
The CEDAW as a legal framework for transnational discourses on gender stereotyping

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1 Introduction

The thirtieth anniversary of the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2009 provided an important opportunity to reflect on the contributions of this instrument to the advancement of women's human rights. It also provided a timely opportunity to consider how the CEDAW might be utilised more effectively in pursuit of this goal over the coming decades. During its first thirty years in operation, the CEDAW 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.¹ Yet much of the potential of the CEDAW for advancing women's human rights has yet to be realised. One area of considerable untapped potential is the obligations of States Parties in Articles 2(f)² and 5³ of the CEDAW to modify or transform

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¹ See generally A. Byrnes, 'The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: reflections on their role in the development of international human rights law and as a catalyst for national legislative and policy reform' [hereinafter 'The CEDAW and the CEDAW Committee'], UNSW Law Research Paper No. 2010-17 (2010).

² Article 2(f) requires States Parties to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

³ Article 5(a) requires States Parties to 'take all appropriate measures' to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the

gender stereotypes and eliminate wrongful gender stereotyping. States Parties have made little progress in the implementation of these obligations, even though the ‘persistence of stereotypical attitudes’ has repeatedly been labelled a ‘significant challenge to the practical realization of women’s human rights’, and there have been numerous calls to make the elimination of wrongful gender stereotyping ‘a key element in all efforts to achieve the realization⁴ of those rights. This chapter argues that the CEDAW provides a powerful, yet largely unexplored, legal framework for addressing gender stereotyping. On the basis of that view, it seeks to bring the potential of Articles 2(f) and 5 to the fore, so that they might be capitalised on to the fullest extent possible.

The chapter begins in section 2 by briefly examining the concepts of gender stereotypes and gender stereotyping and outlining why stereotyping is a human rights issue. Section 3 outlines some of the reasons why the CEDAW has such potential as a framework for addressing gender stereotyping. It also identifies some of the limitations of using the CEDAW as a framework for addressing stereotyping and considers how those limitations might be overcome or, at the very least, their effects minimised. Responding to one of the limitations of the CEDAW framework identified in section 3, namely the lack of clarity surrounding States Parties’ obligations in respect of gender stereotyping, section 4 offers a possible interpretation of the content and meaning of the obligations in Articles 2(f) and 5, applying the widely accepted tripartite framework of state obligations – the obligations to respect, protect and fulfil. Section 5 posits that the question of if and when gender stereotyping can be justified under the CEDAW will be one of the biggest interpretative challenges facing the Committee on the Elimination of Discrimination against Women (CEDAW Committee or Committee) moving forward. Assuming that stereotyping can sometimes be justified, section 5 briefly outlines some of the issues that the Committee will need to take into account when determining the circumstances in which stereotyping is a permissible

elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’. Article 5(b) requires States Parties to ‘take all appropriate measures’ 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’.

⁴ Commission on the Status of Women, 54th Session, *Commemorating 30 Years of the Convention on the Elimination of All Forms of Discrimination against Women: Moderator’s Summary*, 29 March 2010, UN Doc. E/CN.6/2010/CRP.12, paras. 10–11.

limitation of rights guaranteed by the CEDAW. Section 6 concludes by arguing that there are encouraging signs that indicate that States Parties' obligations to modify or transform gender stereotypes and eliminate wrongful gender stereotyping will be a central theme of the Committee's work over the coming decades. It suggests that strong leadership from the Committee, as well as other international and regional human rights treaty bodies, will ensure that the threat of stereotyping is taken seriously. It is argued that this will, in turn, likely produce measureable gains in the advancement of women's human rights and the achievement of substantive equality.

2 Defining and conceptualising gender stereotyping

Gender stereotyping was one of the key issues singled out by the framers of the CEDAW, along with such other issues as equality in marriage and family relations and equality in political and public life, as requiring the attention of States Parties. It is an issue that continues to be singled out today as a 'significant challenge to the practical realization of women's human rights'.⁵ There remains much confusion, however, about the meaning of the terms 'gender stereotype' and 'gender stereotyping'. Moreover, there has been limited discussion of the reasons why gender stereotyping is problematic from a human rights perspective. In an attempt to disrupt the status quo, section 2.1 offers a possible interpretation of the meaning of the terms gender stereotype and gender stereotyping. Section 2.2 then provides an explanation of why gender stereotyping is a human rights issue.

2.1 *Understanding gender stereotypes and gender stereotyping*

Almost all of us, if asked, could provide examples of gender stereotypes. The responses elicited to such a request would invariably include common gender stereotypes such as 'women are nurturing' and 'men are breadwinners'. Not all of us, however, would be able to articulate clearly what the terms 'gender stereotype' or 'gender stereotyping' actually mean. If pressed further, many of us would also struggle to distinguish plainly between the meaning of those terms and that of related but distinct concepts, such as social and cultural norms, myths, prejudices, stigma and generalisations. While the inability to pinpoint a definition or definitions of these terms may be of little consequence in our day-to-day lives,

⁵ *Ibid.*

certainty of meaning becomes increasingly important where legal obligations are involved. It is curious, then, that little attention has been paid by international human rights treaties and treaty bodies to elucidating the meaning of the terms that form the essence of States Parties' obligations to modify gender stereotypes and eliminate wrongful gender stereotyping. What, for example, are the 'gender stereotypes' that States Parties are expected to modify or transform?

One approach, followed in this chapter, is to define a gender stereotype as a generalised view or preconception about the attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, women and men (e.g. women are empathetic, men are athletic).⁶ Understood in this way, a gender stereotype operates to create assumptions about the attributes or characteristics possessed by individuals and the roles that they perform, based on their membership in a particular sex or gender group; all of the dimensions of personality that make individuals unique are filtered through the lens of a stereotypical belief about their sex or gender.⁷ If the term gender stereotype refers to a generalised view or preconception based on sex or gender, the term gender stereotyping refers to the practice of ascribing a stereotypical belief to an individual, by reason only of her or his membership in the social group of women or men.⁸ It is the practice of applying 'gender stereotypic knowledge in forming an impression of an individual man or woman'.⁹ Where the stereotypes of women as mothers and carers are at play, for example, it is presumed that an individual woman strives to be and will become a mother and a carer, irrespective of her distinctive reproductive health capacity, physical and emotional circumstances, and individual priorities.¹⁰

⁶ See R. J. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) at 1, 9, 20, 25–31. Gender stereotypes come in varied and overlapping forms, including sex stereotypes, sexual stereotypes, sex-role stereotypes and compounded stereotypes. Sex stereotypes are preconceptions concerning the physical, including biological, emotional and cognitive, attributes or characteristics that are or should be possessed by women and men (e.g. women are physically and mentally weak). Sexual stereotypes are preconceptions about the sexual characteristics or qualities that women and men are believed or expected to possess (e.g. men have strong libidos). Sex-role stereotypes are preconceptions concerning the roles that women and men perform or are expected to perform, and the types of behaviours to which they are expected to conform (e.g. women should be mothers and caregivers). Compounded gender stereotypes are preconceptions about different subgroups of women and men that result from the ascription of attributes, characteristics or roles based on sex or gender and one or more other traits, such as disability or sexual orientation (e.g. women with a disability are asexual).

⁷ See *ibid.* at 9. ⁸ See *ibid.* at 12, 20. ⁹ *Ibid.* at 20. ¹⁰ See *ibid.* at 11.

Gender stereotypes often embody dominant social and cultural norms, meaning the formal and informal rules that govern the values, beliefs, attitudes and behaviours that a particular community or culture deems acceptable (e.g. dress codes, rules of etiquette, beauty standards). However, social and cultural norms can underpin laws, regulations, customs and practices that discriminate against women, independent of gender stereotypes. Examples include social and cultural norms that operate to deny women access to property or inheritance, sanction the unlawful killing of women accused of witchcraft, encourage women (but not men) to undergo plastic surgery to meet dominant beauty standards, or condone forced marriage. Article 2(f) requires States Parties to take steps to address all violations that are based on discriminatory social and cultural norms and not just those norms that give rise to harmful gender stereotypes and/or the practice of wrongful gender stereotyping. Where a gender stereotype is based on or embodies a social and cultural norm and the stereotype is applied to a woman in ways that violate her rights under the CEDAW, States Parties are required to eliminate the practice of wrongful gender stereotyping and modify or transform the operative norm and the operative gender stereotype.

2.2 *Gender stereotyping as a human rights concern*

The goal of addressing gender stereotyping is not the construction of a world free of all gender stereotypes, since stereotypes can, and do, perform important social functions. One such function is to maximise simplicity and predictability.¹¹ It was Walter Lippmann who, in 1922, first suggested that:

the real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage it.¹²

The goal, instead, is modification or transformation of stereotypical beliefs that are *harmful* (for example, stereotypes ‘based on the idea of the inferiority or the superiority of either of the sexes’¹³) and elimination of the practice of *wrongful gender stereotyping*, meaning those forms of gender

¹¹ See *ibid.* at 14–16.

¹² See W. Lippmann, *Public Opinion* (1922; rep. New York: Macmillan, 1957) at 16.

