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978-1-107-03462-4 - Women's Human Rights: CEDAW in International,
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Edited by Anne Hellum and Henriette Sinding Aasen

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Introduction

ANNE HELLUM AND HENRIETTE SINDING AASEN

1 Background and overall perspectives

For most of human history, men have been assigned a superior status in law. In the twentieth century, however, with the drafting of international and regional human rights conventions and with the emerging women's movement, the political and legal atmosphere changed, and discrimination based on sex and gender became a human rights concern.¹ Following the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 explicitly affirmed the obligation of States Parties to ensure the equal rights of men and women to enjoy all civil, political, social and economic rights set forth in the two Covenants.² The United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted on 18 December 1979, reaffirming

The editors would like to thank Geir Ulfstein, Andreas Føllesdal and the authors for their inputs to the introduction.

¹ The CEDAW, like the UN Charter, the UDHR, ICCPR and ICESCR, uses the term sex and sex-based discrimination. At the time of the enactment of these instruments, the term sex was understood as a biological category. The term gender, which in the social sciences is understood as a social category, does not appear in international human rights discourse until the 1990s. Today the term gender is used by all human rights treaty bodies without any clear definition. In General Recommendation 28, the CEDAW Committee uses the following definition: 'The term gender refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favoring men and disadvantaging women' (para. 5). A comprehensive account of the use of the terms women, sex and gender in the CEDAW and UN treaties and documents is found in C. Chinkin and M. A. Freeman, 'Introduction' in M. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* [hereinafter *CEDAW Commentary*] (Oxford University Press, 2012) 14–15.

² Article 3 of the ICCPR, Article 3 of the ICESCR.

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[More information](#)

in the preamble faith in fundamental human rights, dignity and worth of the human person and in the equal rights of men and women.

The framers of the Convention concluded that the gender-neutral symmetrical approach that covered discrimination on the basis of sex in other international treaties did not sufficiently recognize the pervasive discrimination against women on the basis of their sex, and that a convention and a treaty body with an asymmetric and gender-specific approach was needed.³ The preamble to the CEDAW expresses concern for continued discrimination against women despite the existing international covenants on human rights that promote non-discrimination and equality of rights of men and women. Concerned that 'in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs', the preamble emphasizes the importance of a holistic approach that includes civil, political, social and economic rights, in order to improve the situation of women. Recognizing 'a change in the traditional role of men as well as the role of women in society', 'the great contribution of women to the welfare of the family and to the development of society' and 'the social significance of maternity and the role of both parents in the family and in the upbringing of children', the preamble envisions a transformative approach to women's rights and gender equality. The preamble forms the backdrop for the three overarching themes of this book:

- the CEDAW's *transformative* approach, linking equal rights, social support and socio-cultural elements;
- the CEDAW's *holistic* approach, linking civil, political, social and economic rights;
- the CEDAW's *gender-specific* approach to equality and non-discrimination.

The CEDAW as a gender-specific instrument, acknowledging the shortcomings of other human rights regimes and the indivisibility of all human rights, is applicable to both the private and public domains, and is seen by optimist and constructivist feminist legal scholars as the equality and non-discrimination regime with the greatest potential to ensure substantive gender equality for women.⁴ In a situation where women's protection

³ The main view of the framers of the Women's Convention is described in A. Byrnes, 'Article 1' in M. Freeman, C. Chinkin and B. Rudolf (eds.), *CEDAW Commentary* 51–70 at 52.

⁴ L. Farha, 'Committee on the Elimination of Discrimination against Women: women claiming economic, social and cultural rights – the CEDAW potential' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*

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Excerpt

[More information](#)

INTRODUCTION

3

against discrimination based on sex and gender is embedded in a rapidly increasing body of international, regional and national hard and soft law instruments, this perspective calls for research that addresses the CEDAW regime's actual added value in comparison to and in interaction with other mechanisms. To this end, this book seeks to situate the CEDAW and its Committee in a legal landscape where states are under multiple interacting international, regional and national obligations to respect, protect and fulfil women's right to equality and non-discrimination. The overall aim is to provide an understanding of the CEDAW regime's potential and actual added value in relation and comparison to coexisting and overlapping international, regional and domestic equality and non-discrimination regimes.

