

The CEDAW: a holistic approach to women's equality and freedom

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[Thus], regardless of a universal sex-equality norm, women's reality is one of gross inequality.¹

The abolition of gender norms ... would be the abolition of gender and the radical reformulation – perhaps beyond human recognition – of sexuality. But their reform could begin to make it less true that our society constructs women as inferior to men.²

1 Introduction

From its title, it appears that the overall object and purpose of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, further: the Women's Convention or the Convention) is *the elimination of all forms of discrimination against women*. In this chapter I will explain that this aim may be divided 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. In turn, these sub-aims relate to three possible political and legal methods to enhance women's equality and freedom: i.e. through (1) guaranteeing women's individual rights, (2) giving social support to women and (3) enhancing social and cultural change. Most of my attention will go to the third sub-aim and the corresponding third method and to the provision on which this sub-aim/method is based, that is to Article 5 CEDAW (further:

This chapter builds on various research projects and derives some texts from earlier publications that I have written in this area.

¹ B. E. Hernández-Truyol, 'Out of the shadows: traversing the imaginary of sameness, difference, and relationalism – a human rights proposal', *Wisconsin Women's Law Journal* 17 (2002) 111–62 at 145.

² K. Anthony Appiah, 'Stereotypes and the shaping of identity', *Californian Law Review* 88:41 (2000) 41–53 at 52.

Article 5). This provision lays the basis for an approach to enhancing women's human rights that goes beyond the well-known distinction between formal and substantive equality,³ and includes transformative equality.⁴ It opens up possibilities to read the Women's Convention as not only prohibiting direct and indirect discrimination against women as compared to men, but as also putting an obligation on States Parties to combat systemic or structural gender discrimination.

This interpretation of the meaning and scope of the Convention is based on (the drafting of) its text,⁵ and on an in-depth analysis of the CEDAW Committee's General Recommendations, its Concluding Observations and its decisions under the Optional Protocol.⁶ Contrary to pessimistic voices in the academic literature about the potential of the Women's Convention, this analysis shows that, compared to a standard sex-equality norm, it has considerable additional value. That is, the Convention requires fundamental changes in society in order to create more room for diversity and freedom for women (and men) to decide for themselves what it means to be a woman (or a man).⁷ On the grounds of

³ This distinction has dominated discussions within feminism and feminist legal theory for several decades. See, for example, R. Hunter, *Rethinking Equality Projects in Law. Feminist Challenges* (Oxford/Portland: Hart Publishing, 2008) and R. Holtmaat, 'Van gelijke behandeling naar Ander Recht' in E. Brems and L. Stevens (eds.), *Recht en gender in België* (Bruges: Die Keure, 2011) 237–61.

⁴ This term has been coined by Sandra Fredman. See S. Fredman, 'Beyond the dichotomy of formal and substantive equality. Towards new definitions of equal rights' in I. Boerefijn et al. (eds.), *Temporary Special Measures: Accelerating de facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Antwerp/Oxford/New York: Intersentia, 2003) 111–18.

⁵ As far as the drafting process is concerned, I relied on L. A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dordrecht/Boston/London: Martin Nijhoff Publishers, 1993).

⁶ The documents that are produced by the CEDAW Committee may be found at www.un.org/womenwatch/daw/cedaw/sessions.htm (up to the 41st Session) and at www2.ohchr.org/english/bodies/cedaw/ (from 42nd Session onwards) (last accessed 8 February 2013). I have studied all General Recommendations, all Concluding Observations from the 1st to the 44th session, and all Decisions under the Optional Protocol until the year 2010. My main objective was to reveal how the Committee interprets the States Parties' obligations under the Convention, most specifically under Articles 2(f), 5(a) and 5(b), and 10(c), which all cover the issue of (parental) gender roles and gender stereotyping.

⁷ See also Simone Cusack's chapter about the CEDAW's significant role in combating gender stereotypes in this volume. The argument is that the right to equality is very much linked to the right to freedom to choose one's own identity, instead of being forced to adopt stereotyped and gendered self-images and roles. This affects men in a similar way as women. See J. M. Kang, 'The burdens of manliness', *Harvard Journal of Law and Gender* 33 (2010) 477–507.

this analysis, it will be argued that the Convention is not only dedicated to the fundamental principle of human equality, but also to the idea(l)s of human autonomy, freedom and diversity.

A difficult question that arises in this context is whether international human rights law can effectively impose an obligation on States Parties to modify gender stereotypes⁸ and fixed parental gender roles.⁹ The implementation of this obligation very much depends on their willingness to give up part of their sovereign powers to 'govern' the content and nature of gender relations (for example, through family law and inheritance law). In many countries the way gender relations are structured is closely linked to how States Parties see and experience their national identities. States are most hesitant to implement international law, and are especially inclined to openly contest its legitimacy, when such presumed identity factors are at stake. Before exploring these issues further, I will start out with some observations about the underlying human rights values that colour the interpretation of the Women's Convention as a whole.

2 The human rights values that are incorporated in the Women's Convention

The general object and purpose of the Convention must be interpreted in light of its fundamental principles and values, as declared in the Convention's Preamble. These point back to the Charter of the United Nations, which firmly declares that all human beings are equal in rights and in dignity.¹⁰ This principle was elaborated in the 1948 United Nations Universal Declaration of Human Rights, stating in the Preamble that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world', and in Article 1 stating that '[A]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' These most fundamental principles of human rights are

⁸ This expression summarises the content of Article 5(a) of the CEDAW, discussed below in this chapter.

⁹ This expression summarises the content of Article 5(b) of the CEDAW, discussed below in this chapter.

¹⁰ In a similar vein, see the Preambles of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Convention on the Rights of the Child (CRC), which all refer to the Preamble of the UN Charter.

based on the presumption that *all* human beings – irrespective of time and place of birth, national or ethnic origin, race, language, class or caste, sex, sexual orientation, disability or any other classification that human beings can possibly construct between themselves and regardless of their actual differences– are potentially rational and responsible beings who have a genuine desire to be in control of their own lives.¹¹ *Equality* and *dignity* mean that not subjugation but participation, not dependency but autonomy, not slavery but freedom are the key notions in this human rights value orientation.¹² It means that neither destiny nor fate, neither cultural inheritance nor religious prescriptions, but the autonomy and capacity of each human being to make one's own life plan come true is the foundational idea(l) behind human rights.¹³ Even to the present day, such freedom and autonomy are most often denied to women through a great variety of discriminatory laws and practices, beliefs, customs and traditions all over the world, which are based on gender stereotypes and fixed parental gender roles.¹⁴ The Convention's Preamble recognises this, as it

¹¹ This expresses the fundamental value of the inherent equality of all human beings, which forms the basis for the principle of formal equality in and before the law. Besides this, the principle of substantive equality has also received recognition in international law. In that principle, it is recognised that in fact all human beings are differently situated, that is, they occupy different social, geographic, economic or other positions. At the core of the principle of substantive equality is the recognition of these *de facto* differences, and the idea of distributive justice, which requires that human beings should have equal opportunities to make something of their lives.

¹² H. Bielefeldt, '“Western” versus “Islamic” human rights conceptions? A critique of cultural essentialism in the discussion on human rights', *Political Theory* 28:1 (2000) 90–121 and M. Winston, 'Human rights as moral rebellion and social construction', *Journal of Human Rights* 6 (2007) 279–305.

¹³ Although autonomy and freedom are most often interpreted in an individualistic way, it must be remembered that human rights protection also includes the protection of family life and national and cultural rights. The individual, in other words, can only become a human person within the context of family, culture and nation. See R. Holtmaat and J. Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Antwerp: Intersentia, 2011) at 96.

¹⁴ In Holtmaat and Naber, *Women's Human Rights and Culture* and in R. Holtmaat, 'Article 5' in M. A. Freeman, C. Chinkin and B. Rudolf (eds.), *The Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* [hereinafter *CEDAW Commentary*] (Oxford University Press, 2012), I discuss the concepts of gender stereotypes and fixed parental gender roles (in relation to Article 5 of the CEDAW) in more detail. See also R. J. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2009), and Cusack, this volume. Men who do not conform to the culturally defined male gender role and identity also encounter discrimination on the grounds of their gender. See, for example, D. S. Cohen, 'Keeping men “men” and women down: sex segregation, anti-essentialism and masculinity', *Harvard Journal of Law and Gender* 33 (2010) 509–53.

expressly states that discrimination against women violates the principles of equality of rights and respect for human dignity.¹⁵

3 The Convention's definition of discrimination and its scope

Article 1 of the Convention defines discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field.