¹³ Article 5(a) CEDAW.

stereotyping that result in discrimination or violations of other rights and freedoms, such as the right to a fair trial or the freedom from gender-based violence against women. As the CEDAW Committee recently explained, the elimination of all forms of discrimination against women and the achievement of substantive equality requires States Parties 'to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women'.¹⁴

Refraining from wrongful gender stereotyping enables states to treat individuals with dignity and respect and honour the choices that they make (or would like to make) about their own lives, including what it means for them to be a woman or a man or a person of another gender.¹⁵ The harm of failing to abstain from wrongful gender stereotyping lies in using the power of the state to prescribe certain attributes, characteristics or roles to individuals based on their sex or gender, and in exercising that power in ways that regulate, penalise or stigmatise non-conforming individuals. An example is a law enforcement officer who fails to properly investigate a reported abduction and dismisses the significance of the alleged crime because the female victim was wearing a short skirt at the time of her disappearance, in defiance of stereotypical norms that women should be modest.¹⁶ States might have particular views about the nature of the sexes or preferences for how they should behave or the roles they should perform in society. However, they must not unreasonably impose their stereotypical views or preferences on individual women and men¹⁷ or infringe the rights of non-conforming individuals.¹⁸

¹⁴ CEDAW Committee, *R.K.B. v. Turkey*, Communication No. 28/2010, 13 April 2012, UN Doc. CEDAW/C/51/D/28/2010 (2012), at para. 8.8.

¹⁵ See R. Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (The Hague: Reed Business Information, 2004) at xii. See also Cook and Cusack, *Gender Stereotyping* at 112.

¹⁶ See CEDAW Committee, *Report on Mexico Produced by the Committee on the Elimination of Discrimination against Women Under Article 8 of the Optional Protocol to the Convention, and Reply from the Government of Mexico*, 27 January 2005, UN Doc. CEDAW/C/2005/OP.8/MEXICO [hereinafter *Ciudad Juárez Inquiry*], paras. 57, 67; IACtHR, *González et al. ('Cotton Field') v. Mexico*, Judgment, 16 Nov. 2009, Series C No. 205, paras. 152–154, 196–208, 398–402.

¹⁷ The CEDAW Committee has, for instance, criticised Ireland for institutionalising stereotypes of women as mothers and homemakers in its Constitution, and strongly urged it to stop perpetuating those stereotypes, including through its supreme law: CEDAW Committee, *Concluding Observations: Ireland*, UN Doc. CEDAW/C/IRL/CO/4–5, 22 July 2005, paras. 24–25.

¹⁸ See Cook and Cusack, *Gender Stereotyping* at 111–112. See also D. A. Widiss, E. L. Rosenblatt and D. NeJaime, 'Exposing sex stereotypes in recent same-sex marriage jurisprudence', *Harv. J.L. and Gender* 30 (2007) 461–505 at 464, 469, 488; R. B. Siegel, 'The new

Failure to take reasonable steps to protect women against wrongful gender stereotyping by private actors (for example, employers, religious organisations, media) makes states complicit in the resultant harms to women and the perpetuation of this harmful practice, more generally. Whether through omissions of action or condoning wrongful gender stereotyping by private actors, states' failure to protect legitimises gender stereotypes and creates a culture of impunity around their use, further strengthening their resilience across different social sectors and over time. For instance, repeated failings on the part of many states to work with the media to promote positive and non-stereotypical portrayals of women has helped to fuel an industry already rife with invidious stereotyping of women.¹⁹ Another example is the failure of some states to address gender stereotypes that facilitate polygyny²⁰ and fuel the spread of HIV/AIDS.²¹

States must ensure that individuals are free to make their own choices about what it means for them to be a woman or a man and to have those choices respected and honoured – they must ensure that 'all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices'.²² Law policies, programmes and practices need to be restructured and reformulated in order to ensure that they do not perpetuate women's oppression, including by devaluing women, limiting their life plans or reflecting patriarchal attitudes that attribute subservient characteristics and roles to women through gender stereotypes. There also needs to be a transformation of stereotypical views of men and women in the political economy (i.e. the division of labour and resources) and in the cultural valuations ascribed to men and women (i.e. the privileging of masculinity and devaluing of femininity). This will require the adoption of measures to ensure that,

politics of abortion: an equality analysis of woman-protective abortion restrictions', *U. Ill. L. Rev.* (2007) 991–1053 at 1042–3, 1048.

¹⁹ See for example, CEDAW Committee, *Concluding Observations: Albania*, 16 September 2010, UN Doc. CEDAW/C/ALB/CO/3, para. 25; CEDAW Committee, *Concluding Observations: Russia*, 16 August 2010, UN Doc. CEDAW/C/USR/CO/7, para. 21.

²⁰ See CEDAW Committee, General Recommendation No. 21, UN Doc. A/49/38 (Supp) at 1 (1994), para. 14. See generally L. M. Kelly, 'Polygyny and HIV/AIDS: a health and human rights approach', *Journal for Juridical Science* 31:1 (2006) 1–38; R. J. Cook and L. M. Kelly, *Polygyny and Canada's Obligations Under International Human Rights Law* (Ottawa: Department of Justice, Canada, 2006).

²¹ See generally Kelly, 'Polygyny and HIV/AIDS'.

²² CEDAW Committee, General Recommendation No. 28, 16 December 2010, UN Doc. CEDAW/GC/28, para. 22.

among others things, women's individual worth, talents and capabilities are recognised, and those activities and roles traditionally associated with women are valued.

3 The added value of the CEDAW in addressing wrongful gender stereotyping

Before writing *Gender Stereotyping: Transnational Legal Perspectives*,²³ Professor Rebecca J. Cook and I undertook extensive research on gender stereotyping. Our research showed that legal discourses on gender stereotyping had been limited mainly to national concerns and were concentrated in a small handful of countries (e.g. America, Canada, South Africa). While we learnt, and continue to learn, much from the depth and richness of domestic-centred debates, we found that the global reach of gender stereotypes demands a broader and more inclusive conversation about the practice and its consequent social and legal harms. We hypothesised that discourses on gender stereotyping would benefit immeasurably from insights gained from transnational legal perspectives.²⁴ In this hypothesis we were guided by the wisdom of the former Canadian Supreme Court Justice Claire L'Heureux-Dubé, who observed that a debate that encompasses international and comparative perspectives on wrongful gender stereotyping may 'provide a much-needed external perspective on the myths and stereotypes that may continue to permeate the values and laws of our own communities and cultures'.²⁵

Proceeding on the basis of our belief about the importance and value of transnational perspectives, Professor Cook and I argued that the CEDAW provides a leading framework for debates about gender stereotyping.²⁶ In view of the fact that the current volume explores the added value of the CEDAW, it is perhaps timely to return to the decision we made in writing *Gender Stereotyping* to use the CEDAW. In so doing, I hope to articulate the reasons why we concluded that the CEDAW provides a sound legal framework for transnational discourses on gender stereotyping. How, in

²³ Cook and Cusack, *Gender Stereotyping* (outlining a methodology for addressing wrongful gender stereotyping).

²⁴ *Ibid.* at 7–8.

²⁵ The Honourable Madame Justice C. L'Heureux-Dubé, 'Beyond the myths: equality, impartiality, and justice', *Journal of Social Distress and the Homeless* 10:1 (2001) 87–104 at 101. See also J. Nedelsky, 'Embodied diversity and the challenges to law', *McGill L. J.* 42 (1997) 91–117 at 107.

²⁶ Cook and Cusack, *Gender Stereotyping* at 3–4.

other words, at least in our view, does the legal framework articulated in the CEDAW add value to transnational discourses on gender stereotyping? And what, if any, limitations need to be overcome to ensure the future integrity of this framework?

3.1 *A robust legal framework*

3.1.1 Express obligations to address gender stereotyping

The CEDAW is one of few legal instruments to expressly require states to address gender stereotyping and that provides a set of binding international legal standards against which the acts and omissions of states in relation to stereotyping can be measured.²⁷ In general terms, the Preamble²⁸ and Articles 2(f) and 5 of the CEDAW expressly require States Parties to modify or transform gender stereotypes (for example, through public education campaigns) and eliminate wrongful gender stereotyping (for example, by amending a law that enforces a gender stereotype). Article 10(c) of the CEDAW contains express obligations to address gender stereotyping in the field of education.²⁹ In addition to these express obligations, the CEDAW Committee has applied Articles 2(f) and 5(a) to the fields covered in Articles 6 to 16 of the CEDAW (for example, health, employment, marriage and family relations). In so doing, it has sent a clear message that it views the obligations in Articles 2(f) and 5(a) not only as freestanding obligations but also as ‘overarching, cross-cutting obligations that need to be read in conjunction with other human rights

²⁷ For examples of other human rights treaties that require the elimination of wrongful stereotyping, see Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, OAU Doc. CAB/LEG/66.6, entered into force 25 November 2005, Articles 2(2), 4(2)(d), 12(1)(b); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, OAS/Ser.L/V/1.4 rev., entered into force 5 March 1995, Articles 6(b), 8(b). In the absence of express obligations, some courts and treaties bodies have interpreted the rights to non-discrimination and equality as requiring the elimination of wrongful stereotyping: see, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 16, 11 August 2005, UN Doc. E/C.12/2005/4, paras. 11, 14, 19.

²⁸ CEDAW, Preamble para. 14 (providing ‘that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women’).

