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## Conclusions

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### 1 General reflections

A common aim of all human rights conventions is the protection of human equality, freedom and dignity. All human rights regimes belong to the same normative family and are based on the same values and principles. As shown by the chapters in this book, much can be learned from comparing the interpretation and implementation of different international, regional and national anti-discrimination and equality regimes. A common thread running through all the chapters is the potential and actual added value of the CEDAW's *transformative, holistic and gender-specific* approaches to gender equality and its relationship to other human rights regimes. All in all, the chapters show how the jurisprudence of the CEDAW Committee has gradually evolved in response to a wide range of challenges in a diverse, increasingly complex and rapidly changing world. They provide a window into the twists and turns of the processes whereby international and national lawmakers, the CEDAW Committee, courts, legal scholars and civic organizations have contributed through their work to the development of the Convention's normative content and how it is put into practice.

The rich and nuanced insights provided by the chapters in this volume offer a unique opportunity for further reflection on the options and limits of the Convention and the Committee in comparison and interaction with other instruments. The diverse and complex perspectives of the authors, each speaking with a distinct voice and giving particular insight into fundamental issues related to the interpretation and implementation of the CEDAW, have made it a challenge to arrive at general conclusions. There are, however, some patterns or lines of arguments that can be extracted from the various parts of the book. Focusing on the CEDAW's transformative approach to equality, section 2 addresses the

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strengths and weaknesses of the CEDAW with regard to the realization of the CEDAW's potential added value. In section 3 the Convention's holistic approach, which links civil, political, social and economic rights, is discussed in light of other human rights regimes and the demand for substantive equality and engenderment. Section 4 analyzes the potential and actual added value of the CEDAW regime in light of national case studies from South Asia, Southern Africa, Australia, Canada and Northern Europe.

## 2 From potential to actual added value: the transformative approach (Part I)

The chapters in Part I call for careful consideration of the basic values that are to be protected through human rights instruments in general and the CEDAW in particular. Rikki Holtmaat, with reference to Martha Nussbaum, points to participation, autonomy and freedom as key elements in all human rights protection. The autonomy and capacity of each human being to make his/her own life plan come true is the fundamental idea of human rights across all societies and cultures. At the same time, equal respect for all individuals requires due respect and protection of individual diversity.<sup>1</sup> Today, the CEDAW Convention has been ratified by almost all countries in the world (although with extensive reservations), and the Committee seeks to apply a universal standard of equality and non-discrimination to various categories of women in legal, political, social, cultural and economic contexts. All cultures, as changing and contested bodies of perception, have the potential to protect individual dignity, autonomy and diversity. In light of the domestic studies presented in Part III of this book, it is clear, however, that gender stereotypes embedded in social and cultural perceptions and practices represent strong barriers to gender equality throughout the world.

In line with the demand for substantive equality, the purpose of the CEDAW is threefold: (1) to guarantee women's individual rights, (2) to give social support to women and (3) to enhance social and cultural change.<sup>2</sup> This triple approach to gender equality, which moves beyond formal and symmetric gender equality, distinguishes the CEDAW from other international anti-discrimination and equal rights regimes. The Convention acknowledges that to achieve substantive equality, biologically, socially

<sup>1</sup> R. Holtmaat, Chapter 3 (Introduction and section 9).

<sup>2</sup> General Recommendation No. 25.

and culturally constructed differences between women and men must be taken into account. Assuming that discrimination against women is created and upheld through unequal constructions of gender relations embedded in social and cultural perceptions, norms and practices, States Parties are obliged to take legislative as well as other measures to address and overcome harmful gender stereotypes in their respective countries. While Article 2(f) of the CEDAW addresses discriminatory laws, regulations, customs and practices, Article 5(a) obligates States Parties to take all appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

Several of the authors in this volume emphasize the potential added value of Article 5(a) of the CEDAW.<sup>3</sup> As pointed out by Fleur van Leeuwen in her analysis of women's reproductive rights, a problem of other human rights regimes and monitoring bodies is that they do not address the core causes of human rights violations that affect women's rights to life and health, for example, but only the manifestations or symptoms of these.<sup>4</sup> Rikki Holtmaat is of the view that '[t]hanks to the existence of Article 5, the Women's Convention is a revolutionary instrument that addresses the root causes of discrimination against women'.<sup>5</sup>

To what extent, then, has the Committee been a driving force for the advancement of the CEDAW's transformative approach to substantive equality in general and elimination of gender stereotypes in particular? Simone Cusack observes that attempts to hold States Parties accountable for wrongful gender stereotyping have been successful in the majority of individual communications considered by the Committee.<sup>6</sup> In the same vein she points to the lack of clarity surrounding States Parties' obligations regarding gender stereotyping. Applying the tripartite framework of state obligations – the obligations to respect, protect and fulfil – Cusack's analysis seeks to sharpen the understanding of content and meaning of the obligations in Articles 2(f) and 5(a). Addressing the realization of the normative potential of Article 5(a), Cusack emphasizes that:

<sup>3</sup> R. Holtmaat, Chapter 3; S. Cusack, Chapter 4; C. M. Bailliet, Chapter 5; C. N. Musembi, Chapter 6.

<sup>4</sup> F. van Leeuwen, Chapter 8 (section 5.3).

<sup>5</sup> R. Holtmaat, Chapter 3 (Concluding remarks).

<sup>6</sup> S. Cusack, Chapter 4 (section 3.1.5).

[s]trong leadership from the CEDAW Committee on these issues will not only help to guide States Parties in the implementation of their obligations under CEDAW, but will also influence the thinking and decision-making of other human rights treaty bodies as well as domestic courts. If the Committee is successful in this endeavour, it may change forever – and for the better – the way we think about discrimination and inequality.<sup>7</sup>

Andrew Byrnes articulates the role of the Committee as being ‘a forum for holding governments accountable for their international undertakings, for the engagement of civil society as part of national and transnational struggles to achieve women’s equality, and as a site for the generation and interpretation of legal norms’.<sup>8</sup> The primary method of the Committee, as described by Byrnes, is to consider reports submitted by States Parties on the steps that they have taken to implement the CEDAW, and to engage in a ‘constructive dialogue’ with States Parties. Regarding the Convention’s approach to Article 5(a), which obliges States Parties to modify and eliminate gender stereotypes, Byrnes characterizes the CEDAW Committee as a:

vigorous actor in the cause of universal standards of human rights, and has engaged in advocacy for a norm of equality that transcends and prevails over national laws, practices, religions, customs and traditions that are inconsistent with that norm. This is not to say that the Committee (or the Convention) is antagonistic to religion or traditional cultures and customary laws and practices as such – indeed it sees the centrality of these to women’s sense of themselves and their place in the world – but that it is resolute in being critical of those harmful practices that deny women’s agency, violate their dignity or their persons, and exclude them from full participation in the life of their communities and societies.<sup>9</sup>

In relation to Article 5(a), the CEDAW Committee is thus faced with the problem of striking an appropriate balance between respect for diverse conditions of life on the one hand, and effective human rights protection on the other.<sup>10</sup> Addressing the challenges the realization of Article 5(a)’s potential brings about at the national and local levels, all the authors in this section of the book are concerned with factors that affect the legitimacy

<sup>7</sup> S. Cusack, Chapter 4 (Conclusion). See also R. Holtmaat, who points out the need for a new General Recommendation from the CEDAW Committee on Article 5 (Chapter 3, section 6).

<sup>8</sup> Chapter 1 (Introduction).

<sup>9</sup> A. Byrnes, Chapter 1 (Conclusion).

