

CEDAW AND THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY

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The Committee on the Elimination of Discrimination against Women ('Committee') is the leading United Nations treaty body responsible for monitoring the implementation of women's human rights. This article analyses how the Committee has interpreted the rights to non-discrimination and equality and how it has applied those rights when addressing the situation of individual women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The analysis shows that the Committee has interpreted the rights to non-discrimination and equality generously and has also adopted a broad approach to the application of those rights in individual communications concerning reproductive health or violence against women. It also shows that the Committee has applied those rights conservatively in communications concerning civil, political or economic matters and in doing so has contributed to the low success rate of those communications. The article argues that the strength of the Committee's gender analysis has been a determining factor in whether its application of the rights to non-discrimination and equality fulfils the promise of its broad interpretative practice. It urges the Committee to strengthen its gender analysis of individual communications, particularly those concerning civil, political or economic matters, so it can preserve its broad vision of gender equality and ensure women are afforded maximum opportunity to claim their rights under the Convention on the Elimination of All Forms of Discrimination against Women.

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I INTRODUCTION

The Committee on the Elimination of Discrimination against Women (‘Committee’) is the leading international treaty body responsible for monitoring states’ efforts to protect and promote women’s human rights, specifically those rights guaranteed by the *Convention on the Elimination of All Forms of Discrimination against Women* (‘CEDAW’ or ‘Convention’).¹ How the Committee interprets CEDAW, the coherency and persuasiveness of its interpretative reasoning and the consistency and rigour of its application of the *Convention* to women’s individual situations have a direct bearing on the effectiveness of the *Convention* as a tool for advancing women’s rights. They also affect the reputation and perceived legitimacy of the Committee and, concomitantly, its ability to influence how states parties and other treaty and decision-making bodies address women’s human rights.

This article analyses how the Committee has interpreted the rights to non-discrimination and equality in CEDAW and how it has applied those rights when addressing the situation of individual women under the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (‘*Optional Protocol*’).² The analysis is based on key general recommendations of the Committee that elucidate core elements of the rights to non-discrimination and equality³ and jurisprudence decided under the *Optional*

¹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’). Other treaty bodies are also responsible for monitoring states’ efforts to protect and promote women’s human rights but, unlike the Committee on the Elimination of Discrimination against Women (‘Committee’), the focus of their work is not asymmetrical in nature.

² *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000) (‘*Optional Protocol*’).

³ Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) (‘*General Recommendation 28*’); *Report of the Committee on the Elimination of Discrimination against Women: Thirtieth Session; Thirty-First Session*, UN GAOR, 59th sess, Supp No 38, UN Doc A/59/38 (2004) annex I (‘*General Recommendation No 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*’) [3]–[14] (‘*General Recommendation 25*’); *General Recommendation No 19: Violence against Women*, as contained in *Report of the Committee on the Elimination of Discrimination against Women: Eleventh Session*, UN GAOR, 47th sess, Supp No 38, UN Doc A/47/38 (1993) (‘*General Recommendation 19*’).

Protocol communication procedure.⁴ The analysis shows that the Committee has interpreted the rights to non-discrimination and equality broadly.⁵ It further shows that the Committee has adopted a broad approach to the application of the rights to non-discrimination and equality in communications concerning reproductive health or violence against women and that this much welcomed approach has contributed to the overwhelming success women have had in claiming violations of *CEDAW* in those two areas.⁶ However, the analysis also shows that the Committee has applied the rights to non-discrimination and equality more restrictively and Committee members have regularly adopted different views about the proper application of those rights in individual communications involving civil, political or economic matters.⁷ The inconsistencies between the Committee's interpretative practice and its application of the rights to non-discrimination and equality in communications related to this third area appear to have contributed to the comparatively low success rate of those communications.

This article argues that the strength of the Committee's gender analysis has been a determining factor in whether its application of the rights to non-discrimination and equality fulfils the promise of its broad interpretative practice. Essentially, consistency between interpretation and application of the rights to non-discrimination and equality has been greatest where the Committee has undertaken a robust gender analysis of the facts and weakest where its gender analysis has been less rigorous. It is particularly telling that in communications concerning reproductive health or violence against women, the Committee has paid close attention to the specific needs and interests of women and the impact of sex/gender on their human rights, whilst it has been less overtly concerned with these same aspects in communications concerning civil, political or economic matters. The article urges the Committee to strengthen its gender analysis in individual communications, particularly those concerning civil,

⁴ This article focuses on how the Committee has applied the rights to non-discrimination and equality to women's individual situations and, therefore, does not analyse the Committee's concluding observations. Discussion of the *Optional Protocol* inquiry procedure is also limited because only one inquiry had been completed at the time of writing. For a detailed examination of the Committee's treatment of the rights to non-discrimination and equality under these (and other) mechanisms, see Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012).

⁵ Rikki Holtmaat, 'CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) 95; Ingrid Westendorp and Antonia Waltermann, 'The Essence of Discrimination against Women: An Interpretation by CEDAW and the European Union' in Ingrid Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks, and Prospects* (Intersentia, 2012) 33; Rolanda Oostland, 'The Principle of Equality' in Ingrid Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks, and Prospects* (Intersentia, 2012) 67; Andrew Byrnes, 'The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: Reflections on their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform' (Working Paper No 17, University of New South Wales Faculty of Law Research Series, 2010); Alda Facio and Martha I Morgan, 'Equity or Equality for Women? Understanding CEDAW's Equality Principles' (2009) 60 *Alabama Law Review* 1133.

⁶ See below Part III(B)(1) and Part III(B)(2).

⁷ See below Part III(B)(3).

political or economic matters, so that it can preserve its pioneering work in articulating a broad vision of gender equality and afford women maximum opportunity to claim their rights under *CEDAW*.

The article begins in Part II by examining the content and meaning of the rights to non-discrimination and equality under *CEDAW* as interpreted by the Committee. Part III considers how the Committee has applied those rights in individual communications and examines the nature and significance of its gender analysis. Part IV outlines a road map that might assist the Committee to strengthen its gender analysis moving forward. Part V concludes by exhorting the Committee to demonstrate the same leadership and vision it has shown in its interpretation of the rights to non-discrimination and equality, in the application of those rights to women's individual situations, particularly in relation to civil, political and economic matters.

II INTERPRETATION OF THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY

CEDAW has been the primary international human rights treaty concerned with the protection and promotion of women's human rights since its adoption by the United Nations General Assembly in 1979.⁸ Its overarching object and purpose, as stated by the Committee, is 'to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms'.⁹ The Committee has explained that there are three obligations central to the realisation of the object and purpose of *CEDAW*, namely to: ensure that there is no discrimination against women in laws and women are protected against discrimination; improve the de facto position of women; and address prevailing gender relations and the persistence of gender stereotypes.¹⁰

The rights to non-discrimination and equality are the backbone of *CEDAW*; they guide *CEDAW*'s overarching object and purpose and inform each of the obligations enumerated in the *Convention*. Articles 1–5 and 24 of *CEDAW* enumerate the general obligations of states parties to eliminate all forms of discrimination against women and achieve substantive equality. They also form the interpretative framework for *CEDAW*'s substantive provisions in arts 6–16 of *CEDAW*, which outline states parties' obligations with respect to some of the most common areas of discrimination against women. Together, they protect women's rights to non-discrimination and equality in political and public life, economic and social matters and in legal and civil matters.

As the treaty body that monitors progress in the implementation of *CEDAW*, the Committee is responsible for interpreting the rights to non-discrimination and equality and elucidating the measures needed to ensure women's de jure and de

⁸ Several regional treaties on women's rights have been adopted since *CEDAW*'s entry into force: see, eg, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 210 (not yet in force); *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, opened for signature 11 July 2003, OAU Doc CAB/LEG/66.6 (entered into force 25 November 2005); *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994 (entered into force 5 March 1995).

⁹ *General Recommendation 25*, UN Doc A/59/38, annex I [4].

¹⁰ *Ibid* [6]–[7].

facto equality with men. The Committee's interpretative statements concerning these rights are found in its general recommendations and concluding observations and, since the entry into force of the *Optional Protocol*, its views in individual communications and reports on inquiries. Although the status of these documents as a source of international law is uncertain, the Committee's statements are of considerable practical importance for the interpretation and application of the rights to non-discrimination and equality in *CEDAW*; they clarify and offer 'more or less authoritative statements of'¹¹ the rights and obligations of states parties and provide consistency and legal security.¹² It is therefore significant that the Committee has treated *CEDAW* as a dynamic instrument and interpreted the rights to non-discrimination and equality in *CEDAW* broadly, as Part II shows.

A *The Right to Non-Discrimination*

1 *All Forms of Discrimination against Women*

In 1979, the year *CEDAW* was adopted by the UN General Assembly, it was clear that discrimination against women remained widespread,¹³ despite existing protections against sex discrimination.¹⁴ The *Convention's* adoption was driven by the need to strengthen those protections and end the insidious and systemic discrimination that marred the lives of many women around the world.¹⁵ *CEDAW* introduced an explicit focus on women¹⁶ and recognised the myriad forms of discrimination women experience because of their sex and/or gender; 'sex' meaning the 'biological differences between men and women'¹⁷ and 'gender' meaning the 'socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological

¹¹ Christine Chinkin and Marsha A Freeman, 'Introduction' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 1, 24 (citations omitted).

¹² Ibid 23–4; Andrew Byrnes, 'The *Convention on the Elimination of All Forms of Discrimination against Women*' in Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleitner (eds), *The Human Rights of Women: International Instruments and African Experiences* (Zed Books, 2002) 119, 122–3.

¹³ *CEDAW* Preamble para 6; *General Recommendation 25*, UN Doc A/59/38, annex I [5].

¹⁴ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 3, 26 ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2(2), 3.

¹⁵ Andrew Byrnes, 'Article 1' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 51, 52; Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff, 1993) 44; Noreen Burrows, 'The 1979 *Convention on the Elimination of All Forms of Discrimination against Women*' (1985) 32 *Netherlands International Law Review* 419, 425.

¹⁶ For an analysis of the implications of *CEDAW's* focus on 'women' rather than 'sex', see Darren Rosenblum, 'Unsex *CEDAW* or What's Wrong with Women's Rights' (2011) 20(2) *Columbia Journal of Gender and Law* 98; Berta Esperanza Hernández-Truyol, 'Unsex *CEDAW*? No! Super-Sex It!' (2011) 20(2) *Columbia Journal of Gender and Law* 195.

¹⁷ *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [5].

differences'.¹⁸ *CEDAW*'s focus on discrimination against women marked a shift away from the concept of discrimination used in many contemporary rights instruments — which protect both women and men against sex discrimination¹⁹ — toward the recognition of the importance of addressing women's specific experiences of discrimination.

CEDAW is concerned with all of the various forms of discrimination that women experience. Notwithstanding criticism from some scholars that *CEDAW* treats women as a homogeneous group,²⁰ a number of *CEDAW* provisions acknowledge women's different experiences of discrimination.²¹ Moreover, the Committee has begun to elucidate the content and meaning of states parties' obligations concerning intersectional discrimination against women,²² stipulating, for instance, that states parties should legally prohibit intersectional discrimination and adopt and pursue policies and programmes to eliminate the same.²³ Further work is still needed, though, to improve understanding of the full

¹⁸ Ibid. Although the definition of discrimination in art 1 of *CEDAW* refers to 'sex', several provisions of *CEDAW* (see for example arts 2(f), 5, 16) clearly encompass gender. Moreover, the Committee has affirmed that *CEDAW* encompasses discrimination on the grounds of sex and gender: *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [3], [5], [16]–[17]; *General Recommendation 25*, UN Doc A/59/38, annex I [5], [7], [11]. For a critique of this view of sex and gender, see Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) (forthcoming).

¹⁹ Women have initiated the majority of communications on sex discrimination, even though most contemporary rights instruments prohibit sex discrimination against women and men: see, eg, Human Rights Committee, *Views: Communication No 1610/2007*, 102nd sess, UN Doc CCPR/C/102/D/1610/2007 (16 August 2011) ('*LNP v Argentine Republic*') (holding the state party accountable for discrimination against and the gang rape of a minor); Human Rights Committee, *Views: Communication No 1608/2007*, 101st sess, UN Doc CCPR/C/101/D/1608/2007 (28 April 2011) ('*LMR v Argentina*') (holding the state party accountable for its refusal to authorise an abortion for a girl with a mental disability who was raped); Human Rights Committee, *Views: Communication No 1153/2003*, 85th sess, UN Doc CCPR/C/85/D/1153/2003 (22 November 2005) ('*KNLH v Peru*') (holding the state party accountable for its refusal to perform a therapeutic abortion); Human Rights Committee, *Views: Communication No 24/1977*, 13th sess, UN Doc CCPR/C/13/D/24/1977 (30 July 1981) ('*Lovelace v Canada*') (holding the state party accountable for denying a woman her status as a Maliseet Indian when she married).

