
Making space and giving voice: the CEDAW in Norwegian law

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1 Introduction

Norway, like other nation-states in Northern Europe, is in the throes of rapid and uneven social, political and legal change. Faced with accumulating international legal obligations, unprecedented cultural diversity and increasing transnationalism, a revitalization of traditional nationalism is taking place in Norway, as elsewhere in Northern Europe.¹ Matters related to ratification and domestication of international human rights conventions have in the course of the last twenty years become a site of political and legal contestation, and have challenged privileged positions of identity, status and power.² The controversial status of human rights in general and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in particular, which is a key theme in this chapter, illustrates the ambiguous relationship between Norway's identity as an international champion of human rights and gender equality on the one hand, and the growing concern for protection of national sovereignty and representative democracy on the other.

The research for this chapter started in 2010 when I was granted a six-month research fellowship within the research project 'Should states ratify human rights convention?', led by Andreas Føllesdal and Geir Ulfstein at the Centre for Advanced Study at the Norwegian Academy of Science. I am grateful to research assistant Anniken Sørli for assistance with data collection and to Ingunn Ik Dahl, Beatrice Halsaa, Vibeke Blaker Strand, Lene Løv dal, Else McClimans, Geir Ulfstein and Henriette Sinding Aasen for comments on earlier drafts.

¹ S. Algashi, T. H. Eriksen and H. Gorashi (eds.), 'Introduction' in *Paradoxes of Cultural Recognition. Perspectives from Northern Europe* (Farnham: Ashgate, 2010) 1–18.

² For an overview of these debates from a Nordic perspective, see A. Føllesdal and M. Wind, 'Nordic reluctance towards judicial review under siege', *Nordic Journal of Human Rights* 27 (2009) 131–42.

Through the Human Rights Act of 1999, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), the International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 were incorporated into Norwegian law so as to take precedence when coming into conflict with other Norwegian law.³ The exclusion of the CEDAW, the Convention on the Rights of the Child (CRC) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) gave rise to claims from politicians, women's rights organizations, human rights organizations and independent experts that these conventions should be given the same status as other conventions. These claims sparked political and legal debates about the justiciability of the CEDAW, the CRC and the ICERD, and how their incorporation would affect representative democracy and national sovereignty.⁴

Taking the CEDAW as the starting point, the aim of this chapter is to show how the prevailing tension between international and national law as well as between gender-neutral and gender-specific law is played out in the context of Norway, which is a modern Western welfare state. Unlike EU law, the ECHR and the ICCPR, which address discrimination on the basis of sex (female and male), the CEDAW is premised on the assumption that a symmetrical approach covering discrimination on the basis of sex does not sufficiently recognize the pervasive discrimination against women on the basis of their gender, and that an asymmetric and gender-specific guarantee is needed.⁵ As such the Norwegian CEDAW

³ The European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant of 16 December 1966 on Civil and Political Rights (ICCPR) and the International Covenant of 16 December 1966 on Economic, Social and Cultural Rights (ICESCR) were incorporated by Act of 21 May 1999, No. 30. The UN Convention on the Rights of the Child (CRC) was incorporated into the Human Rights Act by Act of 1 August 2003, No. 86. The UN Convention on the Elimination of All Forms of Discrimination against Women was incorporated into the Human Rights Act by Act of 19 June 2009, No. 80. The Race Convention was incorporated into the Discrimination Act of 3 June 2005, No. 33.

⁴ H. Skjeie, 'Policy views on the incorporation of human rights conventions: CEDAW in Norwegian law', *Nordic Journal of Human Rights* 27 (2009) 260–71; A. Hellum, 'The Global Equality Standard meets Norwegian sameness' in A. Hellum, S. S. Ali and A. Griffiths (eds.), *From Transnational Relations to Transnational Laws* (Farnham: Ashgate, 2011) 71–93.

⁵ The main view of the framers of the Women's Convention is described in A. Byrnes, 'Article 1' in M. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination*

controversy speaks to the broader debate about the added value of the CEDAW in comparison to other treaties.

With the overall focus on law reform, judicial review and state report review, this chapter describes and analyzes the relationship between the Women's Convention and Norwegian laws, policies and practices. Through a textual approach, legislative debates, court cases and administrative practices are reviewed with a view to determining whether, by whom and with what effect the CEDAW has been invoked. To understand the process whereby the CEDAW has been adopted or resisted, an actor perspective focusing contestations within and between different state and non-state actors is adopted. In line with a polycentric conception of law, the state is seen as a body of different centres with different legal cultures and different perceptions of the relationship between international and Norwegian law.⁶ The most significant state actors in this respect are the Ministry of Children and Equality,⁷ the Ministry of Foreign Affairs, the Ministry of Justice and the State Legal Counsel. To situate the process of domestication in a broader historical and political terrain, the chapter draws on interdisciplinary women's and gender studies and interviews with key actors in government, politics and civil society. I also make use of my own observations as a legal expert where I, as Director of the Institute of Women's Law, Child Law, Anti-Discrimination and Equality Law, have provided advice to state and non-state actors regarding the incorporation and implementation of the CEDAW in Norwegian law.⁸

2 Norway 2012: gender-neutral laws and gendered realities

Gender equality, welfare and democracy are established Norwegian values. Yet the Norwegian Constitution does not explicitly prohibit discrimination.⁹ The Gender Equality Act and the Human Rights Act constitute the main vehicles for domestication of the CEDAW in Norwegian law. The first National Action Plan on Gender Equality (2011–14), which specifically addresses the CEDAW, was adopted in 2011. The Norwegian

of All Forms of Discrimination against Women: A Commentary (Oxford University Press, 2012) 51–70 at 52.

⁶ H. Petersen and H. Zahle, *Legal Polycentricity in Law* (Aldershot: Dartmouth, 1995).

⁷ Since 2010, the Ministry of Children, Equality and Social Inclusion.

⁸ Since 2008, The Institute of Women's Law, Child Law, Discrimination and Equality Law.

⁹ A special article proclaiming that Norwegian authorities should respect and protect human rights was included in the Norwegian Constitution in 1994, section 110c(1) of the Constitution.

Storting's Human Rights Commission in their Report of 2011 recommends a prohibition against unfair or disproportionate discrimination.¹⁰

In spite of formal equality between the sexes, statistics show that there are significant social, political and economic differences between women and men, and between different groups of women.¹¹ While roughly as many women as men today have higher education, women's and men's choice of study is highly gendered. Women tend to choose teaching, health and care services and men tend to choose technical subjects and natural sciences. These choices are reflected in a gender-segregated labour market where women's monthly pay is 85 per cent of men's. Although there are almost as many women as men in paid work, women are much more likely than men to work part-time. Fourteen per cent of employed men and 41 per cent of employed women work part-time. As a consequence, 9 out of 10 people with minimum pensions are women. Women are not equally represented in Parliament, where 6 out of 10 representatives are men. Forty per cent of board members in public limited companies are women, while 83 per cent of the board representatives in private limited companies are men.

Immigration patterns are highly gendered. Eighty per cent of labour immigrants are men while 66 per cent of family immigrants are women. Men are in the majority (60 per cent) among refugees, while 60 per cent of immigrants moving to Norway to study, including au pairs, are women. Access to justice is marked by significant gender and race differences. The majority of gender discrimination cases handled by the Equality and Anti-Discrimination Ombud are filed by professional Norwegian women while the majority of complaints regarding ethnic discrimination are filed by men from minority backgrounds.¹²

¹⁰ In 2009 the Storting's Human Rights Commission was appointed to prepare and put forward recommendations for a limited revision of the Constitution with the object of 'strengthening the position of human rights in Norwegian law'. Their report, Document 16 (2011–12) *Report to the Presidium of the Storting by the Human Rights Commission Concerning Human Rights in the Constitution*, suggests a new article 98: 'All people are equal under the law. No person must be exposed to unfair or disproportionate discrimination.'

¹¹ Statistics Norway, 2011, available at: www.ssb.no/likestilling_en/ (last accessed 1 September 2012).

¹² T. Nordstrøm, 'Diskriminering på tvers – rapport fra et oppsøkende rettighetsinformasjonsprosjekt' [Intersectional discrimination – report from an outreach programme directed at immigrant women], *Studies in Women's Law*, No. 83.2010 (Institute of Women's Law, University of Oslo, 2010).

It was against this background that The Equality and Anti-Discrimination Ombud in her supplementary report to Norway's eighth periodic report to the CEDAW Committee in 2012 called for systematic review of gender-neutral law texts 'in order to ensure that they do not in practice exclude or hinder gender-specific measures that are necessary to address specific problems of women and girls'.¹³ There is a growing concern that gender-neutral legislation, policies and programmes provide inadequate protection of women from different age groups, social groups or ethnic groups from direct, indirect and intersectional discrimination; and as such hinder the achievement of substantive equality.

3 Ratification of the CEDAW and the Optional Protocol in a changing economic, political and legal landscape

Gender equality legislation was already in place when Norway ratified the CEDAW in 1981.¹⁴ The Equal Pay Council and the Gender Equality Council were established in the early 1970s and followed by the Gender Equality Act in 1978.¹⁵ In 1975 the Faculty of Law at the University of Oslo, on the basis of a proposal from female lecturers and students working in the student legal aid scheme, Free Legal Advice for Women (JURK), introduced women's law as an elective subject, setting out to describe, understand and improve the position of women in law and society.¹⁶ Changes in Norwegian laws and policies were stimulated by international participation such as the Nordic initiatives in the UN Commission on Women in 1972, to speed up the process of transforming the Declaration on the Elimination of Discrimination against Women into a binding human rights convention.¹⁷ The political structure for women's rights and gender equality proponents in Norway in the 1970s was, with the discovery of oil reserves in the North Sea and the introduction of new labour market

¹³ *The Equality and Anti-Discrimination Ombud's Report to the Pre-session of the CEDAW, a Supplementary Report to the CEDAW Committee* (Oslo: The Equality and Discrimination Ombud, 2012).

¹⁴ Norway ratified the CEDAW on 21 May 1981.

¹⁵ Lov 9. juni 1978 nr 45 om likestilling mellom kjønnene [the Gender Equality Act].

¹⁶ T. S. Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo: Norwegian University Press, 1987).