Most importantly, the Convention incorporates the standard that *all forms* of discrimination against women that lead to an infringement of their human rights should be eliminated. The words 'distinction, exclusion or restriction' are interpreted in an extensive way by the Committee and by academic commentators.¹⁶ Such a broad interpretation of the non-discrimination principle indicates a human rights approach to combating discrimination,¹⁷ as opposed to a formal legal approach, in which a (symmetrical) sex equality or *equal treatment* norm prevails.¹⁸ In such a human rights approach, discrimination against women is seen as an instance of their oppression,¹⁹ which, according to Iris Marion Young, can take at least five different forms. According to her, women experience a mixture of exploitation, marginalisation, powerlessness, cultural imperialism and violence.²⁰ This means that not only factual unequal treatment on the grounds of sex and legal discrimination,²¹ but also (sexual)

¹⁵ CEDAW Preamble, paras. 1–3.

¹⁶ See A. Byrnes, 'Article 1' in Freeman *et al.*, *CEDAW Commentary*.

¹⁷ Winston, 'Human rights as moral rebellion'.

¹⁸ The CEDAW definition is very different from the formal equal treatment definitions of discrimination that are dominant in the context of (inter alia) European sex equality law. See R. Holtmaat, 'European women and the CEDAW Convention. The way forward' in *L'égalité entre femmes et hommes et la vie professionnelle. Le point sur les développements actuels en Europe* (Paris: Dalloz, 2003) 153–74 and R. Holtmaat and C. Tobler, 'CEDAW and the European Union's policy in the field of combating gender discrimination', *Maastricht Journal of European and Comparative Law* 12:4 (2005) 399–425.

¹⁹ See Winston, 'Human rights as moral rebellion', who states that one should keep in mind that all human rights law is meant to put an end to the oppression of certain people or groups of people by their government or by other people.

²⁰ I. M. Young, *Justice and the Politics of Difference* (Princeton University Press: 1990) 40ff.

²¹ See Article 2 and many of the substantive Articles of the Convention.

harassment, sexist hate speech or violence against women²² should be ruled out. ‘Oppression’ includes hidden or indirect forms of sex discrimination and structural or systemic gender stereotypes and gendered structures that are deeply rooted in the religion, culture or tradition of a particular society as well as in its laws and public policies.²³ The drafters of the Convention recognised this and stressed in the Preamble that a change in the traditional roles of both men and women in society and in the family is a prerequisite for achieving full equality between men and women.²⁴

The Convention explicitly recognises the disadvantaged position of *women* and (at least at first sight)²⁵ awards protection to women exclusively. This differs from so-called sex neutral or symmetrical anti-discrimination provisions in many international conventions, in national constitutions and in European Union law, for example, where *unequal treatment on the ground of (either male or female) sex* is prohibited.²⁶ The Convention acknowledges that in present day conditions it is mostly women who suffer from discrimination on the ground of their sex, as well as from a range of other discrimination grounds (i.e. they suffer from intersectional discrimination)²⁷. Recently in the USA, a discussion has been started by Darren Rosenblum as to whether the Women’s Convention should be ‘unisexed’, that is whether it would be better to prohibit all discrimination on the ground of sex and/or gender, instead of discrimination against

²² See in particular CEDAW General Recommendations 12 and 19.

²³ This means that all laws and legal constructs must be subjected to an in-depth gender analysis. See R. Holtmaat, ‘The power of legal concepts: the development of a feminist theory of law’, *International Journal of the Sociology of Law* 5 (1989) 481–502 and R. Holtmaat, ‘Gender, the analytical concept that tackles the hidden structural bias of law’ in *Recht Richtung Frauen: Beiträge zur feministischen Rechtswissenschaft* (Lachen/St Gallen: Dike Verlag, 2001) 159–82. A methodology for such an analysis has been developed in R. Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (Doetinchem: Reed Business Information, 2004).

²⁴ CEDAW Preamble, paras. 13 and 14.

²⁵ Below in this chapter I will argue that a wide interpretation of Article 5 of the CEDAW allows us to include men as well as intersexual and LGBT (lesbian, gay, bisexual and transgender) people who suffer from gender stereotypes and strict masculinity codes, under the protection against discrimination on the basis of this Convention.

²⁶ Holtmaat, ‘European Women and the CEDAW Convention’, and Holtmaat and Tobler, ‘CEDAW and the European Union’s policy’.

²⁷ K. Crenshaw, ‘Demarginalizing the intersection of race and sex, a black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics’, *University of Chicago Legal Forum* (1989) 139–67.

women.²⁸ Rosenblum presents an important argument in an attempt to answer this question positively: the word 'sex' might be understood to include not only the male and female sex but all kinds of sexes, including transgendered, intersexed, and other differently sexed and gendered people.²⁹ To me, this is not a convincing reason to change the scope of the Convention. A prohibition of discrimination on the grounds of sex is commonly interpreted in a binary or bipolar scheme in which the (presumably essential) male and female sexes are compared to one another, and where only one of the two sexes suffers a certain disadvantage, the non-discrimination norm becomes applicable. The vast (feminist) literature shows the strong tendency toward assimilation to the male norm that is inherent in sex discrimination law as it has been constructed since the 1970s.³⁰ Changing the understanding of sex to include 'other' sexes as well might appear to be as difficult and controversial as acknowledging that differences between men and women are culturally and socially constructed instead of 'natural' or 'God-given'. The Dutch (male) professor of Constitutional Law, Henc van Maarseveen, in an early comment on the Women's Convention, congratulated the drafters for the fact that it prohibits discrimination of *women*. Transforming the demand for women's equality into a demand for sex equality, in his view, takes the sting out of the prohibition of discrimination because it soon will be used mainly by dominant, well-positioned men to demand whatever small 'advantage' women might have over them: 'The person who has the power of definition, who succeeds at defining discrimination against women as sex discrimination, takes the sting out of the matter and at the same time does not have to fear much from it anymore.'³¹ The Convention is rightfully directed at the elimination of discrimination against women, because to the present day it is mostly men who set the standards of behaviour for women in many areas of life,³² most notably in respect to family relations

²⁸ D. Rosenblum, 'Unisex CEDAW, or what's wrong with women's rights', *Columbia Journal of Gender and Law* 20:2 (2011) 98–194 and B. E. Hernández-Truyol, 'Unsex CEDAW? No! Super-sex it!', *Columbia Journal of Gender and Law* 20 (2011) 195–223.

²⁹ Rosenblum, 'Unisex CEDAW' at 125.

³⁰ A summary of these discussions may be found in Fredman, 'Beyond the dichotomy of formal and substantive equality'.

³¹ H. van Maarseveen, 'Internationaal vrouwenrecht. Een afzonderlijk rechtsgebied?' in H. van Maarseveen *et al.* (eds.), *Internationaal recht en vrouwen (Deel 1 Commentaren)* (Zwolle: Tjeenk-Willink, 1987) 69–81 at 74–5. (Quote translated from Dutch by the author). See also C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 2.

³² Although gender stereotypes and (separate) gendered roles for women and men also lead to 'harnessed' ideas about masculinity and to men being imprisoned in male roles and tasks, men at the same time make use of gender differences to dominate women. See

and child rearing, through firmly entrenched laws and practices that precisely describe women's inferior (and men's superior) roles and opportunities in life. But men, to a great extent, also determine the culture of workplace relations,³³ the ways people operate in economic or financial affairs,³⁴ and the 'culture of politics'.³⁵

4 The additional value of the Women's Convention

In early feminist legal literature on international human rights law, the Women's Convention was not welcomed as an important contribution for the advancement of the human rights of women. On the contrary, it was often heavily criticised for having very limited instrumental value, because it lacks an adequate system of supervision and because there are ample possibilities for States Parties to make reservations.³⁶ Further points of critique were that the Convention only requires States Parties to take appropriate measures and does not impose clearly defined obligations backed up by effective deterrent sanctions,³⁷ and that it does not

Cohen, 'Keeping men "men" and women down' at 523, who distinguishes between 'hegemonic masculinity' and 'hegemony by men'. 'Hegemonic masculinity ... works to subordinate both women and non-hegemonically masculine men. It subordinates women by definition, as hegemonic masculinity is associated with characteristics that allow men to subordinate women; it subordinates other men, non-hegemonically masculine men, by labelling their expressions of personhood as inferior to "true" manhood.'