²⁰ See, eg, Hernández-Truyol, above n 16, 214–15; Dianne Otto, 'Women's Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 345, 357; Johanna E Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71, 93, 95–7.

²¹ See, eg, *CEDAW* Preamble para 10, arts 11(2), 12, 14, 16(1)(e).

²² See, eg, Committee on the Elimination of Discrimination against Women, *General Recommendation No 26 on Women Migrant Workers*, 42nd sess, UN Doc CEDAW/C/2009/WP.1/R (5 December 2008); Committee on the Elimination of Discrimination against Women, *General Recommendation No 27 on Older Women and Protection of their Human Rights*, 47th sess, UN Doc CEDAW/C/GC/27 (16 December 2010).

²³ *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [18]. Other treaty bodies and UN mechanisms have also recognised intersectional discrimination: see, eg, *Report of the Committee on the Elimination of Racial Discrimination: Fifty-Sixth Session; Fifty-Seventh Session*, UN GAOR, 55th sess, Supp No 18, UN Doc A/55/18 (2000) annex VA ('*General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination*') [2]; Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/17/26 (2 May 2011).

extent of states parties' obligations to prohibit and eliminate intersectional discrimination.²⁴

2 *Definition of Discrimination*

The elimination of all forms of discrimination against women is the primary concern of *CEDAW*. The *Convention* contains a broad definition of the key phrase 'discrimination against women'; one that is based on the definition of 'discrimination' in the *International Convention on the Elimination of All Forms of Racial Discrimination*.²⁵ Article 1 of *CEDAW* defines 'discrimination against women' as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁶

The art 1 definition is concerned with differences in treatment based on sex/gender that comprise of distinctions between women and men, the exclusion of women and not men and restrictions imposed on the rights of women and not men. Differences in treatment may constitute discrimination under *CEDAW* if they have the purpose of 'impairing or nullifying'²⁷ a woman's rights (ie, direct discrimination); that is to say, if they are 'explicitly based on grounds of sex and gender'.²⁸ In addition, identical treatment may constitute discrimination under *CEDAW* if it has the effect of impairing or nullifying a woman's rights (ie, indirect discrimination). This 'occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women'.²⁹

To constitute discrimination under art 1, the difference in treatment must impair or nullify a woman's rights, by which it is meant that it adversely affects her rights; '[a] sex-based action or practice which enhances women's enjoyment of their rights and freedoms is not discrimination against them within the meaning of the *Convention*'.³⁰ In addition, the difference in treatment must affect a woman's human rights and fundamental freedoms. The Committee has

²⁴ See also Otto, 'Women's Rights', above n 20, 363.

²⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 1(1) which defines 'racial discrimination' as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

²⁶ See generally Byrnes, 'Article 1' above n 15, 59–70; Hirose Kazuko, 'Article 1: Definition of Discrimination against Women' in Japanese Association of International Women's Rights (ed), *Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Japanese Association of International Women's Rights, 1995) 39.

²⁷ *CEDAW* art 1.

²⁸ *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [16].

²⁹ *Ibid.*

³⁰ Byrnes, 'Article 1', above n 15, 60.

interpreted this phrase as meaning not only the rights enumerated in *CEDAW* but also those rights recognised under other treaties (eg, rights to life³¹ and a fair trial³²). According to the Committee, *CEDAW*'s spirit 'covers other rights that are not explicitly mentioned in the *Convention*, but that have an impact on the achievement of equality of women with men, which impact represents a form of discrimination against women'.³³

The Committee has characterised oppressive practices against women that are not explicitly addressed in the *Convention* as forms of discrimination encompassed by art 1 of *CEDAW*. For instance, in its *General Recommendation No 19*, the Committee characterised gender-based violence as a form of discrimination against women and elucidated states parties' obligations to

³¹ See, eg, *ICCPR* art 6(1); *General Recommendation 19*, UN Doc A/47/38, [7(a)]; Committee on the Elimination of Discrimination against Women, *Views: Communication No 17/2008*, 49th sess, UN Doc CEDAW/C/49/D/17/2008 (27 September 2011) [7.6] ('*Alyne da Silva Pimentel Teixeira (deceased) v Brazil*') (holding the state party accountable for its failure to prevent an avoidable maternal death); *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 60th sess, UN Doc A/60/38 (Part I) (18 March 2005) annex III ('*Views of the Committee on the Elimination of Discrimination against Women under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Communication No 2/2003*') [9.3] ('*AT v Hungary*') (holding the state party accountable under *CEDAW* for its failure to protect a woman effectively against domestic violence).

³² See, eg, *ICCPR* art 14; Committee on the Elimination of Discrimination against Women, *Views: Communication No 18/2008*, 46th sess, UN Doc CEDAW/C/46/D/18/2008 (22 September 2010) [8.4] ('*Vertido v Philippines*') (holding the state party accountable for a judicial decision that was based on gender stereotypes and which resulted in the acquittal of a man accused of rape); Committee on the Elimination of Discrimination against Women, *Views: Communication No 20/2008*, 49th sess, UN Doc CEDAW/C/49/D/20/2008 (27 September 2011) [9.11] ('*VK v Bulgaria*') (holding the state party accountable under *CEDAW* for its failure to protect a woman effectively against domestic violence).

³³ *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [7]. But see Byrnes, 'Article 1', above n 15, 62 (arguing that the Committee appears to understate the position of these other rights under *CEDAW*, since they are covered by the letter of *CEDAW*, in particular arts 2, 3 and 24). In two communications concerning asylum claims based on domestic violence, Canada challenged the view that the right to non-discrimination extends to rights not explicitly addressed in *CEDAW*: Committee on the Elimination of Discrimination against Women, *Views: Communication No 25/2010*, 51st sess, UN Doc CEDAW/C/51/D/25/2010 (13 April 2012) [4.2] ('*MPM v Canada*'); Committee on the Elimination of Discrimination against Women, *Views: Communication No 26/2010*, 50th sess, UN Doc CEDAW/C/50/D/26/2010 (30 November 2011) [4.4] ('*Rivera v Canada*'). The Committee declared the communications inadmissible on other grounds and did not address the state party's claim: *MPM v Canada*, UN Doc CEDAW/C/51/D/25/2010, [6.3]–[6.4]; *Rivera v Canada*, UN Doc CEDAW/C/50/D/26/2010, [6.3].

eliminate such violence, including violence by non-state actors.³⁴ In a further example, in its *General Recommendation No 24*, the Committee characterised the criminalisation and neglect of health care that only women need as barriers to their health and forms of sex/gender discrimination.³⁵ The Committee's characterisation of these practices as forms of discrimination has helped to clarify which differences in treatment constitute discrimination under *CEDAW* and has been instrumental in enabling women to seek redress for violations of their rights under the *Optional Protocol*.³⁶

3 Coverage

CEDAW's application to all fields of life — the political, economic, social, cultural, civil or any other field — and discrimination by state and non-state³⁷ actors allows it to transcend the public/private distinction, which has operated historically to women's detriment. *CEDAW* expressly rejects the notion of impunity for violations of women's rights that occur in the private sphere — including in the family — and/or are caused by non-state actors. The significance of this approach lies in its recognition that, unlike for men, many violations of women's rights occur within the private sphere and failure to address such violations undermines the exercise and enjoyment by women of their human rights in all spheres of life. Importantly, *CEDAW*'s expansive scope

³⁴ *General Recommendation 19*, UN Doc A/47/38, [1], [4], [6], [9]. See also Committee on the Elimination of Discrimination against Women, *Views: Communication No 31/2011*, 53rd sess, UN Doc CEDAW/C/53/D/31/2011 (24 November 2012) [9.3] ('*VPP v Bulgaria*') (holding the state party accountable under *CEDAW* for its failure to protect a woman effectively against sexual violence); Committee on the Elimination of Discrimination against Women, *Views: Communication No 32/2011*, 52nd sess, UN Doc CEDAW/C/52/D/32/2011 (28 August 2012) [8.4] ('*Jallow v Bulgaria*') (holding the state party accountable under *CEDAW* for its failure to protect a woman effectively against domestic violence); Committee on the Elimination of Discrimination against Women, *Views: Communication No 23/2009*, 49th sess, UN Doc CEDAW/C/49/D/23/2009 (27 September 2011) [7.4] ('*Abramova v Belarus*') (holding the state party accountable under *CEDAW* for its treatment of a woman in detention); *VK v Bulgaria*, UN Doc CEDAW/C/49/D/20/2008, [9.3]; Committee on the Elimination of Discrimination against Women, *Views: Communication No 6/2005*, 39th sess, UN Doc CEDAW/C/39/D/6/2005 (1 October 2007) [12.2] ('*Yildirim (deceased) v Austria*') (holding the state party accountable under *CEDAW* for its failure to protect a woman effectively against domestic violence); Committee on the Elimination of Discrimination against Women, *Views: Communication No 5/2005*, 39th sess, UN Doc CEDAW/C/39/D/5/2005 (6 August 2007) [12.2] ('*Goekce (deceased) v Austria*') (holding the state party accountable under *CEDAW* for its failure to protect a woman effectively against domestic violence); *AT v Hungary*, UN Doc A/60/38 (Part I), annex III, [9.2]. See also Christine Chinkin, 'Violence against Women' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 443.

³⁵ *General Recommendation No 24 (Twentieth Session): Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women — Women and Health*, as contained in *Report of the Committee on the Elimination of Discrimination against Women: Twentieth Session*, UN GAOR, 54th sess, UN Doc A/54/38 (Part I) (4 May 1999) 5–6 [11], 6–7 [14], [31(c)] ('*General Recommendation 24*'). See also Rebecca J Cook and Verónica Undurraga, 'Article 12' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 311, 319.

³⁶ See below Part III(B)(1) and Part III(B)(2).

³⁷ *CEDAW* art 2(e). See also *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [13].

and the Committee's application of the treaty have ensured that the full range of harms women experience because of their sex and gender are scrutinised, regardless of where the harms occur or who perpetrates those harms.

B The Right to Equality

CEDAW's primary concern with the elimination of all forms of discrimination against women is directed towards the achievement of gender equality.³⁸ The concept of equality is not defined in *CEDAW* but a close reading of the text of the *Convention* unearths different theories of equality — formal equality, substantive equality and transformative equality. It has been left to the Committee to articulate the content and meaning of the right to equality protected by *CEDAW* and the relationship between that right and the *Convention*'s substantive provisions. The Committee's practice, evidenced most clearly in its *General Recommendation No 25* (temporary special measures) and *General Recommendation No 28* (state obligations), has been to interpret the right to equality generously and to treat each of the theories of equality embedded in *CEDAW* as essential and complementary to the *Convention*'s overarching object and purpose.³⁹

1 Formal Equality

CEDAW imposes on states parties a 'formal legal obligation of equal treatment of women with men'.⁴⁰ Formal (de jure) equality asserts that, as equals, women and men should be treated the same. This concept of equality lives in numerous provisions of *CEDAW* and is concerned primarily with 'the content of laws and practices and their even-handed application'.⁴¹ For example, art 7(a) requires states parties to adopt measures to guarantee women equal rights with men to vote and art 9 requires them to guarantee women equal rights to acquire, change or retain their nationality. Conscious of the limitations of the formal equality model,⁴² the Committee has explained that the position of women will not improve as long as the underlying causes of discrimination and inequality — which are left intact by a purely formal approach to equality — are not also addressed.⁴³ States parties, the Committee has explained, must therefore implement their obligations 'in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men'.⁴⁴ In other words, formal equality is essential but not sufficient for the full implementation of *CEDAW*.

³⁸ *General Recommendation 25*, UN Doc A/59/38, annex I [4].

³⁹ *Ibid* [3]–[14]; *General Recommendation 28*, UN Doc CEDAW/C/GC/28.

⁴⁰ *General Recommendation 25*, UN Doc A/59/38, annex I [6].

⁴¹ Byrnes, 'Article 1', above n 15, 54.

⁴² Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in Ineke Boerefijn et al (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia, 2003) 111, 112.

⁴³ *General Recommendation 25*, UN Doc A/59/38, annex I [10].

⁴⁴ *Ibid* [6].

