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# Introduction

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## 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.<sup>1</sup> 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.<sup>2</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> Article 3 of the ICCPR, Article 3 of the ICESCR.

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.<sup>3</sup> 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.<sup>4</sup> In a situation where women’s protection

<sup>3</sup> 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.

<sup>4</sup> 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*

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.

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

<sup>6</sup> Farha, 'Committee on the Elimination of Discrimination against Women'.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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

<sup>9</sup> General Recommendation No. 25.

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.<sup>10</sup> 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.<sup>11</sup>

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

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

<sup>11</sup> Farha, 'Committee on the Elimination of Discrimination against Women'.

understood as dynamic, contested and changing, and as such a tool for change.<sup>12</sup>

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.

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

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

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



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.<sup>13</sup> 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.<sup>14</sup> Optimist feminist legal scholars argue today that the CEDAW's recognition of the interdependence and indivisibility of civil, political, social and economic

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

<sup>14</sup> 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.

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

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.<sup>16</sup> Critics have, however, feared that the proliferation of specialized human rights agencies will

<sup>15</sup> Farha, 'Committee on the Elimination of Discrimination against Women'.

<sup>16</sup> 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.

result in fragmentation and marginalization of human rights in general and the rights of women in particular.<sup>17</sup>

These overarching research themes are explored by Sandra Fredman, Fleur van Leeuwen, Ingunn Ikdahl and Henriette Sinding Aasen by means of a textual and comparative legal analysis of convention texts, General Recommendations, individual communications and Concluding Observations of the CEDAW Committee, the ICESCR Committee and the Human Rights Committee. To determine whether or not and to what extent the CEDAW and the work of its Committee provide additional actual value with regard to the engenderment of social and economic rights, all the authors compare the approaches taken by various human rights regimes. To give voice to women's experiences and concerns, Ikdahl extends her analysis to the lived realities of women on the ground in an urban settlement in Dar es Salaam in Tanzania.

### 3.1 Overview of the chapters in Part II of the volume

Sandra Fredman (Chapter 7) introduces the concept of *engenderment*, which is the underlying analytical tool for the analysis of the CEDAW in the following chapters. She starts out with a verdict from the 1995 Human Development Report devoted to gender, which states that '[h]uman development if not engendered, is endangered'.<sup>18</sup> Moving beyond an equal rights approach, which is limited to extending existing socio-economic rights to women, the engenderment approach asks whether or not the rights themselves have been transformed in light of women's lived experiences, constraints and social realities. Most human rights treaties prohibit discrimination on grounds of sex. Fredman argues that this approach to equality does not change the gendered nature of social institutions and structures, and that substantive equality requires that the rights themselves are recast in light of women's needs. First, she considers the distinctive nature of women's experiences of poverty and disadvantage in terms of gendered barriers to economic participation, gender-based

<sup>17</sup> International Law Commission/Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006; D. Buss and A. Manji, *International Law. Modern Feminist Approaches* (Oxford: Hart, 2005); H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Melland Schill Studies in International Law) (Manchester University Press, 2000) 218–20.

<sup>18</sup> United Nations Development Programme (UNDP), *Gender Development* (Oxford University Press, 1995) 1. Available at <http://hdr.undp.org/en/reports/global/hdr1995/chapters> (last accessed 22 January 2013).

violence, limited agency and restricted access to socio-economic goods. Second, she examines the meaning of equality in the context of gender, and the limits of formal equality are clearly spelled out. Furthermore, she discusses what engendering socio-economic rights means in theory and practice. Third, through textual analysis of convention text and General Recommendations, she compares and contrasts the extent to which socio-economic rights are engendered in the ICESCR and the CEDAW.