¹⁷ B. Halsaa, 'No bed of roses? Academic feminism 1880–1990' in H. R. Christensen, B. Halsaa and A. Saarinen (eds.), *Crossing Borders: Re-mapping Women's Movements at the Turn of the 21st Century* (Odense: University Press of Southern Denmark, 2004) 81–99 at 93 and K. Nousiainen and M. Pentikäinen's chapter in this book.

policies implicating new roles for women in paid work and politics, extremely favourable.¹⁸

It was against this background that the Norwegian Labour Party in its ten-point programme promised to present a bill prohibiting discrimination against women. In 1974 a White Paper proposing an Act on gender equality was circulated in a public hearing.¹⁹ The White Paper was surrounded by two major controversies related to the purpose and scope of the proposed legislation.²⁰ Should it adopt a gender-specific approach prohibiting discrimination against women or a gender-neutral approach prohibiting gender discrimination? Should it apply in both the public and the private space, or make exemptions for the private and religious sphere? In 1976 two proposals representing these opposing strands were debated in the Norwegian Parliament. Neither the Labour Party's proposal of a Gender Equality Act nor the Socialist Left Party's proposal of an Act against discrimination of women got a majority vote. In 1978 Parliament passed the Gender Equality Act, which was a compromise between the two strands. The Act prohibits gender discrimination, but allows differential treatment that promotes gender equality in conformity with the purpose of the Act, which is to improve the position of women. In spite of fierce criticism from most of the women's organizations, the Act exempted religion from its scope.²¹ Family life was included but was not to be enforced by the Gender Equality Ombud and the Gender Equality Tribunal.²²

Three years later, in 1981, Norway ratified the CEDAW without any reservations.²³

The Convention was welcomed by all the political parties in Parliament and by the women's organizations, who wanted an Act that prohibited

¹⁸ B. Halsaa, 'No bed of roses?' at 93.

¹⁹ *Utkast til Lov om likestilling mellom kjønnene* [White Paper, Gender Equality Bill from the Ministry of Government Administration and Consumer Affairs]. Notat fra Forbruker og administrasjonsdepartementet [Oslo: Ministry of Government Administration and Consumer Affairs, July 1974].

²⁰ The legal and political controversies surrounding the Act are described in T. S. Dahl, K. Graver, A. Hellum and A. Robberstad, *Juss og Juks* [Law and Deceit] (Oslo: Pax, 1976); Sosialistisk Opplysningsforbund (written by T. Skard), *Hvorfor nei til likestillingslova?* [Why Reject the Gender Equality Act?] (Temahefte sosialistisk opplysningsforbund, 1976).

²¹ According to section 2.1 in the Gender Equality Act of 1978, the Act shall 'apply to all areas, except for the internal affairs of religious communities'.

²² According to Article 2.2 of the Gender Equality Act of 1978: 'With regard to family life and purely personal matters, this Act shall not be enforced by the bodies mentioned in section 9 of this Act.'

²³ Ratification of 21 May 1981.

discrimination against women in all spheres of life.²⁴ In the light of the Gender Equality Act, which was passed in 1978, it was assumed that Norwegian law was in consonance with the CEDAW. The ratification was, in Norway as in Finland, to a large extent seen as an act of solidarity with women in developing countries.²⁵

The Norwegian state's ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, which took place on 5 March 2002, was not plain sailing.²⁶ The objections, which were raised by the Government Legal Counsel, marked a growing resistance to judicial review.²⁷ The Government Legal Counsel argued that the CEDAW, due to the vague character of its standards, particularly the social and economic rights embedded in the Convention, could not be made the subject of judicial review in a Norwegian court of law.²⁸ The Ministry of Foreign Affairs, on the other hand, was of the view that the CEDAW's non-discrimination standard, in as far as it extended into the sphere of social and economic rights, was justiciable. This line of argument, which was adopted by the government and approved by Parliament, lent itself to the Norwegian Human Rights Law Commission's general view that there is no watertight division between civil, political, social and economic rights.²⁹

²⁴ T. Skar, 'Milepeler i norsk kvinnebevegelse' [Milestones in the Norwegian women's movement], Seminar series, available at: <http://kilden.forskningsradet.no/artikkel/vis.html?tid=45836> (last accessed 1 September 2012).

²⁵ See K. Nousiainen and M. Pentikäinen's chapter in this book.

²⁶ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, A/RES/54/4.

²⁷ The government at the time of writing (Stoltenberg II) has, on the basis of advice from the State Legal Counsel, decided not to ratify the Optional Protocol to the Convention on the Rights of the Child A/RES/54/263, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights A/RES/63/117, and Protocol No. 12 to the Convention for the Protection of Human Rights and Freedoms (on discrimination), which entered into force 1 April 2005. The prevailing view of the State Legal Counsel is that conferral of legal power to international treaty bodies leads to erosion of representative democracy. See Letter of 22 October 2009 from the State Legal Counsel to the Ministry of Foreign Affairs 2009-0646 THS/-.

²⁸ H. F. Ervik, *Individuell klage som instrument for kvinners menneskerettigheter* [Individual Complaint Procedure as a Tool for Women's Rights], *Kvinnerettslige studier* nr. 41, Department of Public and International Law's Publication Series No. 5/1998 (Department of Public and International Law, University of Oslo, 1998).

²⁹ *Menneskerettighetslovutvalgets innstilling NOU 1993: 18, Lovgivning om menneskerettigheter* [Human Rights Legislation], 110. Arguing that there was no watertight division between civil, political, social and economic rights, the Norwegian Human Rights Law Commission suggested that the Convention on Social, Economic and Cultural Rights

4 Incorporation of the CEDAW into the Human Rights Act in 2009

On 19 June 2009, almost thirty years after ratification, the Women's Convention and the Optional Protocol to the Convention were incorporated into the Human Rights Act, so as to take precedence when coming into conflict with other Norwegian law. This long journey, which will be described below, illustrates the contested status of international human rights treaties in Norwegian law in general, and the long-standing controversy regarding the relationship between a gender-specific and a gender-neutral approach to gender equality in particular.

The story goes back to 1989, when the government, to strengthen and clarify the status of human rights in Norwegian law, appointed a Human Rights Law Commission to assess how central human rights conventions could be incorporated into Norwegian law.³⁰ The Norwegian legal system is, in spite of the increasing inflow of international law, seen as dualist. It is held, in line with the dualist doctrine, that a special Act is necessary to make binding international treaties a part of Norwegian law. On the basis of the recommendation from the Norwegian Human Rights Law Commission, a special Article proclaiming that Norwegian authorities should respect and protect human rights was included in the Norwegian Constitution in 1994.³¹ Further incorporation of human rights conventions into Norwegian law was, in accordance with this new constitutional provision, to take place through legislation.³²

In 1993 the Human Rights Law Commission suggested that a limited number of human rights conventions be incorporated into the Human Rights Act so as to take precedence when coming into conflict with other Norwegian law.³³ To distinguish between those conventions that were suited for this form of incorporation and those that were not, the

be incorporated into the Human Rights Act, so as to take precedence when coming into conflict with other Norwegian law.

³⁰ Menneskerettighetslovutvalget [the Human Rights Law Commission] was appointed in 1989. Its recommendations are found in NOU 1993: 18, *Lovgivning om menneskerettigheter* [Human Rights Legislation].

³¹ Section 110c(1) of the Constitution.

³² Section 110c(2) of the Constitution.

³³ For an overview of the debate about the CEDAW in Norwegian law up to 2002, see V. Blaker, *Kvinnekonvensjonens status i norsk rett* [The Status of the CEDAW in Norwegian Law], Institutt for offentlig retts skriftserie [Department of Public and International Law's Publication Series] No. 1 (Department of Public and International Law, University of Oslo, 2003).

Commission introduced a distinction between ‘main conventions’ and ‘special conventions’.³⁴ According to the Commission, the three ‘main’ international conventions that were suited for incorporation were the ECHR, the ICCPR and the ICESCR. The Commission recommended that ‘special’ conventions, such as the CEDAW, the CRC, the ICERD and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), should not be incorporated into the Human Rights Act. An important reason why the latter instruments were seen as unsuitable for incorporation was, according to the Commission, their lack of individual complaint mechanisms that could establish and clarify the content and scope of their provisions.

The Human Rights Law Commission’s recommendations were followed up through the Stoltenberg I government’s proposition on the Human Rights Act.³⁵ In the public hearing following the proposal, the Gender Equality Ombud argued that the CEDAW, dealing with the rights of half of the world’s population, should be seen as a ‘main’ convention.³⁶ The Ministry of Education and the Ministry of Children and Family were also of the view that the CEDAW should be incorporated into the Human Rights Act.³⁷ The Ministry of Justice was of the view that ‘it was not natural to see the Women’s Convention as a “main” convention, although it was central and important to eliminate discrimination against women’.³⁸

The distinction between ‘main’ conventions and ‘special’ conventions was not accepted by Parliament, where a majority was of the view that the CEDAW and the CRC, because of their basic character, should be incorporated into the Human Rights Act. When passing the Human Rights Act, a majority in Parliament requested the Stoltenberg I government to incorporate the CEDAW and the CRC into Norwegian law ‘within reasonable time’.³⁹

³⁴ *Hovedkonvensjoner og særkonvensjoner*.

³⁵ Proposition to the Odelsting No. 3 (1998–9).

³⁶ Proposition to the Odelsting No. 38 (1998–9), 29 and E. A. Grannes, ‘Lovgivning om likestilling – bør FNs kvinnekonvensjon inkorporeres i norsk rett’ [Equality legislation – should the CEDAW be incorporated into Norwegian law], *Mennesker og rettigheter* [Humans and Rights] 2 (2001).

³⁷ Proposition to the Odelsting No. 38 (1998–9), 30.

³⁸ *Ibid.*

³⁹ Recommendation No. 51 (1998–9) to the Odelsting, para. 1. See A. Hellum, ‘Maktutredningens påstander settes ut i live – en knekk for demokratiet?’ [The Power and Democracy Commission’s assertions: a democratic problem] *Kritisk juss* [Critical Legal Studies] 30 (2004) 115–17.