2 *Substantive Equality*

In addition to formal equality, *CEDAW* requires states parties to take all appropriate measures to ensure substantive (de facto) equality between women and men. Articles 3 and 24, for example, require steps to be taken to ensure the full development and advancement of women and the full realisation of the rights in *CEDAW*, respectively. The Committee has explained that states parties must ensure that women are ‘given an equal start’⁴⁵ (equality of opportunity) and are ‘empowered by an enabling environment to achieve equality of results’⁴⁶ (equality of results). This means that it is not enough for states parties to guarantee women treatment that is identical to that of men; they must also take biological, socially and culturally constructed differences between women and men into account, which may require non-identical treatment to address those differences.⁴⁷ Significantly, the principle of substantive equality embodied in *CEDAW* and embraced by the Committee further requires states parties to address the underlying causes and structures of gender inequality (‘equality as transformation’⁴⁸ or ‘transformative equality’).⁴⁹ The Committee has tended to view transformative equality as part of substantive equality rather than as a distinct model of equality, though they are considered separately here for ease of analysis.

3 *Transformative Equality*

The principle of transformative equality underpins several of *CEDAW*’s provisions. Examples include arts 2(f) and 5, which together require states parties to address prevailing gender relations and the persistence of gender-based stereotypes. The Committee’s approach to transformative equality has centred on two distinct but related categories of obligations. The first category concerns the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality. According to the Committee, states parties should implement an effective strategy that aims to redistribute power and resources amongst women and men⁵⁰ and adopt measures ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’.⁵¹ The second category of obligations concerns the modification or transformation of harmful norms, prejudices and stereotypes. The Committee has explained that states parties should address the norms, prejudices and stereotypes that violate women’s rights⁵² and create the conditions necessary for women to exercise their autonomy and agency and ‘develop their personal abilities, pursue their

⁴⁵ Ibid [8].

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Fredman, above n 42, 115.

⁴⁹ *CEDAW* Preamble para 14, arts 1–5, 24. See also *General Recommendation 25*, UN Doc A/59/38, annex I [8], [10].

⁵⁰ *General Recommendation 25*, UN Doc A/59/38, annex I [8].

⁵¹ Ibid [10]. See also Fredman, above n 42, 115.

⁵² *CEDAW* Preamble para 14, arts 2(f), 5, 10(c). See also *General Recommendation 25*, UN Doc A/59/38, annex I [7].

professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices'.⁵³

III APPLICATION OF THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY TO WOMEN'S INDIVIDUAL SITUATIONS

The *Optional Protocol* extended the Committee's mandate to include the consideration of cases concerning the rights of individual women.⁵⁴ The *Optional Protocol's* communication procedure requires the Committee to determine communications submitted to it by or on behalf of individuals or groups of individuals who claim that a state party has violated their rights under *CEDAW*.⁵⁵ In order to do this, the Committee must interpret the rights to non-discrimination and equality and apply them to the specific facts of individual communications to determine whether or not the states parties concerned violated *CEDAW*. This Part provides a brief overview of the communication procedure and analyses how the Committee has applied the rights to non-discrimination and equality in communications concerning reproductive health; violence against women; and civil, political or economic matters. It also examines the nature and significance of the Committee's gender

⁵³ *General Recommendation 28*, UN Doc CEDAW/C/GC/28, [22].

⁵⁴ For an overview of the development of the *Optional Protocol*, including its communication procedure, see Jane Connors, 'Optional Protocol' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 607, 608–16; Sille Jansen, 'The *Optional Protocol* to the Women's Convention: An Assessment of Its Effectiveness in Protecting Women's Rights' in Ingrid Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks, and Prospects* (Intersentia, 2012) 435; Division for the Advancement of Women, Department of Economic and Social Affairs, *The Convention on the Elimination of All Forms of Discrimination against Women — The Optional Protocol: Text and Materials* (United Nations, 2000); Emilia Della Torre, 'Women's Business: The Development of an *Optional Protocol* to the United Nations Women's Convention' (2000) 6(2) *Australian Journal of Human Rights* 181; Silvia Cartwright, 'Rights and Remedies: The Drafting of An *Optional Protocol* to the Convention on the Elimination of All Forms of Discrimination against Women' (1998) 9 *Otago Law Review* 239; Martha Roche 'The Proposed *Optional Protocol* to the Convention on the Elimination of All Forms of Discrimination Against Women' (1998) 3 *Human Rights Law and Practice* 268; Andrew Byrnes, 'Slow and Steady Wins the Race?: The Development of an *Optional Protocol* to the Women's Convention' (1997) 91 *American Society of International Law Proceedings* 383; Aloisia Wörgetter, 'The Draft *Optional Protocol* to the Convention on the Elimination of All Forms of Discrimination against Women' (1997) 2 *Austrian Review of International and European Law* 261; Andrew Byrnes and Jane Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?' (1996) 21 *Brooklyn Journal of International Law* 679.

⁵⁵ *Optional Protocol* arts 1–7. Articles 8–10 of the *Optional Protocol* establish a second mechanism, the inquiry procedure, which empowers the Committee to conduct inquiries into reliable allegations that a state party has committed grave or systematic violations of *CEDAW*. The inquiry procedure requires the Committee to apply the rights to non-discrimination and equality to women's individual situations but as only one inquiry has been completed to date it is not considered here. For an overview of the inquiry procedure, see Connors, 'Optional Protocol', above n 54, 659–68; Simone Cusack, 'Mechanisms for Advancing Women's Human Rights: A Guide to Using the *Optional Protocol* to *CEDAW* and Other International Complaint Mechanisms' (Australian Human Rights Commission, June 2011) 25–31; Donna J Sullivan, 'Commentary on the *Optional Protocol* to the Convention on the Elimination of All Forms of Discrimination against Women' in Inter-American Institute of Human Rights (ed), *Optional Protocol: Convention on the Elimination of All Forms of Discrimination against Women* (Inter-American Institute of Human Rights, 2000) 31, 71–82.

analysis and the relationship between that analysis and the overall consistency between its interpretation and application of the rights to non-discrimination and equality.

A *The Communication Procedure*

The communication procedure permits individuals or groups of individuals (or persons acting on their behalf) to submit communications to the Committee alleging violations by a state party of rights in *CEDAW*.⁵⁶ The procedure affords women the opportunity to seek individual redress and to hold states parties legally accountable for violations of their rights in *CEDAW*. It also provides important opportunities to address systemic discrimination, such as where an individual communication serves as a catalyst for addressing the wider conditions that undermine maternal health care for entire communities or groups of women.⁵⁷

Communications must satisfy the admissibility requirements enumerated in arts 2–4 of the *Optional Protocol*.⁵⁸ These requirements include: exhaustion of domestic remedies;⁵⁹ compatibility of the communication with the provisions of *CEDAW* (*ratione materiae*),⁶⁰ and for the alleged facts to have occurred on or after the entry into force date of the *Optional Protocol* for the state party or to have continued after that date (*ratione temporis*).⁶¹ If a communication satisfies the admissibility requirements, the Committee will consider whether or not the state party has met its legal obligations under *CEDAW*. It then transmits its ‘views’ (ie, decision) to the author and the state party and, in communications involving violations, makes recommendations on how to redress those

⁵⁶ *Optional Protocol* art 2.

⁵⁷ A clear example of the potential for systemic change following an individual communication is the recent commitment of the Brazilian Government to address structural problems in its health system that led to the preventable maternal death of a 28 year old woman. The Government agreed to establish an inter-ministerial group to oversee the implementation of the Committee’s recommendations and to monitor cases involving alleged violations of women’s reproductive and sexual health. It has also agreed to provide training on a human rights approach to maternal mortality: see Plataforma Brasileira de Direitos Humanos Econômicos, Sociais, Culturais e Ambientais, ‘A Victory in Alyne’s Case’ (Media Release, 5 September 2012) <<http://www.dhescbrasil.org.br>>. See also Rebecca J Cook, ‘Human Rights and Maternal Health: Exploring the Effectiveness of the Alyne Decision’ (2013) 41 *Journal of Law, Medicine and Ethics* 103; Rebecca J Cook and Bernard M Dickens, ‘Upholding Pregnant Women’s Right to Life’ (2012) 117 *International Journal of Gynecology and Obstetrics* 90, 92.

⁵⁸ See generally Connors, ‘*Optional Protocol*’, above n 54, 621–47; Sullivan, ‘Commentary on the *Optional Protocol*’, above n 55, 40–54.

⁵⁹ *Optional Protocol* art 4(1). See also Donna J Sullivan, ‘Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the *Optional Protocol* to *CEDAW*’ (OP-CEDAW Technical Papers No 1, International Women’s Rights Action Watch Asia Pacific, 2008).

⁶⁰ *Optional Protocol* art 4(2)(b).

⁶¹ *Ibid* art 4(2)(c).

violations.⁶² Although not legally binding, states parties are required to give due consideration to the views and recommendations of the Committee and must submit a written response to the Committee within six months outlining the steps taken to implement the Committee's decision.⁶³ The Committee may also follow up on states parties' progress in this regard.⁶⁴

At the time this article was written, the Committee had decided 15 communications on their merits,⁶⁵ declared 12

⁶² Ibid art 7(3).

⁶³ Ibid art 7(4).

⁶⁴ Ibid art 7(5).

⁶⁵ *VPP v Bulgaria*, UN Doc CEDAW/C/53/D/31/2011; *Jallow v Bulgaria*, UN Doc CEDAW/C/52/D/32/2011; Committee on the Elimination of Discrimination against Women, *Views: Communication No 19/2008*, 51st sess, UN Doc CEDAW/C/51/D/19/2008 (27 April 2012) (*Kell v Canada*) (holding the state party accountable for discrimination and its failure to prevent loss of ownership of property); Committee on the Elimination of Discrimination against Women, *Views: Communication No 28/2010*, 51st sess, UN Doc CEDAW/C/51/D/28/2010 (13 April 2012) (*RKB v Turkey*) (holding the state party accountable under *CEDAW* for unlawful termination of employment); Committee on the Elimination of Discrimination against Women, *Views: Communication No 22/2009*, 50th sess, UN Doc CEDAW/C/50/D/22/2009 (25 November 2011) (*LC v Peru*) (holding the state party accountable under *CEDAW* for the decision of a public hospital to delay spinal surgery and refusal to perform an abortion on a pregnant minor who was a survivor of rape and sexual abuse); *Abramova v Belarus*, UN Doc CEDAW/C/49/D/23/2009; *VK v Bulgaria*, UN Doc CEDAW/C/49/D/20/2008; *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, UN Doc CEDAW/C/49/D/17/2008; *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008; *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005; Committee on the Elimination of Discrimination against Women, *Views: Communication No 4/2004*, 36th sess, UN Doc CEDAW/C/36/D/4/2004 (29 August 2006) (*AS v Hungary*) (holding the state party accountable for the involuntary sterilisation of a Hungarian woman of Roma origin); Committee on the Elimination of Discrimination against Women, *Views: Communication No 3/2004*, 36th sess, UN Doc CEDAW/C/36/D/3/2004 (29 August 2006) (*Nguyen v Netherlands*) (finding that a policy of the state party on maternity benefits did not violate *CEDAW*); *AT v Hungary*, UN Doc A/60/38 (Part I), annex III. Details of one of the communications decided at the Committee's 53rd session are not yet available.

inadmissible⁶⁶ and discontinued 4 others,⁶⁷ with at least 16 more communications pending.⁶⁸ A significant proportion of these communications

⁶⁶ Committee on the Elimination of Discrimination against Women, *Views: Communication No 38/2012*, 53rd sess, UN Doc CEDAW/C/53/D/38/2012 (27 November 2012) (*'JS v United Kingdom of Great Britain and Northern Ireland'*) (declaring inadmissible a communication concerning the inability to pass on nationality to a child); *MPM v Canada*, UN Doc CEDAW/C/51/D/25/2010; *Rivera v Canada*, UN Doc CEDAW/C/50/D/26/2010; Committee on the Elimination of Discrimination against Women, *Decision: Communication No 27/2010*, 50th sess, UN Doc CEDAW/C/50/D/27/2010 (30 November 2011) (*'Mukhina v Italy'*) (declaring inadmissible a communication concerning custody of children); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 15/2007*, 42nd sess, UN Doc CEDAW/C/42/D/15/2007 (26 October 2009) (*'Zheng v Netherlands'*) (declaring inadmissible a communication concerning sex trafficking and applications for asylum and residency); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 12/2007*, 44th sess, UN Doc CEDAW/C/44/D/12/2007 (4 August 2009) (*'GD and SF v France'*) (declaring inadmissible a communication concerning inability to change a family name); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 13/2007*, 44th sess, UN Doc CEDAW/C/44/D/13/2007 (4 August 2009) (*'Dayras v France'*) (declaring inadmissible a communication concerning inability to change a family name); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 11/2006*, 37th sess, UN Doc CEDAW/C/37/D/11/2006 (22 January 2007) (*'Salgado v United Kingdom of Great Britain and Northern Ireland'*) (declaring inadmissible a communication concerning the inability to pass on nationality to a child); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 10/2005*, 38th sess, UN Doc CEDAW/C/38/D/10/2005 (12 June 2007) (*'NSF v United Kingdom of Great Britain and Northern Ireland'*) (declaring inadmissible a communication concerning an asylum claim based on domestic violence); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 8/2005*, 34th sess, UN Doc CEDAW/C/34/D/8/2005 (27 January 2006) (*'Kayhan v Turkey'*) (declaring inadmissible a communication concerning termination of employment for wearing a headscarf); Committee on the Elimination of Discrimination against Women, *Decision: Communication No 7/2005*, 39th sess, UN Doc CEDAW/C/39/D/7/2005 (9 August 2007) (*'Muñoz-Vargas y Sainz de Vicuña v Spain'*) (declaring inadmissible a communication that concerned succession to a title of nobility); *Report of the Committee on the Elimination of Discrimination against Women: Thirtieth Session; Thirty-First Session*, UN GAOR, 59th sess, Supp No 38, UN Doc A/59/38 (2004) annex VIII (*'Decision of the Committee on the Elimination of Discrimination against Women, Declaring a Communication Inadmissible under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Communication No 1/2003, Ms B-J v Germany'*) (*'B-J v Germany'*) (declaring inadmissible a communication concerning divorce and maintenance).