³³ Sexual harassment very often being part of the culture at the workplace and on that ground being presented as 'normal' behaviour. See for example, A. McKinnon and T. I. Emerson, *Sexual Harassment of Working Women: A Case of Discrimination* (New Haven: Yale University Press, 1979).

³⁴ According to feminist critiques, thereby causing financial and economic crises and unsustainable economic development. See, for example, J. K. Gibson-Graham, *The End of Capitalism (As We Knew It): A Feminist Critique of Political Economy – 10 Years On* (Minneapolis: University of Minnesota Press, 2006).

³⁵ See, for example, D. Alexander and K. Andersen, 'Gender as a factor in the attribution of leadership traits', *Political Research Quarterly* 46 (1993) 527.

³⁶ See H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) at 21. See also C. I. Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', *Harvard International Law Journal* 41:2 (2000) 381–418 at 391. Nyamu discusses the fact that attempts by human rights activists to find a legal basis for State responsibility for discrimination against women often fail because many (mainly Islamic) States have made reservations to Articles 2 and 16 of the Convention.

³⁷ See, for example, A. X. Felmeth, 'Feminism and international law. Theory, methodology and substantive reform', *Human Rights Quarterly* 22:3 (2000) 658–733 at 710 and H. Charlesworth, C. Chinkin and S. Wright, 'Feminist approaches to international law', *American Journal of International Law* 85:4 (1991) 613–45 at 634.

oblige States Parties to take positive measures. Charlesworth and Chinkin conclude that: 'For these reasons, even the comparatively broad definition of discrimination contained in the Women's Convention may not have much cutting edge against the problems women face worldwide.'³⁸ More importantly, the Convention was blamed for using a definition of equality in terms of 'equal to men': 'equality is defined as being like a man'.³⁹ On the basis of a textual analysis, it was stated that the Convention requires a comparison to be made with a male standard, which means in order to get equal rights, women must assimilate to the male norm.⁴⁰ This (supposed) emphasis on formal equality misjudges the underlying structures and power relations that contribute to the oppression of women.⁴¹ Summing up the critique, Charlesworth, Chinkin and Wright conclude that 'the Women's Convention ... is an ambiguous offer. It recognizes discrimination against women as a legal issue but is premised on the notion of progress through good will, education and changing attitudes and does not promise any form of structural, social or economic change for women'.⁴² Other commentators, such as Lijnzaad and Burrows, did acknowledge that the Convention covers a broad area and that it goes further than the elimination of (formal) discrimination as it also requires the elimination of gender stereotypes. Nevertheless, these authors also conclude that it is an 'instrument without teeth'.⁴³

It is very regrettable and damaging that such outdated opinions about the limited value of the Women's Convention are still echoed in contemporary academic literature, where authors repeat the view that the Convention might do more harm than good. These opinions have arguably been expressed⁴⁴ without any apparent knowledge of the practice

³⁸ Charlesworth and Chinkin, *The Boundaries of International Law* at 230.

³⁹ Charlesworth *et al.*, 'Feminist approaches to international law' at 631.

⁴⁰ *Ibid.*

⁴¹ Charlesworth and Chinkin, *The Boundaries of International Law* at 229.

⁴² Charlesworth *et al.*, 'Feminist approaches to international law' at 634.

⁴³ See, for example, L. Lijnzaad, 'Over rollenpatronen en de rol van het Verdrag' in A. W. Heringa, J. Hes and L. Lijnzaad (eds.), *Het Vrouwenverdrag. Een beeld van een verdrag* (Antwerp/Apeldoorn: Maklu, 1994) 43–57 and N. Burrows, 'The 1979 Convention on the Elimination of All Forms of Discrimination against Women', *Netherlands International Law Review* 32 (1985) 419–60. An extensive discussion of the literature up to 2004 may be found in Holtmaat, *Towards Different Law and Public Policy*.

⁴⁴ See, for example, S. E. Merry, 'Gender justice and CEDAW: the Convention on the Elimination of All Forms of Discrimination against Women', *Journal of Women of the Middle East and the Islamic World* 9 (2011) 49–75 at 53 and 58, who argues, for example, that the Convention focuses primarily on equalising women's status with that of men, and Rosenblum, 'Unisex CEDAW', who (inter alia) takes it that the Convention

of the last decades of the CEDAW Committee's work, including the Committee's dynamic interpretation of the Convention,⁴⁵ nor of the ways in which the Convention is sometimes used by the judiciary,⁴⁶ nor using any recent studies on the subject.⁴⁷

It has been thoroughly analysed and well documented for some time now that the Women's Convention in fact offers important additional value as compared to the (formal) sex equality approach that is predominant in many national, supranational (for example, the EU) and international legal systems.⁴⁸ This development of the interpretation of the Convention has been stimulated inter alia by a series of studies that were conducted in the Netherlands,⁴⁹ which in turn have inspired the CEDAW

'provides a first step, but not a workable solution to inequality' (at 113) and that 'most of the CEDAW provisions follow a formal equality yardstick' (at 137).

⁴⁵ Which was extensively documented in Holtmaat, *Towards Different Law and Public Policy*; Holtmaat and Tobler, 'CEDAW and the European Union's policy'; F. Raday, 'Culture, Religion, and CEDAW's Article 5(a)' in H. B. Schöpp-Schilling and C. Flinterman (eds.), *The Circle of Empowerment* (New York: The Feminist Press, 2007) 68–85; R. Holtmaat, 'Preventing violence against women: the Due Diligence Standard and Article 5(a) CEDAW' in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Leiden/Boston: Martinus Nijhoff Publishers, 2008) 225–39; and Cook and Cusack, *Gender Stereotyping*.

⁴⁶ See for example, the important study of Cook and Cusack on gender stereotyping and the way in which judges deal with that issue, sometimes with a call on CEDAW. Cook and Cusack, *Gender Stereotyping*. A recent example of 'good judiciary practice' is the landmark decision of the Shah Alam High Court in Malaysia in the case of Noorfadilla where this Court deemed CEDAW directly applicable in a pregnancy discrimination case (Decision of 12 July 2011; on file with the author).

⁴⁷ Although her article was published in 2011, Merry ('Gender justice and CEDAW') calls Bayefsky's study (*The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, NY: Transnational Publishers, 2001)) 'recent' (at 52). Her most recent literature reference on CEDAW concerns Schöpp-Schilling and Flinterman's 2007 book *Circle of Empowerment*; she does not quote any other material between 2001 and 2010. She therefore misses out on many other relevant publications in terms of the topic of her article (see, for example, the publications mentioned in this chapter). Rosenblum, according to his footnotes, hardly read any documents from the CEDAW Committee and sticks to a quite literal interpretation of the Convention, based on the text as it was adopted in 1979 – as he himself acknowledges in footnote 24 of his article 'Unisex CEDAW'.

⁴⁸ Christine Chinkin, who has taken part in the project to put together the *CEDAW Commentary*, has now fully acknowledged the Convention's great potential in contributing to the enhancement of women's human rights. Chinkin wrote the chapter on violence against women (VAW) in that commentary and was one of the editors of that book. See also E. Sepper, 'Confronting the "sacred and unchangeable": the obligation to modify cultural patterns under the Women's Discrimination Treaty', *University of Pennsylvania Journal of International Law* 30:2 (2008), 585–639.

⁴⁹ The Dutch government actively stimulated legal research in the area of CEDAW. See van den Brink's chapter on the implementation of CEDAW in the Netherlands in this volume.