<sup>10</sup> H. Keller and G. Ulfstein, ‘Conclusions’ in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) at 414–55 at 425.

and the effectiveness of the CEDAW. As pointed out by Rikki Holtmaat, state resistance is often linked to the close relationship between national identity and religious and customary gender stereotypes protected by statutory and constitutional law. In order to achieve a higher level of social and cultural acceptance of the norm of women's equality, Holtmaat, with reference to the growing body of cross-cultural human rights scholarship, emphasizes the need to promote and enhance a dialogue between the state and the main internal stakeholders, that is religious leaders, community leaders and (women) NGOs. On the basis of review of the CEDAW Committee's Concluding Comments, Holtmaat shows how the Committee often stresses the necessity of engaging in dialogue with civil society about social and cultural changes that need to take place in order to put an end to discrimination against women. She also documents how the Committee, in its Concluding Comments, encourages States Parties to see culture as something that can be changed. As an example she refers to a Concluding Observation on Jordan of 2007, where the Committee 'urges the State party to view culture as a dynamic aspect of the country's social fabric and life and therefore subject to change'.<sup>11</sup> Holtmaat thus disagrees with legal anthropologist Sally Engle Merry, who claims that the CEDAW Committee has 'an old vision of culture as fixed, static, bounded ... juxtaposed to a more modern understanding of culture as a process of continually creating new meanings and practices that are products of power relationships and open to contestation among members of the group and by outsiders'.<sup>12</sup>

Addressing the tensions between the equality and anti-discrimination standards in the CEDAW on the one hand and the formal and informal customary and religious norms on the other, Andrew Byrnes shows how the CEDAW Committee 'sees the tensions that can exist between particular interpretations of culture and the Convention, and rejects those aspects of cultural practices that mean that women are discriminated against'.<sup>13</sup> Documenting how the Committee addresses gender stereotypes in all parts of the world, he notes in relation to Sally Engle Merry's claim that when 'the drafters of the convention thought about culture, they used ... culture to describe other worlds, not their own',<sup>14</sup> this may

<sup>11</sup> CEDAW Committee, *Concluding Observations: Jordan, 2007*, CEDAW/C/EST/JOR/CO/4, para. 20.

<sup>12</sup> S. E. Merry, 'Gender Justice and CEDAW' (2011), quoted from A. Byrnes in this volume, Chapter 1 (section 7).

<sup>13</sup> A. Byrnes, Chapter 1 (section 7).

<sup>14</sup> Merry, 'Gender Justice and CEDAW'.

fail to adequately reflect the role of prominent women from non-Western countries who were involved in the drafting of the Convention, and who saw it as an important vehicle for engaging with the discriminatory aspects of their own cultures. Pointing to recent communications by the CEDAW Committee, Rikki Holtmaat shows that the current understanding of gender stereotypes does not refer only to non-Western 'exotic' or 'backward' traditions, but encompasses gender stereotyping in all parts of the world.<sup>15</sup> Anne Hellum's study of the CEDAW in Norwegian law underscores Holtmaat's and Byrnes' views. She shows how in cases concerning education and advertisement, the Norwegian Equality and Anti-Discrimination Ombud and Tribunal refer to Article 5(a) and the Committee's Concluding Comments to the Norwegian state reports.<sup>16</sup> According to Hellum, the relatively frequent use of Article 5(a) in matters concerning direct, indirect and structural discrimination of women and girls from the ethnic Norwegian majority points to the actual added value of the CEDAW, in comparison to other regional and international instruments in a modern, Western welfare state.

In their analysis of state resistance to human rights, several of the authors in this book show how the dominant national legal culture often serves as a shield against international legal influence. An interesting example is H el ene Ruiz Fabri and Andrea Hamann's analysis of the CEDAW in French law. The authors argue that the CEDAW's lack of impact on French law must be understood in the light of the dominant French legal culture's emphasis on French 'exceptionalism' or 'specificity'. According to the authors: 'the common and widespread [academic] reaction when feminist approaches to law are mentioned is to consider these to be typically Anglo-Saxon themes and concerns, thereby conveying the impression that France is shielded against these issues'.<sup>17</sup> To understand the CEDAW's invisibility in French law, the authors argue: 'The claim of specificity should not and must not become a systematic explanation in order to justify being exempted from providing any kind of argument but, at the same time, one cannot ignore and disregard that this specificity does indeed exist and must therefore be adequately acknowledged as part and parcel of the dominant French legal culture.'<sup>18</sup>

<sup>15</sup> R. Holtmaat, Chapter 3 (section 9) and R. Holtmaat, 'Article 5' in M. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 141–68.

<sup>16</sup> A. Hellum, Chapter 21 (section 7).

<sup>17</sup> H. Ruiz Fabri and A. Hamann, Chapter 19 (section 1).

<sup>18</sup> *Ibid.*

Addressing challenges faced by both the newly appointed Working Group on Laws that Discriminate against Women and the CEDAW Committee, Fareda Banda asks how intervening in socio-cultural issues that could discredit the entire work of the particular human rights treaty body, such as sexual orientation discrimination, should be handled: 'Can a Working Group on laws that discriminate based on a human rights mandate take such an approach [sacrifice the rights of lesbian women for 'the greater good'] – what about non-discrimination being a binding norm of immediate enforceability without exception?'<sup>19</sup> Her clear answer is no. Banda refers to the decision in the Indian *Naz Foundation* case, which led to the repeal of a section of the Penal Code that criminalized sexual activity between two people of the same sex. In this case, the Court emphasized that the ban was based on British colonial laws that did not reflect Indian traditions and values. According to Banda, this Indian case could serve as an example of good practice in engagement with states.<sup>20</sup>

The requirement of substantive equality, however, calls for careful consideration of what should be treated equally and what should be treated differently under various historical and social circumstances. In situations where women's family roles have not changed, measures for the continued protection of women living under marriage laws that are in conflict with the CEDAW may be necessary in the short term. Celestine Nyamu Musembi adds an important dimension to this discussion when she asks if the CEDAW Committee is too inflexible in its approach to the different ways States Parties deal with discriminatory practices. With reference to the CEDAW Committee's communication with several African States Parties, she claims that the Committee fails to appreciate differentiated efforts in various countries to deal with, for example, polygamy. According to Nyamu Musembi:

States that have taken no steps at all to address the issue, as well as states that have made some attempts – legislative, administrative or aimed at social education – are equally rebuked in stylized language contained in a standard stern paragraph that is administered to all with the slightest variation. Nothing in this stylized language suggests appreciation of the differentiated circumstances of each state, nor the varying levels of effort at reform. It only reinforces the conclusion that, in the view of the CEDAW Committee, nothing short of immediate legislative prohibition will do, an attitude that narrows the scope of possible actions envisioned in Article 5(a).<sup>21</sup>

<sup>19</sup> F. Banda, Chapter 2 (section 8). <sup>20</sup> *Ibid.*

<sup>21</sup> C. N. Musembi, Chapter 6 (section 2.2).

Nyamu Musembi gives voice to the concern that the preferred long-term solution (abolishing polygamy) is often not attainable in a short-term perspective, without running the risk of women losing the little protection they have in existing legal and social arrangements. She asks ‘What is the appropriate feminist response in situations where measures are undertaken that confer tangible and immediate benefits on women, but that rest on a stereotyped understanding of gender roles and therefore pose long-term negative consequences?’<sup>22</sup> She contrasts the position of the CEDAW Committee with the position of the Maputo Protocol and the solutions in several African states, which aim at a gradual phasing out of polygamy, and at the same time extend equal protection of the law to all women. According to Nyamu Musembi, the CEDAW Committee can draw inspiration from the Maputo Protocol’s approach in order to engage African states in a more constructive and productive dialogue that reflects an in-depth understanding of each country’s context and milestones on the way forward towards transformed gender relations.<sup>23</sup>

A similar line of argument is pursued by Cecilia Bailliet, who argues that looking at women’s diverse and individual needs, abilities, priorities and circumstances is an essential part of preventing gender stereotyping and upholding individual dignity and equality.<sup>24</sup> Addressing the relationship between provisions (a) and (b) in Article 5 of the CEDAW concerning gender stereotyping and recognition of maternity, respectively, Bailliet’s chapter complements Cusack’s chapter on wrongful gender stereotyping. Bailliet argues that the CEDAW Committee’s jurisprudence gives more weight to issues of equality (the extension of existing human rights to women on equal terms with men) than to equal worth and the female experience of motherhood (the issue of difference). Seeing maternal identity as an important manifestation of human dignity, Bailliet asserts that the CEDAW regime has had a limited or too-narrow approach to the recognition and protection of maternal identity. She compares the CEDAW approach with that taken by the Inter-American Court of Human Rights, which in its approach uses narratives ‘to flesh out our understanding of non-discrimination and the scope of harm to marginalized groups’.<sup>25</sup> Bailliet suggests that this approach reflects a higher level of legitimacy in the Latin American context compared to the CEDAW regime, and that

<sup>22</sup> C. N. Musembi, Chapter 6 (Conclusion).