On 20 January 2003 the CEDAW Committee considered Norway's fifth and sixth periodic reports.⁴⁰ In its Concluding Comments, the Committee recommended that:

the State party amend section 2 of the Human Rights Act (1999) to include the Convention and its Optional Protocol, which will ensure that the provisions of the Convention prevail over any conflicting statutes and that its provisions can be invoked in domestic courts.⁴¹

In 2003 a White Paper outlining the strengths and weaknesses of alternative ways of incorporating the CEDAW was issued by the Ministry of Children and Equality, which did not take a position. The White Paper referred to the CEDAW Committee's recommendation. It was circulated through a broad public hearing. Of the twenty-nine consultative bodies that expressed their opinion, twenty-two were of the view that the Convention should be incorporated into Norwegian law so as to take precedence over other Norwegian legislation in the event of conflict.⁴² Of the bodies that were in favour of incorporation into the Human Rights Act, thirteen referred explicitly to the CEDAW Committee's recommendation.⁴³ Only two of the consultative bodies, namely the Ministry of Justice (Legislation Department) and the Office of the Norwegian Government's Legal Counsel, argued against incorporation into the Human Rights Act. The Ministry of Justice and the Government Legal Counsel argued that the standards set out in the CEDAW, due to their vague and unclear character, were unsuitable for application in Norwegian courts of law. With reference to the dualist character of the Norwegian legal system, the Ministry of Justice argued that most of the standards embedded in the CEDAW, due to their lack of clarity, were not self-executive. With reference to the majority in the Norwegian Commission of Power and Democracy Report (see below), submitted to the government in 2003, both the Ministry of Justice and the State Legal Counsel argued that

⁴⁰ CEDAW/C/NOR/5 and CEDAW/C/NOR/6.

⁴¹ *Ibid.*

⁴² Proposition to the Odelsting, No. 35 (2004–5), 75 and 79–80.

⁴³ Among these were Akademikerne [the Academicians], Den norske kirke (Oslo biskop) [The Church of Norway, Oslo Bishop], Forsvarsdepartementet [Ministry of Defence], Juridisk rådgivning for kvinner [Free Legal Advice for Women], Likestillingsombudet [Ombud for Equal Status], Oslo kvinnesaksforening [Oslo Association for Women's Rights], Avdeling for kvinnerett [The Institute of Women's Law], Norsk senter for menneskerettigheter [Norwegian Centre for Human Rights], Senter for kvinne- og kjønnsforskning, Universitetet i Tromsø [Centre for Women's and Gender Research, University of Tromsø], Utenriksdepartementet [Ministry of Foreign Affairs] and Yrkesorganisasjonenes Sentralforbund [Confederation of Vocational Unions].

incorporation of the CEDAW into the Human Rights Act would skew the balance between the judiciary and the Parliament and as such undermine representative democracy.⁴⁴ The Ministry of Children and Equality, however, was of the view that the CEDAW should be incorporated into the Gender Equality Act and not be given precedence in the case of conflict with other Norwegian law.⁴⁵

The CEDAW Committee's recommendation was not adopted by the Bondevik II government. On the basis of advice from the Ministry of Justice and the Government Legal Counsel, the government decided to look closely into the Official Report submitted by the majority in the Commission of Power and Democracy before making any decision regarding the legal status of the CEDAW.⁴⁶ The majority in the Commission was concerned that Parliament's scope of action – and thus the Norwegian system of representative government – was being curtailed by the growing number of international treaties that had been ratified by the Norwegian state. The minority in the Commission argued that international human rights instruments such as the CEDAW, by challenging structural power relations, were a tool for a fairer distribution of power and resources between women and men and as such a means of achieving greater democracy.⁴⁷ Adopting the majority view, the Bondevik II government's report to Parliament concluded that the rule of precedence, embedded in the Human Rights Act, should for the future be restricted to very special cases in relation to incorporation of international conventions:

As regards incorporation the main rule should be that the incorporated rule is given status as ordinary law, and that general national principles regarding interpretation are applied. In this way the Government wishes to increase the predictability and clarity of the legal system, and thereby avoid a development to the effect that power is transferred from the legislative to the executive branch of government. In the light of certain international bodies' dynamic interpretation of international law – going in directions beyond the scope of what the legislative branch of government at the time of incorporation reasonably could foresee – it is ample reason to emphasise the need to be as consistent as possible as regards incorporation of international treaties that have a binding effect. The Government

⁴⁴ Norwegian Official Report NOU 2003:19 *Makt og demokrati* [Power and Democracy].

⁴⁵ Proposition to the Odelsting, No. 35 (2004–5), 80.

⁴⁶ Norwegian Official Report (Flertallets rapport) [Majority report] NOU 2003: 19 *Makt- og demokratiutredningen* [Power and Democracy Report].

⁴⁷ H. Skjeie, Mindretallsuttalelse [Minority view] NOU 2003: 19.

is of the view that rules giving international law precedence in the event of conflict with other Norwegian law should be used restrictively.⁴⁸

These views were echoed in the debate in Parliament about the Bondevik II government's proposal to incorporate the CEDAW into the Gender Equality Act. The proposal, which was passed by Parliament, implied that the CEDAW and its Optional Protocol 'shall apply as Norwegian law'.⁴⁹ However, in the event of conflict with other Norwegian legislation, the CEDAW and its Optional Protocol would not, like the Conventions that were incorporated into the Human Rights Act, enjoy statutory precedence over other Norwegian legislation. Like human rights and women's rights organizations, the opposition parties (Labour, the Socialist Left Party and the Centre Party) were of the view that the CEDAW should be incorporated into the Human Rights Act so as to take precedence when coming into conflict with other Norwegian legislation.⁵⁰

When coming into power after the elections in 2005, the Stoltenberg II government, in its political statement for the governing period of 2005–2009 (The Soria Moria Declaration), pledged to 'incorporate the UN Convention on the Elimination of All Forms of Discrimination against Women into the Human Rights Act'.⁵¹ In March 2007 the Minister of Justice, however, said that the government would reconsider the Soria Moria position on the CEDAW.⁵² It was, according to the Minister of Justice, a general need to consider what consequences incorporation of conventions embodying vague and imprecise provisions, such as the CEDAW, the ICERD and the CAT, in the Human Rights Act would have for the nature of the Norwegian legal order.

The proponents of incorporation into the Human Rights Act, particularly the women's organizations, the Anti-Discrimination and Equality Ombud and experts from the Institute of Women's Law at the University of Oslo, argued that the Convention constituted a necessary safeguard against the rapidly increasing body of gender-blind laws and policies that

⁴⁸ Report No. 17 (2004–5) to the Storting, 74–5.

⁴⁹ The Gender Equality Act, section 1b.

⁵⁰ From the newspaper debates see C. Holst and H. Skjeie 'Vikeplikt' [commentary], *Dagbladet*, 23 April 2005; N. Høstmælingen 'Annenrangs menneskerettigheter' [commentary], *Morgenbladet*, 15 April 2005.

⁵¹ The Soria Moria Declaration of 13 October 2005, Chapters 17 and 71.

⁵² See debate between A. Hellum, 'Politisk spydspiss med sviktende legitimitet' [Political spearhead with faltering legality], *Dagbladet*, 8 March 2007 and Minister of Justice, K. Storberget, 'Politisk kritikk med sviktende legitimitet' [Political criticism with faltering legality], *Dagbladet*, 19 March 2007.

in practice fail to adequately address the specific concerns of women and girls.⁵³ Norwegian state actors such as the Ministry of Justice and the State Legal Counsel were, however, of the view that it was unnecessary to incorporate the CEDAW into the Human Rights Act since the ECHR, the ICCPR and the ICESCR already prohibited sex discrimination.

In response to Norway's seventh periodic report, which gave account of the arguments for and against incorporation into the Human Rights Act, the CEDAW Committee recommended that:

the state party take all necessary steps to incorporate the Convention on the Elimination of All Forms of Discrimination against Women into the Human Rights Act so as to ensure that elimination of discrimination against women is addressed as a core human rights obligation.⁵⁴

The shadow report by the women's organizations emphasized the need to address the negative impact of the Human Rights Act's gender hierarchy:

The present situation is giving rise to a wide range of legal controversies as to the status of CEDAW in Norwegian law, which in turn is having an adverse effect on the interpretation of the Gender Equality Act and the use of CEDAW in Norwegian courts. The hierarchic ranking of human rights instruments is also having a negative effect on the authority and status of the Discrimination and Equality Ombud and the efforts to promote gender equality, as equality considerations have to yield to other laws.⁵⁵

The women's organizations' claim was also prompted by the need for a safeguard against the rapidly increasing body of gender-blind laws and policies that in practice fail to adequately address the specific concerns of women and girls.

In spring 2009 the Ministry of Justice and the Government Legal Counsel were publicly criticized for their political resistance to the

⁵³ To discuss the implication of incorporating the CEDAW into the Human Rights Act, the Institute of Women's Law, Free Legal Advice for Women (JURK) and the Norwegian Women's Rights Organization organized a seminar on the CEDAW at the Institute of Women's Law at the University of Oslo on 4 December 2008. A report from the seminar, 'Er Norge i utakt med FNs kvinnekonvensjon' [Is Norway out of step with the UN's Convention on Women] is found at the Norwegian Women's Rights Organization's home page: <http://kvinnesak.no/?p=418> (last accessed December 2010).

⁵⁴ CEDAW/C/NOR/CO/7, para. 14.

⁵⁵ Shadow report by women's organizations in Norway to Norway's seventh periodic report on the implementation of the CEDAW, FOKUS (Forum for Women and Development) Secretariat, Oslo, 19 June 2007 at 11. A submission to the CEDAW Committee was also made by the Norwegian Centre for Human Rights, submission of 17 July.

Stoltenberg II government's policy regarding the incorporation of the CEDAW.⁵⁶ In the aftermath of this newspaper debate, the Minister of Justice and the Minister of Children and Equality, in June 2008, announced that the government had decided to put forward a proposal to incorporate the CEDAW into the Human Rights Act. In November 2009 the Ministry of Justice sent out a White Paper suggesting incorporation of the CEDAW into the Human Rights Act.⁵⁷ The White Paper was circulated in a broad public hearing. Among the thirty-four bodies (state and non-state actors) that expressed their view, only the Government Legal Counsel opposed incorporation into the Human Rights Act.

Assuming that Norwegian law, by and large, was in consonance with the CEDAW, the Ministry of Justice concluded that incorporation of the CEDAW would not skew the balance between the legislative and judicial branches of government.⁵⁸ In Parliament, all the political parties with the exception of *Fremskrittspartiet* (Progress Party) voted for the proposal.⁵⁹ It was generally agreed that the gender equality principle's centrality as a national value should be reflected in the Human Rights Act. In his address to Parliament, the Minister of Justice, however, emphasized that this was the very last convention that would be incorporated into the Human Rights Act so as to take precedence over other Norwegian law.⁶⁰

The incorporation of the CEDAW into the Human Rights Act was a breakthrough for the claim that the CEDAW as a gender-specific instrument added value to the ECHR, the ICCPR and the ICESR, which took a gender-neutral approach. The CEDAW controversy shows how several democratically elected governments were effectively disempowered by the technical legal arguments mobilized by legal experts in the Ministry of Justice and the Government Legal Counsel. In terms of democracy and transparency, civil society played a key role in promoting accountability vis-à-vis the executive branch of government through public debate.