²⁹ Article 10(c) CEDAW (providing that States Parties shall take all appropriate measures to eliminate ‘any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods’).

and fundamental freedoms, because gender stereotyping does not exist in isolation'.³⁰

The obligations in Articles 2(f) and 5(a) extend further still, to rights not expressly guaranteed under the CEDAW but which are recognised under other treaties or customary international law and have an impact on the elimination of all forms of discrimination against women and the achievement of substantive equality.³¹ In *Karen Tayag Vertido v. The Philippines*, for example, the Committee held the Philippines legally accountable for wrongful gender stereotyping that affected, inter alia, the victim's ability to access a fair and just trial.³² In reaching its finding, the Committee observed that 'stereotyping affects women's right to a fair and just trial and ... the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done ... based merely on preconceived notions'.³³ The Committee made this finding even though the right to a fair trial is not expressly guaranteed in the CEDAW.³⁴

3.1.2 Obligations to address gender stereotyping are central to the achievement of substantive equality

Another reason that the CEDAW adds value to transnational discourses on gender stereotyping is that the Committee has made it clear that the obligations in Articles 2(f) and 5 to 'address prevailing gender relations and the persistence of gender-based stereotypes' are *central* to the elimination of all forms of discrimination against women and the achievement of substantive equality.³⁵ The immediate consequence of the Committee's

³⁰ Cook and Cusack, *Gender Stereotyping* at 75. See for example, CEDAW Committee, General Recommendation No. 27, 16 December 2010, UN Doc. CEDAW/C/GC/27, para. 16.

³¹ See generally CEDAW Committee, General Recommendation No. 28 at para. 7. See also Andrew Byrnes, 'Article 1' in M. A. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 51–70 at 62.

³² CEDAW Committee, *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, 22 September 2010, UN Doc. CEDAW/C/46/D/18/2008 (2010), paras. 8.2–8.8. See also *R.K.B. v. Turkey* at paras. 8.7–8.8; CEDAW Committee, *V.K. v. Bulgaria*, Communication No. 20/2008, 27 September 2011, UN Doc. CEDAW/C/49/D/20/2008 (2011), paras. 9.11–9.12.

³³ *Karen Tayag Vertido v. The Philippines* at para. 8.4.

³⁴ Elements of the right to a fair trial are protected in Article 15(1) of the CEDAW, which provides that 'States Parties shall accord to women equality with men before the law'.

³⁵ See CEDAW Committee, General Recommendation No. 25, 30 January 2004, UN Doc. A/59/38, para. 7. The centrality of States Parties' obligations in respect of wrongful

characterisation of these obligations is acknowledgment of the significance of the obligations and States Parties' compliance with them, for the recognition, exercise and enjoyment of women's human rights. Such acknowledgment emphasises that efforts to eliminate direct and indirect discrimination and improve women's de facto position in society will only go so far toward achieving substantive equality, unless they are also accompanied by measures to transform structural inequality that stems from, inter alia, wrongful gender stereotyping.³⁶ A further consequence of the Committee's characterisation is that reservations that seek to limit or qualify the obligations of States Parties to address gender stereotyping are likely to be declared incompatible with the object and purpose of the treaty and, thus, impermissible pursuant to Article 28(2) of the CEDAW.³⁷

3.1.3 Widespread recognition of obligations to address gender stereotyping

The obligations in the CEDAW to modify or transform gender stereotypes and eliminate wrongful gender stereotyping are recognised by, and binding on, almost all Member States of the United Nations.³⁸ The corollary of widespread international support for the CEDAW is that it provides a foundation for transnational discourses that is already recognised by the overwhelming majority of states around the world. By ratifying or acceding to the CEDAW, States Parties effectively agreed to a common framework for discussions about gender stereotyping (among other issues) that is not limited by any one domestic legal system but, rather, supports the

gender stereotyping is reinforced in the Preamble of the CEDAW, which acknowledges 'that a change in the traditional role of men as well as the role of women in society and the family is needed to achieve full equality' and was echoed recently by the Committee when it affirmed that Article 2 of the CEDAW, including Article 2(f), is 'the very essence of the obligations of States parties under the Convention'. See also CEDAW Committee, General Recommendation No. 28 at para. 41.

³⁶ See generally R. Holtmaat, this volume; S. Fredman, this volume; S. Fredman, 'Beyond the dichotomy of formal and substantive equality: towards a new definition 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.

³⁷ Article 28(2) CEDAW (providing that '[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted').

³⁸ As at the time of writing, 187 states had ratified or acceded to the CEDAW, 104 of which had also ratified or acceded to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 2131 UNTS 83, entered into force 22 December 2000.

sharing of external perspectives on gender stereotyping. That is not to suggest, however, that the CEDAW Committee assumes that there is only one correct approach to addressing gender stereotyping. An advantage of using the CEDAW as a framework for transnational discourses is that it allows for the adoption by States Parties of nuanced and flexible solutions to the varied individual and structural experiences of wrongful gender stereotyping. And it does this while still raising awareness of women's collective experiences of gender stereotyping, including through the reporting procedure.

While support for, and the perceived legitimacy of, the CEDAW have come under attack due to high numbers of reservations and declarations, these critiques unravel, even if only in relation to Articles 2(f) and 5, in the face of indications from the Committee that States Parties' attempts to evade their obligations to address gender stereotyping are unlikely to be tolerated due to their central role in the achievement of substantive equality.³⁹ Moreover, while general reservations to Article 2, including Article 2(f), may be high, States Parties seem less attached to their sovereignty where Article 5 is concerned, as evidenced in the comparatively low number of reservations made by States Parties to this provision.⁴⁰ It is also noteworthy that no other international or regional human rights treaty that expressly requires States Parties to address gender and/or other forms of stereotyping enjoys the same level of support or recognition as the CEDAW.⁴¹

3.1.4 Beyond stereotypes of women

A further reason that the CEDAW adds value to transnational debates about gender stereotyping is that it requires States Parties to address gender stereotypes of men, in addition to gender stereotypes of women.⁴² The

³⁹ See section 3.1.2.

⁴⁰ See United Nations Treaty Collection, available at: <http://treaties.un.org/> (last accessed 1 February 2013).

⁴¹ *Ibid.*

⁴² In a departure from other provisions in the CEDAW that focus almost exclusively on women (e.g. 'suppress all forms of traffic in women') or on men only in relation to women or as a yardstick for equality (e.g. 'equality between men and women'), Article 5(a) requires the modification or transformation of gender stereotypes, and the elimination of wrongful gender stereotyping, of both women and men. The obligations in Article 5(a) to address gender stereotyping of both sexes/genders are echoed in the Preamble to the CEDAW, which stresses that 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality'. The obligations of States Parties to address the full spectrum of gender stereotypes were affirmed implicitly in the *Vertido* Case, when the Committee held the Philippines accountable for the decision of a

framers of the CEDAW appear to have understood that gender stereotypes are relational in nature (i.e. they tend to assign women and men distinct yet mutually reinforcing attributes, characteristics and roles) and that stereotypes of women and men therefore need to be examined concurrently. The framers also appear to have understood that wrongful gender stereotyping not only disadvantages women, but also men⁴³ and society in general and that focusing exclusively on gender stereotypes of women would, to paraphrase Nancy Levit, leave umbilical parts of the problem of wrongful gender stereotyping unresolved.⁴⁴ The focus of the CEDAW on gender stereotypes of women and men is to be welcomed, therefore, as it requires States Parties to take the relational quality of gender stereotypes into account, examine how the construction of masculinities (in addition to the construction of femininities) fosters gender hierarchies and male dominance, and address the full range of harms caused by wrongful gender stereotyping.

3.1.5 State accountability for wrongful gender stereotyping

States Parties can be held legally accountable for their failures to comply with the obligations in Articles 2(f) and 5, either through the periodic reporting procedure in Article 18 of the CEDAW⁴⁵ or the

trial court judge to acquit the accused of rape based on gender stereotypes of women and men, rather than law or fact. See *Karen Tayag Vertido v. The Philippines*.

⁴³ The hidden price men may pay for being stereotyped on the basis of their sex and/or gender includes: marginalisation of men who are battered, raped or sexually harassed; overrepresentation of men (especially certain subgroups of men) in the criminal justice system; impaired access to caring and nurturing roles, both in private and professional settings; physical and psychological harms of warfare; and physical harm resulting from high-risk behaviour engaged in to prove one's so-called 'manliness'. See generally N. E. Dowd, N. Levit and A. McGinley, 'Feminist Legal Theory meets Masculinities Theory' in F. R. Cooper and A. C. McGinley (eds.), *Masculinities and Law: A Multidimensional Approach* (New York University Press, 2012); N. E. Dowd, *The Man Question: Male Privilege and Subordination* (New York University Press, 2010); J. M. Kang, 'The burdens of manliness', *Harv. J.L. and Gender* 33 (2010) 477–507; D. S. Cohen, 'Keeping men "men" and women down: sex segregation, anti-essentialism and masculinity', *Harv. J.L. and Gender* 33 (2010) 509–53; R. Collier, 'Masculinities, law, and personal life: towards a new framework for understanding men, law, and gender', *Harv. J.L. and Gender* 33 (2010) 431–75; N. E. Dowd, 'Asking the man question: masculinities analysis and feminist theory', *Harv. J.L. and Gender* 33 (2010) 415–30; J. C. Williams and S. Bornstein, 'The evolution of "FReD": family responsibilities discrimination and developments in the law of stereotyping and implicit bias', *Hastings L.J.* 59 (2008) 1311–58.