<sup>23</sup> *Ibid.* See also F. Banda on polygyny in this volume, Chapter 2 (section 8).

<sup>24</sup> C. M. Bailliet, Chapter 5 (section 6); S. Cusack, Chapter 4.

<sup>25</sup> C. M. Bailliet, Chapter 5 (section 3).



it offers an interpretation of human rights that is more inclusive of the actual women concerned. She concludes that the CEDAW Committee, which has supported the Inter-American human rights system as a partner in the protection of women's rights, should take more advantage in future of the method of narratives in order to give voice to individual women's experiences of human rights violations.<sup>26</sup>

Overall, Part I of the volume contributes to the perspective that the CEDAW has added significant value to the international, regional and national discourses on the rights of women. An important observation made by Byrnes, which is underscored in several of the national case studies in Part III, is that only when the process of preparation, consideration and evaluation of a report by the Committee is linked into domestic processes of policy-making and NGO advocacy, is the reporting procedure likely to have any significant impact at the domestic level. The realization of CEDAW's normative potential, however, encounters a number of problems. A critical factor is the nature of the CEDAW state obligations, which vary from being quite general (take 'appropriate' or 'necessary' steps or measures) to more specific (replace discriminatory laws, ensure women's right to vote). In complex situations it can be difficult for an external body such as the CEDAW Committee to assess whether or not the State Party has in fact lived up to its obligations, since there may be a range of options available for the State Party, and the Committee does not necessarily have the complete picture of the complex relationship between the customary and religious laws embedded in state law and in the existing customary and religious norms.<sup>27</sup> Fareda Banda points out the additional problem of international and regional differences in interpretation of basic concepts, for example the relationship between equality and equity.<sup>28</sup> As demonstrated by Nyamu Musembi and Bailliet, this is where dialogue between international and regional human rights regimes is needed, in particular with regard to how to balance gender equality and gender differences, and what constitutes appropriate measures to achieve substantive equality in different cultural and social contexts.

While the prescribed 'constructive dialogue' between the Committee and the States Parties appears to take place in most cases, there are significant exceptions. Many States Parties exercise considerable resistance to change and give little attention to the Committee's General

<sup>26</sup> C. M. Bailliet, Chapter 5 (Conclusion).

<sup>27</sup> A. Byrnes, Chapter 1 (sections 6 and 7); C. Damiso and J. Stewart, Chapter 16.

<sup>28</sup> F. Banda, Chapter 2 (section 8).

Recommendations and Concluding Observations (and may in fact not be scheduled to appear again before the Committee for many years).<sup>29</sup> As pointed out by Fareda Banda, it is clear that state accountability for violations of women's rights and effective implementation of state obligations are serious challenges. Ratification of the CEDAW, as emphasized by Banda, does not necessarily mean loyalty and commitment to its objectives from all States Parties. In light of the CEDAW's transformative ambition, this is a serious problem for its credibility, legitimacy and effectiveness in those countries where there is little or no progress in areas of great concern for many women. This point is underscored in Banda's analysis of how the limited resources of the CEDAW Committee to follow up communications with States Parties that have discriminatory laws and practices and problematic reservations to the CEDAW led to the establishment of the new UN Working Group on the Issue of Discrimination against Women in Law and Practice on 8 October 2010.

### 3 The actual added value of the CEDAW: engenderment of socio-economic rights (Part II)

For poor and marginalized women and girls, social and economic rights, such as the right to food, water, housing and education, are key in addressing marginalization and the absence of substantive equality.<sup>30</sup> As already pointed out, optimistic feminist legal scholars argue that the CEDAW's recognition of the interdependence and indivisibility of civil, political, social and economic rights makes it the instrument with the greatest potential to address the close relationship between women's marginalization, social rights and inequality.<sup>31</sup> As underscored by all the authors in Part II of this book, the holistic approach, embedded in the CEDAW and developed through the jurisprudence of the CEDAW Committee, is a necessary and essential condition for transforming social and economic rights in light of women's lived experiences, constraints and social realities. Two key questions regarding the realization of this normative potential are central: if and in what way has the CEDAW contributed

<sup>29</sup> A. Byrnes, Chapter 1 (Conclusion); F. Banda, Chapter 2 (sections 4.1 and 8).

<sup>30</sup> 'Montreal Principles on Women's Economic, Social, and Cultural Rights', *Human Rights Quarterly* 26:4 (1991).

<sup>31</sup> L. Farha, 'Committee on the Elimination of Discrimination against Women: women claiming economic, social and cultural rights – the CEDAW potential' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 553–68.

to the transformation of existing social and economic rights in light of women's lived experiences, and how does the CEDAW Committee's jurisprudence interact and intersect with the jurisprudence of other UN bodies that address social and economic rights without discrimination? Does the CEDAW Committee's jurisprudence influence the rapidly developing social rights jurisprudence, or is it operating in isolation and thereby contributing to fragmentation and marginalization of international law's protection against sex and gender discrimination?

### 3.1 *From the margins to the centre: gender mainstreaming*

The failure of the UN human rights system to provide effective protection of women's human rights was acknowledged by the 171 states that adopted the Vienna Declaration and Programme of Action by consensus in 1993. This requires that the status and rights of women be integrated into the mainstream UN human rights monitoring mechanisms and bodies. It was requested that the mainstream UN human rights system add the experiences of women to its traditional human rights approaches, in order to make women more visible and to transform the concept and practice of human rights so that it takes better account of women's lives.<sup>32</sup> This was affirmed in the 1995 *Beijing Declaration*,<sup>33</sup> and in 1997 the UN Economic and Social Council formally adopted the principle of gender mainstreaming:

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.<sup>34</sup>

The chapters in Part II of this book demonstrate the many synergies between the UN gender mainstreaming strategy, the CEDAW regime and other international human rights regimes that protect and promote

<sup>32</sup> F. Van Leeuwen, Chapter 8 (section 4), with reference to C. Bunch, 'Women's rights as human rights: toward a re-vision of human rights', *Human Rights Quarterly* 12:4 (1990) 486–98.

<sup>33</sup> *Beijing Declaration and Platform for Action* (adopted 15 September 1995), Fourth World Conference on Women, UN Doc. A/CONF.177/20 (1995).

<sup>34</sup> UN Economic and Social Council (UN 1997, 28).

women's social and economic rights.<sup>35</sup> In her study of the normative development of women's right to secure housing, Ingunn Ikdahl describes and analyzes the various strategies and normative synergies in General Recommendations and reports of the CEDAW Committee, the ICESCR Committee and the UN Special Rapporteur on Adequate Housing. She documents how the approaches of the CEDAW regime and the ICESCR regime are overlapping and complementary, and have at least in part been combined by the Special Rapporteur through reliance on the principles of gender mainstreaming and indivisibility of rights. Together, they form the basis for a comprehensive understanding of the right to safe housing, and of the range of legal and institutional measures to be taken to reduce women's vulnerability. Addressing maternal mortality as a violation of women's rights to life and health and a particular form of structural and gender-based discrimination, Henriette Sinding Aasen describes the interplay and normative synergies between the CEDAW and the ICESCR regimes with regard to the content and implementation of the right to health for poor women in low-resource settings. Fleur van Leeuwen shows how, after 1993, the Human Rights Committee (HRC) and the ICESCR Committee began to address issues that traditionally were not seen as human rights issues, such as maternal mortality, access to contraceptives, reproductive and sexual information, education and abortion.

Rather than a conflicting jurisprudence, these chapters illustrate how, through a dynamic approach and by drawing inspiration from each other, the various treaty bodies are extending and gradually transforming socio-economic rights so that they become more inclusive of women. In addition to the CEDAW and its Committee, other human rights regimes, such as the UN Special Rapporteur on Adequate Housing, and regional instruments and bodies, have also contributed to the advancement and engenderment of women's rights. This trend points not to fragmentation, but to a development towards more similarities and greater unification of different human rights regimes.