The authors in this book address three interrelated theoretical assumptions regarding the contribution of the CEDAW in international, regional and national law. The first is that the Convention's transformative approach, which combines an equal rights element, a social support element and a socio-cultural element, makes it better equipped than other treaties to address existing legal, social and cultural barriers to substantive equality.⁵ The second assumption is that the CEDAW's recognition of the interdependence and indivisibility of civil, political, social and economic rights makes it the instrument with the greatest potential to address the close relationship between women's marginalization, social rights and inequality.⁶ The third assumption is that the establishment of a gender-specific treaty with a specialized treaty body is a measure that will strengthen the capacity of individual women and women's organizations to make States Parties accountable for their obligation to respect, protect and fulfil the human rights of women.⁷

These three assumptions form the overall point of reference for the authors in this book. In combination with the notion of added value, they

(Cambridge University Press, 2008) 553–68; R. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010); R. Holtmaat and J. Naber, *Women's Human Rights and Culture* (Cambridge: Intersentia, 2011); C. A. MacKinnon, 'Creating international law: gender as a new paradigm' in C. M. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes* (Cambridge University Press, 2012) 17–32.

⁵ Cook and Cusack, *Gender Stereotyping*; Holtmaat and Naber, *Women's Human Rights and Culture*.

⁶ Farha, 'Committee on the Elimination of Discrimination against Women'.

⁷ K. Knop, 'Why rethinking the sovereign state is important for women's international human rights law' in R. Cook (ed.), *Human Rights of Women. National and International Perspectives* (University of Pennsylvania Press, 1995) 153–64.

frame the key research questions that are dealt with in the different sections of the book. A distinction between potential and actual added value of the CEDAW is used in order to distinguish the future potential of the CEDAW from current and past achievements, and to separate normative content from empirical realities.

Part I of the book deals mainly with the CEDAW's *potential* added value with regard to legal and social reform, due to its transformative, holistic and gender-specific approach. Part II examines mainly the *actual* added value of the CEDAW, in particular with regard to social and economic rights. There are, however, overlapping analyses of potential and actual added value of the CEDAW in both these parts, since these normative and empirical aspects are interrelated and intertwined. Part III presents national case studies that explore the actual and potential domestic impact of the CEDAW from Northern Europe, Southern Asia, Canada and Southern Africa.

Posing critical questions and providing analysis of the CEDAW, the role and work of the CEDAW Committee, the implementation and domestication of the CEDAW, as well as the interplay between the CEDAW and other international and regional human rights regimes, the chapters in this volume constitute a critical assessment of the CEDAW's potential and actual contribution to international, regional and national legal developments.

2 Potential added value of the transformative approach (Part I)

The first part of the book addresses the potential added value of the CEDAW and the work of the CEDAW Committee. As pointed out by Rikki Holtmaat, the *transformative* approach is a crucial aspect of the CEDAW. One objective of the Convention is to alter the existing patriarchal and discriminatory structures and patterns embedded in law, society and culture.⁸ In line with the demand for substantive equality, the object and purpose of the Convention is threefold: (1) to ensure full equality of women before the law, and protection against discrimination in the public and the private spheres; (2) to improve the de facto position of women; and (3) to address gender-based stereotypes that uphold unequal gender relations.⁹

⁸ See R. Holtmaat, 'Article 5' in M. Freeman, C. Chinkin and B. Rudolf (eds.), *CEDAW Commentary* 141–67; R. Holtmaat, Chapter 3, this volume.

⁹ General Recommendation No. 25.

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Excerpt

[More information](#)

INTRODUCTION

5

This three-pronged approach sets the CEDAW apart from other gender-neutral and symmetric human rights regimes, such as the ICCPR, the ICESCR, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Union Directive on Gender Equality. Unlike these other international and regional instruments, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) is by and large based on the same model as the CEDAW.