⁵⁶ Interview in *Klassekampen* with Professor Mads Andenæs (Director of the Norwegian Centre of Human Rights) 8 June 2008; 'Konvensjonell Sexisme' [Conventional sexism], article by Professor Anne Hellum in *Dagbladet*, 12 June 2008; 'Om å holde ord' [About keeping promises], opinion by Professor Anne Hellum, Professor Hege Skjeie and senior researcher at PRIO Helga Hernes in *Dagbladet*, 28 May 2009.

⁵⁷ *Høring – inkorporering av kvinnekrimineringskonvensjonen i menneskerettsloven* [Hearing – Incorporation of the CEDAW in the Human Rights Act] Ministry of Justice, 7 November 2008.

⁵⁸ Proposition to the Odelsting No. 93 (2008–9), 36.

⁵⁹ Populist right-wing party.

⁶⁰ Innst. O. [Recommendation to the Odelsting] nr. 115 (2008–9).

5 The state report review process: state–civil society

An important function of the CEDAW Committee is to create a forum for holding governments accountable for their international undertakings, and for the engagement of civil society as part of national and transnational struggles to achieve women's rights and gender equality.⁶¹ To ensure that the review of a state report is linked to domestic law and policy-making processes, the Committee has made provisions for civil society and national human rights institutions to make formal and informal contributions to the work of the Committee. A key question, in this section, is how the Norwegian government in its international and national gender policies has responded to the Committee's initiatives aimed at a participatory, balanced and transparent state report review process.

5.1 *The CEDAW in Norwegian international gender policy*

Norway's smooth ratification of the CEDAW speaks to the strong political commitment to women's rights and gender equality as a global development issue in the 1970s.⁶² The CEDAW has, since its enactment, been a basic reference point for Norwegian development policy.⁶³ In the *Action Plan for Women's Rights and Gender Equality in Development Cooperation* from 2007, Norway's rights-based approach to development is anchored in the CEDAW.⁶⁴ In the foreword to the Action Plan, the Minister of Development Erik Solheim stated:

The Government wants Norway to be a fearless champion of women's rights and gender equality. Accordingly, the rights, participation and influence of women will be at the core of Norway's development cooperation efforts. Our aim is to ensure the realization of the rights of women that are set out in international human rights conventions.

Seeing human rights and democracy as mutually constitutive, the Action Plan will use the CEDAW Committee's Concluding Comments to Norway's partner countries in development cooperation as the point of departure for dialogue and priority-setting. Ratification of the CEDAW

⁶¹ See Andrew Byrnes' chapter in this book.

⁶² See Skar, 'Milepeler i norsk kvinnebevegelse'.

⁶³ *Action Plan for Women's Rights and Gender Equality in Development Cooperation 2007–2009*, Norwegian Ministry of Foreign Affairs.

⁶⁴ *Ibid.*

is seen in the Action Plan as an expression of the partner countries' own development targets and commitments. According to the Action Plan:

Most of Norway's partner countries have acceded to CEDAW, and are required to report every four years to the CEDAW Committee. After its analysis of the report and subsequent dialogue with the authorities, the Committee draws up concluding comments with recommendations for follow-up in the country in question. These concluding comments form a good basis for cooperation on the target country's own terms and should be used actively in development cooperation.⁶⁵

Civil society, particularly women's organizations, are seen as key actors in development and democracy building. With reference to the situation in Norway, the Action Plan states:

In Norway, civil society has played an important role in shaping democratic development, including the position of women and the realization of women's rights. The establishment of women's networks and interest groups and the participation of women in organizations in general have influenced the national agenda.⁶⁶

By strengthening civil society in the global south, the Action Plan sets out to promote democracy in terms of accountability vis-à-vis national authorities. Democratic values such as democracy, good governance, accountability, equal rights and development are seen as closely interlinked. The Action Plan states:

measures to strengthen the competence and capacity of civil society to play such a role will be given high priority. Women's organizations and networks in developing countries will be supported directly through Norwegian embassies, national and regional umbrellas and trust funds.⁶⁷

5.2 *The CEDAW in Norwegian gender policy*

In national gender policy measures to strengthen the competence and capacity of women's organizations' ability to use the state reporting procedure as an accountability mechanism were for a long time absent. The Ministry of Children and Equality has, since ratification in 1981, produced eight periodic reports to the United Nations on Norway's implementation of the CEDAW. The Ministry regularly invites women's organizations

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

and the Anti-Discrimination Ombud to make comments on the state reports. Draft reports have been circulated, and public hearings have been held. A recent study based on women's organizations' participation in the CEDAW and the ICERD state reporting process between 1982 and 2008, however, shows that the participation of non-governmental women's organizations in these processes has been severely limited.⁶⁸ In most instances, the comments from the women's organizations, according to the study, had not been included as separate attachments to the state report but were incorporated without any reference to the statements made by the actual organizations.⁶⁹

In 2007 the women's organizations presented their first shadow report to the CEDAW Committee.⁷⁰ Due to lack of funding, the women's organizations were unable to attend the Committee's preparatory meeting. The CEDAW Committee, in its Concluding Comments to Norway's seventh periodic report, took notice of 'the absence of Norwegian NGOs at the session, apparently for lack of funding'.⁷¹ In 2011 thirty-two women's organizations coordinated by FOKUS submitted an NGO shadow report to the CEDAW Committee.⁷² In its Concluding Comments to the Norwegian eighth periodic report, the Committee commended 'the State party for its financial support of women's organizations (NGOs) for the finalization of a shadow report and for travelling expenses to both the pre-session working group and the session'.⁷³

The FEMCIT study on women's movements in Norway challenges established wisdoms regarding the influence of women's networks and

⁶⁸ B. Halsaa and C. Thun, *Partnering with the State? The Role of Women's Organizations in Governmental, CEDAW and CERD Consultation Processes*, FEMCIT Working Paper No. 4 (Centre for Gender Research, University of Oslo, 2010) at 131. The study was carried out by the EU project 'Gendered citizenship in multicultural Europe: the impact of contemporary women's movements' (FEMCIT). It was based on NGO comments that have been included in the national reports and on shadow reports.

⁶⁹ Norway's fifth periodic report, where comments from the Gender Equality Ombud, the Centre for Gender Equality, the MIRA Resource Centre for Black, Immigrant and Refugee Women and the Women's Front were attached as an appendix, makes an exception.

⁷⁰ The report was a cooperation between FOKUS, Kompetanse- og ressurscenter i interasjonale kvinnespørsmål [the Competence and Resource Centre for International Women's Issues], Kvinnesaksforeningen [the Norwegian Association for Women's Rights], Kvinnefronten [the Women's Front] and Internasjonale kvinnelige for fred og frihet [the Women's International League for Peace and Freedom].

⁷¹ CEDAW/C/NOR/CO/7, para. 5.

⁷² Among the organizations that contributed to the report were The Norwegian Association for Women's Rights, The Norwegian LGBT Organization, the MIRA Resource Centre for Black, Immigrant and Refugee Women and the foundation Stop the Discrimination.

⁷³ CEDAW/C/NOR/CO/8, para. 3.

interest groups on national law and policy making.⁷⁴ It shows how the increasing amount of complicated national and international law and policy documents, and lack of sufficient funding have weakened majority and minority voluntary membership organizations' ability to formulate claims and exert influence on Norwegian law and policy making. Among the approximately 200 organizations that were included in the FEMCIT study, only six organizations had been involved in the CEDAW reporting procedure, and none in the CERD reporting procedure. The women's organizations that participated in the study were of the view that participation in the CEDAW reporting procedure required extensive professional and economic resources of which ordinary membership organizations not were in command.

The CEDAW Committee's Concluding Comments to Norway's most recent state report has, however, prompted the Ministry of Children, Equality and Social Inclusion to take economic measures to facilitate NGO shadow reporting.⁷⁵ The NGO shadow report from 2011, in which women from majority and minority organizations cooperated, indicates that the state reporting procedure gradually is becoming an arena where claims addressing discrimination attributed to the intersection of gender, ethnicity, sexuality, age or religion are discussed and coordinated.

5.3 *National human rights institutions and Parliament*

To broaden the participation in the state report review, the CEDAW Committee has made specific provisions for national human rights institutions (NHRIs) to contribute formally to its work. The Committee adopted a statement on NHRIs in 2008, in which it underlined the importance of NHRIs to the domestic implementation of the Convention, and welcomed the submission of written information for the pre-sessional working groups and the session, and undertook to make

⁷⁴ B. Halsaa, C. Thun and L. N. Predelli, *Women's Movements: Constructions of Sisterhood, Dispute and Resonance: The Case of Norway: Feminist Citizenship in Multicultural Europe: The Impact of Contemporary Women's Movements (FEMCIT)*, FEMCIT Working Paper No. 4. (Centre for Gender Research, University of Oslo, and Department of Social Science and Centre of Research in Social Policy, Southborough University, 2008)

⁷⁵ The need of a national gender policy that takes measures to fortify the capacity of membership-based Norwegian women's organizations to articulate claims is in the context of the increasingly complex political and legal landscape emphasized by the FEMCIT research. See Halsaa et al., *Women's Movements* at 270.

time available for oral interventions by NHRIs at the public sessions of the Committee.⁷⁶

The Norwegian Centre of Human Rights (NCHR), which is a multidisciplinary research centre at the Faculty of Law at the University of Oslo, was granted status as Norway's national institution for human rights by royal decree in 2001.⁷⁷ The Anti-Discrimination Act mandates the Equality and Anti-Discrimination Ombud to ensure that the CEDAW and the ICERD are complied with in law and practice.⁷⁸ The NCHR made a submission to the CEDAW Committee's consideration of Norway's fifth, sixth and seventh periodic reports with focus on the incorporation of the CEDAW into the Human Rights Act. In 2011 the Equality and Anti-Discrimination Ombud made a written supplementary report to Norway's eighth periodic report to the CEDAW Committee.

Unlike in the Netherlands,⁷⁹ the Norwegian Parliament is not involved in the state reporting procedure. To broaden democratic participation, the CEDAW Committee has in its Concluding Comments to Norway emphasized that:

the Convention is binding on all branches of Government, and invites the state party to encourage the Parliament, in line with its procedures, where appropriate, to take the necessary steps with regard to the implementation of the present concluding observations and the Government's next reporting process under the Convention.⁸⁰

5.4 *Towards a more democratic and transparent review process*

The CEDAW Committee's call for a more participatory, balanced and transparent state reporting process involving civil society, national

⁷⁶ Kongelig Resolusjon 21. September 2001, 'Etablering av og mandat for nasjonal institusjon for menneskerettigheter ved Institutt for menneskerettigheter' [Establishment and mandate for a National Institution for Human Rights at the Institute for Human Rights].