⁶⁷ *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 63rd sess, Supp No 38, UN Doc A/63/38 (6 August 2008) [398] (noting its decision to discontinue *LH v Netherlands, Communication No 9/2005*); *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 64th sess, Supp No 38, UN Doc A/64/38 (29 July 2009) [17] (noting its decision to discontinue *LPH v Netherlands, Communication No 14/2007* and *BI v Canada, Communication No 16/2007*); *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 67th sess, Supp No 38, UN Doc A/67/38 (2 April 2012) [22] (noting its decision to discontinue *Communication No 21/2009* against Italy). Communications have been discontinued because the claim had become moot and based on information provided by the author: see, eg, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 67th sess, Supp No 38, UN Doc A/67/38 (2 April 2012) annex IV (*'Report of the Working Group on Communications under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women on its Nineteenth and Twentieth Sessions'*) [11(d)], [12(b)]. As the Committee does not publish discontinued communications, the substance of each claim is unknown.

⁶⁸ Jane Connors, 'Development of CEDAW Jurisprudence under the *Optional Protocol*' (Speech delivered at *CEDAW: 30 Years of Working for Women's Rights*, Istanbul, 1–3 November 2012) <http://www2.ohchr.org/english/bodies/cedaw/docs/statements/JaneConnors_StatementIstanbul.pdf>.

focused on human rights issues that affect women exclusively or in much greater numbers than men, which is not surprising considering *CEDAW*'s focus on women and sex/gender issues. Most striking is the high proportion of communications alleging violations of *CEDAW* related to reproductive health⁶⁹ or gender-based violence.⁷⁰ Yet the Committee is increasingly being required to address a more diverse range of human rights issues. In addition to reproductive health and gender-based violence, the Committee has considered communications concerning titles of nobility, marriage and family relations, asylum claims, employment matters and nationality — what will broadly be referred to here as civil, political and economic matters.⁷¹

In each of these communications and in the ones that will follow them the Committee was or will be required to apply the rights to non-discrimination and equality to women's individual situations. Consistency between the Committee's interpretative practice and its application of the rights to non-discrimination and equality in individual communications is integral to the fulfilment of its mandate and is necessary to ensure legal certainty of the rights and obligations under *CEDAW*.⁷² Such consistency is also essential to help ensure that women have confidence in the *Optional Protocol* as a tool to claim their rights and benefit from the full range of protections afforded to them by *CEDAW*. Moreover, such consistency is important to the ongoing development of a robust and progressive body of jurisprudence on women's human rights.

As the number of communications continues to grow and the Committee's jurisprudence takes on increased significance, it is important to reflect on how the Committee has applied the rights to non-discrimination and equality to women's individual situations and whether and to what extent the victims in those communications benefited from the Committee's generous interpretation of those rights. As the analysis below shows, there has been a high degree of consistency between the Committee's interpretative practice and its application of the rights to non-discrimination and equality in individual communications concerning reproductive health or violence, but a lower level of consistency in communications concerning civil, political or economic matters. Where inconsistencies are evident there has often been a negative impact on the ability of the women concerned to claim their rights.

B *Individual Communications*

1 *Reproductive Health*

Consistent with its interpretation of the rights to non-discrimination and equality and the analysis set out in its *General Recommendation No 24* (on women and health), the Committee has held several states parties accountable for failing to meet the distinctive reproductive health needs of individual women. Through its application of the rights to non-discrimination and equality in communications concerning abortion, maternal mortality and

⁶⁹ See below Part III(B)(1).

⁷⁰ See below Part III(B)(2).

⁷¹ See below Part III(B)(3). It is acknowledged that there is overlap in the subject matter of many communications.

⁷² See below Part III(B)(1) and Part III(B)(2).

involuntary sterilisation, the Committee has stressed the fundamental importance of addressing women's distinctive health needs and interests and providing gender-sensitive health care services and information. It has also highlighted the importance of addressing the intersecting forms of discrimination that nullify and impair the reproductive rights of women from different backgrounds and affirmed that states parties cannot evade their obligations under *CEDAW* by outsourcing reproductive health care services.

In *LC v Peru*, the Committee held the state party accountable under *CEDAW* for the decision of a public hospital to delay spinal surgery and refusal to perform a therapeutic abortion on LC.⁷³ LC was just 11 years old when a 34 year old man began to rape and sexually abuse her. LC became pregnant at the age of 13 as a result of the abuse and in a state of depression attempted suicide by jumping off a building. She was rushed to a hospital where doctors recommended surgery to realign her spine and prevent risk of further injury and permanent paralysis. However, her doctors refused to proceed with the surgery after they learned she was pregnant. They also refused to perform an abortion on LC, even though abortion is lawful in Peru to preserve a woman's life and health. LC later miscarried but the significant delays in providing essential medical care left LC paralysed from the neck down. The Committee determined that the state party violated *CEDAW* when the doctors delayed spinal surgery, refused to perform a therapeutic abortion on LC and prioritised the foetus over the life, health, and dignity of LC based on the stereotype that women should be mothers.⁷⁴

The Committee's decision in *LC v Peru* is historic. First, the Committee held the state party accountable for the discriminatory refusal of the doctors to provide LC a therapeutic abortion, a health care service needed only by women.⁷⁵ Secondly, the Committee's decision reiterates the importance of ensuring that women can access lawful abortion services. The Committee explained that since the state party had recognised therapeutic abortion to preserve a woman's life and health, it was required under *CEDAW* to

establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals who must perform it.⁷⁶

The Committee further explained that the legal framework must: include a mechanism to guarantee timely decisions; ensure the opinion of the woman or girl is taken into account; require well-founded decisions; and establish a right of appeal.⁷⁷ It went on to recommend that the state party review its laws, with a view to establishing 'a mechanism for effective access to therapeutic abortion under conditions that protect women's physical and mental health and prevent

⁷³ *LC v Peru*, UN Doc CEDAW/C/50/D/22/2009, [8.18]–[9].

⁷⁴ *Ibid* [8.15].

⁷⁵ *Ibid* [8.11]–[8.15]. See also Eszter Kismödi et al, 'Human Rights Accountability for Maternal Death and Failure to Provide Safe, Legal Abortion: The Significance of Two Ground-Breaking *CEDAW* Decisions' (2012) 20(39) *Reproductive Health Matters* 31, 34.

⁷⁶ *LC v Peru*, UN Doc CEDAW/C/50/D/22/2009, [8.17].

⁷⁷ *Ibid*.

further⁷⁸ violations similar to those experienced by LC. Thirdly, the Committee's decision is significant as it is the first of an international treaty body to call on a state party to decriminalise abortion in cases where pregnancy results from rape or sexual abuse.⁷⁹ Whereas other international decisions have focused on holding states parties accountable for failing to implement their own abortion laws in practice,⁸⁰ the Committee went further and specifically called for legal recognition of women's right to access abortion in cases of rape and sexual assault.

In another reproductive rights case, *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, the Committee held the state party accountable for its failure to provide timely, non-discriminatory and appropriate health services that would have prevented the maternal death of a poor 28-year-old Afro-Brazilian woman who was six months pregnant.⁸¹ The Committee characterised the death of Alyne as 'maternal' and determined that she had died because she had been denied appropriate and effective services in connection with her pregnancy.⁸² The Committee based its determination on the poor quality of the services, the significant delays in the provision of emergency obstetric care to Alyne and the failure of the private health care centre to transfer Alyne's medical records when she was moved to a public hospital.⁸³

Alyne da Silva Pimentel Teixeira (deceased) v Brazil, like *LC v Peru*, is a groundbreaking case. It is the first decision of a UN treaty body to hold a state party legally accountable for a preventable maternal death,⁸⁴ a condition that only affects women and that therefore requires targeted health responses to meet women's specific reproductive needs. It is also the first decision of a UN treaty body to require a state party to 'provide adequate and quality maternal health care services as part of its non-discrimination obligations'.⁸⁵ According to the expert view of the Committee, '[t]he lack of appropriate maternal health services in the State party ... clearly fail[ed] to meet the specific, distinctive health needs and interests of women'⁸⁶ and therefore constituted discrimination in violation of *CEDAW*. It also had 'a differential impact on the right to life of women'.⁸⁷ In yet another first, the Committee held the state party accountable for intersectional discrimination, specifically on the basis of sex/gender, race and socio-economic

⁷⁸ Ibid [9.2(a)].

⁷⁹ Ibid [9.2(c)].

⁸⁰ See, eg, *KNLH v Peru*, UN Doc CCPR/C/85/D/1153/2003; *LMR v Argentina*, UN Doc CCPR/C/101/D/1608/2007.

⁸¹ *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, UN Doc CEDAW/C/49/D/17/2008, [8]. See also Cook, above n 57.

⁸² *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, UN Doc CEDAW/C/49/D/17/2008, [7.3]–[7.4].

⁸³ Ibid.

⁸⁴ *Xákmok Kásek Indigenous Community v Paraguay* [2010] Inter-Am Court HR (Ser C) No 214. In this case, the Inter-American Court of Human Rights considered a subsidiary claim related to maternal mortality in the land claims case: at [231]–[234]. The Court held Paraguay accountable for the preventable maternal death and ordered provision of appropriate medical care for pregnant women and their newborns.

⁸⁵ Kismödi et al, above n 75, 33.

⁸⁶ *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, UN Doc CEDAW/C/49/D/17/2008, [7.6].

⁸⁷ Ibid.

status.⁸⁸ Other significant aspects of the decision include the clarification of states parties' obligation to adopt and implement adequately funded and action and result-oriented policies that meet women's distinctive health needs⁸⁹ and the due diligence obligation to ensure that private institutions implement health policies and practices appropriately.⁹⁰

In *AS v Hungary*, the Committee held the state party accountable for its failure to obtain full and informed consent and to provide reproductive health information before sterilising AS, a Hungarian woman of Roma origin.⁹¹ The Committee based its decision on the short time span between the arrival of AS at the hospital and the completion of two medical procedures (ie the sterilisation and a caesarean section), her poor state of health upon arrival and the barely legible handwritten note included at the bottom of the consent form that used the Latin term for sterilisation, which was unknown to AS. The Committee also rejected as implausible the state party's suggestion that hospital staff had provided AS with comprehensive counselling and information sufficient to enable her to make a full and informed decision to be sterilised.

The decision in *AS v Hungary* was the first of a UN treaty body to hold a state party accountable for its failure to provide information necessary to enable a woman to give full and informed consent to a reproductive health procedure and, consequently, it laid important groundwork for subsequent decisions on involuntary sterilisation.⁹² The decision in *AS v Hungary* is also important as it affirms, in line with the Committee's *General Recommendation No 24*, that the obligation of states parties to ensure women access to appropriate health care services in connection with pregnancy means services that, inter alia, are based on women's fully-informed consent and respect their dignity and reproductive self-determination.⁹³ Furthermore, the Committee's decision helpfully addresses the social reality of involuntary sterilisation, a practice that disproportionately affects women, especially particular subgroups, of women including Romani women, HIV-positive women and women and girls with disabilities.