### 3.2 *From gender mainstreaming to engenderment?*

Despite the clear trend of greater integration of women's human rights after 1993, the question of if and to what extent these normative synergies

<sup>35</sup> An overview of the measures that were taken by the UN to mainstream gender into the different human rights treaty bodies is found in A. Gallagher, 'Ending the marginalization: strategies for incorporating women into the United Nations human rights system', *Human Rights Quarterly* 19:2 (1997) 283–333.

have contributed to substantive equality for women remains a key question. The chapters in Part II of this book address this question and provide nuanced answers to it. The notion of *engenderment*, elaborated by Sandra Fredman in Chapter 7, is in our view a fruitful analytical tool to assess the legal development from a gender perspective. Exploring how the CEDAW's normative potential has been translated by the CEDAW Committee and other treaty bodies, Fredman suggests that it is not sufficient to extend existing human rights to women on equal terms with men. Instead, the rights themselves need to be recast in light of the specific needs and disadvantaged situations of women.

Considering the gendered nature of the current social disadvantages of women, Fredman points out the limitations of formal equality, which require women to conform to male-oriented social structures rather than challenging the unfairness of existing structures.<sup>36</sup> Fredman argues that if the gender-specific factors that cause disadvantages for women are to be fully addressed, 'rights must be infused with substantive gender equality'.<sup>37</sup> This means moving beyond the need for a male norm with which to compare women, and requiring that existing social norms change. Where equal treatment leads to a disadvantage for women, it may be necessary to treat women differently (e.g. with regard to education, work and health-care). However, the definition of the *substance* of substantive equality remains controversial. According to Fredman, the conceptions of dignity, equal opportunity and equality of result are all too limited to function on their own to constitute the substantive core of equality. She proposes that the concept of substantive equality has four different and complementary dimensions: redistribution, recognition (including respect and dignity), transformation and participation.<sup>38</sup>

Fredman concludes that the CEDAW regime has a significant added value in terms of engenderment and substantive equality. She points out three factors that, in her view, reflect the CEDAW's commitment to a conception of substantive equality that requires more than merely extending socio-economic rights to women: the asymmetric approach and focus on women's disadvantaged positions, the demand for structural change (Article 5), the emphasis on women's representation and participation. This engendered approach is reflected in many of the socio-economic rights contained in the Convention. However, according to Fredman, despite these positive aspects of the CEDAW, it also speaks with another

<sup>36</sup> S. Fredman, Chapter 7 (section 3.1).

<sup>37</sup> *Ibid.* <sup>38</sup> S. Fredman, Chapter 7 (section 3.2).

voice, which simply extends existing socio-economic rights to women, rather than reframing them. In particular, this is evident from the wording of the right to work and work-related benefits (Article 11), which in her view is premised on a male model of work and the assumption that 'work' equates to paid work outside the home. The right to education in Article 10 also speaks to a great extent with the voice of formal equality between men and women (same conditions, same curricula and examinations) and does not address common barriers for girls to access educational institutions. Thus, according to Fredman, important parts of the Convention are still in need of continued engagement to ensure that feminist jurisprudence continues to develop the CEDAW in the direction of engendered human rights, particularly through the medium of General Recommendations and the developing jurisprudence under the Optional Protocol.<sup>39</sup>

Fredman argues that the ICESCR does not go far enough to engender socio-economic rights, and that a gender-neutral approach to equality often does not recognize the particular experiences of women. She asserts that the approach of the ICESCR Committee to a great extent has been to slot women into existing male-dominated structures, for example with regard to the right to work and favourable working conditions. This observation is partly supported by Ingunn Ikdahl, who describes how women's experiences of a lack of secure housing were initially marginalized in mainstream (male) human rights discourses.<sup>40</sup> Ikdahl, however, draws attention to the cumulative effect of the different entry points of various bodies in the UN system that over time have strengthened women's right to secure tenure. Ikdahl has shown that through a focus on equal distribution of property between husband and wife during marriage and in the event of divorce and death, the CEDAW Committee has contributed to human rights analysis of the gendered nature of security of tenure for one's home. In addition, the reports of the Special Rapporteur of the Right to Adequate Housing have had significant impact on adding women's perspectives to the ICESCR Committee's understanding of adequate and secure housing. As forced eviction from the home was identified as

<sup>39</sup> S. Fredman, Chapter 7 (Conclusion and Introduction). Another area that calls for engagement from a grounded women's perspective is the human right to water, which is embedded in the CEDAW, the CRC and the ICESCR. See A. Hellum 'Engendering the human right to water: taking the lived realities of women and girls as starting point' in M. Langford and A. Russell (eds.) *The Right to Water: Theory, Prospects and Practice* (Cambridge University Press, 2013).

<sup>40</sup> I. Ikdahl, Chapter 9 (section 4).

a human rights issue, women's experiences of being evicted from their homes upon divorce or widowhood (family evictions) were conceptualized as a violation of the right to secure housing.

Both Ikdaahl and Fredman emphasize the significant impact of the UN Special Rapporteur on Adequate Housing on the engenderment of the right to secure housing for women. Ikdaahl shows how the reports of the Special Rapporteur have been central in making the experiences, threats and vulnerabilities experienced by women visible in the human rights discourse on the right to safe housing according to Article 11.1 of the ICESCR.<sup>41</sup> Fredman points out that the approach of the Special Rapporteur incorporates many of the elements of substantive equality, in particular the fourth dimension of giving women voice, agency and participation: 'Indeed, it is because he has instituted wide-ranging consultations, and listened to testimonies received from women at grass-roots level, that he has succeeded in formulating the right from a particularly gendered perspective.'<sup>42</sup> The use of women's testimonies seems to have brought attention to the experiences and vulnerabilities of women and paved the way for a renewed understanding of the right to adequate housing, one that is more inclusive of women and sensitive to their situation of dependency and lack of power. This focus on individual testimonies and stories is in line with Bailliet's view that individual narratives are necessary in order to acknowledge the nature of the human rights violations and to restore the dignity of the individual woman.

Van Leeuwen examines whether or not the work of the HRC and ICESCR Committee reflects compliance with the request of the 1993 World Conference on Human Rights to add the experiences of women to existing approaches in order to transform the concept and practice of human rights so that they take better account of women's lives.<sup>43</sup> In her analysis of the practices of these treaty bodies, van Leeuwen concludes that the recommendations and guidelines are often too limited in their formulation of specific state obligations. While the gender-specific constraints experienced by women in exercising their rights are addressed by the HRC and ICESCR Committee, formulations of state obligations to *fulfil* the right to health (e.g. with regard to accessible pregnancy-related and maternal services) are not spelled out. In general, the Committees do not question whether or not abortion services are available to women, even though they indicate that States Parties should allow abortion when

<sup>41</sup> *Ibid.* (section 4.4). <sup>42</sup> S. Fredman, Chapter 7 (section 5.2).