⁷⁷ For a description of the complex architecture of the national supervisory human rights mechanisms in Norway, see *Protecting and Promoting Human Rights in Norway: Review of the Norwegian Centre for Human Rights in its Capacity as Norway's National Human Rights Institution*, by the Norwegian Ministry of Foreign Affairs team for the review of the existing national institution: N. Sveaass, B. Kofod Olsen, K. Lund and G. M. Ekekløve-Slydal (Oslo: NCHR, 2011).

⁷⁸ The Anti-Discrimination Act (ADA).

⁷⁹ See van den Brink's chapter in this book.

⁸⁰ CEDAW/C/NOR/CO/8, para. 8.

human rights institutions and democratically elected Parliamentarians is slowly prompting change. Through its contribution to a more democratic and transparent review process, the CEDAW adds value in comparison to both EU law and the ECHR, which are based on a top-down model.⁸¹

6 The CEDAW in national legislation

The equal status of women in law and society has been an important part of law and policy making since the enactment of the Gender Equality Act in 1978. The Norwegian state's obligation to incorporate the principle of gender equality and non-discrimination in existing legislation derives from a wide range of international and regional international treaties that in practice reinforce and supplement Norwegian gender equality policy. The rapid and uneven development in the field of gender equality is characterized by a situation where Norwegian law is both ahead of and behind its obligations under international law. By passing an Act requiring that 40 per cent of all company board members should be women, the Norwegian Parliament made international headlines.⁸² So did the marriage law reform, which put lesbian and homosexual couples on an equal footing with heterosexual couples.⁸³ An increasing number of reforms are, however, a response to Norway's international legal obligations, particularly European Union law and the CEDAW.

6.1 *In the shadow of European Union law*

Norway is not a member of the EU, but has been a member of the European Free Trade Association (EFTA) since 1994. It is bound by the European Economic Area (EEA) agreement, which guarantees equal rights and obligations within the 'Internal Market' for citizens.⁸⁴ The EU Gender Equality

⁸¹ Since 1984 the EU Commission has been assisted by the European Network of Legal Experts in the Field of Gender Equality in order to help monitor the implementation of the EU *acquis* related to the principle of equal treatment between men and women and to develop new legal initiatives in this field. Publications from the Commission's Network of Legal Experts is found at http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm (last accessed 1 September 2012).

⁸² Article 6–11a of the Norwegian Companies Act. Amended by Act of 19 December 2003, No. 120. Following this law reform, the share of women on corporate boards increased from 25 per cent in 2004 to 42 per cent in 2009.

⁸³ By Act of 27 June 2008, No. 53, section 1 of the Marriage Act allows same-sex marriage.

⁸⁴ www.efta.int/eea/eea-agreement.aspx (last accessed 1 September 2012).

Directive is directly binding in Norwegian law through the EEA agreement.⁸⁵ The Court of Justice of the European Union (ECJ) has through its case law in the 1970s, 1980s and 1990s, been way ahead of the CEDAW Committee in its development of women's protection against direct and indirect discrimination in the labour market.⁸⁶ Through a dynamic interpretation of EU law, the ECJ has significantly strengthened women's protection against pregnancy and part-time work-related discrimination.⁸⁷ This body of case law, which today is codified in the Recast Gender Equality Directive, is reflected in a series of changes in the Norwegian Gender Equality Act.⁸⁸

In 2002 the Gender Equality Act underwent extensive revisions in the light of Norway's obligations under EU law and the CEDAW.⁸⁹ A duty for public authorities and employers to make active, targeted and systematic efforts to promote gender equality was included.⁹⁰ A new provision providing protection against sexual harassment was introduced.⁹¹ The protection against direct and indirect discrimination was strengthened.⁹² The principle of equal pay for work of equal value was extended to work connected with different trades and professions.⁹³ The rules concerning burden of proof were changed in the favour of victims of discrimination.⁹⁴ Liability for damages regardless of the fault of the employer was introduced.⁹⁵ Giving an account of Norway's international legal obligations, the Proposition to the Odelsting, which was worked out by the Ministry of Children and Equality, makes systematic reference to both EU law and the CEDAW.⁹⁶ While the obligations under the CEDAW serve as a general point of reference in the Proposition, the actual changes in the text of the Gender Equality Act are made with direct reference to the Equal Pay Directive, the Gender Equality Directive and the Burden of Proof

⁸⁵ The Equal Treatment for Men and Women Directive (2002/73/EØF), which now is replaced by the Recast Gender Equality Directive (2006/54).

⁸⁶ R. Nielsen, 'The impact of EU law on Scandinavian law in matters of gender equality' in R. Nielsen and C. Tvarnø, *Scandinavian Women's Law in the 21st Century* (Copenhagen: DJØF Publishing, 2012) 63–91.

⁸⁷ Case 170/84 *Bilka*; C-109/00 *Tele Danmark*; C-177/88 *Dekker*; C-171/88 *Rinner-Kuhn*; C-109/88 *Danfoss*.

⁸⁸ Proposition to the Odelsting No. 77 (2000–1); Proposition to the Odelsting No. 35 (2004–5).

⁸⁹ Act of 14 June 2002, No. 21.

⁹⁰ GEA section 1a. ⁹¹ GEA section 8a.

⁹² GEA section 3. ⁹³ GEA section 5.

⁹⁴ GEA section 16. ⁹⁵ GEA section 17.

⁹⁶ Proposition to the Odelsting No. 77 (2000–1).

Directive.⁹⁷ As shown above, the substantive inputs to these reforms came from EU law, which has taken a more incisive position than the CEDAW. Yet in the public hearing, state and non-state actors such as the Ministry of Foreign Affairs, the women's organization Kvinnefronten (Women's Front) and the National Union (LO) invoked the CEDAW, and not EU law, in support of the reform.⁹⁸

6.2 *The actual added value of the CEDAW*

In recent years the CEDAW has clearly emerged from the shadows. In the following examples of how it has been invoked in legislative matters concerning protection against discrimination in family and religious affairs, the needs for gender-specific legislation and protection against intersectional discrimination are presented.

6.2.1 Exemptions for religion and family in the Gender Equality Act

Recognizing that gender stereotypes embedded in social, cultural and religious structures are a *root cause* of discrimination against women, the CEDAW Committee has, in its General Recommendations and Concluding Comments, systematically addressed discrimination in the private sphere, the family sphere and the religious sphere. It has, in its Concluding Comments to Norway's periodic reports, addressed the Gender Equality Act's exemptions for religion and family life on a number of occasions. Dealing with Norway's third and fourth periodic reports in 1995, the Committee expressed a concern for provisions in the Gender Equality Act to exempt certain religious communities from compliance with the equal rights law. Since women often face greater discrimination in family and personal affairs in certain communities and in religion, they asked the Norwegian government to amend the Gender Equality Act to eliminate exceptions based on religion.

The CEDAW Committee's recommendation was not followed up by the Bondevik II government's revision of the Gender Equality Act in 2002, which was carried out to ensure compliance with Norway's international legal obligations.⁹⁹ In 2007 the Stoltenberg II government appointed the Commission to Propose a Comprehensive Anti-Discrimination

⁹⁷ 75/117/EØF; 76/207/EØF; 97/80/EØF.

⁹⁸ Proposition to the Odelsting No. 77 (2000–1), 45.

⁹⁹ Report to the Odelsting No. 77 (2000–1).

Legislation (Discrimination Law Commission). A part of its mandate was to consider whether the special exemptions for religious communities from the prohibition against discrimination on the basis of gender or homosexual cohabitation in the Gender Equality Act and the Working Environment Act should be abolished. In 2008 the Discrimination Law Commission, in a partial report mainly looking into Norway's obligations under the ECHR, concluded that the existing exemptions for religion in the Gender Equality Act and the Working Environment Act were too wide.¹⁰⁰ In 2009 a specialist report, looking into Norway's international legal obligations embedded in the ICCPR, ICESCR, CEDAW, CRC, ECHR and EU law recommended a more wide-reaching prohibition against religious discrimination in the Gender Equality Act than the Discrimination Law Commission had made.¹⁰¹ In 2010 the Gender Equality Act and the Working Environment Act were changed accordingly.¹⁰²

In its consideration of Norway's third periodic report, the CEDAW Committee asked why the Gender Equality Act applied to, but was not enforced by, the Ombud and Tribunal in relation to family matters.¹⁰³ In 2009 the Discrimination Law Commission, without any discussion of the Committee's previous comments, suggested exempting family life from the scope of the proposed unified discrimination legislation (see below).¹⁰⁴ The majority in the Commission was of the view that the proposed change was in consonance with the protection of the right to privacy in Article 8 of the ECHR. The minority in the Commission argued that since unequal family relations constitute one of the root causes of discrimination against women, family life not should be exempted.¹⁰⁵ In their comments to the proposal, a number of women's organizations were of the same view as the minority.¹⁰⁶ Experts in the field of discrimination and equality

¹⁰⁰ Official Report NOU 2008: 1 *Kvinner og homofile i trossamfunn* [Women and Homosexuals in Religious Communities].

¹⁰¹ V. B. Strand, 'Report commissioned by the Ministry of Children and Equality of January 2009' *Studies in Women's Law* 80 (2001); V. B. Strand, *Diskrimineringsvernets rekkevidde i møte med religionsfrihet* [Balancing Protection against Discrimination and Religious Freedom] (Oslo: Gyldendal, 2012).

¹⁰² Act of 9 April 2010, No. 12.

¹⁰³ With regard to family life and purely personal matters, the Gender Equality Act 'shall not be enforced by the bodies mentioned in section 9 of this Act'.

¹⁰⁴ Official Report NOU 2009: 14 *Et helhetlig diskrimineringsvern* [Comprehensive Anti-Discrimination Legislation].

¹⁰⁵ Professor Dr Juris Hege Brækhus, Faculty of Law, University of Tromsø, is a former member of the Tribunal and teaches anti-discrimination and equality law.

¹⁰⁶ *Høringsuttalelse fra Norsk kvinnesaksforening* [Statement from the Norwegian Rights Association], December 2001.

law referred to the CEDAW Committee's Concluding Comments and argued that Article 8 of the ECHR should be interpreted in the light of the CEDAW.¹⁰⁷ The government has not yet decided what weight the CEDAW Convention and the CEDAW Committee's Concluding Observations should be given in the proposed revision of the Gender Equality Act, which will be put before Parliament in the course of 2013.