Committee to elaborate on a broader interpretation of the Convention's object and purpose. In these studies it was recognised that the Women's Convention not only addresses unequal treatment of women (as compared to men) in laws and public policies or in policies of employers, for example, but also addresses other forms of gender-specific discrimination such as violence against women, polygamy and the failure to provide adequate healthcare to women, both in public and private life.⁵⁰ It was found that the Convention admits to the existence of the unequal power relations between the sexes by taking an asymmetrical approach to discrimination, that it is quite unique in its recognition of the persistently damaging role of gender stereotypes, and that it entails a broad, encompassing approach to the principle of equality between the sexes, not only requiring formal and substantive equality but also striving for transformative equality. In the remaining part of this chapter I will concentrate on the Convention's role in combating gender stereotypes and in enhancing transformative equality.

5 The triple approach to equality in the Women's Convention

On the basis of an analysis of the nature and structure of the Convention by an independent commission of experts,⁵¹ in 1998 the Dutch government adopted the view that the Convention's overall aim to eliminate all forms of discrimination against women can be divided into three sub-aims.⁵² The CEDAW Committee, in its Concluding Observations on the second and third Country Reports of the Netherlands, stated in 2001 that it appreciated this work and in the same document subscribed

⁵⁰ See the CEDAW Committee's General Recommendations 12, 19, 21 and 24.

⁵¹ See L. S. Groenman *et al.*, *Het vrouwenverdrag in Nederland anno 1997* (The Hague: Ministerie van SZW, 1997). The Groenman Commission (named after its chair) was installed by the Dutch government to write a report about the implementation of the Convention in the Netherlands. The present author was a member of this Commission. Their report was submitted to the Second Chamber of Parliament in 1998. A translation in English of the main chapters of this report is included as an appendix in Holtmaat, *Towards Different Law and Public Policy*. The Commission based itself on the historical background and a textual analysis of the Convention, on the General Recommendations and Concluding Comments of the Committee, and on the relevant legal literature up to the year 1996.

⁵² This position was confirmed in the second and third Country Reports of the Netherlands to the CEDAW Committee (submitted in 2000, discussed by the CEDAW Committee in 2001).

to the Dutch analysis of the Convention's threefold aims.⁵³ In its General Recommendation No. 25 on temporary special measures on the ground of Article 4(1), adopted in January 2004,⁵⁴ the Committee confirmed that 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 as well as the private sphere;
2. to improve the de facto position of women; and
3. to address prevailing gender relations and the persistence of gender-based stereotypes.

These three purposes reflect a threefold interpretation of the fundamental principle of equality. *Full equality between men and women*, a principle to which the Convention refers in many of its Articles, means much more than equality before and in the law. Of course, Article 2 makes it unambiguously clear that women have equal rights under the law and should not be treated differently purely *because* they are women. Women have the *right to formal equality*. In addition, the Convention in its Articles 3, 4 and 24 makes it clear that all appropriate measures need to be taken in order to achieve women's de facto equality with men. This means that sometimes (in the language of Article 4) temporary special measures are necessary. With the inclusion of the right to *substantive equality*, the Convention acknowledges that individual human beings, through place of birth, mental and physical capacities, wealth, development of the country, discrimination and a whole range of other factors, in fact have very different positions and possibilities in life. Women, in many cultures around the world, are in a position of inequality and oppression not only because of physical or biological differences, but also because of persistent political, social, economic and cultural discrimination against them.

The third mentioned objective of the Convention, that is addressing prevailing gender relations and the persistence of gender-based stereotypes, is laid down in Article 5, which provides that:

States Parties shall take all appropriate measures:

- (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and

⁵³ 25th Session of the CEDAW Committee, July 2001, A/56/38, CEDAW/C/SR. 512 and 513, para. 196.

⁵⁴ CEDAW Committee, General Recommendation 25 on Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (Thirteenth Session, 2004), paras. 6 and 7.

customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; and

- (b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.⁵⁵

In short, the Article, in its two parts, calls for the modification of gender stereotypes and fixed parental gender roles.⁵⁶ It should be read in conjunction with Article 2(f), which requires that States Parties 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. Rebecca Cook writes that these Articles combined mean that States Parties are obliged to:

reform personal status laws and to confront practices, for instance of religious institutions, that, while claiming to regard the sexes as different but equal, in effect preclude women from senior levels of authority and influence. These articles strongly reinforce the commitment to eliminate all forms of discrimination, since many pervasive forms of discrimination against women rest not on law as such but on legally tolerated customs and practices of national institutions.⁵⁷

According to the CEDAW Committee, Article 5 means that the Convention acknowledges that gender stereotypes and fixed parental gender roles 'affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions'.⁵⁸ Therefore, the Convention not only addresses *personal convictions, cultural practices* and *traditional values*, but also addresses the *systemic and structural discrimination against women* that is embedded in the country's laws and

⁵⁵ The Article is part of the first section of the Convention, which contains the general obligations for the States Parties. These norms are to be regarded on their own merits, but they are also indicative for the interpretation of all other Articles of the Convention.

⁵⁶ See Holtmaat, 'Article 5' for a more extensive analysis of the content and scope of this Article.

⁵⁷ R. J. Cook, 'State accountability under the Convention on the Elimination of All Forms of Discrimination against Women' in R. J. Cook (ed.), *Human Rights of Women. National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 228–56, at 239–40.

⁵⁸ CEDAW Committee, General Recommendation No. 25, para. 7. See also e.g. CEDAW Committee, Luxembourg (2000), A/55/38, CEDAW/C/SR.446 and 447, para. 404.

policies, and – in order to overcome the structural discrimination that results from that inequality – calls for *transformative equality* or ‘equality as transformation’.⁵⁹

It should be noted that, in this regard, the Women’s Convention has taken the lead. After its adoption, similar provisions were included in many other international documents.⁶⁰ Some international documents use wording similar to that of Article 5.⁶¹ A wide range of documents express the recognition of maternity as a positive social function and the sharing of responsibilities of parents as important values and approaches.⁶² A very clear example may be found in the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 16, where it is fully acknowledged that gender stereotypes and fixed parental gender roles stand in the way of the fulfilment of all of women’s human rights.⁶³ The CESCR defines gender stereotyping as a form of discrimination against women,⁶⁴ thereby reflecting a wide acceptance of the CEDAW Committee’s analysis of the causes and consequences of discrimination against women. Traditional gender roles, prejudices and stereotypes are seen by the CESCR and also by the Human Rights Committee (HRC) as important obstacles to the full enjoyment of women’s social and economic rights.⁶⁵

6 Article 5 and discrimination against women

Although Article 5 does not contain the word discrimination, and Article 1, in which discrimination is defined, does not mention gender stereotypes and fixed parental gender roles, these phenomena can be related to discrimination against women in two ways. A first line of reasoning is that, through the inclusion of Article 5, especially when read in combination with the Convention’s Preamble, the Convention acknowledges that

⁵⁹ Fredman, ‘Beyond the dichotomy of formal and substantive equality’ at 116. See also further below in this chapter.

⁶⁰ See Cook and Cusack, *Gender Stereotyping* at 145–6 and 174.

⁶¹ For example, the Convention of Belém do Para: Articles 7(e) and 8(b); the Protocol to the Banjul Charter on the Rights of Women in Africa, Articles 2(2) and 4(d), and Articles 6 and 13.

⁶² For example, the Preamble and Article 18(1) of the CRC; Article 17 American Convention on Human Rights (ACHR); UN CCPR ‘General Comment 19’ (1990) UN Doc. HRI/GEN/1/Rev.1 para. 8.

⁶³ UN CESCR General Comment 16 (2005) UN Doc. E/C.12/2005/4, para. 14.

⁶⁴ UN CESCR General Comment 20 (2009) UN Doc. E/C.12/GC/20, para. 20.