The gender-specific three-pronged transformative approach of the CEDAW, which to a large extent has served as a model for the Maputo Protocol, has been viewed as a more fruitful and promising approach than the approach of formal gender-neutral equality.¹⁰ Due to its emphasis on the need for social support systems that address the legal, social and cultural obstacles to substantive equality, including the needs and vulnerabilities particular to women, the CEDAW is regarded as the human rights instrument with the greatest potential to address and combat women's socio-economic marginalization, dependency and inequality.¹¹

The assumptions of significant potential added value related to the CEDAW's transformative approach raise a series of interrelated research questions dealt with by the authors in Part I of the book. The question of how the transformative approach of the CEDAW and the CEDAW Committee supplements other international and regional conventions and treaty bodies is an overarching theme. A key concern in this regard is how the CEDAW and regional instruments strike a balance between equality and difference in order to achieve substantive equality in different political, social and cultural contexts. A related question regarding the legitimacy and the effectiveness of the CEDAW as a tool for change is how a balance is struck by the CEDAW and other regional instruments between effective implementation of women's protection against gender stereotypes embedded in social and cultural beliefs on the one hand, and respect for national values, sovereignty and democracy on the other hand. A critical concern regarding the CEDAW regime as a tool for social and cultural change is its conception of culture. In particular, it is important to address the relationship between static and homogenous approaches to culture, which see culture as a barrier to change, in contrast to culture

¹⁰ Cook and Cusack, *Gender Stereotyping*; Holtmaat and Naber, *Women's Human Rights and Culture*.

¹¹ Farha, 'Committee on the Elimination of Discrimination against Women'.

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[More information](#)

understood as dynamic, contested and changing, and as such a tool for change.¹²

The authors in this part of the book rely on various methods and sources to address these research themes. Andrew Byrnes, Rikki Holtmaat and Simone Cusack use a textual legal approach to describe and analyze the development of the norms and procedures associated with the transformative approach, focusing on the General Recommendations, individual communications and Concluding Comments of the CEDAW Committee. Fareda Banda takes stock of the actual achievements of the CEDAW regime thus far by addressing the potential synergies between the CEDAW and the Working Group on Laws that Discriminate against Women (WG) from 2010. Through comparative Latin American and African perspectives, Cecilia Bailliet and Celestine Nyamu Musembi explore the CEDAW's potential added value as well as current limitations in different legal, social and cultural contexts. Bailliet uses narratives in order to give voice to individual women's experiences of human rights violations. Nyamu Musembi situates her comparison between the CEDAW and the Maputo Protocol in the context of local court cases and the lives of individual women.

2.1 *Overview of the chapters in Part I*

Andrew Byrnes (Chapter 1) introduces the CEDAW and its Committee. He provides a detailed presentation and analysis of the Committee, including fresh and critical assessments of its composition, reporting procedures, work (and workload), and the role and potential for international and domestic impact. Although the main focus is on the Committee, the special nature of the CEDAW, with its particular transformative and holistic approach, is integrated into the discussion of the role and function of the Committee. The analysis of how the CEDAW is advancing equality in a world of social and cultural diversity and sovereign states gives insight into the many and significant challenges facing this particular human rights body. A key question is how to strike a balance between the concern for effective implementation and the legal, political and social legitimacy of the Committee in situations where women's rights issues are deeply related to interpretations of culture.

¹² S. E. Merry, 'Constructing a global law – violence against women and the human rights system', *Law & Social Inquiry* 28:4 (2003) 941–77.

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Excerpt

[More information](#)

INTRODUCTION

7

Fareda Banda (Chapter 2) follows up the question of effectiveness and added value of the CEDAW with a timely discussion of the need and function of the newly appointed UN Working Group on Laws that Discriminate against Women. The Working Group was established by the Human Rights Council in 2010 due to failure of states to revoke and amend laws that discriminate against women. An important question is whether or not there is a need for this body, and what role it should have, in addition to the existing CEDAW regime. Considering the process leading up to the establishment of the Working Group, and the discussion of its mandate (which is more limited than that of the CEDAW), challenges and opportunities, Banda provides valuable and critical reflections not only on this new body, but also on the role, potential and limitations of the CEDAW and its Committee in fighting discrimination against women.