2 *Violence against Women*

The Committee has upheld the claims of all women who have alleged violations of *CEDAW* resulting from gender-based violence, in line with its interpretation in *General Recommendation No 19* of such violence as a form of discrimination prohibited under art 1 of *CEDAW*. Almost all violence-related

⁸⁸ Ibid [7.7].

⁸⁹ Ibid [7.6].

⁹⁰ Ibid [7.5].

⁹¹ *AS v Hungary*, UN Doc CEDAW/C/36/D/4/2004, [11.2]–[11.4].

⁹² See, eg, *VC v Slovakia* (European Court of Human Rights, Chamber, Application No 18968/07, 8 February 2012) [84] (holding the state accountable for involuntary sterilisation of a Roma woman and referring to the *CEDAW* Committee's decision in *AS v Hungary*, Communication No 4/2004).

⁹³ Despite earlier recognition of the obligation to eliminate intersectional discrimination, the Committee failed to consider how AS's status as a Roma woman influenced the sterilisation. Notwithstanding this oversight, subsequent jurisprudence has displayed greater attention to the impact of intersectional discrimination on women's rights: see, eg, *Ahne da Silva Pimentel Teixeira (deceased) v Brazil*, UN Doc CEDAW/C/49/D/17/2008, [7.7].

communications have concerned compliance with the due diligence obligation to prevent, investigate, punish and remedy domestic violence.⁹⁴ Although the facts differ, each communication reveals evidence of a sustained and serious pattern of actual and/or threatened violence by a current or former partner that was known to officials or authorities of the states parties concerned. A small number of violence-related communications have concerned issues other than domestic violence, including sexual harassment and rape/sexual assault. What is clear from all these communications is the seriousness with which the Committee views discriminatory gender-based violence against women and the high standard of action it requires states parties to take to protect and support individual victims/survivors. Also clear is the importance the Committee attaches to primary prevention, particularly addressing the root causes of violence.

AT v Hungary is the first in a line of cases in which the Committee has affirmed that gender-based violence against women is a form of discrimination prohibited under *CEDAW*.⁹⁵ It is also the first of a number of cases in which the Committee has elucidated the content and meaning of the due diligence obligation through its application of the obligation to a specific set of facts involving domestic violence.⁹⁶ The Committee held the state party accountable in this case for its failure to protect AT effectively against domestic violence. AT's former partner had abused her for a period of more than four years and she had been unable to exclude him from the family home despite instituting civil and criminal proceedings. AT had also been unable to obtain a protection order or to seek refuge due to the unavailability of such orders and adequately equipped shelters within the state party.⁹⁷ In upholding AT's claim, the Committee determined that the state party's legal and institutional frameworks on domestic violence fell well short of international standards and its remedies provided ineffective protection and support for victims/survivors.⁹⁸ The Committee also condemned the low priority afforded by national courts to domestic violence matters and the failure to address wrongful gender stereotyping, which it considered to be a root cause of gender-based violence within the state party.⁹⁹ The Committee's decision makes it clear that the due diligence obligation requires states parties to: implement robust legal protections against gender-based violence; ensure that courts prioritise women's rights to life and physical and mental integrity over the rights of perpetrators;¹⁰⁰ and address the root causes of gender-based violence.¹⁰¹

⁹⁴ Claims of domestic violence have also been made in several communications related to asylum. As the decisions focused primarily on the asylum claims, they are considered in Part III(B)(3). It should be noted, however, that each communication was declared inadmissible.

⁹⁵ *AT v Hungary*, UN Doc A/60/38 (Part I), annex III [9.2].

⁹⁶ *Ibid.*

⁹⁷ *Ibid* [9.4].

⁹⁸ *Ibid* [9.3].

⁹⁹ *Ibid* [9.3]–[9.4].

¹⁰⁰ The European Court of Human Rights subsequently adopted this view in its decision in *Opuz v Turkey* (European Court of Human Rights, Chamber, Application No 33401/02, 9 September 2009) [147] (holding the state accountable for its failure to protect a woman and her mother effectively against domestic and family violence and referring to *CEDAW* and the Committee's jurisprudence on domestic violence).

¹⁰¹ *AT v Hungary*, UN Doc A/60/38 (Part I), annex III [9.2]–[9.5].

Subsequent domestic violence cases have required the Committee to consider allegations that the states parties concerned failed to ensure that the victims/survivors benefited from existing legal protections in practice. In two such cases, *Yildirim (deceased) v Austria* and *Goekce (deceased) v Austria*, the Committee held the state party accountable for its failure to prevent the victims, Yildirim and Goekce, from being murdered by their husbands, despite sustained periods of serious violence that were known to the authorities.¹⁰² In doing so, the Committee acknowledged the state party's comprehensive system to address domestic violence but noted that in order for women to realise their rights in practice 'the political will that is expressed in the ... system ... must be supported by State actors, who adhere to the State party's due diligence obligations'.¹⁰³ According to the Committee, the steps taken by the state party to implement its legal protections, including the prosecution of the perpetrators to the full extent of the law, were inadequate to prevent the deaths of Yildirim and Goekce.¹⁰⁴ Key in this regard was the state party's failure to detain the perpetrators in spite of its knowledge of the extremely serious threat they posed to the women. Andrew Byrnes and Eleanor Bath have suggested that

[t]he upshot of this appears to be that in a case where there was preventable violence that has occurred because of the State's failure to fulfill its duty of due diligence, prosecution of the offender will not in itself be enough to cure the earlier violation, though it may be necessary to avoid a further violation.¹⁰⁵

Whilst acknowledging the rights of the perpetrators, the Committee reiterated the view it expressed in *AT v Hungary* that those rights cannot be allowed to supersede women's rights to life and their physical and mental integrity.¹⁰⁶

VK v Bulgaria, like the two previous communications, concerned the de facto enjoyment of legal protections against domestic violence. However, unlike those communications, *VK v Bulgaria* focused primarily on the refusal of domestic courts to issue a permanent protection order. In holding the state party accountable for refusing VK such an order, the Committee criticised its reliance on an overly restrictive understanding of domestic violence, its failure to take the complete history of violence into account and the excessively high standard of proof imposed on the victim/survivor.¹⁰⁷ The Committee cautioned against such a restrictive understanding and clarified that gender-based violence must be understood to include actual and threatened physical and non-physical violence, coercion and other deprivations of liberty; a direct and immediate threat to life,

¹⁰² *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.4]–[12.1.6]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.3]–[12.1.6].

¹⁰³ *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.2]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.2].

¹⁰⁴ *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.5]–[12.1.6]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.5]–[12.1.6].

¹⁰⁵ Andrew Byrnes and Eleanor Bath, 'Violence against Women, the Obligation of Due Diligence, and the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* — Recent Developments' (2008) 8 *Human Rights Law Review* 517, 525.

¹⁰⁶ *Yildirim (deceased) v Austria*, UN Doc CEDAW/C/39/D/6/2005, [12.1.5]; *Goekce (deceased) v Austria*, UN Doc CEDAW/C/39/D/5/2005, [12.1.5].

¹⁰⁷ *VK v Bulgaria*, UN Doc CEDAW/C/49/D/20/2008, [9.9].

health or physical integrity, it said, is not required.¹⁰⁸ At the same time, the Committee clarified that it is inconsistent with *CEDAW* and current anti-discrimination standards to require an individual victim/survivor in civil proceedings to prove domestic violence beyond all reasonable doubt.¹⁰⁹ The Committee was also highly critical of the lack of domestic violence shelters and the domestic courts' reliance on gender stereotypes.¹¹⁰

In *Jallow v Bulgaria*, the Committee held the state party accountable for its failure to provide effective protection against domestic violence.¹¹¹ The communication centred around the state party's failure to conduct 'a suitable and timely investigation'¹¹² into allegations of domestic violence against Jallow. The Committee was especially critical of the state party's failure to interview Jallow about the abuse it was alleged she had suffered and its disregard for her vulnerable position as an isolated and illiterate immigrant with little command of Bulgarian.¹¹³ Also central to the case was the state party's reliance on gender stereotypes, which the Committee determined contributed to its decision to investigate allegations of violence made by Jallow's partner but not by her. According to the Committee, the authorities based their actions 'on a stereotyped notion that the husband was superior and that his opinions should be taken seriously'¹¹⁴ and ignored evidence concerning the disproportionate and discriminatory impact of domestic violence on women.

As with domestic violence, the Committee has held states parties to a high standard in communications concerning other forms of discriminatory gender-based violence. In one such communication, *Abramova v Belarus*, the Committee held the state party accountable under *CEDAW* for discriminating against and sexually harassing Abramova whilst she was detained under administrative arrest.¹¹⁵ The Committee based its decision on the failure of the state-run detention facility to meet the distinctive needs of female prisoners and to ensure that women prisoners were attended and supervised by women officers.¹¹⁶ It also based its decision on the treatment of Abramova by the male guards, which included touching her inappropriately, threatening to strip her naked, unrestricted visual and physical access to her and unjustified interference with her privacy including watching her use the toilet.¹¹⁷ The Committee's decision clarified that the failure to meet the specific needs of women detainees and the failure to ensure that women prisoners are attended and supervised by women officers constitutes discrimination under art 1 of *CEDAW*.¹¹⁸ It also affirmed that gender-based violence perpetrated by state actors, including sexual harassment and gender violence constituting torture and other cruel, inhuman or

¹⁰⁸ Ibid [9.8].

¹⁰⁹ Ibid [9.9].

¹¹⁰ Ibid [9.11]–[9.13].

¹¹¹ *Jallow v Bulgaria*, UN Doc CEDAW/C/52/D/32/2011, [8.4].

¹¹² Ibid [8.4].

¹¹³ Ibid [8.2], [8.5].

¹¹⁴ Ibid [8.6].

¹¹⁵ *Abramova v Belarus*, UN Doc CEDAW/C/49/D/23/2009, [7.7].

¹¹⁶ Ibid [7.3]–[7.6].

¹¹⁷ Ibid [7.7].

¹¹⁸ Ibid [7.4]–[7.5].

degrading treatment or punishment, violates the prohibition against discrimination.¹¹⁹

Vertido v Philippines,¹²⁰ another violence-related communication, involved the acquittal of a man accused of rape. In upholding the rights of Vertido, a majority of the Committee condemned the state party for not making lack of consent an essential element of the crime of rape¹²¹ and its failure to ensure that Vertido had access to an effective remedy, evidenced by the eight year delay in bringing her case to trial.¹²² The majority was also highly critical of the trial judge for basing her decision to acquit the accused on gender stereotypes and myths about rape, rather than on law and fact. It determined that, because of her reliance on stereotypes and myths, the trial judge formed a favourable view of the accused's credibility and a negative view of Vertido's credibility, particularly as she had not responded how an 'ideal' victim was expected to respond in a rape situation.¹²³ *Vertido v Philippines* affirms that states parties must ensure that their rape/sexual assault laws focus on lack of consent and do not include requirements related to physical resistance, use of force or violence or proof of penetration.¹²⁴ They must also ensure that allegations of rape/sexual assault are 'dealt with in a fair, impartial, timely and expeditious manner'.¹²⁵ Furthermore, the case provides early guidance on states parties' obligations with respect to wrongful gender stereotyping, including the obligation of judges to

take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.¹²⁶

The Committee's most recent decision on gender-based violence, *VPP v Bulgaria*,¹²⁷ concerned sexual violence against a minor and, fittingly, reinforces the seriousness with which the Committee views gender-based violence and the failure to provide effective protection against such violence. The Committee held the state party accountable for its inadequate legal protections against sexual violence and failure to exercise due diligence in relation to the violent acts perpetrated against VPP.¹²⁸ The Committee based its decision on the state party's decision to charge the perpetrator with sexual molestation rather than rape or attempted rape, the two year delay in filing charges and the plea bargain agreement that left VPP without a remedy, resulting in the perpetrator receiving a three year suspended sentence, which was considerably less than the prescribed maximum sentence.¹²⁹ Also central to the Committee's findings were the

¹¹⁹ Ibid [7.4], [7.7].

¹²⁰ *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008.

¹²¹ Ibid [8.7].

¹²² Ibid [8.3].

¹²³ Ibid [8.5]–[8.6].

¹²⁴ Ibid [8.5], [8.7], [8.9(b)(i)]–[8.9(b)(ii)].