⁶⁵ For example, UN CESCR General Comment 16 (2005) UN Doc. E/C.12/2005/4, para. 14; UN CCPR General Comment 28 (2000) UN Doc. CCPR/C/21/Rev.1/Add.10, paras. 5 and 25.

gender stereotypes and fixed parental gender roles *lie at the base* or are a *root cause* of discrimination against women.⁶⁶ In that way, it looks as if Article 5 is not an integral part of the prohibition of discrimination under the Convention, but that it merely tells us something about the ultimate causes of discrimination.⁶⁷ Secondly, in some views, the inclusion of this provision in the Convention, especially when read in conjunction with Article 2(f), means that discrimination, as defined in Article 1, also covers *prejudices* and all *customs and practices that are based on the inferiority of women and on stereotyped roles for men and women*. This means that these phenomena should be seen as discriminatory in themselves.⁶⁸

The CEDAW Committee sometimes points to stereotypes as *causing* discrimination and sometimes calls stereotypes *discriminatory per se*. Sometimes, both views are present in one text. An example thereof can be found in a Concluding Observation about Burundi:

The Committee continues to be concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the role and responsibilities of men and women in society, *which discriminate against women*. The Committee is also concerned that the preservation of negative cultural practices and traditional attitudes *serves to perpetuate women's subordination* in the family and society and constitutes a serious obstacle to women's enjoyment of their fundamental rights.⁶⁹

It would be most helpful if the Committee, in a new General Recommendation on Article 5, would be more explicit and specific about the discriminatory nature of gender stereotyping and fixed parental gender roles.⁷⁰

⁶⁶ This is also reflected in the Committee's appeal of 1986, where it remarks that it is necessary 'to overcome obstacles to equality *arising from* prejudices, customs or practices'. UN Doc. A/41/45, para. 365, as cited by M. Wadstein, 'Implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women', *Human Rights Quarterly* 10 (1988) 5–21 at 13.

⁶⁷ For example, Wadstein, 'Implementation of the UN CEDAW', and Lijnzaad, 'Over rollenpatronen'.

⁶⁸ ECOSOC General Comment No. 20, E/C.12/GC/20, 25 May 2009, para. 20. S. Cusack and R. J. Cook, 'Combating discrimination on sex and gender' in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Åbo: Institute for Human Rights, Åbo Akademi University, 2008) at 222. See also R. J. Cook and S. Howard, 'Accommodating women's differences under the Women's Anti-Discrimination Convention', *Emory Law Journal* 56:4 (2007) 1039–91 at 1043.

⁶⁹ CEDAW Committee, *Concluding Observation: Burundi* (2008), CEDAW/C/BDI/CO/4, para. 17 (emphasis added).

⁷⁰ The CEDAW Committee issued General Recommendation No. 3 on Article 5 in its Sixth Session in 1987. See UN Doc. A/42/38. See also Cook and Cusack, *Gender Stereotyping* at 13 and 137ff., and Cusack's chapter in this volume.

7 Three strategies to eliminate discrimination against women

The three approaches to equality that were adopted by the CEDAW Committee should not be seen as competing ways of conceptualising this basic principle of human rights,⁷¹ but should be seen as complementary to each other. The first five Articles of the Convention make clear that formal, substantive and transformative equality lie at the basis of a simultaneously applied (holistic) approach to combating discrimination against women. For that purpose, three different strategies could and should be applied by the States Parties to the Convention:

- (1) a strategy of giving individuals a legal right (entitlement) to equal treatment before and in the law (an *Individual Rights Strategy*; IRS);
- (2) a strategy of providing social support to those persons or groups of persons who have least opportunities to lead a meaningful life as a human being, for example to those who are disabled or poor, and/or who are discriminated against on the grounds of (inter alia) sex (a *Social Support Strategy*; SSS); and
- (3) a strategy to take away the structural causes of such discrimination through a process of social and cultural change (*Strategy of Social and Cultural Change*; SSCC).⁷²

This three-dimensional empowering approach may be illustrated with the example of violence against women (VAW).⁷³ When one examines the CEDAW Committee's Concluding Observations with respect to this issue, it is clear that the Committee discusses the necessity of measures in all three areas. It pleads for legal reform, especially in terms of prohibiting all kinds of VAW; for putting in place protective and preventive measures; and for putting an end to all gender stereotypes and cultural and religious practices that sustain the idea of women's inferiority to men or that in some way or another make VAW appear as an acceptable social or cultural practice.⁷⁴

⁷¹ Like the formal and substantive approach, which have been seen as competing interpretations of (legal) equality by many feminist legal scholars. See Fredman, 'Beyond the dichotomy of formal and substantive equality'.

⁷² See for example, Groenman *et al.*, *Het vrouwenverdrag in Nederland anno 1997*, and Holtmaat, *Towards Different Law and Public Policy*.

⁷³ See Holtmaat, 'Preventing violence against women'.

⁷⁴ The 'case law' of the Committee on the issue of VAW has been analysed in great depth in Chinkin's contribution to the *CEDAW Commentary*.

8 Article 5 of the Women's Convention: the international legal basis for enhancing transformative equality

Articles 2–5 of the Convention, read together, instruct States Parties to adopt a comprehensive or holistic strategy to combat discrimination against women, aiming at formal, substantive *and* transformative equality.⁷⁵ Transformative equality, or 'equality as transformation',⁷⁶ aims at changing society in such a way that those features of existing cultures, religions or traditions, and of legal, social and economic structures that obstruct the equality and human dignity of women are subjected to fundamental change. This means that 'States parties are required to undertake a social re-ordering of their political economy, and the cultural valuations ascribed to men and women.'⁷⁷ This requirement has been adopted as an international legal obligation, where Article 5 'requires a modification of social and cultural patterns of conduct'.⁷⁸ In other words, it calls for 'a possible feminisation of culture, at least of the culture that is represented in the legal order'.⁷⁹ In this view, Article 5 embodies what could also be phrased as the *vehicle for cultural change*.⁸⁰

This analysis of Article 5 was first elaborated in the work of the already mentioned Dutch Commission of independent experts who carried out an in-depth study into the nature and scope of the Women's Convention at the end of the 1990s.⁸¹ On the basis of an analysis of the Committee's General Recommendations and Concluding Observations on Article 5, the Commission held that besides addressing individual beliefs and conduct of men and women, this provision calls for eradicating gender differences that have become an intrinsic part of a society's social and legal structures and systems.⁸² As a consequence of this, States Parties not only have to put an end to direct and indirect discrimination against women,

⁷⁵ Groenman *et al.*, *Het vrouwenverdrag in Nederland anno 1997*; Holtmaat, *Towards Different Law and Public Policy*; Holtmaat and Tobler, 'CEDAW and the European Union's policy'; and Cook and Cusack, *Gender Stereotyping*.

⁷⁶ Fredman, 'Beyond the dichotomy of formal and substantive equality' at 116.

⁷⁷ Cusack and Cook, 'Combating discrimination on sex and gender' at 207. See also Cook and Cusack, *Gender Stereotyping* at 5.

⁷⁸ Fredman, 'Beyond the dichotomy of formal and substantive equality' at 116.

⁷⁹ Van Maarseveen, 'Internationaal vrouwenrecht' at 75.

⁸⁰ *Ibid.*; Groenman *et al.*, *Het vrouwenverdrag in Nederland anno 1997*.

⁸¹ Groenman *et al.*, *Het vrouwenverdrag in Nederland anno 1997*.

⁸² *Ibid.* at 27. After the publication of the Groenman report, the Dutch government ordered a follow-up study in which the content and scope of Article 5(a) of the CEDAW was investigated in more depth. See Holtmaat, *Towards Different Law and Public Policy*.

but they also have to reveal and replace the gender stereotypes that *underlie* existing laws and public policies.⁸³ The Commission argued that:

[I]f this does not happen, the implementation of full equality before the law and a policy to improve the position of women could sometimes have contrary effects. The concepts and assumptions that are currently being used in law and public policies are often coloured by gender stereotypical relationships and expectations. If these concepts and assumptions are included in new legislation or new policies, this will lead to unwitting and unintentional reproduction of gender differences.⁸⁴

The Commission concluded that on the basis of Article 5, States Parties are obliged to question the content of existing legal rights and duties from a gender perspective. This method or strategy ‘creates the possibility that dominant (male) norms are not assumed to be self-evident. In a number of areas, this can mean that it is not *equal* rights or *equal* opportunities that must have priority, but that *other* rights must be developed or *other* opportunities must be offered’.⁸⁵

The CEDAW Committee adopted the principle of transformative equality in 2004, when in General Recommendation No. 25 it acknowledged that measures must be taken ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’.⁸⁶

9 Article 5 of the Women’s Convention: freedom, autonomy and diversity

Article 5 not only subscribes to the principle of women’s equality, but also expresses the principle of human autonomy or freedom, sometimes also phrased as the principle of diversity. Combating gender stereotypes and fixed parental gender roles is not only required in order to achieve full equality of women, but also – and perhaps foremost – these cultural transformations are required in order to achieve more freedom, autonomy and space for diversity for women.