<sup>43</sup> F. van Leeuwen, Chapter 8.

pregnancy is the result of rape or endangers the life of the woman, and despite the fact that they regularly express concern about unsafe abortions.<sup>44</sup> Van Leeuwen concludes that the work of the two Committees needs to be more far-reaching in order to reflect the gender-specific circumstances that affect women's rights, and to formulate adequate women-inclusive human rights obligations that can effectively address the constraints experienced by women.<sup>45</sup> Another criticism is that the Committees mostly fail to place the specific human rights issues of women in the context of gender-based and structural discrimination:

Although the Committees address many human rights abuses and constraints that characteristically affect women in their respective GCs on equality of men and women, they generally do not label these as symptoms of (structural) discrimination. Reference to these issues in their GCs, as well as reference to Articles 3 of the ICCPR and the ICESCR in the work of the Committees, rather seems to reflect the Committee's awareness of the fact that ... women may face different hurdles than men in their enjoyment of human rights. Although this understanding is an important first step away from the idea of *sameness* ... this does not mean that the HRC and the ICESCR Committee examine whether these *women-specific* human rights issues are the result of discrimination against women.<sup>46</sup>

Henriette Sinding Aasen addresses the high prevalence of preventable maternal deaths as a violation of women's rights to life and health, and as a form of gender-based discrimination caused by structural disadvantage suffered by poor women.<sup>47</sup> Although high-level international campaigns by the UN and WHO have focused on strategies in order to reduce the alarmingly high maternal mortality in many developing countries, it still constitutes a major challenge to women's rights to life and health. Both Article 12 of the ICESCR and Article 12 of the CEDAW contain provisions concerning the right to health. While Article 12 of the ICESCR is written in gender-neutral terms, Article 12 of the CEDAW is formulated in gender-specific terms, granting women adequate maternal healthcare services. Aasen examines the jurisprudence of the ICESCR and CEDAW Committees with regard to maternal mortality, women's reproductive rights and access to maternal healthcare services. She finds the Available, Accessible, Acceptable Services of Good Quality (AAAQ) framework developed by the ICESCR Committee particularly well suited to address the lack of services. This framework is also utilized by the

<sup>44</sup> F. van Leeuwen, Chapter 8 (section 5.2).

<sup>45</sup> *Ibid.* <sup>46</sup> F. van Leeuwen, Chapter 8 (section 5.3).

<sup>47</sup> H. S. Aasen, Chapter 10.



CEDAW Committee in its dialogue with States Parties. Both monitoring bodies, according to Aasen, provide relevant guidelines that address maternal deaths, and recognize that non-discrimination and substantive equality require reasonable accommodation for social differences, between men and women, between urban and rural women, and between rich and poor women. However, the engendered, diverse and inclusive understanding of women's right to health that has been developed at the international level, in particular the recognition of the need for appropriate, women-specific and accessible maternal healthcare services, has not yet materialized on the ground in countries with high maternal mortality. Thus, there is an urgent need for new, radical and structural strategies to implement women's rights to life and health, including proper national reproductive health indicators and monitoring systems.

#### 4 Making space and giving voice: from international to national law (Part III)

The case studies from Southern Asia, Southern Africa, Northern Europe, Canada and Australia provide a window into the process whereby the CEDAW is making its mark on national law, policy-making and judicial decision-making. The most striking similarity between these studies is the women's organizations' increasing use of the CEDAW's state reporting procedure as a means of holding national governments accountable for their duty to respect, protect and fulfil the human rights of women. As already pointed out, the most striking difference regarding the CEDAW's effect on national law is between those states that have acceded to regional mechanisms that provide protection against sex and gender discrimination, those that do not have that option and those that have acceded regional instruments with weak enforcement mechanisms.<sup>48</sup>

There are, however, significant variations between and within these broad categories, pointing to an uneven and complex process of legal development, which in our view must be understood in light of each country's historical, political, legal and economic contexts. To better understand these variations, we will highlight the following factors and how

<sup>48</sup> Beth Simmons' study of international law in domestic politics suggests that the nature of the legal system generally has a consistent effect on governments' commitment patterns. According to Simmons' study, governments in common-law settings are systematically more reluctant to ratify human rights treaties and tend to enter far more reservations than governments in civil-law jurisdictions. B. A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009) at 109.

they play out in different political, legal, economic and cultural contexts: the degree of democracy, the nature of the legal system and the dominant legal culture, the availability of other international and regional mechanisms, the states' motivations for ratification, the democratic elements in the processes of ratification and monitoring, the extent of legal education of duty-bearers and rights-holders, and the strength of civil society.<sup>49</sup> Our concluding comments focus on the state reporting procedure and how the CEDAW features in national law and policy reform and in national judicial review.

#### 4.1 *The state reporting procedure and democratic involvement*

Looking into more or less democratic, liberal and autocratic states that have or have not become parties to regional human rights mechanisms, the domestic studies in this volume confirm the assumption that the introduction of a new monitoring mechanism dealing with discrimination against women has given women a stronger stake in organizing demands of equality and non-discrimination under both international and national law.<sup>50</sup> Yet the extent to which the international and national dialogue facilitated and monitored by the CEDAW Committee has led to change varies significantly. The discussion below focuses on the role of democratic elements in the ratification and monitoring process.

The process whereby a treaty is ratified and monitored is a factor that is likely to have a bearing on the level of state commitment and as such on the domestication process. The political legitimacy and effectiveness of the actual treaty obligations is from this perspective seen as being linked to the democratic elements in the domestic ratification and monitoring

<sup>49</sup> With the exception of ratification of regional treaties, these factors are pointed out by Simmons, *Mobilizing for Human Rights*.

<sup>50</sup> This assumption is clearly spelt out in K. Knop, 'Why rethinking the sovereign state is important for women's human rights law' in R. Cook (ed.), *Human Rights of Women. National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994). Recent empirical evidence confirms that membership in women's NGOs tends to grow in the first and second years after CEDAW ratification, the assumption being that ratification will contribute to the empowerment of women's rights organizations. See Simmons, *Mobilizing for Human Rights* at 212. A recent study on contemporary women's movements in the UK, Spain and Norway show that various uploading processes related to the CEDAW, EU law and other international instruments are regarded as important opportunity structures for women's organizations. See L. N. Predelli and B. Halsaa (eds.), *Majority-Minority Relations in Contemporary Women's Movement: Strategic Sisterhood* (Basingstoke: Palgrave MacMillan, 2012) at 266.

process, including the degree of involvement of the Parliament and civic organizations. Andrew Byrnes demonstrates in this volume how the CEDAW Committee has made provisions for civil society, national human rights institutions and Parliaments to make formal and informal contributions to the work of the Committee in order to ensure that the review of a state report is linked to domestic law and policy-making processes.<sup>51</sup>

In regard to political legitimacy, the studies uncover variations regarding Parliamentary involvement in the ratification and monitoring processes. Van den Brink describes that in the Netherlands, where ratification requires approval by a Parliamentary majority, the responsible Ministry is required by law to report to the Parliament every four years on the implementation of the CEDAW.<sup>52</sup> The Dutch study shows how this procedure has enhanced the political legitimacy of the CEDAW and facilitated democratic control of the executive power regarding the fulfilment of the treaty obligations. The Norwegian study reflects the CEDAW Committee's call for a more democratic and participatory monitoring process, not only involving civil society but also national human rights institutions and Parliamentarians.<sup>53</sup>

While the CEDAW Committee has clearly provided space for and given voice to women's claims, there are significant variations regarding NGOs' involvement in the state reporting procedure. In some countries the state agency in charge of the reporting procedure consults NGOs in the drafting of the state report. In other countries the NGOs are offered state support to produce independent shadow reports, and funding to present these to the Committee. The Dutch study shows how the government has offered NGOs economic support to write shadow reports in order to assist NGOs in fulfilling the critical role assumed by the human rights system.<sup>54</sup> In Finland and Norway, 'state feminism'<sup>55</sup> diminished for a long time the possibility for women's organizations to make full use of the Convention's communications procedure as independent actors.<sup>56</sup>

<sup>51</sup> A. Byrnes, Chapter 1.

<sup>52</sup> M. van den Brink, Chapter 17 (section 3).

<sup>53</sup> A. Hellum, Chapter 21 (section 5.3).

<sup>54</sup> M. van den Brink, Chapter 17 (section 4).

<sup>55</sup> 'State feminism' was defined by Helga M. Hernes in *Welfare State and Woman Power. Essays in State Feminism* (Oslo: Norwegian University Press, 1987) at 15 as 'a state where injustice on the basis of gender would be largely eliminated without an increase in other forms of inequality, such as among groups of women'.

<sup>56</sup> K. Nousiainen and M. Pentikäinen, Chapter 20 (section 4.2); A. Hellum, Chapter 21 (section 5.2).