¹²⁵ Ibid [8.3].

¹²⁶ Ibid [8.4]. See also Simone Cusack and Alexandra S H Timmer, 'Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v The Philippines*' (2011) 11 *Human Rights Law Review* 329, 339–40.

¹²⁷ *VPP v Bulgaria*, UN Doc CEDAW/C/53/D/31/2011.

¹²⁸ Ibid [9.5]–[9.10].

¹²⁹ Ibid [9.5], [9.9].

absence of effective remedies for victims/survivors of sexual violence and the state party's failure to ensure that its legal protections reflected the seriousness of sexual violence and did not enforce gender stereotypes.¹³⁰ Other relevant factors included the absence of legal mechanisms to protect against re-victimisation and policies and procedures that guaranteed victims/survivors access to appropriate healthcare services.¹³¹

3 *Civil, Political and Economic Matters*

In contrast to the 100 per cent success rate in communications concerning reproductive health or violence against women, few women have had their claims upheld in communications involving civil, political or economic matters. In fact, the Committee has declared all but two such communications inadmissible and the two successful communications have contained dissenting or concurring opinions related to the proper application and understanding of the rights to non-discrimination and equality.¹³² In many instances, there have been legitimate reasons for declaring the communications inadmissible. For example, in *MPM v Canada*, the alleged victim rendered her claim that deportation from the state party posed a serious risk to her life and safety moot when she returned voluntarily to Mexico.¹³³ In *Mukhina v Italy*, the alleged victim failed to provide sufficient information to substantiate her claim that the state party had violated her rights under *CEDAW* when it revoked custody of her child;¹³⁴ and in *JS v United Kingdom of Great Britain and Northern Ireland*, the alleged victim conceded that domestic remedies concerning transmission of nationality had not been exhausted.¹³⁵ Yet, it is respectfully argued that the low success rate in communications concerning civil, political or economic matters is due in part to the Committee's more conservative application of the rights to non-discrimination and equality to women's individual situations and/or differences of opinion

¹³⁰ Ibid [9.5]–[9.7], [9.11].

¹³¹ Ibid [9.7], [9.10].

¹³² See *Kell v Canada*, UN Doc CEDAW/C/51/D/19/2008; *RKB v Turkey*, UN Doc CEDAW/C/51/D/28/2010. In *Kell v Canada*, which concerned the loss of Kell's property rights, the majority and dissenting Committee members disagreed about whether the standard of proof for a claim of discrimination had been met. The majority found that Kell had been discriminated against because she is an Aboriginal woman and victim/survivor of domestic violence but it remained silent as to which specific actions leading to or following the loss of her property rights constituted discrimination: *Kell v Canada*, UN Doc CEDAW/C/51/D/19/2008, 15 [10.2]. Committee member Schulz dissented, noting that Kell had not substantiated her allegation of discrimination and in any event concluded that the loss of Kell's property rights stemmed from the allegedly fraudulent actions of her former, deceased partner and not from the discriminatory treatment of the state party: at 21–2 [3.1]–[3.2] (Committee member Schulz). In *RKB v Turkey*, which concerned unlawful termination of employment, the majority and concurring Committee members determined that the state party violated *CEDAW* when its courts failed to hold the employer accountable for unequal treatment. However, they disagreed about whether the state party had violated RKB's formal or substantive equality rights: *RKB v Turkey*, UN Doc CEDAW/C/51/D/28/2010, [8.6]. See also at 16 (Committee member Patten).

¹³³ *MPM v Canada*, UN Doc CEDAW/C/51/D/25/2010, [6.3]–[6.4].

¹³⁴ *Mukhina v Italy*, UN Doc CEDAW/C/50/D/27/2010, [4.2].

¹³⁵ *JS v United Kingdom of Great Britain and Northern Ireland*, UN Doc CEDAW/C/53/D/38/2012, [6.3].

amongst its members about the proper application of those rights to the particular facts.¹³⁶

*Muñoz-Vargas y Sainz de Vicuña v Spain*¹³⁷ provides a clear example of the impact of these inconsistencies and differences of opinion. The case concerned the succession of Muñoz-Vargas y Sainz de Vicuña, the firstborn child of the Count of Bulnes, to her father's title of nobility. Under the Decree on the Order of Succession to Titles of Nobility ('Decree'), which was then in effect in the state party, a woman was entitled to inherit a nobility title only if she was the firstborn child and did not have a younger brother. Following the death of the Count, Muñoz-Vargas challenged the succession of her younger brother to the title, claiming that male primacy in the order of succession to nobility titles was discriminatory and, thus, unconstitutional. Her claim was dismissed on the ground that the Decree was compatible with the rights to non-discrimination and equality because of the honorary and historic nature of nobility titles and because succession occurred prior to the *Spanish Constitution's* commencement.

Muñoz-Vargas subsequently submitted a communication to the Committee, claiming a violation of *CEDAW* in general and art 2 (general obligations) in particular.¹³⁸ Her communication was unsuccessful, however, with a slim majority of the Committee declaring it inadmissible *ratione temporis* on the basis that succession occurred before *CEDAW* or the *Optional Protocol* entered into force, both internationally and for Spain.¹³⁹ Several Committee members also found the communication inadmissible on the basis that it was incompatible with *CEDAW*.¹⁴⁰ One Committee member, Dairiam, issued a dissenting opinion in which she declared the communication admissible and found a violation, in principle, of the rights to non-discrimination and equality and a violation of art 5(a) on gender stereotyping.¹⁴¹

The different approaches of the concurring and dissenting Committee members to the interpretation and application of the rights to non-discrimination and equality help to explain their divergent views in *Muñoz-Vargas y Sainz de Vicuña v Spain*.¹⁴² The concurring members took the view that the rights to non-discrimination and equality in *CEDAW* apply only in relation to 'human rights and fundamental freedoms'.¹⁴³ As there is no human right to succeed to a title of nobility and the concurring members viewed the title in question to be 'of a purely symbolic and honorific nature, devoid of any legal or material effect',¹⁴⁴

¹³⁶ It is beyond the scope of this article to provide an exhaustive examination of the 15 communications related to civil, political or economic matters. A representative sample of communications has therefore been selected for discussion.

¹³⁷ *Muñoz-Vargas y Sainz de Vicuña v Spain*, UN Doc CEDAW/C/39/D/7/2005.

¹³⁸ Ibid [3.1].

¹³⁹ Ibid [11.1]–[11.7].

¹⁴⁰ Ibid [12.1]–[12.2] (Committee members Arocha Dominguez, Flinterman, Patten, Pimentel, Saiga, Simms, Tan and Zou).

¹⁴¹ Ibid [13.4]–[13.13].

¹⁴² The decision of the Committee members who authored the majority opinion to find the communication inadmissible *ratione temporis* meant that they did not attempt to apply the rights to non-discrimination and equality to the particular facts of the communication: see *ibid* [11.5].

¹⁴³ Ibid [12.2] (Committee members Arocha Dominguez, Flinterman, Patten, Pimentel, Saiga, Simms, Tan and Zou).

¹⁴⁴ Ibid [12.2].

they concluded that Muñoz-Vargas's claim was not compatible with *CEDAW*. This view aligns with a textual reading of art 1 of *CEDAW* which, as explained previously, defines discrimination as a difference in treatment based on sex/gender that impairs or nullifies women's human rights.

In contrast, Committee member Dairiam took the view that the communication was not concerned with a right to succeed to a title of nobility, which she conceded does not exist but, rather, with gender stereotypes and the different treatment of women and men 'in the distribution of social privileges using the law and legal processes'.¹⁴⁵ For Dairiam, it was simply a case of formal discrimination involving stereotypes that entrenched the notion of the inferiority of women.¹⁴⁶ Declaring the communication admissible *ratione materiae* was thus not inconsistent in her view with the phrase 'human rights and fundamental freedoms' in art 1 of *CEDAW*.¹⁴⁷ In fact, Dairiam considered that the concurring members' textual reading of art 1 failed to 'take into account the intent and spirit of the *Convention*'.¹⁴⁸ In finding violations of the rights to non-discrimination and equality, Dairiam expressed the view that states parties must ensure that any laws they adopt do not discriminate against women on the basis of sex/gender.¹⁴⁹ The fact that the state party, when it enacted and enforced a law regulating titles of nobility, chose to treat women and men differently on the basis of discriminatory norms and stereotypes that entrenched women's inferiority was thus sufficient in Dairiam's view to find a violation of *CEDAW*. Dairiam went on to explain that:

when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, it is a violation, in principle, of women's right to equality.¹⁵⁰

¹⁴⁵ Ibid [13.8]. See also at [13.9].

¹⁴⁶ See generally Fareda Banda, 'Project on a Mechanism to Address Laws that Discriminate against Women' (Report, Office of the High Commissioner for Human Rights, 6 March 2008) 103–7 <http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf>.

¹⁴⁷ *Muñoz-Vargas y Sainz de Vicuña v Spain*, UN Doc CEDAW/C/39/D/7/2005, [13.5], [13.8], [13.9].

¹⁴⁸ Ibid [13.9].

¹⁴⁹ Ibid [13.4], [13.5]. Dairiam's reasoning in *Muñoz-Vargas y Sainz de Vicuña v Spain* echoes that of two dissenting members of the Human Rights Committee in similar inadmissible decisions concerning Spanish titles of nobility. In both cases, Committee member Rivas Posada stressed that the authors' claims were based on Spanish law and not caprice, which positively required discrimination against women. He even went so far as to say that the majority had ruled *ultra petita* and should have restricted their determination to the claim of sex discrimination. Committee member Solari-Yrigoyen supported Rivas Posada's view that the communication was concerned with sex discrimination rather than a claim to succeed to a title of nobility and that the law (enforced by Spanish courts) established the superiority of men over women. He concluded that the law was discriminatory and could not be justified by reference to historical traditions or on any other grounds: Human Rights Committee, *Decision: Communication No 1008/2001*, 80th sess, UN Doc CCPR/C/80/D/1008/2001 (15 June 2004) [3]–[5] (Committee member Rivas Posada), 14–15, 17 (Committee member Solari-Yrigoyen) ('*Isabel Hoyos Martínez de Irujo v Spain*'); Human Rights Committee, *Decision: Communication No 1019/2001*, 80th sess, UN Doc CCPR/C/80/D/1019/2001 (24 June 2004) [3]–[5] (Committee member Rivas Posada), 12–13, 15 (Committee member Solari-Yrigoyen) ('*Barcaiztegui v Spain*') (both declaring inadmissible communications that concerned succession to titles of nobility).

¹⁵⁰ *Muñoz-Vargas y Sainz de Vicuña v Spain*, UN Doc CEDAW/C/39/D/7/2005, [13.7].

‘Such exceptions’, she continued,

serve to subvert social progress towards the elimination of discrimination against women using the very legal processes meant to bring about this progress, reinforce male superiority and maintain the status quo.¹⁵¹

It is not clear whether the concurring and dissenting Committee members were in agreement about the scope of the right to non-discrimination. Whilst the concurring members expressed the view that the art 1 definition of discrimination applies to ‘human rights and fundamental freedoms’, Dairiam appears to have suggested a broader interpretation, one that recognises an ‘inalienable right to non-discrimination on the basis of sex which is a stand-alone right’.¹⁵² Dairiam went on to note that

[i]f this right is not recognized in principle regardless of its material consequences, it serves to maintain an ideology and a norm entrenching the inferiority of women that could lead to the denial of other rights that are much more substantive and material.¹⁵³

Yet, at the same time, Dairiam went to great lengths to point out the connection between the impugned law and art 5 of *CEDAW*; that is to say, to find a connection with a human right that might bring the communication within the scope of art 1. Regardless, the ways in which the concurring and dissenting Committee members characterised Muñoz-Vargas’s claim were fundamentally at odds with each other — the former taking the view that she had asserted a right to succeed to a title of nobility and the latter considering that she had asserted a right, as a woman, not to be treated differently from a similarly situated man under the laws of the state party.

Although the views of the concurring and dissenting Committee members in *Muñoz-Vargas y Sainz de Vicuña v Spain* are not definitive, their differing characterisations and treatment of Muñoz-Vargas’s claim have left lingering questions about the applicability of the rights to non-discrimination and equality in *CEDAW* to titles of nobility and other similar hereditary titles. In the case of the individual opinion of the concurring Committee members, questions remain as to why the communication was not compatible with several of the ‘human rights’ guaranteed by *CEDAW*. This includes art 7 of *CEDAW*, which, as Byrnes has argued, applies to ‘rules which discriminate between males and females in the transmission of these titles ... to the extent that they can be seen as relating to public and political life’.¹⁵⁴ Other potentially relevant provisions include art 16 of *CEDAW* to the extent that titles of nobility can be characterised as pertaining to family relations,¹⁵⁵ art 13(c) to the extent that such titles are seen to relate to cultural life and arts 2(f) and 5(a) on discriminatory norms and gender stereotyping. In considering Dairiam’s view, there are lingering questions about

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Byrnes, ‘Article 1’, above n 15, 70.