Fleur van Leeuwen (Chapter 8) discusses the role of the CEDAW more indirectly by focusing on how women's rights are protected in the mainstream human rights system. She opens her chapter with this famous slogan from the women's rights movement at the World Conference on Human Rights in Vienna in 1993: 'Women's rights are human rights!' The statement reflects the fact that much of what women experience as everyday abuse in their lives was largely kept outside the realm of mainstream (malestream) international human rights. This deficiency was recognized in Vienna in 1993, and the states represented at the Conference agreed that the status and experiences of women should be systematically addressed and integrated into the UN mainstream human rights system and mechanisms, including the work of the monitoring bodies. The author identifies the traditional critique of the CEDAW: that mainstream monitoring bodies did not address blatant violations of women's dignity as violations of human rights, but instead left these issues to be dealt with by the specialized CEDAW Committee. Furthermore, she explores how and to what extent the HRC and the ICESCR Committee have now mainstreamed gender into their comments, observations and recommendations.

Ingunn Ikdahl (Chapter 9) starts out with a case describing the insecure housing of a widow living in an informal settlement in Dar es Salaam, Tanzania. She addresses the double vulnerability of women in informal settlements: they experience insecurity due to in-laws refusing to see them as owners upon widowhood, but are also subject to the same vulnerability as men at the hands of a state that does not recognize the legitimacy of the settlement. The situation illustrates both the gender bias in the distribution of property rights between spouses and the urgency of the right to housing. At the local level, a mixture of norms comes into play: state law, norms of fairness, religious norms and customary norms. At the international level, the housing theme illustrates current dynamics in the development of international human rights law. Despite the inclusion of equal rights for women and the principle of non-discrimination

in the human rights conventions, women's experiences of insecure housing have been marginalized in human rights discourses. Since the early 1990s several UN institutions and mechanisms have, however, engaged in developing more detailed human rights analyses of women's rights and access to land, property and housing. By contrasting and comparing the General Recommendations and reports of the CEDAW Committee, the ICESCR Committee and the Special Rapporteur on the Right to Adequate Housing, Ikdaahl identifies two different paths for approaching women's rights to their homes in international law, focusing on the lack of equality in the distribution of *property* rights between husband and wife, and the gendered nature of *security* of tenure for one's home.

Henriette Sinding Aasen (Chapter 10) addresses the high maternal mortality rate in many developing countries, and conceptualizes preventable maternal deaths as violations of women's rights to life and health. This constitutes a particular form of gender-based discrimination and structural disadvantage suffered by poor women in particular. Although high-level international campaigns by the UN and the World Health Organization (WHO) have focused on strategies to reduce the alarmingly high maternal mortality rate in the most-affected areas, it still constitutes a major challenge for women's right to health. While both Article 12 of the ICESCR and Article 12 of the CEDAW contain provisions concerning the right to health, Article 12 of the CEDAW is formulated in more specific and women-oriented terms, granting women adequate maternal health-care services. The author examines the interplay and jurisprudence of both the ICESCR Committee and the CEDAW Committee with regard to their responsiveness to women's particular experiences and needs related to maternal healthcare. Of particular interest concerning state obligations is the Available, Accessible, Acceptable Services of Good Quality (AAAQ) framework developed by the ICESCR Committee, which is also utilized by the CEDAW Committee in its communications with States Parties. *Accessibility* of services is a highly relevant theme with regard to maternal mortality, and includes the right to adequate information as well as to physical and economic access to appropriate services.

#### 4 The CEDAW in national law (Part III)

The CEDAW and the CEDAW Committee were welcomed by African, Asian and Northern feminist scholars who regarded the CEDAW regime as a space in which women's different voices, interests and claims

in international law could be represented.<sup>19</sup> More pessimistic feminist scholars feared, however, that the CEDAW, because it lacked an adequate system of supervision, would have very limited instrumental value.<sup>20</sup> In this part of the book, the transformative capacity of the CEDAW and the CEDAW Committee are described and discussed in light of domestic case studies from Northern Europe, Canada, South Asian and Southern African countries.<sup>21</sup>