⁴⁴ N. Levit, 'Feminism for men: legal ideology and the construction of maleness', *UCLA L. Rev.* 43 (1995–6) 1037–116 at 1054.

⁴⁵ Article 18 CEDAW (providing that 'States Parties undertake to submit ... for consideration by the Committee, a report on the legislative, judicial, administrative or

Communication⁴⁶ or Inquiry⁴⁷ procedures of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Optional Protocol). Attempts to hold States Parties accountable for wrongful gender stereotyping have been successful in the majority of Communications decided on the merits in which stereotyping was raised as an issue for the Committee's consideration,⁴⁸ as well as in the Committee's first Inquiry.⁴⁹ For example, in *L.C. v. Peru* the Committee found that the State Party, through the actions of medical staff at a public hospital, had engaged in wrongful gender stereotyping (among other things), in violation of Article 5 of the CEDAW. In the Committee's expert view, the decision of medical staff to delay necessary spinal surgery and refusal to perform an abortion on L.C., a

other measures which they have adopted 'give effect to the provisions of the present Convention and on the progress made in this respect'). Because use of the periodic reporting procedure to address wrongful gender stereotyping has been examined elsewhere, this chapter focuses mainly on relevant Optional Protocol jurisprudence. See Holtmaat, this volume; 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* (Oxford University Press, 2012) 141–68.

⁴⁶ Article 2 Optional Protocol (providing 'Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party').

⁴⁷ Article 8(1) Optional Protocol (providing '[i]f the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned').

⁴⁸ For Communications in which allegations of wrongful gender stereotyping have been considered on the merits, see CEDAW Committee, *A.T. v. Hungary*, Communication No. 2/2003, 26 January 2005, UN Doc. CEDAW/C/32/D/2/2003 (2005); CEDAW Committee, *Fatma Yildirim v. Austria*, Communication No. 6/2005, 1 October 2007, UN Doc. CEDAW/C/39/D/6/2005 (2007); CEDAW Committee, *Şahide Goekce v. Austria*, Communication No. 5/2005, 6 August 2007, UN Doc. CEDAW/C/39/D/5/2005 (2007); *Karen Tayag Vertido v. The Philippines*; CEDAW Committee, *Inga Abramova v. Belarus*, Communication No. 23/2009, 27 September 2011, UN Doc. CEDAW/C/49/D/23/2009 (2011); *V.K. v. Bulgaria*; CEDAW Committee, *L.C. v. Peru*, Communication No. 22/2009, 25 November 2011, UN Doc. CEDAW/C/50/D/22/2009 (2011); *R.K.B. v. Turkey*. Several dissenting Committee members considered allegations of wrongful gender stereotyping in Communications that have been declared inadmissible. See CEDAW Committee, *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain*, Communication No. 7/2005, 9 August 2007, UN Doc. CEDAW/C/39/D/7/2005 (2007); CEDAW Committee, *Michèle Drayas et al. v. France*, Communication No. 13/2007, 4 August 2009, UN Doc. CEDAW/C/44/D/13/2007 (2009); CEDAW Committee, *G.D. and S.F. v. France*, Communication No. 12/2007, 4 August 2009, UN Doc. CEDAW/C/44/D/12/2007 (2009).

⁴⁹ See *Ciudad Juárez Inquiry*.

pregnant minor who had been repeatedly sexually assaulted and who subsequently attempted suicide, was based on the prescriptive sex-role stereotype that women should be mothers. The Committee reasoned that reliance on this stereotype had the effect of prioritising protection of the foetus over the life, health and dignity of L.C., and ultimately contributed to her becoming a paraplegic.⁵⁰ In another Communication, *A.T. v. Hungary*, the Committee condemned widespread gender stereotyping in Hungary that had the effect of positioning women as subordinate to men. The Committee linked that stereotyping to the author's experiences of domestic violence and the failure of the state to take adequate steps to put an end to it and, on that basis, found Hungary in violation of its obligations under Article 5(a) of the CEDAW, read in conjunction with Article 16 on marriage and family relations.⁵¹

With only a small number of Communications decided and one Inquiry completed, it is perhaps too soon to draw any concrete conclusions regarding the effectiveness of the CEDAW and its Optional Protocol as a tool to hold States Parties accountable for wrongful gender stereotyping. Nevertheless, several encouraging developments are worthy of brief consideration here. Perhaps one of the most exciting developments is the growing leadership of the CEDAW Committee and, in particular, individual members of the Committee, on the issue of gender stereotyping. Nowhere is this leadership clearer than in the readiness of several Committee members to raise gender stereotyping in two separate Communications concerning the ability of women in France to change their surname, even though the authors themselves had not identified stereotyping as an issue for consideration.⁵² Just as exciting is the Committee's increasingly sophisticated analysis of gender stereotyping, as evidenced in the *Vertido* Case, where the Committee named and examined operative gender stereotypes and analysed at length how the trial judge's reliance on them impaired the rights of the victim, Karen Tayag Vertido, in violation of the CEDAW.⁵³ Also welcome is the recognition in the Committee's views in the *Vertido* Case that the obligations of States Parties in respect of harmful gender stereotyping are not limited to the rights and freedoms expressly enumerated in the CEDAW, but extend also to those rights and freedoms guaranteed by other treaties.⁵⁴ The approach adopted by the

⁵⁰ *L.C. v. Peru* at para. 8.15.

⁵¹ *A.T. v. Hungary* at para. 9.4.

⁵² See *G.D. and S.F. v. France* at para. 8; *Michèle Drayas et al. v. France* at para. 7.

⁵³ *Karen Tayag Vertido v. The Philippines* at paras. 8.4–8.6.

⁵⁴ *Ibid.* at para. 8.4.

Committee ensures that individual women can submit Communications under the Optional Protocol alleging wrongful gender stereotyping that has violated such rights and freedoms as the right to life, the right to an adequate standard of living and the freedom of expression.

There are, however, several areas of concern worthy of brief consideration here. One concern is that the CEDAW Committee has failed to take advantage of several important opportunities to consider how gender stereotypes are implicated on the facts. For example, in *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain* one Committee member, in a dissenting opinion, condemned a Spanish law that entrenched male primacy in the order of succession on the basis that it perpetuated discrimination and institutionalised stereotypes, in violation of the CEDAW.⁵⁵ Yet the remaining Committee members either were unable to discern or chose not to address the institutionalisation of gender stereotypes in the relevant law. Had they done so, they might, as the dissenting Committee member did, have seen fit to declare the Communication admissible. Missed opportunities, such as that in the Spanish Communication, seem at odds with the Committee's own recognition that addressing gender stereotyping is central to the elimination of all forms of discrimination against women, which would seem to include discriminatory forms of succession to hereditary titles of honour that are based on gender stereotypes.⁵⁶

A further concern, which materialises in two domestic violence Communications against Austria, relates to the consistency of the Committee's approach to stereotyping. In the Communications against Austria, the Committee noted 'linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence', but found that the submissions did not warrant further findings in relation to Article 5(a).⁵⁷ It is unclear on what basis the Committee reached this conclusion and how these Communications differed from *A.T. v. Hungary*, where the Committee earlier found a violation of the state's obligations to address gender stereotyping related to domestic violence. As the Committee develops its jurisprudence on gender stereotyping, it is imperative that these concerns are addressed so as to ensure that States Parties are held fully accountable for their violations of Articles 2(f) and 5.

⁵⁵ *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain* (individual opinion by Committee member Mary Shanthi Dairiam, dissenting) at paras. 13.1–13.13.

⁵⁶ See Cook and Cusack, *Gender Stereotyping* at 149.

⁵⁷ *Goekce v. Austria* at para. 12.2; *Yildirim v. Austria* at para. 12.2.

3.2 *Limitations of the CEDAW framework*

Section 3.1 pointed to some of the ways that the CEDAW adds value to transnational discourses on gender stereotyping. Nevertheless, there are limits to the CEDAW's framework for addressing gender stereotyping that, although by no means fatal, need to be examined so that they can be overcome or, at the very least, their effects minimised.

3.2.1 Limited understanding of state obligations

A potential limitation of the CEDAW as a framework for transnational discourses on gender stereotyping is that the obligations in Articles 2(f) and 5 have been formulated in sweeping and ambiguous terms.⁵⁸ Consider, for example, Article 5(a), which requires States Parties to 'take all appropriate measures to modify the social and cultural patterns of conduct of men and women'. What it means for a State Party to 'modify' social and cultural 'patterns of conduct' is not defined in Article 5(a) or any other provision of the CEDAW. Addressing the breadth and ambiguity of Article 5(a), Noreen Burrows has argued that '[t]he obligation on the State is to modify behaviour patterns using all appropriate measures. The measures themselves are not defined nor is the extent of the behaviour patterns which are to be changed. Presumably each State must decide for itself the extent of sex-role stereotyping in its cultural and social practices and then attempt to change these patterns'.⁵⁹

While it is true that the language used in Articles 2(f) and 5 to articulate the obligations of States Parties with respect to gender stereotyping is broad in scope, there is a tendency to overstate the significance of this potential limitation of the CEDAW framework. The constant need to determine the content and meaning of human rights is not unique to Articles 2(f) and 5 or to the CEDAW in general, but is common to all human rights protected in international treaties, which have been described by one commentator as 'invariably vague and ambiguous'.⁶⁰ Rather than seeing the language of

⁵⁸ See H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd edn (New York: Oxford University Press, 2000) at 179; B. R. Roth, 'The CEDAW as a collective approach to women's rights', *Mich. J. Int'l J.* 24 (2002–3) 187–225 at 192; E. Sepper, 'Confronting the "sacred and unchangeable": the obligation to modify cultural patterns under the women's discrimination treaty', *U. Pa. J. Int'l. L.* 30:2 (2008) 585–639 at 589.