⁸³ This methodology is further developed in Holtmaat, *Towards Different Law and Public Policy*, Chapters 15 and 16.

⁸⁴ Groenman *et al.*, *Het vrouwenverdrag in Nederland anno 1997* at 27.

⁸⁵ *Ibid.* Italics in original. See also Holtmaat, ‘The power of legal concepts’.

⁸⁶ General Recommendation No. 25, para. 10.

Above, it was stated that the underlying presumption of the principles of human equality and dignity⁸⁷ is that *all* human beings in principle have an authentic desire to control their own lives and are deemed capable of making rational choices for what it means to be living a dignified and worthy life as a human being. Constructing firm ('closed') categories of human beings, and attributing a set of fixed (often negative) characteristics to those who are placed within a particular category, results in a deprivation of people's control over their own lives. The gendered categories of 'man' and 'woman' or 'male' and 'female' are examples of such fixed social and cultural constructions.⁸⁸ The *social and cultural patterns of conduct* and *stereotyped roles* that are addressed in Article 5, which are based on *prejudice* and on *traditional or customary ideas about the inferiority of women*, deny the individual woman the possibility to be a person in her own right and to utilise all of her human capacities and capabilities in order to lead a meaningful life according to her own interests and convictions.⁸⁹ Gender stereotypes and fixed parental gender roles therefore not only deny women the right to be treated respectfully as equal and dignified human beings, they also deny women the autonomy to live their lives according to their own interests and convictions about their personal and unique contributions to sustaining and developing humanity. Women (and men!) have a fundamental right not to be confined to constructed (essentialist) understandings of femininity or masculinity, or to prefixed (and fixated) female and male parental roles that are entrenched in their culture, tradition or religion, as well as in the main social and legal institutions or organisations of their society. In the words of Cook and Cusack: 'Any law, policy or practice that aims to promote substantive equality and non-discrimination must ... honour the basic choices

⁸⁷ The fact that the Preambles of the main Human Rights Covenants all mention equality and dignity in one breath already indicates that equality is not the sole foundational principle of human rights.

⁸⁸ Gendered categories are often presented as 'natural', 'essential' or 'God-given', that is, as *eternal* and *unchangeable*. I have discussed the role of gender-essentialism in Holtmaat and Naber, *Women's Human Rights and Culture*.

⁸⁹ M. Nussbaum, *Women and Human Development. The Capabilities Approach* (Cambridge University Press, 2000). See also Kang, 'The burdens of manliness' at 478, who argues that guaranteeing the right to self-definition is the main objective of (US) constitutional equality clauses: 'By the right to self definition, I mean the right not to be overly dominated by government in how I structure and give meaning to my identity.' The right to be free from gender stereotypes, in that sense, should also stretch to men, according to Kang.

women make (or would like to make) about their own lives, and enable them to shape or carve out their own identities.⁹⁰

The CEDAW Committee has made it clear that a correct implementation of the Convention requires ‘the recognition that women can have various roles in society, not only the important role of mother and wife, exclusively responsible for children and the family, but also as an individual person and actor in her community and in the society in general’.⁹¹ In this way, the Convention recognises that all human beings are equal, have equal rights and deserve respect for their human dignity, but at the same time they may have very *diverse* ideas and wishes about what they actually want to do with their lives.⁹² Therefore, the concepts of individual autonomy, freedom and diversity are crucial for a correct understanding of the content and scope of Article 5 and of the Convention as a whole.

A similar ‘diversity principle’ lies at the basis of all anti-discrimination clauses in international human rights law and in national constitutions, which ban unequal and undignified treatment on the basis of an individual belonging to a certain ‘category’ or ‘class’ of human beings. Some categorisations, like those on the basis of race or sex, are deemed to be so invidious that they are subjected to a ‘strict scrutiny test’ by the judiciary. As South African Supreme Court Justice Sachs clarified:

[w]hat the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative ... What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself.⁹³

For *all* women and men this ‘diversity principle’ is as important as the principle of equality per se. But it is important first and foremost for women and men who do not conform to dominant legal, social and cultural standards about what it means to be a female or male person. Women’s

⁹⁰ Cook and Cusack, *Gender Stereotyping* at 68.

⁹¹ CEDAW Committee, *Concluding Observations: Suriname* (2002), A/57/38 (part II), CEDAW/C/SR. 557, 558 and 566, para. 48. See also CEDAW Committee, *Concluding Observations: Uzbekistan* (2001), A/56/38, CEDAW/C/SR.500, 501 and 507, para. 169.

⁹² Lijnzaad, ‘Over rollenpatronen’ at 57.

⁹³ Judgment in *National Coalition for Gay and Lesbian Equality v. Ministry of Justice*, South African Supreme Court 1999 1 SA 6 (CC), para. 143, as quoted by E. Bonthuys and C. Albertyn (eds.), *Gender, Law and Justice* (Cape Town: Juta, 2007) at 28.

sexuality and their reproductive capacity are crucial for the construction of gender stereotypes and fixed parental gender roles in all traditions and cultures and in all periods of human history up to the present time. This means that the construction of human sexuality as (exclusively) *heterosexual* forms part of the construction of patriarchal gender relations.⁹⁴ The most blatant transgression of the patriarchal female gender identity and her fixed gender (motherly) role is the lesbian woman who chooses to renounce a male sexual partner and thereby also rejects the protection of the male head of household, and all other forms of male supervision and control of her life.⁹⁵ As was discussed above,⁹⁶ the obligation to modify gender stereotypes and fixed parental gender roles is also of great importance to men who do not want to conform to their assigned 'masculine' identity and gender role. Beyond that, this obligation is equally important for all 'differently sexed' (intersex, transsexual) people and people with a 'different sexuality' (gay, lesbian and bisexual people).⁹⁷ Gender stereotypes and fixed parental gender roles directly affect the lives of all persons who renounce traditional heterosexual and patriarchal feminine and masculine gender identities and gender roles.⁹⁸ Through a wide interpretation of Article 5, all of these situations may be brought under the

⁹⁴ See J. Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 1st edn (London/ New York: Routledge, 1990) at 1–34 and 110–28 and J. Butler, 'Imitation and gender subordination' in D. Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories* (New York: Routledge, 1991) at 13. See A. M. Gross, 'Sex, love, and marriage: questioning gender and sexuality rights in international law', *Leiden Journal of International Law* 21 (2008) 235–53. At 251, Gross summarises Butler's position as follows: 'the division in two genders as part of the institution of compulsory heterosexuality, (which) requires a binary polarised gender system since patriarchy and compulsory heterosexuality are only possible in a world built on such a hierarchised division'. Real liberation or emancipation of women and gay and lesbian people, according to this author, requires 'undoing gender', instead of accepting the thus prefixed gender categories and identities (as either being male/female or heterosexual/homosexual). Another way of expressing the same principle is saying that a *transformation* of gender and sexuality needs to take place. See also Gross, 'Sex, love, and marriage' at 252.

⁹⁵ Lesbian women being gang raped in order 'to cure them' from their outrageous 'abnormal' sexual preference, is an example of this kind of 'correction'. See for example, *Report of the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Commission on Human Rights, March 2006, UN Doc. E/CN.4/2006/6/Add.1, paras. 180 and 183.

⁹⁶ See text in footnotes 14 and 32.

⁹⁷ That is, different from the heterosexual norm and other than the binary male–female scheme.