The aim of these studies is to explore whether or not and with what outcome the CEDAW has been invoked, adopted or resisted by state and non-state actors in various legal, political, economic, social and cultural contexts. Maintaining a focus on the CEDAW and the CEDAW Committee, the chapters in Part III situate the CEDAW in national legal landscapes where states are under multiple interacting international, regional and national obligations to respect, protect and fulfil women's right to equality and non-discrimination. Each case study explores whether or not and to what extent the Convention and the Committee have provided additional avenues of intervention in comparison to or in synergy with other national, regional and international treaties. Exploring the political, legal, social and economic context in which the CEDAW is domesticated, the authors provide qualitative insights that supplement empirical macro-studies identifying factors that are assumed to have a bearing on the effects of ratifying human rights conventions.<sup>22</sup> Whether actual changes in national law are taking effect at the local level are critical questions only marginally dealt with by the chapters in this part of the book, whose main focus is on legal and political contestations taking place at the national level.<sup>23</sup>

<sup>19</sup> R. Cook (ed.), *Human Rights of Women. National and International Perspectives*.

<sup>20</sup> See Charlesworth and Chinkin, *The Boundaries of International Law* 21; S. Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Uppsala: Iustus, 2004).

<sup>21</sup> The CEDAW case study project, which is part of the project 'Should states ratify human rights conventions', has been carried out by Anne Hellum.

<sup>22</sup> See generally B. A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009). All these factors with the exception of the availability of other international and regional mechanisms are dealt with by B. A. Simmons.

<sup>23</sup> A growing body of legal and anthropological literature is focusing on women's human rights from a local bottom-up perspective. S. E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006); A. Hellum, J. E. Stewart, A. Tsanga and S. S. Ali (eds.), *Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking* (Harare: Weaver Press, 2007); R. Sieder and J. McNeish (eds.), *Gender Justice and Legal Pluralities: Latin American and African*

To describe and understand the process whereby the CEDAW is domesticated at the national level, the authors, who are all highly qualified legal scholars or lawyers, focus on legal changes that have taken place through legislation and judicial review. Through a textual legal approach, they examine legislative debates and judicial review with a view to determining whether or not, by whom and to what effect the Convention and the Committee's General Recommendations and Concluding Observations have been invoked. To better understand the outcomes of these processes, the authors extend their perspective to the historical and political contexts of the legal texts. Drawing on insider knowledge, acquired through provision of expert advice to governments or non-governmental organizations, the authors provide fresh insights into the complex and uneven processes through which international law is domesticated.

The studies have been selected on the basis of a combination of availability and assumed variations regarding the domestication of the CEDAW.<sup>24</sup> Influential factors are the availability of other international and regional mechanisms, the degree of democracy, the nature of the legal system and the dominant legal culture, the states' motivations for ratification, the democratic elements in the process of ratification and monitoring, the extent of legal education of duty bearers and rights holders, and the strength of civil society and its national, regional and international networks.<sup>25</sup>

In the presentation below we have grouped the studies in two main categories that show the most striking difference regarding the CEDAW's effect on national law: states that have acceded regional mechanisms providing protection against gender discrimination and states that have not or have acceded regional instruments with weak enforcement mechanisms. The South Asian and Canadian studies represent states that have not acceded to regional instruments. In Southern Africa, Zimbabwe has acceded the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol). The Maputo Protocol has the same international framework as other treaties,

*Perspectives* (London: Routledge, 2012); A. Hellum. 'Introduction: human rights in a gendered, relational and plural legal landscape' in B. Derman, A. Hellum and K. B. Sandvik (eds.), *Worlds of Human Rights: Ambiguities of Rights Claiming in Africa* (Leiden: Brill, 2013) 131–42.

<sup>24</sup> Regrettably we did not have resources to include case studies from Latin America. Furthermore, the South African case study fell out along the way.