The Norwegian study shows how the CEDAW Committee's interventions have prompted the state to make funds available for NGO shadow reporting, and in this way has contributed to greater civil society mobilization. In the UK, many women's organizations regard the CEDAW as a valuable lobbying tool that draws ministerial attention to women's rights issues. Although the CEDAW Committee has requested that the UK ensure that the Convention and the Protocol are made an integral part of legal education of rights-holders and duty-bearers, the UK Coalition government, in power since 2010, has cut back on public support for the very bodies that had previously created 'opportunity structures' for women's organizations to utilize the CEDAW, such as the Women's National Commission (WNC).<sup>57</sup>

According to political theorists, the state's motivation for ratification of international treaties is a factor that is likely to affect whether and to what extent the obligations arising from treaty obligations are loyally implemented.<sup>58</sup> The studies in this volume illustrate this point. For example, the Pakistani case indicates that the ratification of the CEDAW has had little effect in the context of an autocratic state that ratified the CEDAW in pursuit of increased international political and economic goodwill.<sup>59</sup> The Zimbabwean study, on the other hand, demonstrates how the gamble of the ZANU PF government, which ratified the CEDAW without any intent to put the principle of gender equality on an equal footing with the protection of customary law, has backfired. As shown by Damiso and Stewart, Zimbabwe's ratification of the Maputo Protocol in 2008 is used by various women's groups as a lobbying tool in conjunction with the CEDAW in the ongoing debates on legal and constitutional reform.<sup>60</sup> In the present political climate, where the Zimbabwean Unity government seeks to appear in the best possible light and to be seen as moving towards equal rights for women, the state reporting process is clearly a factor that strengthens the legitimacy of women's rights organizations' demands for gender equality.

In political theory, domestic ownership is seen as important for the reception of international human rights standards in national law. In

<sup>57</sup> S. Fredman, Chapter 18 (section 4).

<sup>58</sup> Political theory assumes that states have different motives for ratification of international treaties, and that information about the state's motivation is important to understanding whether and to what extent the obligations arising from treaty obligations are loyally implemented. See Simmons, *Mobilizing for Human Rights* at 354.

<sup>59</sup> S. S. Ali, Chapter 15 (section 5).

<sup>60</sup> C. Damiso and J. Stewart, Chapter 16 (section 12).

many countries both state and non-state actors rely on technical or economic support from international or regional human rights networks or international donors. The studies in this part of the book illustrate the complex relationship between domestic ownership and the increasing involvement of international consultants and experts in the national reporting processes. The Indian, Nepalese, Pakistani and Zimbabwean studies highlight how the presence of donor aid, regional alliances and technical support may strengthen the capacity of women's organizations to use the state reporting procedure as an arena of convergence between themselves and engagement with the government.<sup>61</sup> In the Pakistani study, Shaheen Sardar Ali describes how the government's use of external consultants and experts may negatively affect the sense of domestic ownership, which may in turn undermine the political legitimacy of the treaty obligations. According to Ali:

Unfortunately, given economic constraints and limited human resource capacity, the institutional structures that in an ideal world might help domesticate the CEDAW into Pakistani law have not been put in place as part of governmental routine. In fact, since accession the CEDAW has been viewed a 'project' to be taken up subject to available funding (which is mostly expected to come from foreign donor agencies) without becoming part of mainstream, budgeted government functions. Time and again, and with support from international donors, 'project' proposals have been written and funding received, and consultants have been hired at governmental and NGO levels to write Pakistan's country report as well as shadow reports on behalf of the country's NGOs and civil society.<sup>62</sup>

In Ali's view, the lack of steps to incorporate the CEDAW into national legislation through an Act of Parliament, as required by the Constitution and the Convention, should be seen as a reflection of the absence of national institutional commitment in the state reporting process.

Despite these variations, the studies indicate that the involvement of women's organizations, as emphasized by Byrnes' analysis of the work of the CEDAW Committee, is a key factor in the social and political legitimacy and the effectiveness of the state reporting procedure at the national level.<sup>63</sup>

#### *4.2 The CEDAW in national law and policy-making*

Whether or not the CEDAW and the work of the CEDAW Committee has had any effect on national law and policy-making, and if so to what

<sup>61</sup> Chapters 13–16. <sup>62</sup> S. S. Ali Chapter 15 (section 5).

<sup>63</sup> A. Byrnes, Chapter 1.

extent, is difficult to assess since debates on ratification and domestication are often a continuation of women's rights struggles that predate the CEDAW, and which must be described and understood in the context of national and local histories and timescales.

The clearest effect of ratification is demonstrated by the Australian and the Finnish studies. The Australian Sex Discrimination Act (SDA) of 1984 was motivated primarily by a long-standing claim for an Act that addresses discrimination against women, and to give effect to the provisions of the CEDAW, which Australia ratified in 1983.<sup>64</sup> Unlike the CEDAW, the SDA prohibits discrimination of both women and men on the ground of sex and marital status in many of the areas it covers. Yet the recommendation of the Australian Law Reform Commission (ALRC), that the SDA contain a general prohibition of discrimination as defined in Article 1 of the CEDAW, has gone unheeded. In the same vein, Finland's ratification of the CEDAW in 1986 prompted reform of legislation held to be contrary to the CEDAW. The Act on Equality between Women and Men was the most visible legislative outcome of the ratification.<sup>65</sup> Unlike the CEDAW, the Equality Act adopted a symmetric and gender-neutral approach with the overall focus on discrimination in the labour market.

According to Mehra, ratification of the CEDAW in India in 1993 took place after an extensive law reform that narrowed the gap between the constitutional promise of equality and the statutory standards that were in place in the 1980s.<sup>66</sup> According to Mehra, reservations to Articles 5(a), 16(1) and 16(2) have hampered reform relating to community-specific family and marriage laws for Muslims, Christians, Parsis and Hindus. Mehra's analysis of the political contestations related to the Supreme Court judgments concerning sexual violence show that implementing normative changes in areas free of reservations, despite NGO presence and a wide variety of actors heavily involved in the implementation process, is also an uphill battle.<sup>67</sup> In Nepal, which ratified the CEDAW in 1991 without reservations, the pace of legislative change in the first ten years after ratification was very slow in spite of the Interim Constitution and the Nepalese Treaty Act, which provided that ratified conventions take precedence when in conflict with other Nepalese law.<sup>68</sup> Both in India

<sup>64</sup> A. Byrnes, Chapter 11 (section 1).

<sup>65</sup> K. Nousiainen and M. Pentikäinen, Chapter 20 (section 2).

<sup>66</sup> M. Mehra, Chapter 13 (section 2).

<sup>67</sup> M. Mehra, Chapter 13 (section 3.2).

<sup>68</sup> K. Pandey, Chapter 14.

and Nepal, state resistance to legal reform has been countered by judicial review making extensive reference to the CEDAW (see the next section).

The Northern European studies describe how the CEDAW has operated in the shadow of the more-effectively sanctioned EU law, particularly in the field of labour law. The Dutch study shows that the CEDAW is largely absent in national political and legislative debates compared to the EU Directives, in spite of the high degree of involvement of Parliamentarians, women's organizations, and experts in the field of women's law and anti-discrimination law in the state reporting procedure.<sup>69</sup> In France, the twenty-two new laws relating to women's rights adopted between 2002 and 2007 were prompted by EU law. One area where the CEDAW does have a potential added value in comparison to EU law is in the right of French women to give their family names to their children. Yet France's reservation to Article 16(1)(g) of the CEDAW has, along with the lack of transparency, served as a shield against law reform in this area.<sup>70</sup> In the UK, successive Conservative and Labour governments have resisted the CEDAW Committee's persistent urging that it incorporate the Convention into the Human Rights Act of 1998. Most reforms strengthening women's protection against discrimination in the labour market are a result of the UK's obligations under EU law.<sup>71</sup> Even in Finland, where the Constitution makes human rights instruments part of national law, references to the CEDAW in law reform have, since the ratification of the CEDAW, been few in comparison to references to EU law.<sup>72</sup> The Norwegian study shows that the most recent reforms of the Gender Equality Act make reference to Norway's obligations under both EU law and the CEDAW. According to Hellum, the CEDAW has been of particular importance in relation to law reform providing protection against structural discrimination and discrimination on religious grounds.<sup>73</sup> It has also served as a safeguard against gender-neutral laws that overlook the specific situation of various groups of women. The Norwegian study demonstrates the actual added value of the CEDAW, and how the realization of its potential is linked to increased participation and networking involving women's organizations, national human rights institutions, and experts in the fields of women's

<sup>69</sup> M. van den Brink, Chapter 17 (section 8).