Rikki Holtmaat (Chapter 3) divides the overarching goal of the CEDAW into three sub-aims: to ensure full equality of women before the law; to improve the *de facto* position of women; and to modify gender-based stereotypes. She deals mainly with the third sub-aim and the corresponding legal and political methods envisioned in Article 5(a) of the CEDAW, which include transformative equality as a distinct aspect. The potential added value of the CEDAW's transformative jurisprudence, which combines an equal rights element, a social support element and a socio-cultural element, raises a series of questions about its democratic and socio-cultural legitimacy. Entering a realm where cultural, religious and national norms and values often conflict, Holtmaat explores how the CEDAW Committee strikes a balance in its jurisprudence between effective implementation of women's protection against gender stereotypes embedded in social and cultural beliefs and practices, and national sovereignty and democracy. A related question is how the Committee strikes a balance between equality and difference in order to ensure substantive equality in different historical, social and cultural contexts.

Simone Cusack (Chapter 4) states that, during its first thirty years of operation, the CEDAW has proved to be a catalyst for legal and policy reform, an effective tool in domestic litigation, advocacy and activism, and an important means of holding States Parties accountable for violations of women's human rights. However, much of the potential of the CEDAW for advancing women's human rights has yet to be realized. According to Cusack, one area of considerable untapped potential incorporates the obligations of States Parties in Articles 2(f) and 5(a) of the CEDAW to modify or transform gender stereotypes and eliminate wrongful gender stereotyping. Cusack provides in-depth analysis of the term 'gender

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Excerpt
[More information](#)

stereotyping' and explains why stereotyping is a human rights issue. She argues that the CEDAW provides a powerful yet largely unexplored legal framework for addressing gender stereotyping. In addition, she identifies some of the limitations of using the CEDAW as a framework for addressing stereotyping, and considers how those limitations might be overcome or minimized.

Cecilia M. Bailliet (Chapter 5) contributes to the discussion on elimination of all forms of discrimination against women by giving important input to one of the most challenging dilemmas within the field of women's rights: the balance between equality and difference. She argues that maternity is a valuable life project of women, and that motherhood should be viewed as a type of agency to be protected by the state. While the aim of Article 5(b) of the CEDAW is to combat prejudice or inferior conceptions of women and lift the social perception of maternity, this provision has been overshadowed by Article 5(a) in CEDAW jurisprudence and the academic literature. In contrast, the regional Inter-American Court of Human Rights has adopted a difference-oriented perspective in order to protect maternal identity as part of women's human dignity. The Court uses narratives or individual testimonies to give voice and recognition to the experiences of individual women, and to elucidate the scope of women's right to a life project. The case of *Miguel Castro-Castro Prison v. Peru* (2006) serves to define the content and scope of the protection of maternity as a life project. This enables the protection discussion to move beyond the traditional focus on sexual autonomy in order to address maternal identity. Bailliet contrasts the approach of the regional court with academic criticism, which seeks to underscore the duty to avoid wrongful gender stereotypes according to Article 5(a) of the CEDAW. The chapter concludes that the Inter-American Human Rights System complements the CEDAW by precisely addressing the protection interests framed in Article 5(b).

Celestine Nyamu Musembi (Chapter 6) provides comparative perspectives from countries in Southern and Eastern Africa concerning the complex relationship between gender, human rights and legal pluralism. She addresses the CEDAW Committee's view that, under the circumstances, elimination of discrimination against women necessitates wholesale displacement of other moral codes. While recognizing the need for cultural and social reform as prescribed by the CEDAW (Articles 2(f) and 5(a)), the author problematizes the CEDAW Committee's abolitionist approach to the plural legal regimes of African countries as expressed mainly in General Recommendation No. 21, and Concluding Observations on

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Excerpt

[More information](#)

INTRODUCTION

9

periodic reports submitted by selected East and Southern African (ESA) States Parties. The position of the CEDAW Committee is compared with the approach of the Maputo Protocol and selected ESA countries. For example, while the CEDAW Committee makes it clear that nothing short of elimination of polygamy will suffice, the Kenyan and Ugandan governments appear to have taken an approach aimed at a gradual phasing-out of polygamy (by providing for conversion of polygamous into monogamous marriages but not the reverse) and extending equal protection of the law to all women. The Maputo Protocol provides for women's right to live in a 'positive cultural context' (Article 17), and unlike the CEDAW calls on states to enact legislation signalling that monogamy is the *encouraged* and *preferred* form of marriage, while at the same time ensuring that the rights of all women in marriage and family are promoted and protected.