¹⁵⁵ Yofi Tirosh, ‘A Noble Cause: A Case Study of Discrimination, Symbols and Reciprocity’ in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press, 2013) 121, 123–9 (arguing convincingly that titles of nobility can be understood as a familial title and legacy to a familial past).

whether or not she intended to suggest an interpretation of the right to non-discrimination that extends beyond the Committee's articulation of those rights described in Part II above.

GD and SF v France,¹⁵⁶ which concerned legislation prohibiting transmission of a mother's surname to her children, is another example of a communication where the different and at times conservative approaches of Committee members to the application of the rights to non-discrimination and equality have affected women's ability to claim their rights. GD and SF submitted a communication to the Committee claiming that the state party had prevented them from using their mothers' surnames, in violation of art 16(1)(g) of *CEDAW*. A majority of the Committee declared the communication inadmissible on the basis that GD and SF had failed to establish that they had legal standing as 'victims' of sex discrimination.¹⁵⁷ The majority reasoned that art 16(1)(g) enables married women, women living in de facto relationships and mothers to keep their maiden name and transmit it to their children, but does not protect children who have been prevented from inheriting their mothers' surnames.¹⁵⁸ Notwithstanding an interim decision of the whole Committee to consider the communication also under arts 2 (general obligations), 5 (gender stereotyping) and 16(1) (marriage and family relations) of *CEDAW*,¹⁵⁹ the majority inexplicably limited its consideration of the communication to art 16(1)(g) and did not consider whether GD and SF were victims of discrimination under those other provisions.

In contrast, five Committee members issued a dissenting opinion in which they declared the communication admissible and found violations of arts 2, 5 and 16(1) of *CEDAW*. The dissenting members took the view that GD and SF had been directly and personally affected because they had inherited their fathers' surnames under a law that discriminated against women and, therefore, had legal standing.¹⁶⁰ Turning to the merits of the communication, the dissenting members concluded that GD and SF were indirect victims of a law based on discriminatory and sexist customary rules that viewed fathers as heads of family and thus violated the aforementioned articles of *CEDAW*.¹⁶¹ The dissenting members explained that states parties are obligated to 'uphold the principle of equality between women and men in their legislation and to ensure practical realization of this principle (article 2) and to abolish and change stereotypes on roles of women and men (article 5)'.¹⁶² These obligations, they felt, had not been met in this case. Byrnes has suggested that the dissenting members' approach of considering the procedural and substantive issues under arts 2, 5 and 16(1) and placing the impugned law 'in a broader social context (in contrast to the more

¹⁵⁶ *GD and SF v France*, UN Doc CEDAW/C/44/D/12/2007.

¹⁵⁷ *Ibid* [11.10], [11.15(a)].

¹⁵⁸ *Ibid* [11.10].

¹⁵⁹ *Ibid* [8].

¹⁶⁰ *Ibid* [12.5] (Committee members Šimonović, Hayashi, Halperin-Kaddari, Pimentel, Neubauer and Chutikul).

¹⁶¹ *Ibid* [12.13]. On the significance of laws regulating names, see Yofi Tirosh, 'A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights' (2010) 33 *Harvard Journal of Law & Gender* 247.

¹⁶² *GD and SF v France*, UN Doc CEDAW/C/44/D/12/2007, [12.15] (Committee members Šimonović, Hayashi, Halperin-Kaddari, Pimentel, Neubauer and Chutikul).

formalistic analysis of the majority)'¹⁶³ underlies their finding of violations of the rights to non-discrimination and equality.¹⁶⁴

Zheng v Netherlands,¹⁶⁵ which concerned the state party's treatment of a Chinese woman who had been trafficked to the Netherlands for the purposes of sex, provides yet another example of the impact of the differences in opinion amongst Committee members about the proper application of the rights to non-discrimination and equality. A majority of the Committee declared the communication inadmissible on the basis of the victim's failure to exhaust domestic remedies relating to asylum and residency.¹⁶⁶ In contrast, three dissenting Committee members declared the communication admissible and found a violation of art 6 of *CEDAW* on trafficking. They concluded that the aforementioned remedies did not need to be exhausted because they were irrelevant to the claim before the Committee, which in their view concerned sex trafficking.¹⁶⁷ They further concluded that the state party's failure to recognise that Zheng was trafficked and to inform her of her rights constituted a violation of art 6.¹⁶⁸ In so concluding, the dissenting members highlighted the nature of the crime and the difficulty that trafficking victims — overwhelmingly women — experience in reporting violations precisely and in detail.¹⁶⁹ They paid particular attention to Zheng's circumstances, including her illiteracy and very limited education and the fact that she was orphaned at an early age.¹⁷⁰ The dissenting members also noted a medical report that corroborated Zheng's claim that she had been trafficked.¹⁷¹ Interestingly, neither the majority nor the dissenting Committee members refer explicitly to the rights to non-discrimination and equality in their respective opinions, though this is likely because art 6 of *CEDAW* is not framed in non-discrimination terms.

*Nguyen v Netherlands*¹⁷² provides a final illustration of how the different and sometimes conservative approaches of Committee members to the application of

¹⁶³ Byrnes, 'The Convention on the Elimination of All Forms of Discrimination against Women', above n 5, 11.

¹⁶⁴ *GD and SF v France*, UN Doc CEDAW/C/44/D/12/2007, [12.15]–[12.17]. The Committee declared another communication concerning a substantially similar claim inadmissible under the *Optional Protocol*: see *Dayras v France*, UN Doc CEDAW/C/44/D/13/2007. Like in *GD and SF v France*, the majority limited its consideration of the case to art 16(1)(g) of *CEDAW*, while the concurring Committee members also took arts 2, 5 and 16(1) of *CEDAW* into account: at [10.3]. See also at [11.5], [11.7]–[11.8] (Committee members Hayashi, Šimonović, Halperin-Kaddari, Pimentel, Neubauer, Chutikul and Popescu). The majority concluded that the communication was inadmissible *ratione temporis* and due to failure to exhaust domestic remedies: at [10.13]. The concurring Committee members determined that the communication was inadmissible due to failure to exhaust domestic remedies: at [11.22] (Committee members Hayashi, Šimonović, Halperin-Kaddari, Pimentel, Neubauer, Chutikul and Popescu). The majority and concurring Committee members disagreed about whether the authors satisfied the standing requirement, adopting similar views to those expressed in *GD and SF v France*: at [10.4]–[10.9]. See also at [11.16]–[11.17], [11.19] (Committee members Hayashi, Šimonović, Halperin-Kaddari, Pimentel, Neubauer, Chutikul and Popescu).

¹⁶⁵ *Zheng v Netherlands*, UN Doc CEDAW/C/42/D/15/2007.

¹⁶⁶ *Ibid* [7.3]–[7.4].

¹⁶⁷ *Ibid* [8.1] (Committee members Dairiam, Neubauer and Pimentel).

¹⁶⁸ *Ibid* [8.7].

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid* [8.6].

¹⁷¹ *Ibid*.

¹⁷² *Nguyen v Netherlands*, UN Doc CEDAW/C/36/D/3/2004.

the rights to non-discrimination and equality in civil, political and economic communications have affected women's ability to claim their rights under *CEDAW*. The *Nguyen v Netherlands* communication focused on an 'anti-accumulation clause' that capped the maternity benefits of women who were concurrently self-employed and working part-time in salaried employment. A majority of the Committee characterised the state party's maternity leave scheme as being consistent with *CEDAW* and determined that Nguyen had not been discriminated against despite receiving less maternity benefits as a result of her dual part-time roles.¹⁷³ The majority acknowledged that *CEDAW* prohibits discrimination on the basis of pregnancy and childbirth and requires states parties 'to introduce maternity leave with pay or comparable social benefits'.¹⁷⁴ However, according to the majority, *CEDAW* does not require 'full compensation for loss of income' resulting from pregnancy and childbirth and it also affords states parties a 'margin of discretion to devise a system of maternity leave benefits'.¹⁷⁵ Whilst the dissenting members agreed with the majority's views regarding the scope and application of *CEDAW*'s protections against direct discrimination, they considered the communication in light of the broader social context of women's employment and determined that the anti-accumulation clause may indirectly discriminate against women who work in multiple part-time roles.¹⁷⁶ In contrast to the majority, the dissenting Committee members expressed particular concern about the disproportionate impact of disadvantageous part-time working conditions on women.¹⁷⁷

4 Summary

This analysis of the Committee's decisions in communications concerning reproductive health, violence against women and civil, political and economic matters is revealing. On the one hand, it shows a high degree of consistency between the Committee's interpretative practice and its application of the rights to non-discrimination and equality in individual communications concerning reproductive health or violence. As the discussion shows, this consistency has been integral to the success of the claims brought by individual women (or those acting on their behalf) and has seen the Committee make a number of important contributions to international human rights law. Additionally, it has laid a strong foundation for the ongoing development of a robust body of jurisprudence on reproductive health and gender-based violence. On the other hand, the Committee's more conservative approach and members' differences of opinion about the proper application of the rights to non-discrimination and equality in communications concerning civil, political or economic matters have impeded the ability of a number of women to claim violations of their rights.

¹⁷³ Ibid [10.2].

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid [10.4]–[10.5] (Committee members Gabr, Schöpp-Schilling and Shin).

¹⁷⁷ Ibid. See also Frances Raday, 'Article 11' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 279, 304.

C *Robust Gender Analysis: A Missing Link?*

Considering the significance of the aforementioned consequences, it is important to scrutinise what is behind the differences in the Committee's application of the rights to non-discrimination and equality. An examination of the Committee's jurisprudence suggests that the strength of its gender analysis is a key, though by no means the only or always the most relevant, reason for the differences.¹⁷⁸ To put it simply, consistency between the interpretation of the rights to non-discrimination and equality and their application to women's individual situations has been at its greatest where the Committee's views reveal a robust gender analysis. In the reproductive health communications, this is noticeable in the high level of scrutiny of states parties' efforts to address the distinctive health needs of women (ie, access to abortion and emergency obstetric care) and practices that disproportionately affect women's health rights (ie, sterilisation). In the communications concerning violence it is evident in the detailed analysis of the extent of states parties' efforts to address the gendered causes and consequences of violence against women and the disproportionate impact of gender-based violence on women. Conversely, there is less consistency between the Committee's interpretation of the rights to non-discrimination and equality and its application of those rights to women's individual situations, where the gender analysis is less rigorous. In this connection, it is significant that in communications concerning civil, political or economic matters, the Committee appears not to comprehend always, or at least has failed to articulate clearly, women's specific needs and/or the ways in which sex/gender have affected the rights of a particular woman. On such occasions, it has been left to individual members of the Committee to undertake a gender analysis.

Take *Muñoz-Vargas y Sainz de Vicuña v Spain* as an example. Whereas the concurring Committee members concluded their examination after determining that there was no human right to a title of nobility,¹⁷⁹ Dairiam proceeded to engage in a gender analysis of the facts and through that analysis identified specific rights in *CEDAW* that were pertinent to the case.¹⁸⁰ Her analysis focused on how titles of nobility embody sex/gender norms, prejudices and stereotypes that operate to entrench the notion of the inferiority of women and sustain a patriarchal institution predicated on that supposed inferiority.¹⁸¹ Her analysis also examined how the Decree and its preference for male succession reproduced the gendered status quo in the state party.¹⁸² It was this perspective, which was missing from the concurring opinion, that allowed Dairiam to declare the

¹⁷⁸ Another reason, evident in many of the communications discussed in Part III(B)(3) above, concerns inconsistencies and weaknesses in some of the Committee's legal analysis and reasoning and its failure at times to articulate its legal reasoning clearly, particularly the relationship between the facts of a communication, its determination and its subsequent recommendations. On inconsistencies in the Committee's decision-making: see, eg, Byrnes and Bath, above n 105, 531–3; Connors, 'Optional Protocol', above n 54, 639, 647; Jim Murdoch, 'Unfulfilled Expectations: The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*' (2010) 1 *European Human Rights Law Review* 26, 42–5.