<sup>25</sup> With the exception of availability of regional mechanisms, most of these factors are addressed in Simmons, *Mobilizing for Human Rights*.

yet the African Commission, which is tasked with the monitoring of the Protocol, has not developed its gender analysis of human rights violations on the continent, making the enforcement ineffectual. The Northern European case studies represent a legal scenario where the CEDAW coexists with two regional treaty regimes that include protection against sex discrimination: the European Convention on Human Rights (ECHR) and EU law. The studies are presented country by country within these categories. There are, however, significant variations between and within these broad categories as to whether or not and to what extent the CEDAW makes its mark on law reform and judicial review.

#### *4.1 Lacking or weak regional mechanisms: South Asia, Southern Africa and Canada*

Australia, Canada, India, Nepal and Pakistan are states that have not acceded to regional human rights mechanisms. Canada is a member of the Organization of American States (OAS) but has not ratified the American Convention on Human Rights. Zimbabwe has acceded the Maputo Protocol. Australia and the South Asian states mentioned have no regional or sub-regional human rights mechanisms available to which they can submit themselves. All of these states are characterized by ethnic diversity, normative pluralism and, with the exception of Nepal, a common law heritage as former British colonies. With the exception of Zimbabwe, they are all federal states. The struggle for women's human rights, however, takes place in differing political contexts, ranging from relatively democratic states such as Australia, Canada and India, post-conflict states such as Nepal, and autocratic states such as Pakistan and Zimbabwe.

The Australian case study (Chapter 11) carried out by Andrew Byrnes shows how, in an endeavour to promote gender equality, both state and non-state actors have used the CEDAW as a vehicle of legal change in a federal state with a legal system that has no general constitutional guarantee of equality, or of sex or gender equality. Unlike the CEDAW, which takes a gender-specific approach, the Sex Discrimination Act 1984 (SDA) prohibits discrimination on the grounds of sex and marital status against both women and men in many of the areas it covers. The study describes how the Convention has provided a policy framework and specific equality standards for a number of inquiries into law and policy reform, including a major review of laws by the Australian Law Reform Commission (ALRC), which recommended that the SDA contain a general prohibition of discrimination as defined in Article 1 of the



CEDAW. According to Byrnes, women's rights advocates have found the broad-ranging and detailed stipulations of the CEDAW substantively more useful both for legal action and political solidarity compared with the brief and general non-discrimination guarantees of the ICCPR and the ICESCR (none of which are incorporated into domestic law). This reflects the fact that the CEDAW and the SDA both emerged from the women's movement in which the advocates of legislative reform in the 1970s and 1980s in Australia also participated. Byrnes demonstrates how the SDA of 1984 was motivated primarily by a desire to address discrimination against women and to give effect to the provisions of the CEDAW, which Australia ratified in 1983. As shown by Byrnes, Australian courts have drawn on the Convention and CEDAW Committee output to give CEDAW-consistent interpretations of the SDA in a number of cases.

In Chapter 12, Lucie Lamarche explores the domestication of the CEDAW in the context of Canada as a dualist federal state of the Americas. Canada ratified the CEDAW in 1981 without reservations. A year later the Canadian feminist campaign for an effective constitutional equality standard resulted in the inclusion of two new sex equality provisions in the Canadian Charter of Rights and Freedoms (the Charter). The Supreme Court of Canada has dealt with a number of cases where the equality provisions in the Charter have been invoked, but has only referred to the CEDAW in two of these cases. The Canadian Charter has in recent years been criticized by feminist activists and scholars because of its inadequate protection of social and economic rights and as such the equality of the most marginalized women in society. Lamarche describes how women's organizations have turned to the international human rights arena in order to make the conservative government accountable for the growth of women's poverty and inequality resulting from its neo-liberal policies. The case study examines the process of shadow reporting by the Canadian women's movement to the CEDAW Committee and the ICESCR Committee during the decade 1998–2008.