⁵⁹ Noreen Burrows, 'The 1979 Convention on the Elimination of All Forms of Discrimination against Women', *Netherlands International Law Review* 32 (1985) 419–60 at 428.

⁶⁰ See John Tobin, 'Seeking to persuade: a constructive approach to human rights', *Harv. Hum. Rts. J.* 23 (2010) 1–50 at 1.

the CEDAW as a limitation, its breadth should be welcomed, as Andrew Byrnes suggests, as allowing ‘flexibility in its interpretation and its adaptability to new issues and understandings’.⁶¹

The relatively modest and incremental attention given by the Committee, at least initially, to elucidating the content and meaning of the obligations in Articles 2(f) and 5, rather than the broad terminology used therein, is a more pressing concern for transnational discourses on gender stereotyping. It is not just that the Committee has given modest attention to states’ obligations in Articles 2(f) and 5, but that it has also failed to seize opportunities to lay down clear guidance on the content and meaning of those obligations. In the *Vertido* Case, for example, the Committee failed to take the opportunity to elucidate states’ obligations to address systemic stereotyping by members of the judiciary. Had the Committee addressed these obligations, it might have recommended that the Philippines establish continued education and training programmes for judges, prosecutors and lawyers that aim to foster impartial and independent legal proceedings conducted free of wrongful gender stereotyping. The Committee might have encouraged the Philippines government to take steps to ensure that a central focus of such training was educating judges to identify wrongful gender stereotyping, name operative gender stereotypes, and understand if and when gender stereotyping violates human rights.⁶² That the Committee has been slow or reluctant to provide clear and detailed guidance on the obligations in Articles 2(f) and 5 could be seen to undermine its characterisation of them as central to efforts to achieve substantive equality.

Some feminist legal scholars have sought to elucidate the general and specific obligations in Articles 2(f) and 5,⁶³ and some guidance can be found in the CEDAW Committee’s existing body of jurisprudence on stereotyping. Yet there is no substitute for a clear statement from the Committee – ideally in the form of a General Recommendation – that gives content and clarity to the obligations of States Parties to modify or transform gender stereotypes and eliminate wrongful gender stereotyping.⁶⁴ In addition

⁶¹ Byrnes, ‘The CEDAW and the CEDAW Committee’ at 6.

⁶² See generally UN General Assembly, 66th Session, *Interim Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 10 August 2011, UN Doc. A/66/289, paras. 34–40, 94–96.

⁶³ See Holtmaat, ‘Article 5’; Cook and Cusack, *Gender Stereotyping*.

⁶⁴ See F. Raday, ‘Culture, Religion, and CEDAW’s Article 5(a)’ in H. Beate Schöpp-Schilling and C. Flinterman (eds.), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007) 68–85 at 81; Cook and Cusack, *Gender Stereotyping* at 137.

to defining and guiding States Parties on their obligations in relation to gender stereotyping, a General Recommendation from the Committee has the potential to stimulate and enrich transnational discourses about gender stereotyping. A commitment from the Committee to elucidate States Parties' obligations in this area must also involve ensuring 'that, where appropriate, new General Recommendations on other issue-specific provisions of the Convention, such as Article 10 on education, articulate States Parties' obligations to eliminate wrongful gender stereotyping as they pertain to those provisions'.⁶⁵ In this regard, the Committee could build on the approach adopted in General Recommendation No. 19 on violence against women (as well as in other General Recommendations), in which it recognised that wrongful gender stereotyping perpetuates and justifies gender-based violence against women, and urged States Parties to adopt measures to address such stereotyping.⁶⁶ The Committee must also be vigilant in ensuring that, where relevant, States Parties' obligations to address wrongful gender stereotyping are articulated in its decisions and reports under the Optional Protocol and in its Concluding Observations issued under the reporting procedure.

3.2.2 Modest recognition of compounded stereotyping

A second potential limitation of the CEDAW is the absence of any express recognition that there is no monolithic experience of gender stereotyping, but varied experiences that result from compounded stereotyping. When addressing gender stereotyping, the CEDAW refers to stereotypes of 'men and women'⁶⁷ and, in so doing, glosses over the myriad stereotypes of different subgroups of men and women. Contrast this approach with that adopted in the Convention on the Rights of Persons with Disabilities, which expressly obligates States Parties to 'undertake to adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life'.⁶⁸ The lack of any express recognition in the CEDAW of compounded stereotyping is echoed in many of the Committee's Concluding Observations and its Optional Protocol jurisprudence, which often fail to identify operative stereotypes of different

⁶⁵ Cook and Cusack, *Gender Stereotyping*.

⁶⁶ See CEDAW Committee, General Recommendation No. 19, January 1992, UN Doc. A/47/38 at 1 (1994), paras. 11, 24(t)(ii).

⁶⁷ Article 5(a) CEDAW.

⁶⁸ Convention on the Rights of Persons with Disabilities, 993 UNTS 3, entered into force 3 May 2008, Article 8(1)(b).

subgroups of women and men. An example is the Committee's report on its inquiry into the systematic abduction, rape and murder of women in Ciudad Juárez, Mexico, which failed to address compounded stereotyping of poor, young, migrant women and, instead, treated Mexican women as a homogeneous group that shares the same experiences of gender stereotyping.⁶⁹

If the CEDAW is truly to be a leading framework for debates about gender stereotyping, the Committee must ensure that varied experiences of gender stereotyping are taken into account, and States Parties are held accountable not only for wrongful gender stereotyping of women (and men) but also different subgroups thereof. It is encouraging, therefore, that the Committee's jurisprudence on stereotyping is already becoming more nuanced, reflecting, at least in part, growing understanding of compounded stereotyping and its implications for the achievement of substantive equality.⁷⁰ This emergent approach is reflected, among other places, in the 2010 Concluding Observations on the Netherlands, in which the Committee noted its concern regarding the persistence of compounded stereotypes of immigrant and migrant men and women, and called for the development of 'additional programmes to address gender stereotypes related to discrimination on other grounds, such as race, age, sexual orientation and disability'.⁷¹ Increased attentiveness to compounded stereotypes, as in the case of the Netherlands' Concluding Observations, will allow for more constructive dialogue with States Parties and more targeted responses to stereotyping. Consideration of compounded stereotypes of poor, young, migrant women in the *Ciudad Juárez Inquiry* might, for instance, have led to more critical analysis of how to tackle the view of this particular subgroup of women as 'waste' that can be disposed of once their value has been used up.⁷² Just as important is the need to work collaboratively with other human rights treaty bodies, especially those bodies monitoring treaties that impose express obligations related to stereotyping, to ensure a considered and consistent approach to compounded stereotyping across the entire international human rights system.

⁶⁹ See *Ciudad Juárez Inquiry*. See also Cook and Cusack, *Gender Stereotyping* at 165–72.

⁷⁰ Growing awareness of compounded stereotyping is commensurate with growing awareness of the broader concept of compounded discrimination (also known as intersectional or multiple discrimination). See generally CEDAW Committee, General Recommendation No. 28 at para. 18.

⁷¹ CEDAW Committee, *Concluding Observations: The Netherlands*, February 2010, UN Doc. CEDAW/C/NLD/C0/5, para. 25.

⁷² See Cook and Cusack, *Gender Stereotyping* at 167–72, citing M. W. Wright, 'The dialectics of still life: murder, women, and maquiladoras', *Public Culture* 11 (1999) 453–73,

3.2.3 Institutionalisation of gender stereotypes

A third potential limitation of the CEDAW is that certain of its provisions institutionalise gender stereotypes, in blatant disregard for the goals of Articles 2(f) and 5 and, more broadly, the CEDAW's overarching object and purpose of achieving substantive equality. Dianne Otto has argued persuasively that Article 6, which requires States Parties to 'suppress all forms of traffic in women and exploitation of prostitution of women', perpetuates the stereotype of women as (sexually) weak and vulnerable (among other stereotypes) and, thus, in need of protection. She writes:

The protected woman can ... be discerned in the ambiguous provision requiring 'the suppression ... of the exploitation of prostitution of women' (Article 6), which clearly does not recognise the rights of women as workers in the sex industry. Instead it seems to cast all prostitution as 'exploitation' and, therefore, all sex workers as needing protection from their 'exploiters'. Such over-simplification of the complexity of women's economic decision-making not only denies women agency, but also reflects gendered anxieties about women's sexuality, as did the earlier anti-trafficking instruments.⁷³

An alternative approach, modelled on New Zealand's Prostitution Reform Act 2003, might have been for the CEDAW to distinguish more clearly between those forms of prostitution that constitute exploitation and those that do not, and to establish a framework that explicitly safeguards the welfare and human rights of trafficked victims and sex workers.