6.2.2 Gender-specific or gender-neutral anti-discrimination law

What distinguishes the CEDAW from other international human rights treaties and European Union law is, as already pointed out, its explicit recognition that it is mostly women who suffer from discrimination on the ground of their sex, as well as from a range of other discrimination grounds resulting in intersectional discrimination.¹⁰⁸ The CEDAW Committee has, on a number of occasions, addressed the consequences for attention to women's rights issues of the establishment of unified legal and institutional structures and mechanisms with the responsibility for promoting equality issues more generally, and for addressing multiple grounds of discrimination.

In its Concluding Comments to Norway's seventh periodic report, the Committee noted the reorganization of the Norwegian gender equality machinery. The Centre for Gender Equality was closed down in 2005 and replaced by a new organ: the Equality and Anti-Discrimination Ombud. The Ombud was, as a result of the reform, mandated to monitor the Gender Equality Act, the Discrimination Act and the Anti-Discrimination and Accessibility Act. In addition, she was mandated to promote equality, mainly on the basis of gender, ethnicity and disability.¹⁰⁹ The CEDAW Committee stated:

While appreciating that the State party has a long-standing policy of gender mainstreaming in all fields covered by its central administration, the Committee notes with some concern that the new scope of action of the Anti-Discrimination Equality Ombud may result in insufficient focus being given to discrimination against women.¹¹⁰

¹⁰⁷ *Høringsuttalelse, Avdeling for kvinnerett, barnerett, likestillings og diskrimineringsrett* [Statement from the Institute of Women's Law, Discrimination Law and Child Law] of 3 December 2009.

¹⁰⁸ See R. Holtmaat's chapter in this book.

¹⁰⁹ The Anti-Discrimination and Equality Ombud and the Anti-Discrimination Tribunal Act (ADA) of 10 June 2005, No. 40.

¹¹⁰ CEDAW/C/NOR/CO/7, para. 15.

The reorganization of the national gender equality machinery was a controversial issue, which was addressed in the Norwegian women's organizations' shadow report to Norway's seventh periodic report. In the shadow report, the women's organizations stated that they strongly regretted the government's decision to close down the Centre for Gender Equality:

The earlier Centre for Gender equality played an important role in developing and influencing Norwegian policy-making, keeping gender equality clearly in focus. The Centre's independent role – given to the Centre by Parliament – allowed the Centre for Gender Equality to be a reprimanding and correcting mechanism for the Government's priorities and policies ... The Centre played an important liaison role between the women's organizations in promoting women's rights.¹¹¹

Following up the procedural reform mandating the Ombud to monitor the Gender Equality Act, the Anti-Discrimination Act and the Anti-Discrimination and Accessibility Act, the Discrimination Law Commission in 2009 submitted its proposal for a new comprehensive Anti-Discrimination Act. The Commission suggested that the Gender Equality Act, which in accordance with section 1 in the Act 'shall promote equality and aims in particular at improving the position of women' be abolished. The Commission did not consider the CEDAW Committee's concerns regarding the establishment of unified legal and institutional structures and mechanisms. In the NGO shadow report commenting on Norway's eighth periodic report, the women's organizations were of the view that the suggested amendment:

would be contrary to the obligation under the CEDAW, which requires dynamic action. Another consequence would be that differential treatment aimed at improving the status of women would be put on par with differential treatment aimed at improving the status of men.¹¹²

The Anti-Discrimination Ombud in her Supplementary Report to Norway's eighth periodic report to the CEDAW Committee commented:

If protection against discrimination on grounds of gender is incorporated in a new comprehensive Act without retaining the 'statement of purpose', the Ombud sees a danger that the work against discrimination of women

¹¹¹ *Shadow Report by Women's Organizations in Norway to Norway's Seventh Periodic Report on the Implementation of CEDAW.*

¹¹² *NGO Shadow Report to CEDAW 2011, Supplementing and Commenting on Norway's Eighth Periodic Report on the Implementation of CEDAW* at 10.

can be weakened. A neutral statement of purpose in a comprehensive Act will obscure the fact that, as a society, Norway has not achieved full gender equality, and that discrimination has a gender perspective that still requires targeted efforts and measures aimed at improving the position of women in particular.¹¹³

In its Concluding Comments to Norway's eighth periodic report, the Committee noted the Discrimination Law Commission's proposal and expressed concern:

that the use of gender-neutral legislation, policies and programs ... might lead to inadequate protection of women against direct and indirect discrimination and hinder the achievement of substantive equality of women and men.¹¹⁴

In response to criticisms from the Ombud and the women's organizations, the Ministry of Children, Equality and Inclusion in a press statement of 2 September 2011 informed the public that the government had decided not to propose a comprehensive Anti-Discrimination Act. According to the Minister, a proposition to revise the Gender Equality Act, the Anti-Discrimination Act, the Anti-Discrimination and Accessibility Act and a Bill protecting lesbian, gay, transsexual and intersex persons against discrimination would be presented to Parliament in 2012–13.¹¹⁵ This indicates that the women's organizations' mobilization of the CEDAW is having an impact on the law reform process.

6.2.3 Intersectional discrimination

Although the Women's Convention does not explicitly refer to intersectional discrimination suffered by women by virtue of their sex and other status, it recognizes that different groups of women, such as elderly women, rural women and migrant women may be subject to intersectional discrimination based on both their sex and other characteristics.¹¹⁶ The Committee has addressed the concept of intersectional discrimination in its General Recommendation 28 and in its General Recommendations concerning disabled women, elderly women and migrant women workers.¹¹⁷

¹¹³ *The Equality and Anti-Discrimination Ombud's Report to the Pre-session of the CEDAW. A Supplementary Report on Norway's Eighth Official Report to the CEDAW Committee* at 7.

¹¹⁴ CEDAW/C/NOR/CO8, para. 8.

¹¹⁵ www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2011/arbeidet-med-ny-diskriminering-slovginvin.html?id=653933 (last accessed 1 September 2012).

¹¹⁶ Byrnes, 'Article 1' at 68.

¹¹⁷ CEDAW GR 24, para. 6; CEDAW GR 25, para. 12; CEDAW GR 26, paras. 6 and 7.

In Norway, the quest for an intersectional approach to gender discrimination has come from both immigrant women's organizations and international human rights treaty bodies. In 2001 the MIRA Resource Centre for Immigrant and Refugee Women expressed concern that the Norwegian Gender Equality Act did not take their problems and experiences into account. In the government's proposed revision of the Act, they commented:

We are of the view that the new proposal to the Gender Equality Act does not represent the multiplicity of diversity that exists in contemporary Norway. We wish that the Ministry of Children and Family would take the living conditions of immigrant and refugee women in Norway into account so as to enhance equality for women from the minority population.¹¹⁸

The CEDAW Committee has in its Concluding Comments to Norway's fifth, sixth, seventh and eighth periodic reports expressed concern about the particular forms of discrimination faced by refugee, minority and migrant women, particularly multiple discrimination.¹¹⁹ The Equality Tribunal has addressed multiple discrimination in several cases.¹²⁰ With reference to these cases, the Discrimination Law Commission concludes that intersectional discrimination is covered by existing legislation and sees no need for a legal provision that explicitly addresses the issue. A different view was presented by the Gender Equality Commission, which was appointed in 2011 by the government to assess existing gender policies.¹²¹ With reference to General Recommendation 28, paragraph 18, the Gender Equality Commission proposes a separate legal provision that would address intersectional discrimination. In her supplementary report to Norway's eighth periodic report, the Anti-Discrimination Ombud emphasizes the need to strengthen the legal protection against intersectional discrimination:

The Ombud believes that this is unfortunate seen in light of Norway's obligations under the CEDAW Convention, including the obligation to

¹¹⁸ Proposition to the Odelsting No. 77 2001–2022.

¹¹⁹ CEDAW/CNOR/CO/7, paras. 24, 27, 34 and 39; CEDAW/C/NOR/CO/8, paras. 32, 35, 36; CEDAW GR 28, para. 18.

¹²⁰ See the Equality Tribunal case 1/2008 and the Equality Tribunal case 8/2008. Case 09–136827TVI-OSFI. Øst Finnmark Court Judgment of 17 March also addresses intersectional discrimination.

¹²¹ Norwegian Official Report NOU 2011: 18 *Struktur for likestilling* [Structure for Equality] at 22.

ensure the legal recognition of (and policies and programmes addressing) intersecting forms of discrimination and its compounded negative impact on women concerned (GR 28, Para. 18). The explicit inclusion of a prohibition on intersectional and multiple discrimination in the statutory framework will remove any doubts about the legal basis for considering the grounds together when enforcing the Act.¹²²

The CEDAW Committee, in its Concluding Comments to Norway's eighth periodic report, expresses 'concern at the lack of attention, in some laws and policies, to the specific needs of minority groups of women, including women with ethnic minority backgrounds and women with disabilities, often leading to intersectional discrimination'.¹²³ Whether and to what extent these concerns will be taken into consideration in the proposed revision of the Gender Equality Act will be decided in the revision of that Act, which will be presented in 2013.

6.2.4 A gender-neutral or gender-specific crisis centre Act?

Crisis centres run by women's NGOs are in Norway, as elsewhere in the world, the most important lifeline for women living in violent relationships. In the Soria Moria Declaration, the Stoltenberg II government promised to make the crisis centres that are run by women's NGOs a public responsibility. As a follow-up, the Ministry of Children and Equality presented a White Paper introducing a Crisis Centre Bill in 2008.¹²⁴ The Bill, which was gender-neutral, defined the right holders as 'persons that have been exposed to violence in intimate relationships'. The White Paper made no reference to the CEDAW, although the government at that point in time was tabling a proposal to incorporate the CEDAW into the Human Rights Act. A consequence of the gender-neutral wording of the proposed legislation was that women would be denied a right to a separate shelter.¹²⁵ For this reason, its gender-neutral character was criticized by most of the crisis centres for women and women's organizations that were included in the hearing. In their critique of the White Paper, Oslo Crisis Centre, The Equality and Anti-Discrimination Ombud and the Institute of

¹²² *The Equality and Anti-Discrimination Ombud's Report to the Pre-session of the CEDAW. A Supplementary Report to Norway's Eighth Official Report to the CEDAW Committee* (Oslo: The Equality and Anti-Discrimination Ombud, 2011).

¹²³ CEDAW/C/NOR/CO/8, para. 8.

¹²⁴ White Paper, *Forslag til lovfesting av krisesentertilbudet* [The Crisis Centre Bill], 30 October 2008.