<sup>70</sup> H. Ruiz Fabri and A. Hamann, Chapter 19 (section 3.2).

<sup>71</sup> S. Fredman, Chapter 18 (section 5).

<sup>72</sup> K. Nousiainen and M. Pentikäinen, Chapter 20 (section 3).

<sup>73</sup> A. Hellum, Chapter 21 (section 6.1).

law, anti-discrimination and equality law, in relation to law reform at the national level.

The Canadian, UK and Dutch studies demonstrate how the political opportunities for women's rights and gender equality proponents has become more unfavourable under conservative neoliberal governments. As already mentioned, the UK Coalition government, in power since 2010, has cut back on public support for the organizational structure that has facilitated the capacity for women's organizations such as the Women's National Commission (WNC) to utilize the CEDAW.<sup>74</sup> Due to budget cuts under the conservative government, many of the established study centres for gender and the law in the Netherlands have lost their funding.<sup>75</sup> In Canada, where economic and social rights do not benefit from explicit constitutional protection, and the courts promote a restrictive understanding of the state's social and economic rights obligations, women's organizations have turned to the international human rights arena in order to make the conservative government accountable for the increase in women's poverty and inequality resulting from its neoliberal policies.<sup>76</sup> The Canadian study demonstrates the normative potential of a claims-making strategy involving both the CEDAW Committee and the ICESCR Committee. It also demonstrates this strategy's lack of transformative power in the context of a national government that, in line with its neoliberal economic politics, refuses to comply.

In autocratic states such as Pakistan and Zimbabwe, where national identity is closely linked to a constitutional gender hierarchy embedded in religion and custom, the CEDAW has had little direct impact on law reform. It should, however, be borne in mind that in order to have an impact, women's rights experts and organizations in these countries often couch their equal rights claims in religious or customary terms. In Pakistan, according to Ali, a comparative study emphasizing the similarities between the basic principles underlying the CEDAW and Islam influenced the Pakistani government's decision to ratify the CEDAW.<sup>77</sup> In a similar vein, the Zimbabwean study shows how a research project carried out by the Women and Law in Southern African Research Trust (WLSA), documenting that the customary norms on the ground were changing so

<sup>74</sup> S. Fredman, Chapter 18 (section 4).

<sup>75</sup> M. van den Brink, Chapter 17 (section 9).

<sup>76</sup> L. Lamarche, Chapter 12 (section 3).

<sup>77</sup> S. S. Ali, Chapter 15 (section 3) and S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Islamic Law and the Laws of Pakistan* (Peshawar: Shaheen Printing Press, 1995).



as to allow widows to inherit their husbands, led to legal reform recognizing women's right to inherit from their spouses on an equal footing with men.<sup>78</sup>

Although many women's organizations regard the CEDAW as a valuable lobbying tool that draws public attention to women's rights issues, the record of legislative change as a result of the Convention and the Committee's interventions is mixed. The studies show how state resistance to human rights in general and to the CEDAW in particular is prevalent in both democratic and autocratic states in both the north and the south. As demonstrated by the Indian, Nepalese, Pakistani and Zimbabwean studies, ethnic and religious identity politics is a factor that hampers law reform in various ways. In Canada, where the Convention is relatively well known by both rights-holders and duty-bearers through research and action, the growing state resistance is ascribed to the neoliberal politics of the existing government. In Northern Europe, EU law, with its more concise legal standards and strong enforcement machinery, has been a more effective tool for legal change than both the CEDAW and the ECHR. The Northern European studies indicate that the extent to which the CEDAW's normative potential in areas not covered by EU law is realized depends on factors such as the degree of transparency, existence of national research addressing the CEDAW and the strength of the women's organizations.

### 4.3 *The CEDAW in judicial decision-making*

The domestic studies demonstrate that judicial review is an important safeguard in situations where the executive branch of government refuses to comply with existing human rights obligations. In the studies included in this volume, the Convention is most frequently referred to in case law in Southern Asian countries, where no regional instruments are in place. Yet in later years the CEDAW has gained ground in Northern European case law as well, and is slowly starting to make its mark on case law from the ECtHR.

Comparisons between the countries indicate that the effect of domestication through judicial review is greatest in relatively democratic South

<sup>78</sup> See J. Stewart and A. Tsanga, 'The widows' and female child's portion: the twisted path to partial equality for widows and daughters under customary law in Zimbabwe' in A. Hellum, J. E. Stewart, A. Tsanga and S. S. Ali (eds.), *Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking* (Harare: Weaver Press, 2007) 407–37.

Asian states such as India and Nepal. Madhu Mehra analyzes how the Indian judiciary, in the context of a volatile political terrain marked by ethnic and religious identity politics, has played a leadership role in domesticating the CEDAW.<sup>79</sup> Being a federal state, with a legal system based on common law, the Supreme Court and the high courts are, through the exercise of judicial review, empowered to harmoniously interpret a law to achieve compliance with the fundamental rights (that encompass human rights) in the Constitution. In a series of landmark cases covering restorative justice, sexual harassment in the workplace, child sexual offences and compulsory registration of marriage, the Indian Supreme Court has formulated guidelines, urging legislative reform to follow. Through its decisions and in spite of reservations, the Supreme Court has to a certain degree initiated family law reform with respect to minority women. The Indian state's passivity in relation to minority women, which must be understood in light of the volatile political situation regarding ethnic and religious minorities, has been criticized by the CEDAW Committee. Pointing to the political contestations related to the Supreme Court judgments concerning sexual violence against women, Mehra, however, shows that implementation of the CEDAW is also resisted in areas free of reservation and despite strong NGO presence.

The Nepalese study demonstrates the close relationships between legal literacy, legal aid, judicial education and judicial review.<sup>80</sup> Kabita Pandey compares judgments handed down by the Nepalese Supreme Court before and after the civic organization Pro Public's judicial training programme focusing on the CEDAW. In the light of the Supreme Court's changing jurisprudence, Pandey argues that the judiciary, when given training on women's human rights and the state obligation under the CEDAW, upholds the state obligation to protect and promote women's human rights in its judgments. It appears that an important factor regarding the legitimacy and effectiveness of this legal education programme was the systematic use of regional legal resources, including the contributions of the then-Chief Justice of India, showing how the Indian judiciary handled cases where Hindu law came into conflict with the CEDAW. Furthermore, the Nepalese study indicates that the Court's directive orders for the enactment and amendment of discriminatory laws concerning widow allowances, women's property rights, marital rape and sexual harassment have to a large extent been followed up by the executive branch of government.

<sup>79</sup> M. Mehra, Chapter 13 (section 3.1 and section 3.2).

<sup>80</sup> K. Pandey, Chapter 14 (section 4).

As shown by Byrnes, Australian courts have drawn on the Convention and CEDAW Committee output to give CEDAW-consistent interpretations of the SDA in a number of cases.<sup>81</sup> A comprehensive overview of the main constitutional battles for women's rights in Canada shows that the Supreme Court of Canada rarely relies explicitly on human rights in general or the CEDAW in particular.<sup>82</sup> It did so, however, in the *Ewanchuk* case concerning sexual assault, and in the *Chan* case, where the risk of forced sterilization was seen as a form of persecution.

The CEDAW is also making a modest mark on judicial review in autocratic states such as Pakistan. In the reported case law of Pakistan's superior judiciary (five high courts and the Supreme Court) from accession in 1996 through to 2010, there are four judgments where the court specifically alluded to the CEDAW. While these judgments are widely quoted abroad and in human rights circles, they are rarely quoted in the reported case law from the five high courts and the Supreme Court in Pakistan. According to Ali, this reflects a situation where using human rights in general and the CEDAW in particular is out of tune with the dominant legal argumentation culture. The analysis of reported Supreme Court cases from Zimbabwe shows that the CEDAW has been invoked in two cases. It also shows how the judiciary, in the context of an undemocratic and violent regime where human rights lawyers are subject to threats, violence, torture and unlawful arrest, have contributed to piecemeal legal change through dynamic interpretation of national statutory law. While not explicitly referred to in most judgments, according to the authors the CEDAW often informs the work of practising lawyers and judges.