⁹⁸ Cook and Cusack, *Gender Stereotyping* at 2.

scope of the Convention.⁹⁹ It seems that the Committee, although still in a careful way, is now willing to do so.¹⁰⁰

10 States Parties' obligations to modify gender stereotypes and State sovereignty

The existence of gender stereotypes and fixed parental gender roles is linked to cultural patterns, customary rules, religious prescriptions or beliefs and traditions in a particular society or country.¹⁰¹ This means that the international obligation to modify gender stereotypes and fixed parental gender roles runs against the vested interests of many stakeholders in *keeping women in their 'proper' (traditional) place*.¹⁰² Often they justify or defend women's inequality or women's 'different' roles with the argument for the freedom of religion or the right to maintain or preserve a particular culture.¹⁰³ Yakin Ertürk, the former UN Special Rapporteur on violence against women, has observed that: 'despite the fact that the international community has recognised the universality of rights, identity politics and cultural relativist paradigms are increasingly employed to constrain in particular the rights of women'.¹⁰⁴ And in the words of

⁹⁹ It is therefore not necessary to 'unisex' CEDAW, as is argued by Rosenblum in 'Unisex CEDAW'. This author does discuss Article 5 of the CEDAW, but does not give much attention to its relevance for intersex and LGBT people.

¹⁰⁰ In 2009 the Committee recognised that women may be discriminated against on the grounds of their sexuality, thereby possibly including their homosexuality. However, it seems to be hesitant to use that word or to use the word lesbianism. See, for example, CEDAW Committee, *Concluding Observations: Guatemala*, CEDAW/C/GUA/CO7 (2009) para. 19, where it speaks of sexuality in general. It has mentioned sexual orientation and gender identity in CEDAW Committee, *Concluding Observations: Panama*, CEDAW/C/PAN/CO/7 (2010) para. 22. In its General Recommendations on older women (GR 27) and on Article 2 (GR 28), adopted in October 2010, the CEDAW Committee has explicitly mentioned sexual orientation and gender identity. See www.ighrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1235.html (last accessed 11 January 2012).

¹⁰¹ In the following, I will capture all of these phenomena under the word 'culture' or 'cultural' (without the quotation marks).

¹⁰² See Holtmaat and Naber, *Women's Human Rights and Culture*, Chapter 3 for the description of various stakeholders.

¹⁰³ There is extensive international legal and academic debate about the 'clash' between women's human rights and the right to culture. See Holtmaat and Naber, *Women's Human Rights and Culture*, Chapter 3 para. 2.5. It is especially contested whether the right to culture prevails over women's human rights or vice versa.

¹⁰⁴ UN Special Rapporteur on Violence Against Women (VAW), *Report on Intersections between Culture and Violence against Women*, 17 January 2007, UN Doc. A/HRC/4/34, para. 68.

the Independent Expert in the Field of Cultural Rights, Farida Shaheed: '[T]he challenge is to ensure that the right to pursue, develop and preserve culture in all its manifestations is in consonance with and serves to uphold the universality, indivisibility and interdependence of all human rights.'¹⁰⁵

Apart from individual men and women, heads of families and traditional or religious leadership, the State itself may be an important stakeholder in maintaining the status quo of unequal gender relations.¹⁰⁶ This is because the construction of a particular cultural specificity as regards 'true' gender relations may influence to a high degree a State's perception of its (presumed) essential national identity through which it distinguishes itself from other States.¹⁰⁷ The construction of particular gender identities and parental gender roles very much lies at the basis of the claimed identity of many (traditionalist) cultures, which are adopted and presented by political leaders or national governments as the one and only national culture.¹⁰⁸ National identities often coalesce around women's bodies and incorporate racial or ethnic judgements.¹⁰⁹ Therefore, States may have a great interest in maintaining or sustaining the existing gendered social and cultural order because this may (so to say) 'keep the country together'. Often, such culture is expressed in rules and practices that deny women's equality and curtail women's freedoms. These rules or practices are not just expressions of oppression or hatred of women, but serve to preserve and sustain the group's or nation's particular cultural or religious identity or even its very existence. Sometimes, a government goes as far as proclaiming that the prevailing gender relations within the family form 'the

¹⁰⁵ Quote by Farida Shaheed, Independent United Nations Expert in the Field of Cultural Rights, in her first press Statement on 23 November 2009. See: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9619&LangID=e (last accessed 20 July 2010).

¹⁰⁶ As becomes apparent from the work of Ann Hellum, State resistance to women's equality does not only come from the side of (religious) dictatorships in the south. See Hellum's chapter in this volume and A. Hellum, 'The Global Equality Standard meets Norwegian sameness' in A. Hellum, S. Ali and A. Griffiths (eds.), *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads* (London: Ashgate, 2010). An example of the ambivalent responses of States (and their organs) to the CEDAW is given in Ali's chapter in this volume.

¹⁰⁷ Gross, 'Sex, love, and marriage'.

¹⁰⁸ Most famous in this respect are two crucial symbols of cultural unity in France, consisting of the positive symbolic images of two women: Jeanne D'Arc and 'Marianne'.

¹⁰⁹ L. Vollp, 'Blaming culture for bad behaviour', *Yale Journal of the Humanities* 12 (2000) 89–115 at 90.

foundation of the State'.¹¹⁰ A particular construction of gender relations is often embedded in the State's constitution, in order for the State to distinguish itself from other States (e.g. from a State from which it has become independent, after a long duration of colonisation). An example is Article 41(2) of the Irish Constitution, which reads as follows:

1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

This provision, according to the CEDAW Committee, reflects a stereotyped image of the roles of women 'in the home and as mothers'.¹¹¹ Demanding that a State Party modify gender stereotypes and fixed parental gender roles, as Article 5 does, in such cases strikes at the heart of the State's fundamental understanding of its own identity.

From this perspective, it will come as no surprise that there is strong (most often implicit) resistance by States to implement international provisions that oblige them to promote gender equality. This observation links up with important research findings from which it appears that 'States apparently are more willing to negotiate, in other words seem less attached to their sovereignty, when material issues are at stake, as opposed to normative questions'.¹¹² The conclusion from this research is that 'all States shared their reluctance to part with social and cultural practices', and that 'social values, more so than economic or military power, are the strongest aspects of global civil society's challenges to autonomy and legitimacy'.¹¹³ This is even more so when the construction of fixed gender

¹¹⁰ CEDAW Committee, *Concluding Observations: Guatemala* (1994), A/49/38, CEDAW/C/SR. 242 and 246, para. 70.

¹¹¹ CEDAW Committee, *Concluding Observations: Ireland* (1999), A/54/38, CEDAW/C/SR. 440 and 441, paras. 193–194. Catholic Ireland thus wanted to distinguish itself from Protestant Britain. See M. van den Brink, 'Gendered sovereignty? In search of gender bias in the international law concept of state sovereignty' in I. Boerefijn and J. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights. Essays in Honour of Cees Flinterman* (Antwerp: Intersentia, 2008) 65–83.

¹¹² See van den Brink, 'Gendered sovereignty?' at 73, who discusses the research of E. Friedman, K. Hochstetler and A. M. Clark, 'Sovereignty challenges and bargains on the environment, human rights, and women', *International Studies Quarterly* 44:4 (2000) 591–614.

¹¹³ Van den Brink, 'Gendered sovereignty?' at 75, quoting Friedman *et al.*, 'Sovereignty challenges and bargains on the environment' at 611–12.

identities and parental gender roles lies at the basis of the national identity of a country, which is the case with many post-colonial and traditionalist countries that have strong links with certain religious beliefs or religious institutions.

From the very beginning the CEDAW Committee has acknowledged that a change of culture requires the strong political will of States Parties to do so effectively: '[M]embers emphasised that attitudes and behaviour could be changed if there was political will and broad support.'¹¹⁴ Even if a State is willing to bow its head under international pressure or is voluntarily willing to accept international human rights standards, it may be very difficult for it to effectively implement these norms in the internal legal order as well as at the horizontal level (i.e. between private parties or citizens among themselves). This is particularly so when an international norm requires a change of well-established patterns of conduct that are based on tradition, religion, custom or culture of many of its inhabitants, as is the case with Article 5. In order to be able to implement this norm, it is necessary that the State is *legally* and *culturally* legitimised to enforce or even promote such change.¹¹⁵ The necessary formal legal legitimisation for the implementation of Article 5 can be found in the fact that the State has ratified this Convention.¹¹⁶ After ratification of a human rights convention, a national government – be it monistic or dualistic with respect to the effects of international law on its own legal system – may argue (for example in its Parliament, answering political opposition) that it is *obliged* to implement the norms that are included in it. However, cultural legitimisation, especially when it concerns equality between men and women, is far more difficult to achieve because it requires modifying or overcoming very deeply rooted gender stereotypes and fixed parental gender roles.