¹²⁵ R. Hennum, 'Kjønnslikestilling på ville veier – kan kjønnsnøytrale krisesentre forsvares?' [Can gender-neutral crisis centers be defended?] in B. Halsaa and A. Hellum (eds.), *Rettferdighet* [Justice] (Oslo: Universitetsforlaget, 2010).

Women's Law invoked the CEDAW, with particular reference to General Recommendation 19 concerning violence against women. In response to this critique, the final proposal, which was put forward to Parliament by the Ministry of Children and Equality, referred to Norway's international obligations, particularly the ECHR and the CEDAW. Both the Ministry of Justice and the Ministry of Children and Equality were, however, of the view that a gender-specific Crisis Centre Act would be a contravention of Norway's obligations under the ECHR.¹²⁶ Their attention was primarily drawn to the ECHR's gender-neutral approach without any consideration of how it should be balanced against the CEDAW's emphasis on the need for measures that take into consideration the gendered character of domestic violence. Under the gender-neutral Act, which was passed by Parliament, shelters were instructed to offer separate departments for women and men.¹²⁷

The Equality and Anti-Discrimination Ombud, who has monitored the implementation of the Act, reports that some crisis centres offer accommodation for women and men at the same address.¹²⁸ The Ombud, in her supplementary report to Norway's eighth periodic report, expresses a concern that the gender-neutral character of the offer may have detrimental consequences for women and girls with immigrant backgrounds. She is also concerned that in 2009 fewer than half of the Norwegian crisis centres were adapted to the needs of women with disabilities. Similar concerns were raised in the NGO shadow report.¹²⁹ The CEDAW Committee in its Concluding Comments to Norway's eighth periodic report encouraged Norway to:

Provide adequate assistance to and protection to women victims of violence, including women with disabilities, by strengthening the capacity of shelters and crisis centres, and ensure that the need to help men victims of violence is addressed without detriment to the needs of women victims of violence.¹³⁰

The government's decision to evaluate the Crisis Centre Act indicates that interventions by the Ombud, civil society and experts from the Institute

¹²⁶ Proposition to the Odelsting No. 96 (2008–9).

¹²⁷ Lov om kommunale krisesentertilbud, 15 May 2009, section 2 [The Crisis Centre Act, section 2].

¹²⁸ *The Equality and Anti-Discrimination Ombud's Report to the Pre-session of the CEDAW. A Supplementary Report to Norway's Eighth Official Report to the CEDAW Committee* (Oslo: The Equality and Anti-Discrimination Ombud, 2011) at 6.

¹²⁹ *NGO Shadow Report to CEDAW 2011* at 27.

¹³⁰ CEDAW/C/NOR/CO/8, para. 26d.

of Women's Law are taken into consideration by law and policy makers in the field of domestic violence.

6.3 *Slowly but surely*

After initially appearing to be in the shadow of EU law, the CEDAW's actual value has, as demonstrated above, become more apparent in recent years. Between 2006 and 2010 the Anti-Discrimination and Equality Ombud invoked the CEDAW nine times in public hearings on law and policy reform.¹³¹ In the same period the Institute of Women's Law at the University of Oslo invoked the CEDAW six times in public hearings.¹³² The women's organizations use the CEDAW and not EU law or the ECHR to support their claims. This suggests that the CEDAW is better known and enjoys greater socio-political legitimacy than EU law and the ECHR. An area of potential added value is family and marriage law, where existing legislation, as demonstrated by the CEDAW Committee's comment to Norway's eighth periodic report, leaves much to be desired:

The Committee is concerned that the State party's current law on property distribution upon divorce (Norwegian Marriage Act) does not adequately address gender-based economic disparities between spouses resulting from traditional work and family life patterns. This often leads to enhanced human capital and earning potential of men while women may experience the opposite, so that spouses currently do not equitably share in the economic consequences of the marriage and its dissolution.¹³³

7 The CEDAW in judicial review

The CEDAW requires effective judicial and other protection of women's entitlement to enjoy rights on an equal basis with men. 'Effective' protection of women's human rights under national law means providing for both legally binding and practically available protection.¹³⁴ In Norway,

¹³¹ An overview of the Anti-Discrimination and Equality Ombud's reference to the CEDAW in public hearings is found in A. Hellum and E. McClimans, 'Kartlegging av Likestillings- og diskrimineringsombudets tilsyn med FNs kvinnekonsensjon og FNs rasediskrimineringskonvensjon' [A mapping of the Anti-Discrimination Ombuds supervision of state compliance with the CEDAW and the ICERD], *Kvinnerettslig skriftserie* [Studies in Women's Law] No. 87 (2011).

¹³² An overview of inputs to public hearings and evaluation reports conducted by the Institute of Women's Law is found at: www.jus.uio.no/ior/forskning/omrader/kvinnett/evalueringer_utredninger_horingsuttalelser/ (last accessed 1 September 2012).

¹³³ CEDAW/C/NOR/CO/8, para. 37.

¹³⁴ Byrnes, 'Article 1' at 84–5.

discrimination cases can be dealt with by the courts or the Equality and Anti-Discrimination Ombud and its appeals board,¹³⁵ the Equality and Anti-Discrimination Tribunal.¹³⁶

7.1 *The CEDAW in international and national judicial review*

No individual cases have so far been lodged and decided under the Optional Protocol.¹³⁷

The Norwegian state invoked the CEDAW in the University of Oslo case in which the EFTA Court handed down a judgment against Norway for breaching the European Union's Equal Treatment Directive of 2006.¹³⁸ The EFTA Court found that earmarking of research fellowships and professorships for women was a contravention of the EU Equal Treatment Directive of 2006.¹³⁹ The EFTA Court did not apply the revised EU Equal Treatment Directive of 2002, which refers to the CEDAW, since it had not yet entered into force.¹⁴⁰

In 2009 the CEDAW was invoked in a Supreme Court case concerning the right to freely choose one's defence counsel.¹⁴¹ With reference to Article 11, the appellant argued that his right to freely choose his defence counsel had not been respected, because the appeals court case was dealt with while his lawyer was on pregnancy leave. The Supreme Court turned the appeal down with reference to the need for speedy conduct of the legal process. The same year, the CEDAW was invoked in an appeal court case concerning adoptive parents' right to parental benefits pursuant to section

¹³⁵ Until 2006, the Gender Equality Appeal Board.

¹³⁶ An overview and analyses of the cases decided by the courts and the Anti-Discrimination Tribunal up to 2009 is found in H. Aune, 'Kvinnekonvensjonen og kvinneverettslig teoris betydning for norsk rettsanvendelse og rettsvitenskapelig analyser' [The impact of CEDAW and feminist jurisprudence on application of the law and legal analysis in Norway], *Retferd* [Nordic Journal of Law and Practice] 2:129 (2010) 51–71. For an overview of case law up to 2012 and academic articles dealing with the CEDAW in Norwegian law, see I. Ikdahl, 'Kommentar til FNs Konvensjon om avskaffelse av alle former for diskriminering av kvinner' [Commentary to the Convention on the Elimination of All Forms of Discrimination against Women], *Norsk lovkommentar- Lovdata* [Norwegian Law Commentary – Lawdata], August 2012 (online).

¹³⁷ There is no readily accessible government guidance on the CEDAW or the use of the Protocol. The Equality and Anti-Discrimination Ombud has since 2011 provided information about the Convention and the Optional Protocol on her website.

¹³⁸ E-1/102. ¹³⁹ 76/207/EØF.

¹⁴⁰ 2002/73/EF. ¹⁴¹ Rt. 2009, 1389.

14–6 of the National Insurance Act.¹⁴² In this case the Agder Court of Appeal in its interpretation of the National Insurance Act referred to the Gender Equality Act and Articles 11, 15 and 16 of the CEDAW. The Court ruled that a practice where the adoptive father could accumulate benefits right until paternity leave, while the adoptive mother had her application turned down on the ground that adoptive mothers must meet the benefit entitlement criteria on the date of assumption of care, constituted direct gender discrimination.

7.2 *The CEDAW in the practice of the Ombud and the Equality and Anti-Discrimination Tribunal*

In Norway, the overwhelming majority of discrimination cases are channelled through the administrative route: the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal.¹⁴³ Unlike the courts, these law enforcement agencies do not have the power to award damages.

7.2.1 The Ombud

The mandate of the Equality and Anti-Discrimination Ombud is to oppose discrimination and promote equality regardless of gender, ethnicity, functional ability, language, religion, sexual orientation and sex.¹⁴⁴ The Ombud is professionally independent, while administratively placed under the Ministry of Children, Equality and Social Inclusion.

As a law enforcer, the Ombud is mandated to issue opinions on complaints concerning breaches of the Gender Equality Act, the Anti-Discrimination Act and the Anti-Discrimination and Accessibility Act.¹⁴⁵ The Ombud has invoked Article 5a of the CEDAW in several cases concerning advertisement based on stereotypical gender roles.¹⁴⁶ The CEDAW has also been invoked in three ongoing cases concerning gender

¹⁴² Agder Court of Appeal, 12 February 2009. Two other cases make brief mention of the CEDAW.

¹⁴³ Between 2007 and 2010 the Ombud handled 273 complaints concerning gender discrimination. Between 2008 and 2011 the Tribunal handled 43 appeal cases.

¹⁴⁴ The Anti-Discrimination and Equality Ombud and the Anti-Discrimination Tribunal Act (ADA) of 10 June 2005, No. 40.

¹⁴⁵ ADA section 1.2.

¹⁴⁶ Gender Equality Ombud Case 2002/381 and Gender Equality Ombud Case 2003/083.

violence.¹⁴⁷ In a case concerning a Roma woman, who alleged that the police had not given her adequate protection against her violent husband, the Ombud invoked General Recommendation 19 from the CEDAW Committee and Article 14 of the ECHR with particular reference to *Opus v. Turkey*, where the Court referred to the CEDAW.¹⁴⁸

As a national supervisory human rights body, the Ombud is mandated to ensure that the CEDAW and the ICERD are complied with in law and practice.¹⁴⁹ So far, the Ombud has not issued any formal report to the Ministry of Children, Equality and Social Inclusion on breaches of the CEDAW and the ICERD in law and practice.¹⁵⁰

7.2.2 The Equality and Anti-Discrimination Tribunal

The Ombud's decisions can be appealed to the Equality and Anti-Discrimination Tribunal. Since the ratification of the CEDAW in 1981 and up to the time of writing, the CEDAW has been referred to in less than ten appeal cases decided by the Tribunal. In the following, a selection of cases demonstrates how the Tribunal, through cases concerning the power of the Tribunal, the right to equality in relation to education, day care, insurance and health, has interpreted the Gender Equality Act in the light of the Convention and the CEDAW Committee's General Recommendations and Concluding Comments. A significant trend in the Tribunal's jurisprudence is the use of Article 5a in the CEDAW to strengthen the Gender Equality Act's protection against discrimination.