The Indian case study is authored by Madhu Mehra (Chapter 13). When India signed the CEDAW in 1981, the Indian Constitution already guaranteed gender equality and mandated affirmative action for women. The study describes how in the 1990s India aligned its economy with the global market, positioned itself as a significant member of the international community and ratified the CEDAW in 1993. The ratification followed the completion of an extensive law reform exercise aimed at closing the gap between the constitutional promise of equality and the statutory law. With the presence of international donor aid, regional

alliances and NGOs flushed with the experience of the run-up and follow-up to the Beijing Conference in 1995, the CEDAW became an important tool for many Indian women's organizations. According to Mehra, the country review processes have provided an arena for convergence between women's groups at the local, state and national levels, for the collective production of shadow reports, as well as for simultaneous engagement with the government. India's reservations to Articles 5(a), 16(1) and 16(2) in the Convention have been a barrier to implementation of the CEDAW in family law, particularly the community-specific family and marriage laws for Muslims, Christians, Parsis and Hindus. Through review of cases where the CEDAW has been invoked by the Indian Supreme Court, the study shows how the judiciary, in the context of a volatile political terrain marked by identity politics, has played a leadership role in domesticating the CEDAW. The political nature of the terrain related to incorporation of the CEDAW is brought out through illustration of the judicial navigation of the various challenges with which the Supreme Court is confronted.

The CEDAW was ratified by Nepal in 1991 without reservations. Despite political and constitutional reform, Nepalese law and society are strongly influenced by the Hindu religion and customary norms that define the status of women in terms of their sex and marital status. In Chapter 14, Kabita Pandey describes how the civic organization Pro Public, through a combination of legal literacy, judicial education and public-interest litigation, has used the CEDAW as a tool for legal change. In spite of the Interim Constitution and the Nepalese Treaty Act implying that ratified conventions take precedence when coming into conflict with other Nepalese laws, the pace of legislative and administrative change was slow in the first ten years after ratification of the CEDAW. Pandey's study describes how the Nepalese civic organization Pro Public, in cooperation with the Asia Pacific Forum for Judicial Education on Equality Issues, embarked in 1997 on a judicial education programme focusing on the CEDAW. Comparing cases decided by the same Supreme Court judges before and after the judicial education programme, Pandey explores whether or not and to what extent the legal education of the judges prompted a more dynamic jurisprudence. She also explores how the range of directive orders issued by the Supreme Court, and how requiring the enactment and amendment of discriminatory laws concerning widows' allowances, women's property rights, marital rape, sexual harassment and discrimination, have been implemented by the executive branch of government.

Pakistan acceded to the CEDAW in 1996. Shaheen Sardar Ali's study (Chapter 15) shows how demands for accession to the CEDAW were initiated and strongly articulated by civil society as well as in some governmental and political quarters. Her research situates the fifteen-year journey toward final accession in 1996 and the subsequent struggle for domestication in the context of visible, invisible and hidden power relations that underlie the prevailing dissonance between formal laws and governmental policy on the one hand, and religious practices and beliefs on the other. According to Ali, the accession process opened up spaces for advancing women's rights and the CEDAW at a national level, such as the National Commission on the Status of Women and the Women Ministers Forum. In the post-accession period, the CEDAW became part of training programmes run by governmental and non-governmental bodies. Despite this, no steps to incorporate the CEDAW into national legislation through an Act of Parliament, as required by the Convention and the Constitution, have thus far been taken. A series of laws that are discriminatory to women, such as the Citizenship Act of 1951, the Law of Evidence Act of 1984 and the Hudood Ordinance of 1979 remain in force. In the reported case law of Pakistan's superior judiciary, there are four judgments in which the court specifically alluded to the CEDAW, most of them by the same judge.