The institutionalisation of gender stereotypes in Article 6 is, in part, a reflection of understandings of female sexuality and the sex and trafficking industries in the period during which the CEDAW was drafted. Even so, the stereotypes implicit within the text of Article 6 serve as a reminder of the part that feminists and women's rights-centred instruments, including the CEDAW, have played, and continue to play, in reproducing gender stereotypes and related mythologies.⁷⁴ Gender stereotyping is not just something that is done *to* women; it is done *by* and *to* all of us, and is a consequence of our living in a world that is structured around,

reprinted in J. Comaroff and J. L. Comaroff (eds.), *Millennial Capitalism and the Culture of Neoliberalism* (Durham, NC: Duke University Press, 2001) 125–46 (discussing the 'disposable' women concept).

⁷³ D. Otto, 'Disconcerting "masculinities": reinventing the gendered subject(s) of international human rights law' in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford; Portland, OR: Hart, 2005) 105–29 at 118–19.

⁷⁴ See *ibid.* at 118.

indeed saturated with, gender stereotypes.⁷⁵ That certain provisions of the CEDAW institutionalise gender stereotypes does not preclude its use as a legal framework for debates about gender stereotyping, provided that those stereotypes are contested and transnational discourses are framed in ways that ensure that embedded stereotypes are not perpetuated. To use the example of Article 6 of the CEDAW, the challenge is how to recognise the vulnerable situation of many (but not all) individuals within the sex industry, without perpetuating the stereotype of women as (sexually) weak and vulnerable.

3.2.4 Gender stereotypes versus stereotypes of men and women

Another potential limitation of the CEDAW, which is addressed only briefly here, is its codification of the male/female binary of gender stereotyping. Consider again Article 5(a) of CEDAW, which addresses 'stereotyped roles for men and women', and the Preamble, which deals with 'the traditional role of men as well as the role of women in society and in the family'.⁷⁶ Both Article 5(a) and the Preamble reify diametrically opposed and heteronormative categories of gender stereotypes. By focusing on stereotypes related to men and women, rather than the broader concept of 'gender' stereotypes, the CEDAW and the Committee in its jurisprudence overlook the gradations and complexities of gender and, more specifically, gender stereotyping. A consequence of this framing is the creation of false and polarising categories of gender stereotypes that expressly exclude from debates those individuals who do not fit neatly into either category, including transgender and intersex persons. To borrow the powerful words of Darren Rosenblum, the use in the CEDAW of categories of stereotypes of men and stereotypes of women 'truncate[s] the diversity of gender identity'.⁷⁷ Such truncation is harmful not only to those persons excluded from debates, or who are included only to the extent that they are characterised as 'non-conforming', but also to the CEDAW's broader goal of substantive gender equality. It is important, therefore, that transnational discourses focus on gender stereotypes, rather than the narrower categories of stereotypes of women and stereotypes of men.

⁷⁵ See Cook and Cusack, *Gender Stereotyping* at 14–16.

⁷⁶ CEDAW, Preamble. para. 14.

⁷⁷ See Darren Rosenblum, 'Unisex CEDAW, or what's wrong with women's rights', *Colum. J. Gender and L.* 20:2 (2011) 98–194 at 135.

4 Defining state obligations to address gender stereotyping

Understanding of the potency of the CEDAW as a framework for transnational legal discourses on gender stereotyping is in its embryonic stages. Feminist legal scholars have begun to explore the value and limits of the CEDAW in relation to gender stereotyping, as section 3 shows. Further strengths and weaknesses of the CEDAW will undoubtedly emerge as closer scrutiny is brought to bear on Articles 2(f) and 5, and as understanding of gender stereotypes and gender stereotyping evolves. For now, at least, it is clear that there is value in utilising the CEDAW to propel discourses on gender stereotyping beyond the domestic and into the transnational sphere. And while the limitations of the CEDAW cannot be ignored, and nor should they be, there are steps that can be taken to help minimise, even overcome, many of them.

Fashioning the limitations outlined in section 3.2 into an agenda for strengthening the CEDAW and transnational discourses on gender stereotyping is one way to move forward. Any such agenda must prioritise articulation of States Parties' obligations in Articles 2(f) and 5 to modify or transform gender stereotypes and eliminate wrongful gender stereotyping. Section 4 outlines a possible approach to the interpretation of those obligations.⁷⁸ In order to do this, it draws on the text of the CEDAW, particularly Articles 2(f) and 5, as well as the jurisprudence of the CEDAW Committee on gender stereotyping. Section 4 uses as its primary interpretative tool the widely accepted tripartite framework of state obligations – namely, the obligations to respect, protect and fulfil human rights and fundamental freedoms.

4.1 *Obligation to respect*

The obligation to respect requires States Parties to refrain from arbitrarily interfering with women's human rights and fundamental freedoms.⁷⁹ The CEDAW Committee has explained that the first limb of the tripartite framework requires States Parties to abstain 'from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural

⁷⁸ Section 4 builds on and updates the discussion of state obligations in Cook and Cusack, *Gender Stereotyping* at 71–103.

⁷⁹ See CEDAW Committee, General Recommendation No. 28 at paras. 9–10, 37(a).

rights'.⁸⁰ According to the Committee, the obligation to respect also requires States Parties to refrain from 'performing, sponsoring or condoning any practice, policy or measure that violates the Convention'.⁸¹

Applied to Articles 2(f) and 5 of CEDAW, read in conjunction with Articles 1 and 2(d), the obligation to respect requires States Parties to refrain from wrongful gender stereotyping. It also prohibits States Parties from exercising state powers in ways that regulate, penalise, stigmatise or otherwise marginalise individuals who do not conform to gender stereotypes. Legislative branches must not enact laws that institutionalise gender stereotypes in ways that violate women's human rights and fundamental freedoms. The executive branch of States Parties must ensure that policies, regulations, programmes, administrative procedures and institutional structures are not based on gender stereotypes. State agents and officials, including politicians, must refrain from making public statements or decisions that are based on gender stereotypes.⁸² States Parties must ensure that all legal structures and processes, rules of evidence, criminal investigations and legal proceedings are impartial and fair, and not affected by gender stereotyping.⁸³ Members of the judiciary must not enforce laws based on gender stereotypes, but rather must invalidate them and/or recommend their repeal or amendment. Members of the judiciary must also be careful not to apply, enforce or perpetuate gender stereotypes through their behaviour, reasoning or decisions, including, for example, by reinforcing sex-role stereotypes about marriage during divorce proceedings.⁸⁴ Related to this, gender stereotypes should not be a determining factor in deciding the extent of women's legal rights and protections.⁸⁵

The leading authority on the application of the obligation to respect to Articles 2(f) and 5(a) of the CEDAW is the *Vertido* Case.⁸⁶ In April 2005, the Regional Trial Court of Davao City in the Philippines acquitted Jose B. Custodio of raping Karen Vertido.⁸⁷ In support of her ruling, Judge

⁸⁰ *Ibid.* at para. 9. ⁸¹ *Ibid.* at para. 37(a).

⁸² See Articles 2(d), 2(f) and 5(a) CEDAW. See also *Ciudad Juárez Inquiry* at paras. 50, 54, 56, 67.

⁸³ See generally UNGA, *Interim Report of the Special Rapporteur on the Independence of Judges and Lawyers; Karen Tayag Vertido v. The Philippines*.

⁸⁴ See *V.K. v. Bulgaria* at para. 9.12.

⁸⁵ Human Rights Committee, General Comment No. 28, 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 20.

⁸⁶ *Karen Tayag Vertido v. The Philippines*.

⁸⁷ *The People of the Philippines v. Jose B. Custodio*, Crim. Case No. 37,921–96, 11 April 2005 (Philipp., Regional Trial Court Davao City).

Virginia Hofileña-Europa cited insufficient evidence to prove beyond all reasonable doubt that the accused was guilty of the crime of rape. Her Honour also emphasised her unfavourable assessment of the victim's credibility based (among other things) on her failure to take advantage of perceived opportunities to escape from the accused. Following judgment, the author (i.e. Vertido) submitted a Communication to the CEDAW Committee claiming that the decision to acquit infringed her rights under the CEDAW.⁸⁸ Of particular relevance here is the author's claim that the decision had no basis in law or fact but, rather, 'was grounded in gender-based myths and misconceptions about rape and rape victims ... without which the accused would have been convicted'.⁸⁹ What is significant about this claim is that the author sought to hold the Philippines accountable for the failure of Judge Europa to refrain from arbitrarily interfering with her rights in the CEDAW, including Articles 2(f) and 5(a).

In its decision, the CEDAW Committee affirmed that States Parties can be held accountable under the CEDAW where judges fail to refrain from wrongful gender stereotyping, in violation of Articles 2(f) and/or 5(a) (the obligation to respect). Acknowledging that gender stereotyping can impede women's access to a fair trial, the Committee stressed that 'the judiciary must take caution not to create inflexible standards of what women or girls should be or ... have done when confronted with ... rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general'.⁹⁰ The majority concluded that, on the facts, Judge Europa had evaluated the victim's behaviour against gender stereotypes, and formed a negative view of her creditability because she had not responded as a rational and ideal victim was expected to in a rape situation.⁹¹ It further concluded that the trial decision contained 'several references to stereotypes about ... sexuality being more supportive for the credibility of the alleged perpetrator than the creditability of the victim'.⁹²

The Committee affirmed the application of the obligation to respect to Articles 2(f) and 5(a) of the CEDAW in *V.K. v. Bulgaria*, in which it held the State Party accountable for its failure to provide V.K. effective protection against domestic violence. Recalling its decision in the *Vertido* Case, the Committee noted that States Parties are accountable under the CEDAW

⁸⁸ *Karen Tayag Vertido v. The Philippines* at paras. 3.1–3.17.