While initially situated in the shadow of the dynamic case law from the European Court of Justice (ECJ), the CEDAW has become more visible in Northern European case law in recent years. This is reflected in the relatively high number of complaints under the Optional Protocol to the CEDAW lodged against the states. By October 2009 three complaints against the Netherlands had been lodged under the Optional Protocol, one unsuccessful, one dismissed and one pending. There have been two cases against the UK and two against France, all of which were declared admissible by the CEDAW Committee. No complaints have thus far been lodged against the Norwegian or the Finnish states. The number of court cases in Northern European national courts that refer to the CEDAW is also increasing. A prominent case involving the CEDAW is that concerning

<sup>81</sup> A. Byrnes, Chapter 11 (section 5).

<sup>82</sup> L. Lamarche, Chapter 12 (section 2.3).

the Dutch SGP Party's refusal to accept women as (full) members. In 2010 the Dutch Supreme Court established that Article 7(a) of the CEDAW requires the state to effectively ensure the right of women to stand for election. On 10 July 2012 the ECtHR, with reference to the CEDAW, the ICCPR and the ECHR, concluded that the SGP's position is unacceptable regardless of the deeply-held religious conviction on which it is based.<sup>83</sup> Also, in the UK, increasing reliance has been paid to the CEDAW as an interpretative aid in cases before the courts. In the *Yemshaw* case the CEDAW Committee's definition of gender-based violence in General Recommendation 19 was invoked when interpreting a statutory provision deeming persons to be homeless when they are exposed to violence in the home.<sup>84</sup>

In Norway, the CEDAW has, since 2009, been referred to in only one Supreme Court case and in one Court of Appeals case.<sup>85</sup> According to Hellum, the low number of court cases where the CEDAW is referred to can be explained in part by the low number of discrimination cases handled by the courts in general. In Norway, most discrimination cases are dealt with by the specialist administrative agencies, the Equality and Anti-Discrimination Ombud, and the Equality and Anti-Discrimination Tribunal. These cases demonstrate how the Tribunal has interpreted the Gender Equality Act in light of the Convention and the Committee's General Recommendations and Concluding Comments. A significant trend in both the Ombud's and the Tribunal's jurisprudence is the use of Article 5(a) in the CEDAW to strengthen the Gender Equality Act's protection against discrimination. Looking into the background of the Tribunal members, Hellum shows that in most of the cases in which the CEDAW is referred to, it was invoked by female Tribunal members with a specialist background in women's law, anti-discrimination and equality law.

As demonstrated by these studies, the judiciary does not operate in a legal vacuum but is receptive to the legal, political and cultural contexts in which it operates. How elite legal education, carried out at a certain historical moment, may have an effect on both judicial review and law reform is demonstrated by the Nepalese case. The Dutch and Norwegian studies suggest that the increasing attention given to the CEDAW through a combination of research, civic action and state reporting makes a difference

<sup>83</sup> M. van den Brink, Chapter 17 (section 6.1).

<sup>84</sup> S. Fredman, Chapter 18 (section 2).

<sup>85</sup> A. Hellum, Chapter 21 (section 7.2).

in comparison to countries where the CEDAW has been given little attention in research and action, such as France and the UK. While these are important factors, the dominant culture of legal argumentation may, as demonstrated by the Canadian, French and UK studies, constitute an additional barrier. Yet even in situations with fierce state resistance, the Pakistani and Zimbabwe studies demonstrate that individual judges are taking the Convention itself or its spirit into consideration.

## 5 Future prospects and research needs

Through a comparative and interactive perspective, the chapters in this book show how the CEDAW slowly but surely is making its mark on international, regional and national legal developments. From different angles and perspectives the authors describe and analyze the development of the CEDAW's *transformative, holistic and gender-specific* approaches to gender equality and non-discrimination as the outcome of a multiplicity of interactive and overlapping international, regional and national processes. Uncovering synergies and tensions, the various chapters point to the CEDAW regime's significance as a framework and an international legal arena where women's NGO's, governments and women's rights scholars from various parts of the world frame their diverging claims and arguments.

The chapters in Part I show how the CEDAW regime's potential added value is translated into actual added value. Through 'constructive dialogue' and individual communications from the Committee, the CEDAW's transformative approach is linked to domestic processes of law-making, litigation and NGO advocacy in different political, legal and economic contexts. Addressing the options and limits of the CEDAW regime's transformative capacity, the chapters in this part of the book point to the tensions between the quest for concise concepts and effective sanctions on the one hand, and the Convention's method of 'constructive dialogue' on the other. A critical factor in all parts of the world is the complex nature of the demand for substantive equality and appropriate measures, which, in the context of complex plural legal situations, makes it difficult for an external body such as the CEDAW Committee to strike a balance between equality and difference, and to assess the various short- and long-term measures available for the State Party.

Focusing on if and to what extent the CEDAW Committee, the ICESCR Committee and the HRC interpret social and economic rights

in the light of women's lived realities, the authors in Part II address the relationship between the CEDAW regime's potential and actual added value in comparison to other regimes. Showing how the regimes learn and draw inspiration from each other through a synergetic process, most authors conclude that the CEDAW regime has contributed to engendering social and economic rights to a greater extent than the HRC or ICESCR Committee. This is ascribed to the asymmetric approach and specific focus on women's disadvantaged positions, the demand for structural change (Article 5), and the emphasis on women's representation and participation. However, important parts of the Convention, such as the right to work and the right to water, still need continued engagement to ensure that the Committee continues to develop the CEDAW in the direction of more engendered social and economic human rights.

Despite significant variations regarding the realization of women's right to equality and non-discrimination in various historical, political, legal and economic settings, the national case studies presented in Part III clearly indicate that the involvement of women's organizations is a key factor in the social and political legitimacy and the effectiveness of the state reporting procedure at the national level. The case studies show that the CEDAW has had greater impact on judicial review and legislation in South Asian countries where no regional instrument is in place, than in Northern Europe where the CEDAW operates side by side with EU law and the ECHR. As pointed out by the Northern European authors, the CEDAW's potential added value in areas not developed in EU law and the ECHR, such as protection against structural discrimination, religious discrimination and sexual violence, should be given more attention in academic work as well as by state and non-state actors.

As a normative and institutional framework in which similarities and differences between international, regional and national conceptions of discrimination, equality and difference are discussed and resolved, the CEDAW regime has clearly had a catalytic effect on the multiple levels on which it operates. The findings that emerge from the chapters in this book thus point in the same direction as the international legal scholar Bruno Simma's optimistic view that the establishment of separate epistemic communities 'contribute[s] to a growing and ever more dense corpus of law which responds to the needs of the specific regime. In a positive light, these sub-systems of international law, more densely integrated and more technically coherent, may show the way forward for general international

law, as both laboratories and boosters for further progressive development at the global level.<sup>86</sup>

At a theoretical and methodological level, the CEDAW regime has provided space for the development of an interdisciplinary, interregional and transnational human rights jurisprudence focusing on the relationship between substantive equality and engenderment. The CEDAW's context-sensitive human rights approach, which includes a grounded understanding of the circumstances that affect women's lives and enjoyment of rights, is clearly a factor that constitutes both potential and actual added value in comparison to other international and regional regimes. In order to contribute to the further realization of the CEDAW's transformative potential, as well as continued engenderment and effective implementation of women's human rights, further research is needed. The chapters in this book demonstrate that in particular interdisciplinary analysis of the interaction between international and national law, and between state and non-state actors, at the international, national and local levels, is of particular importance. Such research can provide important knowledge about the legal, political, social and cultural factors that affect the legitimacy and effectiveness of the CEDAW, the various processes of domestication and engenderment, and the potential and limitations of the work of the CEDAW Committee in different contexts and settings. Only on the basis of such in-depth analysis can the full realization of the added value of the CEDAW be ensured.

<sup>86</sup> B. Simma, 'Universality of international law from the perspective of a practitioner', *European Journal of International Law* 20:2 (2009) 265–97.