Zimbabwe signed the CEDAW in 1991 and ratified it without reservations in 1998. Julie Stewart and Choice Damiso's longitudinal study (Chapter 16) shows how the CEDAW has been invoked by state and non-state actors under different governments. They address the situation under the *de facto* one-party ZANU PF rule, associated with rampant economic mismanagement and human rights abuses, and under the Government of National Unity (GNU), which was put in place due to strong regional and international pressure after violent elections in 2008. The overarching theme is how proponents of women's rights and gender equality have navigated in a contested political and legal terrain, where the Constitution privileges customary law when it conflicts with the principle of gender equality in areas of personal and family law. Through a comprehensive analysis of judicial review and law reform, the study shows how, in the context of a highly nationalist and undemocratic political and legal terrain, the judiciary, women's rights organizations and independent experts have achieved piecemeal legal change through mobilization of national sources of law, mainly statutory and customary law. The CEDAW has been referred to in two Supreme Court decisions, one

concerning inheritance (the *Magaya* case) and one concerning pregnancy discrimination (the *Mandividza* case). Focusing on the present situation, where the Unity government seeks to appear in the best possible light internationally, the authors discuss the options and limits of using the CEDAW as a lobbying tool for constitutional reform.

#### 4.2 *Strong regional mechanisms: the Northern European studies*

The Northern European states included in this book are the Netherlands, France, the UK, Finland and Norway. They have all acceded to the European Convention on Human Rights and are EU or European Free Trade Association (EFTA) members. All of these states are characterized by increasing ethnic diversity, normative pluralism, declining economies (with the exception of Norway), and accumulating regional and international legal obligations. The legal systems represent different European legal cultures in the throes of change, ranging from Roman Dutch law, common law, French civil law and Nordic civil law. While the struggle for women's human rights takes place in relatively democratic states, there are significant differences regarding the status of human rights and gender equality in national law.

The Netherlands ratified the CEDAW in 1991 with a unique provision included in the Act approving ratification. The provision required that the government periodically report to Parliament on the implementation of the Convention (Chapter 17). This, according to Marjolein van den Brink, led the Dutch Parliament to adopt the holistic three-dimensional approach implying that direct discrimination and legal inequalities must be eliminated, the position of women must be improved and the dominant gender ideology must be combated.<sup>26</sup> The study shows how the CEDAW Committee's requirement that women's NGOs be involved in the reporting procedures has since 1995 been followed up through the government's financial support for the preparation of shadow reports. Over the years, shadow reporting has become an arena where different majority and minority women's organizations coordinate and frame their claims with the assistance of experts on women's rights and gender equality. Due to budget cuts, many of the established study centres for gender and the law have lost their funding in recent years. In spite of the high degree of involvement of parliamentarians, women's organizations and academic

<sup>26</sup> See Holtmaat's chapter on the CEDAW's three-dimensional approach in this volume (Chapter 3).

scholars, the CEDAW is, according to van den Brink, largely absent in political and legislative debates. Van den Brink also notes that the absence of the CEDAW in Dutch courts is striking, in particular when compared to the Convention on the Rights of the Child (CRC), the ECHR and the EU gender equality directives. A prominent case that was decided recently by the European Court of Human Rights (ECtHR) with reference to the CEDAW is that concerning the male-dominated religious *Staatkundig Gereformeerde Partij/The Reformed Political Party's* (SGP) refusal to accept women as (full) members.

The UK signed the CEDAW in 1981. It was ratified in 1986 with comprehensive reservations, including in relation to legislation and rules governing pension schemes and certain social security benefits. Sandra Fredman's study (Chapter 18) describes how successive Conservative and Labour governments have consistently refused to incorporate the CEDAW into the Human Rights Act in spite of repeated criticism from the CEDAW Committee. The Committee argues that incorporation of the ECHR is not sufficient, since it does not provide for the full range of women's human rights in the CEDAW or cater to temporary special measures. The study demonstrates the potential added value of the work of the CEDAW Committee, particularly its criticism that the principle of equality used in the UK focuses to too great a degree on gender neutrality, same treatment and equal opportunity. Although many women's organizations regard the CEDAW as a valuable lobbying tool drawing ministerial attention to women's rights issues, according to Fredman there is little evidence of real change as a result of the Committee's interventions. This is explained by the strong influence of EU law, the Convention's lack of visibility in society at large and the lack of recognition in the dominant legal culture due to the vague character of the Committee's Concluding Observations. There have, however, been two cases against the UK since it acceded to the Optional Protocol in 2004, both of which were declared inadmissible by the CEDAW Committee. Increasing attention has been paid in recent years to the CEDAW as an interpretative aid in cases before the courts. One example is the *Yemshaw* case, where the CEDAW Committee's definition of gender-based violence in General Recommendation 19 was invoked.