⁸⁹ *Ibid.* at paras. 3.4–3.5.

⁹⁰ *Ibid.* at para. 8.4. ⁹¹ *Ibid.* at para. 8.5.

⁹² *Ibid.* at para. 8.6.

for judicial decisions that are based on gender stereotypes, rather than law and fact. '[S]tereotyping', the Committee said, 'affects women's right to a fair trial and ... the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence.'⁹³ Considering the facts, the Committee found that the refusal of Bulgaria's courts to grant a permanent protection order was based on gender stereotypes related to domestic violence and that the divorce proceedings had been influenced by gender stereotypes related to the roles and behaviours expected of men and women within marriage and family relations. According to the Committee, reliance by the judiciary on these gender stereotypes resulted in discrimination and the revictimisation of V.K, in violation of the CEDAW.⁹⁴

4.2 *Obligation to protect*

The obligation to protect requires States Parties to take all appropriate measures to ensure that state and private actors do not unlawfully infringe rights.⁹⁵ This means that States Parties must '[t]ake steps to prevent, prohibit and punish violations of the Convention by [state actors] third parties ... and to provide reparation to the victims of such violations'.⁹⁶

Interpreted in light of Articles 2(f) and 5, as well as Articles 2(a)–(c) and 2(e), the obligation to protect requires States Parties to take positive steps to ensure that appropriate laws, policies and plans of action are in place and properly administered and implemented to address wrongful gender stereotyping. States Parties should also implement education and training programmes to educate the public about gender stereotypes and wrongful gender stereotyping.⁹⁷ Such programmes should name gender stereotypes, identify the consequent harms of wrongful gender stereotyping for all and provide guidance on the steps that can be taken to eliminate the practice of wrongful gender stereotyping. They should also promote tolerance of, and respect for, the multiple and varied expressions of sex and gender, in an effort to debunk the erroneous

⁹³ *V.K. v. Bulgaria* at para. 9.11.

⁹⁴ *Ibid.* at para. 9.12.

⁹⁵ See CEDAW Committee, General Recommendation No. 28 at paras. 9–10, 37(a).

⁹⁶ *Ibid.* at para. 37(b).

⁹⁷ See CEDAW Committee, General Recommendation No. 3, April 1987, UN Doc. A/42/38 at 78 (1987); CEDAW Committee, General Recommendation No. 19 at paras. 24(f), 24(t) (ii); CEDAW Committee, General Recommendation No. 24, 1999, UN Doc. A/54/38 at 5 (1999), at para. 28.

notion that there is a singular and correct expression of femininity and/or masculinity to which individuals are obliged to conform. Education and training programmes should further aim to dismantle androcentric norms and replace sexism with positive valuations of those characteristics, roles and behaviours that are coded as feminine.

States Parties are required to put legal structures into place to ensure that complaints of wrongful gender stereotyping are investigated promptly, impartially and independently. Courts and other relevant decision-making bodies should also hold actors legally accountable for wrongful gender stereotyping and provide effective remedies to those who have been harmed by gender stereotyping. States Parties that fail to protect women against wrongful gender stereotyping can be held accountable under the CEDAW, in accordance with the due diligence obligation.⁹⁸ For example, in *R.K.B. v. Turkey* the Committee held the State Party accountable for the failure of its courts to challenge and reject evidence submitted by an employer in an unfair dismissal case that relied on sexual stereotypes that condoned extramarital affairs by men, but not women (obligation to protect).⁹⁹

4.3 *Obligation to fulfil*

The obligation to fulfil – the last limb of the tripartite framework – enjoins states to ensure the full realisation of rights in law and in practice.¹⁰⁰ The CEDAW Committee has explained that this obligation requires States Parties to ‘take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures’.¹⁰¹ The Committee has further explained that ‘States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men’.¹⁰²

⁹⁸ See CEDAW Committee, General Recommendation No. 28 at para. 13. See also R. Holtmaat, ‘Preventing violence against women: the Due Diligence Standard with respect to the obligation to banish gender stereotypes on the grounds of Article 5(a) of the CEDAW Convention’ in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Leiden, Boston: Martinus Nijhoff, 2009) 63–90.

⁹⁹ *R.K.B. v. Turkey* at paras. 8.7–8.8.

¹⁰⁰ See CEDAW Committee, General Recommendation No. 28 at para. 20.

¹⁰¹ *Ibid.* at para. 9. ¹⁰² *Ibid.*

Applied to Articles 2(f) and 5 of the CEDAW, the obligation to fulfil requires States Parties to adopt all appropriate measures to ensure that women can exercise and enjoy the right to be free from wrongful gender stereotyping. Pursuant to the obligation to fulfil, States Parties should conduct an audit of national laws and policies, and reform or repeal those that apply, enforce or perpetuate gender stereotypes. Executive branches should adopt a comprehensive national strategy on wrongful gender stereotyping,¹⁰³ either as part of a national plan of action to achieve gender equality or as a stand-alone plan of action on stereotyping. The plan should identify the structures put in place to monitor the implementation of measures to ensure that the right to be free from wrongful gender stereotyping is realised in practice (for example, the adoption and independent monitoring of gender equality guidelines for media). Executive branches should work closely with heads of government departments and peak bodies to facilitate the elimination of wrongful gender stereotyping in different sectors, by naming the gender stereotypes that operate in those sectors and revealing how they harm women and men, and identifying concrete steps to bring an end to wrongful gender stereotyping in those sectors. Executive branches should also adopt measures designed to break gender stereotypes, such as ensuring access to paid parental leave for men to encourage them to assume equal responsibility for caring or permitting women to serve in armed combat roles. The Committee has explained that ‘temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women’.¹⁰⁴

States Parties should also establish effective remedies for wrongful gender stereotyping and ensure that women and men can access those remedies. The obligation to fulfil requires the establishment of institutionalised and continuing education and training programmes for judges, prosecutors and lawyers that aim to foster impartial and independent legal proceedings conducted free of wrongful gender stereotyping.¹⁰⁵ A central focus of such training should be educating judges

¹⁰³ See for example, CEDAW Committee, *Concluding Observations: Russia*, 16 August 2010, UN Doc. CEDAW/C/USR/CO/7, para. 21; CEDAW Committee, *Concluding Observations: Albania*, 16 September 2010, UN Doc. CEDAW/C/ALB/CO/3, para. 25; CEDAW Committee, *Concluding Observations: United Arab Emirates*, 5 February 2010, UN Doc. CEDAW/C/ARE/CO/1, para. 25.

¹⁰⁴ CEDAW Committee, General Recommendation No. 25 at para. 38.

¹⁰⁵ *Karen Tayag Vertido v. The Philippines* at para. 8.9(b). See also UNGA, *Interim Report of the Special Rapporteur on the Independence of Judges and Lawyers*.

to name gender stereotypes, identify their harms and hold public and private actors accountable for wrongful gender stereotyping. Such training should also urge judges to invalidate and/or recommend the repeal or amendment of laws that are found to unlawfully apply, enforce or perpetuate gender stereotypes.

In the *Vertido* Case the Committee paid close attention to the Philippines' non-compliance with the obligation to respect the right to be free of wrongful gender stereotyping. Yet it remained largely silent as to the failure of the state to comply with the obligation to fulfil that same right. This is somewhat surprising given the information submitted by the author regarding the pervasiveness of wrongful gender stereotyping in the Philippines judiciary.¹⁰⁶ Had the Committee scrutinised this information more closely, it might also have held the Philippines liable for its failure to educate its judiciary properly about the obligations incumbent upon them to not only abstain from stereotyping but also to name, contest and dismantle harmful gender stereotypes, including those related to rape. It appears, however, that the Committee was conscious of this breach when it recommended that the Philippines '[e]nsure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions'.¹⁰⁷ 'To achieve this', the Committee explained, 'a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women.'¹⁰⁸

5 The 'good' gender stereotype: is gender stereotyping ever justified?

The CEDAW does not contain a general limitations provision,¹⁰⁹ nor do Articles 2(f) or 5 contain internal limitations,¹¹⁰ similar to those found in some other human rights instruments. One of the biggest interpretative challenges facing the CEDAW Committee in future is how to resolve the difficult and contested question of when it is permissible for States Parties to limit rights guaranteed by the CEDAW, including in particular those in

¹⁰⁶ *Karen Tayag Vertido v. The Philippines* at para. 3.8.

¹⁰⁷ *Ibid.* at para. 8.9(b). ¹⁰⁸ *Ibid.*

¹⁰⁹ See for example, Canadian Charter of Rights and Freedoms of 1982 (Can.), section 1.

¹¹⁰ See for example, International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976, Articles 12, 19.