3 Actual added value of the holistic approach: socio-economic rights (Part II)

Due in part to the schism between civil and political rights on the one hand and economic, social and cultural rights on the other, the capacity of international human rights law to respond to the concerns of socially and economically marginalized women was for a long time seen as limited. As the principal forms of oppression against large groups of women operate in the socio-economic domain, critical feminist scholars in the 1990s argued that international law, by according priority to civil and political rights, had little to offer women.¹³ In light of recent developments in international social rights theory and practice, particularly the recognition of the indivisibility of civil, political, social and economic rights, the question is no longer whether or not international human rights law has something to offer women, but where in the human rights system women's social and economic rights are best protected.¹⁴ Optimist feminist legal scholars argue today that the CEDAW's recognition of the interdependence and indivisibility of civil, political, social and economic

¹³ H. Charlesworth, C. Chinkin and S. Wright, 'Feminist approaches to international law', *American Journal of International Law* 85:4 (1991) 613–45.

¹⁴ D. Otto, 'Defending women's economic and social rights: some thoughts on indivisibility and a new standard of equality' in I. Merali and V. Oosterveld (eds.), *Giving Meaning to Economic, Social and Cultural Rights* (University of Pennsylvania Press, 2001) 52–62; U. Khliq and R. Churchill, 'The protection of economic and social rights: a particular challenge?' in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 199–261.

Cambridge University Press

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Excerpt

[More information](#)

rights makes it the instrument with the greatest potential to address the close relationship between women's marginalization, social rights and inequality.¹⁵

With a focus on social and economic rights, particularly reproductive rights and the right to safe housing, the second part of the book addresses the *actual* added value of the CEDAW and the work of the CEDAW Committee. Two research questions involving the intertwined analytical dimensions of the potential and actual added value of the CEDAW are dealt with. The first is whether and to what extent the CEDAW has simply extended existing social and economic rights to women, or whether the Convention has contributed to transforming these rights in the light of women's lived experiences, constraints and social realities. The concept of *engenderment*, developed by Sandra Fredman in Chapter 7, is used as an analytical tool for the assessment of the CEDAW's actual and potential added value to the international human rights regime. In Part II, the authors explore whether or not existing human rights, such as the rights to life, health and housing, have been transformed, engendered and implemented in a way that accommodates the specific needs of women in various contexts and social realities.

The second question is whether the jurisprudence of the CEDAW Committee has made its mark on other sub-systems or whether it has operated in isolation and as such has contributed to fragmentation and marginalization. A closely related issue is how the proliferation of sub-systems of international law, such as the CEDAW and the CEDAW Committee, has affected the development of international law. Recent studies of normative developments within international law point to the actual normative synergies between different sub-systems and international law in general, and between the CEDAW and other international and regional protective regimes in particular.¹⁶ Critics have, however, feared that the proliferation of specialized human rights agencies will

¹⁵ Farha, 'Committee on the Elimination of Discrimination against Women'.

¹⁶ B. Simma, 'Universality of international law from the perspective of a practitioner', *European Journal of International Law* 20:2 (2009) 265–97; C. M. Bailliet, 'Introduction' in C. M. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes* 1–7; MacKinnon, 'Creating international law'; V. B. Strand, *Diskrimineringsvern og religionsutøvelse* (Protection against Discrimination and Religious Freedom) (Oslo: Gyldendal, 2012); V. B. Strand, 'Balancing an individual and a structural approach towards gender equality, the question of the police hijab' in R. Nielsen and C. D. Tvarnø (eds.), *Scandinavian Women's Law in the 21st century* (Copenhagen: DJØF Publishing, 2012) 219–48.