A key case concerning the legal powers of the Tribunal was dealt with in 2006. Whether or not the Gender Equality Ombud and the Tribunal have the power to assess whether an Act passed by Parliament is in consonance with the Gender Equality Act or Norway's obligations under international law has been a long-standing controversy between the Ministry of Justice and the Ombud. In the Egg Donation Case, the Tribunal concluded that it has the power to deal with concrete situations where the Gender Equality Act comes into conflict with other Norwegian laws.¹⁵¹ In such matters,

¹⁴⁷ Anti-Discrimination and Equality Ombud Case 10/1147, Anti-Discrimination and Equality Ombud Case 10/1153, and Anti-Discrimination and Equality Ombud Case 10/1004.

¹⁴⁸ *Opus v. Turkey*, para. 76.

¹⁴⁹ ADA section 1.3.

¹⁵⁰ A description and assessment of the Ombud's role as a national supervisory body in the field of gender and race discrimination is found in Hellum and McClimans, 'Kartlegging av Likestillings- og diskrimineringsombudets tilsyn'.

¹⁵¹ Egg Donation Case. The Equality and Anti-Discrimination Tribunal LKN 2006–09. The Tribunal's decision has not been appealed.

it elaborated, it is empowered to make a decision on the basis of general interpretative principles, including the presumption that Norwegian law is in consonance with its obligations under international law and section 2 of the EEA Act, concerning conflicts between Norwegian law and legal obligations pertaining to the EEA agreement. This view was affirmed by the Ministry of Justice and confirmed by Parliament when the CEDAW was incorporated into the Human Rights Act in 2009.¹⁵²

In 2001 the Gender Equality Appeal Board, for the first time, invoked the CEDAW. The Board had to rule whether the teaching materials used by the ACE (Accelerated Christian Education) schools in Norway constituted a contravention of the right to equal education embedded in section 7 of the Gender Equality Act.¹⁵³ The Ombud, who initiated the case, concluded that the ACE schools' teaching materials, portraying women and girls as subordinate to men, were in contravention of the Act. The ACE schools invoked section 2 of the Gender Equality Act, which at that point in time exempted internal religious affairs. To support its view, the schools argued that the principle of religious freedom embedded in the Constitution should take precedence over the gender equality principle, which does not enjoy constitutional protection. The majority of the Gender Equality Appeal Board disagreed with the schools. In its decision, the majority interpreted the Gender Equality Act in the light of Article 5a in the CEDAW and referred to the CEDAW Committee's comment to Norway's third and fourth periodic reports, where Norway was asked to 'amend the Norwegian Equal Status Act to eliminate exceptions based on religion'. The exemption for internal religious affairs did not, according to the majority, apply in relation to education, which is a civil and not a religious matter. The curriculum was, according to the majority, based on a stereotypical notion of gender roles that clearly undermined women's right to equal education both under the Gender Equality Act and the CEDAW. The general exemption for internal religious affairs has, as described above, been abolished.¹⁵⁴

In an appeals case from 2005 concerning temporary special measures, the Board interpreted Article 3 of the Gender Equality Act in the light of Article 5a in the Women's Convention.¹⁵⁵ The Board unanimously ruled that the Frognerbekken Day Care Centre's decision to offer three

¹⁵² Proposition to the Odelsting No. 93 (2008–9) at 3.

¹⁵³ The ACE Case. Gender Equality Appeal Board Case LDN 2001–1.

¹⁵⁴ Act of 9 April 2010, No. 12.

¹⁵⁵ Frognerbekken Day Care Centre Case. Gender Equality Appeal Board Case LDN 12–2005.

vacancies to one boy and two girls instead of the three boys who were first on the waiting list was not a contravention of the Gender Equality Act. Had they not given the two girls preference, all the children in the day care centre would have been boys. In its interpretation of Article 3 in the Gender Equality Act, the Board stated that:

Article 5a of the CEDAW imposes on states an obligation to take all appropriate measures in order to modify gender-stereotyped gender roles. In addition, ensuing from the Gender Equality Act, the state's duty to promote equality in day care centres is also expressed in the Government's Action Plan for gender equality in kindergartens and basic education.

The CEDAW Convention was also invoked in a case where the Tribunal ruled that the use of gender as a factor used in calculating premiums for accident and sickness insurance constituted a contravention of the Gender Equality Act.¹⁵⁶ The decision, which also referred to the revised EU Gender Equality Directive, which had not then entered into force, was appealed by the insurance company and struck down by the appeals court without any discussion of Article 5a in the CEDAW. The ECJ has later ruled that the use of statistical gender differences in calculation of insurance premiums constitutes a contravention of the right to an individual assessment and, as such, direct gender discrimination under EU law.¹⁵⁷

In 2003 the Board had to rule whether, pursuant to the Gender Equality Act, it is permitted to charge a higher user co-payment for the sterilization of women than for the sterilization of men.¹⁵⁸ After the introduction of different rates for women and men, the number of women undergoing sterilization in public hospitals dropped by 77 per cent. The Ombud was of the view that differential pricing was a contravention of Article 3 in the Gender Equality Act. The health authorities appealed the Ombud's decision. In its decision, the majority of the Board interpreted the Gender Equality Act's prohibition against direct discrimination in section 3 in the light of Article 12.1 of the Woman's Convention. The majority ruled that different pricing of the same health service for women and men, regardless of biological differences, constituted direct discrimination under the Gender Equality Act. The minority of the Board was of the view that sterilization of women and men constituted different medical interventions and therefore constituted neither direct nor indirect discrimination. The

¹⁵⁶ Insurance Case. Gender Equality Appeal Board Case LDN 2004–1.

¹⁵⁷ C-236/09 *Association Belge des Consommateurs Test-Achats and Others*.

¹⁵⁸ The Sterilization Case. Gender Equality Appeal Board Case LDN 2003–4.

Ministry of Health has not appealed the case, and has in the same vein refused to change its practice.

7.3 *The effectiveness and legitimacy of the CEDAW in judicial review*

Most Norwegian gender discrimination cases are, as we have seen, dealt with by the Ombud and the Tribunal, which are administrative agencies with specialist competence in the field of women, gender and the law. These agencies are, through the use of international legal sources such as the CEDAW, EU law and the ECHR, making their mark on the development of the standards in the Gender Equality Act.¹⁵⁹ A number of their decisions have, as demonstrated above, paved the way for legal reform. There have, however, been incidents where the executive branch of government, instead of appealing the Tribunal's decision to the courts, has flatly refused to comply.¹⁶⁰ Such incidents, which undermine the Tribunal's authority, have prompted a broader discussion about the Tribunal's effectiveness and legitimacy. To strengthen the Tribunal's effectiveness, the Equality Commission in NOU 2011:18 suggests that the Tribunal be awarded power to award financial compensation in discrimination cases. In its Concluding Comments to Norway's eighth periodic report, the CEDAW Committee welcomed the appointment of the Equality Commission, mandated to strengthen the Ombud's and the Tribunal's mandate for promoting equality and the advancement of women.¹⁶¹

8 Making space and giving voice

The incorporation of the CEDAW into the Human Rights Act put the gender-specific prohibition against sex discrimination in the CEDAW on an equal footing with the gender-neutral prohibitions against sex discrimination in the ICCPR, the ICESCR and the ECHR. The controversies surrounding the gender-neutral Anti-Discrimination Bill and the gender-neutral Crisis Centre Act show how the CEDAW is, slowly but surely, making its mark on the prevailing tension between gender-specific and gender-neutral law. The jurisprudence of the Ombud and the Tribunal show how Article 5a, with its focus on stereotypes that reflect subordinate

¹⁵⁹ The Faculty of Law at the University of Oslo and the Faculty of Law at the University of Tromsø offer optional courses in discrimination and equality law and women's law and human rights.

¹⁶⁰ The Sterilization Case. Gender Equality Appeal Board Case LDN 2003–4.

¹⁶¹ CEDAW/C/NOR/CO/8, para. 13.

and unequal roles for women, is being used to strengthen women's and girls' protection against discrimination in cases concerning advertisement, education, work and insurance. The relatively frequent use of Article 5a in matters concerning direct, indirect and structural discrimination points to the actual added value of the CEDAW, in comparison to other regional and international instruments in a modern, Western welfare state. The Anti-Discrimination Tribunal's lack of power to award damages in conjunction with lack of case law from national and international courts is, however, a factor that affects the legal legitimacy and the effectiveness of both the Gender Equality Act and the CEDAW.

The role of non-state actors in promoting accountability vis-à-vis Norwegian authorities is key, both in relation to law reform and judicial review. The lack of legal aid in discrimination cases and insufficient funding of membership-based organizations clearly hampers the women's organizations' ability to use the CEDAW in litigation and as a means to exert influence on Norwegian law and policy making.¹⁶² In a similar vein, the lack of legal literacy programmes addressing immigrant women may partly explain why the majority of the gender discrimination complaints handled by the Ombud and the Tribunal are filed by ethnic Norwegian women, while the majority of those regarding ethnic discrimination are filed by men with ethnic minority backgrounds. While the CEDAW Committee's contribution to enhancing the status and power of the Tribunal has so far been modest, the Committee's call for a more participatory, balanced and transparent state reporting process involving both majority and minority civil society organization, national human rights institutions and democratically elected Parliamentarians is, slowly but surely, prompting change. This is indeed promising with a view to strengthening the legitimacy and effectiveness of the CEDAW in a changing social, political and legal landscape. See addendum.

¹⁶² The Legal Aid Act does not include discrimination cases in prioritized cases without financial means-testing.

Addendum: In March 2013, a Proposition to the Storting (2012–13) Prop. 88 L on Discrimination Law was put forward by the Ministry of Children, Equality and Inclusion. With reference to the interventions made by the women's organizations and the Anti-Discrimination Ombud it suggests that the provision in the Gender Equality Act stating that the Act shall 'promote equality with the aim of improving the position of women' be upheld and not abolished as suggested by the Discrimination Law Committee in 2009. The Proposition, however, turns down the longstanding quest from the women's organizations, the Anti-Discrimination Ombud and the Gender Equality Commission to strengthen the Equality Tribunal's effectiveness by awarding the Tribunal power to award compensation in discrimination cases. The proposition thus fails to provide for effective protection of women's human rights under national law in terms of legally binding as well as practically available protection.