Articles 2(f) and 5. Alexandra Timmer captured this challenge succinctly when she said: ‘stereotypes often serve a legitimate social function; how do we determine which stereotypes are legitimate and which stereotypes should be actionable by law?’¹¹¹

The limitations question that the Committee needs to determine can be divided into two parts, the first concerning stereotypical *beliefs*, specifically: when is it permissible for States Parties not to modify or transform gender stereotypes? States Parties are compelled by Articles 2(f) and 5 to adopt all appropriate measures to modify or transform the gender stereotypes that are characterised as harmful to women. The absence of harm may, however, be justification for States Parties not adopting measures to modify or transform a gender stereotype.¹¹² The central question for determination then becomes: what is the measure of whether or not a stereotypical belief based on sex/gender is harmful? The answer to this question will require careful case-by-case analysis by the CEDAW Committee of the attributes, characteristics or roles attributed to women and men through gender stereotypes and what they say about the worth, talents and capabilities of individual women and men. It is important to note, however, that it is not just hostile or negative gender stereotypes that can be harmful to women. Seemingly benign, protective or benevolent stereotypes can also be harmful, including when they confine women to specific roles, keep them in their place or deny their ability to make autonomous decisions about their life plans.

The second part of the limitations question that the Committee needs to determine concerns the *practice* of gender stereotyping, specifically: when is gender stereotyping permissible? Gender stereotyping might constitute a permissible limitation of rights if the limitation serves a legitimate purpose and the means chosen to attain that purpose are both reasonable and proportionate.¹¹³ It has been argued that a legitimate purpose is one that has an objective and reasonable goal and, on that basis:

¹¹¹ See A. Timmer, ‘Book review, Gender Stereotyping: Transnational Legal Perspectives (Rebecca J. Cook and Simone Cusack), Philadelphia: University of Pennsylvania Press, 2010’, *H.R.L.R.* 10:3 (2010) 583–6 at 585.

¹¹² See R. Holtmaat and J. Naber, *Women’s Human Rights and Culture: From Deadlock to Dialogue* (Antwerp: Intersentia, 2011) at 33, 49, 59–60; Cook and Cusack, *Gender Stereotyping* at 17–18, 23.

¹¹³ See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20, 25 May 2009, UN Doc. E/C.12/C/20 (2009), para. 13 (providing that ‘[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate,

that gender stereotyping that seeks to alleviate women's immediate disadvantage is in pursuit of a legitimate purpose, since it aims to address the consequences of past discrimination against women. However, gender stereotyping that seeks to create or maintain existing gender hierarchies is not a legitimate purpose; it is not legitimate as it is antithetical to the Women's Convention's overarching object and purpose of eliminating all forms of discrimination against women and ensuring substantive equality.¹¹⁴

It has been further argued that a reasonable and proportionate response:

requires that the means chosen to achieve the legitimate purpose not be excessive. Gender stereotyping that results in the impairment or nullification of the recognition, enjoyment, or exercise by women, on a basis of equality of men and women, of human rights and fundamental freedoms, will be characterized as excessive (i.e. not proportionate) and, therefore cannot be justified under ... the Women's Convention.¹¹⁵

The purposes of gender stereotyping that will be characterised by the CEDAW Committee 'as legitimate, and the means chosen to achieve those purposes that will be deemed proportionate, will vary depending on the context within which such stereotyping occurs'.¹¹⁶ For that reason, the question of which justifications for wrongful gender stereotyping will withstand scrutiny under the CEDAW will ultimately need to be determined by the Committee on a case-by-case basis.¹¹⁷

The question of whether gender stereotyping is a permissible limitation under the CEDAW will sometimes be clear-cut. It is exceedingly unlikely, for example, that a State Party could ever successfully claim that a member of its judiciary was justified in basing its decision to acquit an accused of rape on gender stereotypes rather than law or fact.¹¹⁸ The challenge for the CEDAW Committee will be to provide guidance on permissible limitations in circumstances that are substantially more complex than this. Consider, for instance, the situation where there are short-term benefits for women but negative long-term consequences, if a state agent stereotypes on the basis of sex/gender.¹¹⁹ Is a presidential pardon that seeks to

compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects').

¹¹⁴ Cook and Cusack, *Gender Stereotyping* at 128.

¹¹⁵ *Ibid.* ¹¹⁶ *Ibid.* ¹¹⁷ *Ibid.* at 123.

¹¹⁸ See *Karen Tayag Vertido v. The Philippines*.

¹¹⁹ See also Nyamu Musembi in this volume; A. Hellum, 'Transnational challenges to international and national law: Norwegian-Pakistani women at the interface' in C. M. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes* (Cambridge University Press, 2012).

alleviate immediate disadvantage to women by authorising the early release of female (but not male) prisoners so that they can care for dependent children justified even if it entrenches the sex-role stereotype of women as carers, a fundamental cause of women's disadvantage?¹²⁰ Is a state policy that seeks to increase women's access to education¹²¹ or participation in other areas of public life (e.g. sport) by requiring separate education, facilities or, for example, transport for women justified even if it institutionalises gender stereotypes related to women's vulnerability or capabilities?¹²² Consider, also, the situation where a gender stereotype reflects a statistical reality but, by putting its stamp of approval on that stereotype, the state entrenches the stereotype and stigmatises or excludes non-conforming individuals. Does the fact that the stereotype reflects a statistical reality make its incorporation into law a permissible limitation of the right to be free of wrongful gender stereotyping? What about situations where a state agent or official seeks to justify gender stereotyping by making broad appeals to culture, religion or tradition?¹²³ And what about situations where intervention by a State Party to protect against wrongful gender stereotyping by private actors would unjustifiably limit the exercise and enjoyment of other human rights?¹²⁴ How should States Parties seek to

¹²⁰ See, for example, *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC) (S. Afr., Constitutional Court). See also J. Elvin, 'The continuing use of problematic sexual stereotypes in judicial decision-making', *Fem. Leg. Stud.* 18 (2010) 275–97 at 281.

¹²¹ On gender stereotyping in the education sector, see generally J. Jha and E. Page, *Exploring the Bias: Gender and Stereotyping in Secondary Schools* (London: Commonwealth Secretariat, 2009).

¹²² The author acknowledges Shaheen Sardar Ali, who raised this example during the *From Ratification to Implementation: CEDAW in International and National Law* Conference held at the University of Oslo Faculty of Law on 11–12 March 2010.

¹²³ See generally Holtmaat and Naber, *Women's Human Rights and Culture*; A. Timmer, 'Toward an anti-stereotyping approach for the European Court of Human Rights', *H.R.L.R.* 11:4 (2011) 707–38.

¹²⁴ See 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: M. Nijhoff Publishers, 1993) at 80 (noting concerns raised during the drafting process regarding potential conflicts with other human rights, including the freedom of expression); T. Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process* (Oxford: Clarendon Press, 1986) at 66, quoted in Roth, 'The CEDAW as a collective approach to women's rights' at 193 (worrying that the breadth of Article 5(a) 'might permit States to curtail to an undefined extent privacy and associational interests and the freedom of opinion and expression. Moreover, since social and cultural behavior may be patterned according to factors such as ethnicity or religion, state action authorized by [paragraph] (a) ... may conflict with the principles of forbidding discrimination [on those bases]. The danger of intrusive state action and possible violation of the rights of ethnic or religious groups might have been mitigated by limiting state action to education measures').

balance the right to be free of wrongful gender stereotyping against potentially competing human rights, including the freedom from arbitrary interference in private life and cultural rights? (See also Nyamu Musembi in this volume.)

6 Conclusion

The CEDAW Committee showed great leadership and vision when, in its General Recommendation No. 25, it characterised the obligation to modify or transform gender stereotypes and eliminate wrongful gender stereotyping as one of three categories of obligations central to the achievement of substantive equality. Yet, with few exceptions, the significance of this authoritative statement and the potential of Articles 2(f) and 5 of the CEDAW to help realise the goal of substantive equality have been largely overlooked. One reason for this is the failure of the CEDAW Committee to seize opportunities to give content and meaning to the broadly defined obligations in Articles 2(f) and 5 of the CEDAW. Another is the failure of women's rights advocates to realise and take full advantage of their potential. The recent decisions of the Committee in cases such as *Vertido* and *R.K.B.* are, therefore, encouraging. They show that Articles 2(f) and 5 can produce measureable gains in the protection of the rights of women, and put States Parties on notice that the Committee will hold accountable those states that do not meet their obligations to modify or transform gender stereotypes and eliminate wrongful gender stereotyping. Moreover, these decisions have the potential to focus attention on wrongful gender stereotyping and cause the Committee's visionary statement in General Recommendation No. 25, in which it called on States Parties to address prevailing gender relations and gender stereotypes, to be revisited.

While these recent cases may serve as a catalyst for reinvigorating transnational legal discourses on gender stereotyping, these discourses are unlikely to move beyond their embryonic stages if the CEDAW Committee does not make articulation of States Parties' obligations to modify or transform gender stereotypes and eliminate wrongful gender stereotyping a priority. Key issues that need to be addressed include States Parties' obligations to address compounded stereotypes and the question of if and when wrongful gender stereotyping is a justifiable limitation of the rights in Articles 2(f) and 5 of the CEDAW. Strong leadership from the CEDAW Committee on these issues will not only help to guide States

Parties in the implementation of their obligations under the CEDAW, but will also influence the thinking and decision-making of other human rights treaty bodies as well as domestic courts. If the Committee is successful in this endeavour, it may change forever – and for the better – the way we think about discrimination and inequality.