The effectiveness of programmes to modify gender stereotypes and fixed parental gender roles will most probably be very limited if the State Party internally lacks cultural legitimisation or symbolic validation to do so;¹¹⁷ that is, if there is no connection with norms and values that

¹¹⁴ CEDAW Committee, *Concluding Observations: Ecuador*, UN Doc.A/49/38, 13th Session (1994) para. 524.

¹¹⁵ See C. Packer, *Using Human Rights to Change Tradition* (Antwerp/Oxford/New York: Intersentia, 2002) at 15.

¹¹⁶ States Parties are obliged to implement international norms in good faith, and so on. See Cook, 'State accountability under the CEDAW' at 229ff. See also CEDAW Committee, *Concluding Observations: Portugal*, CEDAW/C/PRT/CO/7 (2008) para. 29.

¹¹⁷ Hernández-Truyol, 'Out of the shadows' 148ff.

(also) exist in its society, in particular with norms and values that women themselves consider to be of crucial importance for their lives and for the realisation of their human rights. States will certainly have difficulty finding this (internal) cultural legitimisation when there are important cultural majorities or even minorities that oppose women's equality. In such situations women's (equal) rights are often constructed as opposite to a nation's culture or to particular (minority or majority) religious rights. This makes implementation, even by governments who are highly committed to women's human rights, a very difficult issue. One of the strategies of advocates of women's human rights could be to help the State Party to enhance or broaden this necessary cultural legitimisation by way of an intercultural or cross-cultural dialogue about women's rights.

11 Enhancing a dialogue to avoid a clash between women's human rights and culture

In order to achieve a higher level of cultural acceptance of the norm of women's equality, it is important to stimulate a dialogue between the State and international actors (for instance the CEDAW Committee), but also to promote and enhance a dialogue between the State and the main internal stakeholders, that is, religious leaders, community leaders and (women's) NGOs.¹¹⁸ Many academic commentators acknowledge that the only way out of a deadlock between opposite and fixed positions about women's human rights and culture is to engage in an intercultural or cross-cultural dialogue.¹¹⁹ When one has to choose between, on the one hand, forcing some cultures to eradicate or abolish traditional practices that are deemed to violate women's human rights (and will thereby most likely generate even more resistance), and on the other hand the position of cultural relativism, in which moral or ethical values, including the values of women's equality and dignity, no longer seem to have any

¹¹⁸ See the recommendations made by the CEDAW Committee in its Concluding Observations, as cited below in notes 123 and 124.

¹¹⁹ For example, A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001); A. Phillips, *Multiculturalism without Culture*, (Princeton University Press, 2007); Nyamu, 'How should human rights and development respond to cultural legitimization'; and A. A. An-Na'im, 'Problems of universal cultural legitimacy' in A. A. An-Na'im and Francis M. Deng (eds.), *Human Rights in Africa. Cross Cultural Perspectives* (New York: Brookings Institution, 1990) 331–67.

weight, the most effective and safe middle way seems to be to try to start understanding each other and speaking with each other. In the words of Celestine Nyamu: 'The non-abolitionist approach, therefore, calls for a non-hegemonic human rights practice that incorporates the two simultaneous processes of internal discourse and cross-cultural dialogue, in order to find legitimacy for human rights principles within all cultures.'¹²⁰ Engaging in such a dialogue is also seen as the only way to guarantee that women's voices are heard in the process of the implementation of human rights standards.¹²¹

In its Concluding Observations, the CEDAW Committee often stresses the necessity of engaging in a dialogue with civil society about cultural changes that need to take place in order to put an end to discrimination against women. It 'urges the State party to intensify co-operation in this regard with civil society organisations, women's groups and community leaders, traditional and religious leaders, as well as teachers and the media'.¹²² And it urges the State Party 'to undertake such efforts in co-ordination with a wide range of stakeholders, and involving all sectors of society, so as to facilitate social and cultural change and the creation of an enabling environment that is supportive of gender equality'.¹²³

In order to do so, States Parties need to interpret their culture and traditions in a non-essentialist and dynamic manner. In the words of a General Comment of the ESCR Committee: 'The expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.'¹²⁴ This has also been acknowledged by the CEDAW Committee,¹²⁵ who

¹²⁰ Nyamu, 'How should human rights and development respond to cultural legitimization' at 393.

¹²¹ Currently, this strategy is attracting more and more political and scholarly attention in all areas of legal pluralism or multilayered jurisdictions. See, for example, F. Fontanelli, G. Martinico and P. Carrozza, *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Groningen: European Law Publishing, 2009).

¹²² CEDAW Committee, *Concluding Observations: Nigeria*, CEDAW/C/NGA/6 (2008) para. 323.

¹²³ CEDAW Committee, *Concluding Observations: Nicaragua*, CEDAW/C/NIC/CO/6 (2007) para. 12.

¹²⁴ UN CESCR General Comment 21, 20 November 2009, UN DOC. E/C. 12/GC/21, para. 11.

¹²⁵ Here again I disagree with Merry ('Gender justice and CEDAW'), who states that the Convention and the Committee adhere to a static and essentialist view of culture and also use culture to describe other worlds, not their own. For a more detailed discussion on this issue, see Holtmaat and Naber, *Women's Human Rights and Culture* at para. 3.1.

in many Concluding Observations encourage States Parties to see culture as something that can be changed and that can (also) incorporate the human rights standards that are embodied in the Convention. An example of this stance can be found in a Concluding Observation on Jordan of 2007, where the Committee ‘urges the State party to view culture as a dynamic aspect of the country’s social fabric and life and therefore subject to change’.¹²⁶

12 Concluding remarks

This chapter argues that the Women’s Convention contains a holistic understanding of equality and that it includes the principle of freedom or diversity. On this basis, the Convention aims at eliminating all forms of discrimination against women by means of various strategies of legal, social and cultural reform. Especially in the last part of the chapter, it becomes clear that such reform meets with a lot of (often silent) resistance, and sometimes even with a vehement call upon other values and rights, such as the right to sustain and support cultures, traditions and religions, however oppressive these may be for women. It is not enough that Article 5 offers the legal legitimacy for the necessary changes in this respect; it is also required that States Parties and other stakeholders find the roads to broaden and strengthen the necessary cultural legitimisation for the process of modifying gender stereotypes and fixed parental gender roles. Thanks to the existence of Article 5, the Women’s Convention is a revolutionary instrument that addresses the root causes of discrimination against women. However, in order for this instrument to become

¹²⁶ CEDAW Committee, *Concluding Observations: Jordan* (2007), CEDAW/C/EST/JOR/CO/4, para. 20. See also CEDAW Committee, *Concluding Observations: Mozambique* (2007), CEDAW/C/MOZ/CO/2, paras. 20 and 21 and CEDAW Committee, *Concluding Observations: Cook Islands* (2007), CEDAW/C/COK/CO/1, para. 23. We found a similar consideration for the first time in CEDAW Committee, *Concluding Observations: Angola* (2004), A/59/38/CEDAW/C/SR. 655 and 661, para. 147. The Committee in its earlier days at some points went rather far in suggesting that a particular culture or religious practice or conviction can and should be changed. See, for example, CEDAW Committee, *Concluding Observations: Libyan Arab Jamahiriya* (1974), A/49/38, CEDAW/C/SR.237 and 240, para. 130 and CEDAW Committee, *Concluding Observations: Pakistan* (2007), CEDAW/C/PAK/CO/3, para. 29. In the latter Concluding Observation the Committee ‘calls on the State party to take prompt action to counteract the influence of non-State actors, which, through the misinterpretation of Islam and the use of intimidation and violence, are undermining the enjoyment by women and girls of their human rights’.

effective, all stakeholders in the advancement of women's human rights need to take steps in order to enhance the necessary cultural, social and legal changes. Improving the quality and effectiveness of transnational and local dialogues about women's human rights and culture is an important step in that direction.