France signed the Convention in 1980 and ratified it through an Act of Parliament in 1983 with a number of reservations. To perceive the ambiguous reception of a gendered instrument in the context of the universal French legal tradition, H el ene Ruiz Fabri and Andrea Hamann begin by reflecting on the dominant French political and legal culture

that marginalizes specificity by privileging universalism (Chapter 19). While most reservations were withdrawn very shortly after the ratification of the Convention, reservations to Articles 14.2(h), embodying rural women's social and economic rights such as water and sanitation, and 16(1)(g), guaranteeing equality between men and women in marriage and family relations, have prevailed. In spite of significant amendments, the law on family still establishes that without an explicit declaration by both parents, a child will automatically be given only the name of the father. This rule was challenged in a case against France under the Optional Protocol, but the complaint was considered inadmissible by the CEDAW Committee. The principle of gender equality is guaranteed by the Constitution in its Preamble and in twenty-two new laws relating to women's rights adopted between 2002 and 2007. These were, according to the authors, mainly adopted to ensure conformity of French law with EU law. Case law relating to the CEDAW is either non-existent or minimalistic and inconsistent. The Conseil d'État, the highest French administrative court, is the only higher jurisdiction whose case law exhibits traces of the CEDAW.

Finland ratified the CEDAW in 1986. In Chapter 20 Kevät Nousiainen and Merja Pentikäinen show how the ratification prompted reform of Finnish legislation held to be contrary to the CEDAW. The Act on Equality between Women and Men 1986 (the Equality Act) was the most visible legislative outcome of the ratification. The study shows that in spite of constitutional reform and making human rights instruments a part of national law, references to the CEDAW in law reform and judicial review have been few in comparison to EU law, the ECHR and the ICCPR. By engaging major women's organizations in close cooperation with the government, the authors argue that Finnish 'state feminism' has diminished the interest of these organizations in making use of the Convention's reporting and communications procedure. They point to the mixed character of Finland's state reporting method, which does not clearly separate the activities and the views of NGOs from those of the state. In recent years the CEDAW Committee's call for increased civil society participation in the state reporting procedure has been commended by Finnish NGOs, which presented separate reports in 2004 and 2008. Finland's recent decision not to enact a new unified and gender-neutral discrimination act but to uphold the Equality Act indicates, however, that women's organizations and the CEDAW Committee's views are gaining ground.

As described in Anne Hellum's study (Chapter 21), gender-equality legislation was already in place when Norway ratified the CEDAW without reservations in 1981. In light of the Gender Equality Act of 1978, which

prohibits gender discrimination and aims to improve the position of women, it was assumed that Norwegian law was in conformity with the CEDAW. In 2009, after fierce debate, the CEDAW was incorporated into the Human Rights Act and put on an equal footing with the gender-neutral prohibitions against sex discrimination embedded in the ICCPR, the ICESCR and the ECHR, which were all incorporated in the Act in 1999. The study shows how the EU Gender Equality Directive, which through the European Economic Agreement is directly binding in Norwegian law, works in synergy with the CEDAW, and has prompted a series of reforms that strengthen women's protection against direct and indirect discrimination. The study shows that the CEDAW has been of particular importance in relation to laws that provide protection against structural discrimination and discrimination on religious grounds. It has also served as a safeguard against gender-neutral laws that overlook the specific situations of different groups of women. No individual cases have been lodged under the Optional Protocol (lodged by Norway in 2002), and there are very few court cases. The overwhelming majority of discrimination cases are handled by the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, which in a number of cases have interpreted the Gender Equality Act in light of the CEDAW.

