 10, U.N. Doc. E/C.12/GC/20 (2009) [hereinafter ESCR Committee, *Gen. Comment No. 20*]; Human Rights Committee, *General Comment No. 28: Article 3 (The equality of rights between men and women)*, (68th Sess., 2000), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, para. 3, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 28*]; CEDAW Committee, *General Recommendation No. 28: The core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, (47th Sess., 2010), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, para. 20, U.N. Doc. CEDAW/C/GC/28 (2010) [hereinafter CEDAW Committee, *Gen. Recommendation No. 28*]; see also Sandra Fredman, *Engendering Socio-Economic Rights in WOMEN AND SOCIO-ECONOMIC RIGHTS* 12-13 (2011).
- ⁴ Human Rights Committee, *Concluding Observations: Cape Verde*, para. 8, U.N. Doc. CCPR/C/CPV/CO/1 (2012); *Concluding Observations: Jordan*, para. 7, U.N. Doc. CCPR/C/JOR/CO/4 (2010); *Canada*, para. 20, U.N. Doc. CCPR/C/79/Add.105 (1999).
- ⁵ Human Rights Committee, *Gen. Comment No. 28, supra* note 3, para. 3.
- ⁶ Human Rights Committee, *Concluding Observations: Kyrgyzstan*, para. 401, U.N. Doc. A/55/40 (2000).
- ⁷ CEDAW Committee, *Gen. Recommendation No. 25, supra* note 3, paras. 8 & 10.
- ⁸ See CEDAW Committee, *Concluding Observations: Congo*, para. 35(f), U.N. Doc. CEDAW/C/COG/CO/6 (2012); *Uruguay*, para. 203, U.N. Doc. A/57/38 (2002).
- ⁹ ESCR Committee, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3)*, (34th Sess., 2005), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, para. 8, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).
- ¹⁰ Rebecca Cook, *Human Rights and Reproductive Self Determination*, 44 THE AMERICAN UNIVERSITY LAW REVIEW 975, 1007 (1995) [hereinafter Cook].
- ¹¹ ICCPR, *supra* note 2, Arts. 7, 8, 16, 19, 23, & 26.
- ¹² CEDAW, *supra* note 2, Arts. 7, 15, & 16(e).
- ¹³ Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, art. 3, G.A. Res. A/RES/61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/61/611, (*entered into force* May, 3 2008).
- ¹⁴ Committee on the Rights of Persons with Disabilities (CRPD Committee), *Concluding Observations: Spain*, paras. 33-34, U.N. Doc. CRPD/C/ESP/CO/1 (2011).
- ¹⁵ See *K.L. v. Peru*, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.C. v. Peru*, CEDAW Committee, Commc'n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (2011); *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Commc'n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011); CEDAW Committee, *Concluding Observations: Togo*, para. 29, U.N. Doc. CEDAW/C/TGO/CO/5 (2006).
- ¹⁶ Human Rights Committee, *Gen. Comment No. 28, supra* note 3, para. 3; CEDAW Committee, *Gen. Comment No. 28, supra* note 3, para. 20.
- ¹⁷ *K.L. v. Peru*, Human Rights Committee, Commc'n No. 1153/2003, para. 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).
- ¹⁸ *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Commc'n No. 17/2008, para. 7.6, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).
- ¹⁹ Cook, *supra* note 10, at 1007.
- ²⁰ *K.L. v. Peru*, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, *Gen. Recommendation No. 24, supra* note 1, paras. 11 & 21.
- ²¹ CEDAW Committee, *Gen. Recommendation No. 24, supra* note 1, para. 22; Human Rights Committee, *Concluding Observations: Slovakia*, para. 13, U.N. Doc. CCPR/C/SVK/CO/3 (2011); *Czech Republic*, para. 10, U.N. Doc. CCPR/C/CZE/CO/2 (2007).
- ²² CEDAW Committee, *Gen. Recommendation No. 24, supra* note 1, para. 31(e).
- ²³ CEDAW Committee, *Concluding Observations: Chile*, para. 35(a), U.N. Doc. CEDAW/C/CHL/CO/5-6 (2012).