¹⁷⁹ *Muñoz-Vargas y Sainz de Vicuña v Spain*, UN Doc CEDAW/C/39/D/7/2005, [12.1]–[12.2].

¹⁸⁰ *Ibid* [13.1]–[13.13].

¹⁸¹ *Ibid* [13.7], [13.9].

¹⁸² *Ibid* [13.7].

communication admissible *ratione materiae* and ultimately to find violations of the rights to non-discrimination and equality. The attention paid by the dissenting Committee members in *GD and SF v France* to the sexist customary rules that underpinned the impugned legislation concerning transmission of family names likewise played an important part in their finding of violations of CEDAW.¹⁸³ Similarly, the focus of the minority in *Zheng v Netherlands* on the gendered nature of the crime of trafficking¹⁸⁴ and that of the minority in *Nguyen v Netherlands* on the gendered division of labour and the disproportionate effect of disadvantageous part-time conditions on women¹⁸⁵ were key to their favourable individual opinions.

The considerable work undertaken by feminist legal scholars, sociologists and others, including the Committee, to unearth the gendered causes and consequences of reproductive health violations and violence against women may help to explain the strength of the Committee's gender analysis in related communications. In large part because of this work, there is now widespread awareness that many reproductive health violations are the result of factors such as neglect of women's distinctive reproductive needs, failure to treat women with the same respect and dignity as men and state enforcement of prescriptive stereotypes related to marriage and family relations.¹⁸⁶ There is also greater awareness that violence against women is 'deeply rooted in structural relationships of inequality between women and men' and is not simply 'the result of random, individual acts of misconduct'.¹⁸⁷ Whilst important work has been undertaken in relation to women's civil, political and economic rights — for example in relation to their legal capacity, voting rights, equal pay and in relation to women in leadership — this work has often been less visible and received less traction in human rights and other discourses than work related to reproductive

¹⁸³ *GD and SF v France*, UN Doc CEDAW/C/44/D/12/2007, [12.5]–[12.6], [12.13] (Committee members Šimonović, Hayashi, Halperin-Kaddari, Pimentel, Neubauer and Chutikul).

¹⁸⁴ The dissenting Committee members highlight 'the nature of the crime of trafficking' and a number of aspects of Zheng's experiences (eg, her illiteracy and experiences of prostitution and rape) that affect women in much greater numbers than men: *Zheng v Netherlands*, UN Doc CEDAW/C/42/D/15/2007, [8.6]–[8.7] (Committee members Dairiam, Neubauer and Pimentel). In doing so, they appear to stress the ways in which sex/gender affected Zheng's rights and, more generally, make women more vulnerable than men to the rights-violations that she experienced. In addition, the dissenting Committee members acknowledge that women victims of trafficking often face specific obstacles when seeking justice and highlight the opportunity that the *Optional Protocol* affords states parties 'to assess the weaknesses in the procedures, the legal and administrative institutions and implementation processes of the legal system that do not allow women to obtain the benefit of the law as intended and to take remedial action': at [9.2] (Committee members Dairiam, Neubauer and Pimentel).

¹⁸⁵ *Nguyen v Netherlands*, UN Doc CEDAW/C/36/D/3/2004, [10.5] (Committee members Gabr, Schöpp-Schilling and Shin).

¹⁸⁶ See, eg, Rebecca J Cook and Susannah Howard, 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) 56 *Emory Law Journal* 1039; Reva B Siegel, 'The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions' [2007] *University of Illinois Law Review* 991; Reva Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford Law Review* 261.

¹⁸⁷ *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, UN GAOR, 61st sess, Agenda Item 60(a), UN Doc A/61/122/Add.1 (6 July 2006) [23].

health or gender-based violence.¹⁸⁸ Due to this, a keener analysis of individual communications concerning civil, political and economic matters may be required to unearth the potential ways in which sex/gender may have operated to nullify or impair the exercise and enjoyment of the rights to non-discrimination and equality. There is an important role here for women's rights advocates to assist individual victims/survivors in highlighting how sex/gender has affected their rights.

IV WHERE TO NOW?

Strengthening its gender analysis in individual communications should be a priority for the Committee moving forward and, importantly, will help it to preserve its broad vision of gender equality under *CEDAW* and to ensure that women are afforded maximum opportunity to claim their rights. There is no single correct way for the Committee to ensure a robust gender analysis of individual communications. Indeed, feminist scholars have articulated a variety of methodologies that the Committee could usefully employ to identify, analyse and expose women's gendered experiences of rights violations. Which approaches will prove most effective in any given communication will need to be determined by the Committee and might vary depending on such factors as the nature and context of the alleged violations. Part IV outlines three methodologies — asking the 'woman question', asking the 'man question' and asking the 'other question' — and examines how the Committee could have employed them to strengthen its gender analysis in civil, political and economic communications, using *Muñoz-Vargas y Sainz de Vicuña v Spain* as an example.

A *Asking the 'Woman Question'*

'Asking the woman question', a foundation of feminist methodology, is one approach that the Committee could take to maximise its gender analysis in individual communications. In her classic articulation of the methodology, feminist legal scholar Katharine T Bartlett explained that the 'woman question'

asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also 'male' in a specific sense.¹⁸⁹

Bartlett argued that the 'woman question' requires consideration of the overlapping forms of oppression that women experience because of their

¹⁸⁸ See, eg, Alice M Miller, 'Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection' (2004) 7(2) *Health and Human Rights* 16 (examining how violence, particularly sexual violence, came to prominence in the women's rights movement and the impact of the hyper-visibility of sexual harm).

¹⁸⁹ Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 837.

sex/gender and other aspects of their identities.¹⁹⁰ She suggested that a further series of questions must be asked in order to understand whether all women are considered or are similarly situated and whether some groups of women face specific forms of oppression:

what assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?¹⁹¹

Asking the ‘woman question’ would help to ensure that the situations and gendered experiences of women are key considerations in all of the Committee’s decisions. It would do this by directing the Committee’s attention to what a law, policy or practice says (or implies) or does not say about women or different subgroups of women, including the attributes, characteristics or roles it ascribes to them. The ‘woman question’ would also assist the Committee to expose institutions, systems and structures that are grounded in male paradigms of power and life patterns and to understand the forms of ‘subordination of women that are deeply rooted in our thinking, our myths, and in our individual, institutional, and social ways of functioning’.¹⁹² It might, for instance, prompt the Committee to ask: are domestic institutions, systems and/or structures male-defined? Do they favour men in the distribution of power and resources? Do they perpetuate gender inequality or women’s oppression? The answers that the ‘woman question’ yields will likely put the Committee in a better position to make more gender-sensitive decisions and recommendations that require states parties to take effective steps to redress individual and structural discrimination against women.

Had the concurring members of the Committee asked the ‘woman question’ when determining the compatibility of the *Muñoz-Vargas y Sainz de Vicuña v Spain* communication with *CEDAW*, they might have re-characterised the case as concerning formal discrimination or equal protection of the law, rather than as a case about a non-existent right to succeed to a title of nobility. Specifically, they might have focused their assessment on how the impugned Decree, a law of the state, disadvantaged women with younger brothers and constructed women as inferior to men. Asking if and how the Decree left women out of consideration, for instance, may have led the concurring members to conclude that the nobility regime allowed men with younger brothers, but not women in the same situation, to succeed to titles of nobility. Asking about the gender implications of this difference in treatment may have prompted the members to reflect on the harm that the Decree appeared to inflict on women, specifically how it denied Muñoz-Vargas and other similarly situated women access to a benefit afforded to

¹⁹⁰ Ibid 847. See also bell hooks, *Ain't I A Woman: Black Women and Feminism* (South End Press, 1981); Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *University of Chicago Legal Forum* 139; Angela P Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 581; Angela P Harris, ‘Gender, Violence, Race, and Criminal Justice’ (2000) 52 *Stanford Law Review* 777.

¹⁹¹ Bartlett, above n 189, 848.

¹⁹² Rebecca J Cook, ‘Structures of Discrimination’ (2011) 28 *Macalester International Journal* 33, 33.

men and perpetuated a patriarchal institution that elevated men over women. Taking this analysis one step further, the concurring members might have considered the consequences of the state party's endorsement of the nobility regime, through both its legislative and judicial systems. Lastly, asking about how the difference in treatment could be corrected and what difference it would make to do so may have led the concurring members to conclude that continued endorsement of the nobility regime by the state party must be predicated on gender equality.

B *Asking the 'Man Question'*

At the same time as *CEDAW*'s asymmetry concentrates attention on women, it conceals how the social and cultural construction of men/masculinities contributes to the stratification and subordination of women. The exclusive framing of *CEDAW* has informed the gender analysis of communications with the effect that the Committee has regularly left this potential cause of discrimination unexamined. Yet, it is difficult to see how *CEDAW*'s object and purpose can be achieved unless the social and cultural construction of men/masculinities — a key factor contributing to gender inequality — is also explored. As the Committee moves to consolidate and strengthen its jurisprudence over the coming decades, it is important that it takes steps to ensure that its gender analysis is inclusive of men/masculinities. In fact, *CEDAW* requires it to take such steps.¹⁹³

One way that the Committee could seek to maximise its gender analysis is to ask the 'man question'. Feminist legal theorist Dowd has explained that the 'man question' asks about the gender implications of a law, policy or practice for different groups of men and boys and explores how they accept privilege with its patriarchal dividend and costs.¹⁹⁴ Asking the 'man question' may seem antithetical, at least at first glance, to the decision of *CEDAW*'s framers to focus on women, and there will undoubtedly be some women's rights advocates who are nervous about a call to incorporate this question into the Committee's gender analysis. However, when this methodology is unpacked, it is clear that there are significant advantages for women and gender equality in the Committee asking this question. Asking the 'man question' could, for instance, help the Committee to understand better how, in relation to the particular set of facts before it, male privilege and dominance have been constructed and the relationship between that privilege and dominance and the alleged violations of the victim's rights. This would in turn enable the Committee to tailor its recommendations more effectively in order to eradicate discrimination against women. Asking the 'man question' could also assist the Committee in developing a more nuanced view of discrimination and inequality including, in particular, the way that women and

¹⁹³ *CEDAW* Preamble para 14, arts 2(f), 5(a).

¹⁹⁴ Nancy E Dowd, *The Man Question: Male Subordination and Privilege* (New York University Press, 2010) 1, 66–7. See also Nancy E Dowd, 'Asking the Man Question: Masculinities Analysis and Feminist Theory' (2010) 33 *Harvard Journal of Law & Gender* 415, 415 n 1.

men are regularly assigned distinct, yet mutually reinforcing, (heteronormative) roles and behaviours.¹⁹⁵

If asked in conjunction with the ‘woman question’, the ‘man question’ does not diminish or deny women’s experiences of human rights violations, nor does it detract from or minimise the legacy of patriarchy, which has enabled men in all societies and cultures to occupy a privileged position vis-a-vis women. Rather, as Dowd rightly argues, asking the ‘man question strengthens the promise of feminist analysis’¹⁹⁶ and allows us

to enrich feminist theory by clarifying, reorienting, and further contextualizing how and why inequality exists. It would benefit women as a group and would add men as a group as an object of inquiry, but with due attention to their generally different position.¹⁹⁷

An examination of the Committee’s jurisprudence shows limited attention, at least initially, to the relationship between the social and cultural construction of men/masculinities and violations of women’s rights in *CEDAW*. There is no analysis in *Muñoz-Vargas y Sainz de Vicuña v Spain* of the situation of Muñoz-Vargas’s brother and other similarly situated men or the gender implications of the impugned Decree for men. Had members of the Committee engaged in such an analysis, they might have examined how the social and cultural construction of men (and not women) as nobles, leaders, decision-makers and heads of households influenced the legal recognition by the state party of a regime that privileges a certain class of men over women from that same class in the line of succession for titles of nobility. They might have also examined how such legal recognition allows men from noble families, but not women, to succeed to titles of nobility with its patriarchal dividends, including the social, familial and historical status that such titles bring.

Vertido v Philippines points to the growing awareness amongst Committee members of the importance of taking men/masculinities into account in their gender analysis.¹⁹⁸ In contrast to its earlier decisions, including in *Muñoz-Vargas y Sainz de Vicuña v Spain*, the Committee was careful to consider how sexual stereotypes of both women and men had contributed to the decision of the trial judge to acquit Custodio of raping Vertido. In addition to examining stereotypes of women and how they had influenced the evaluation of Vertido’s testimony, the Committee analysed the reasoning of the trial judge for implicit assumptions about men/masculinities. It was this detailed analysis, prompted by Vertido’s own submissions,¹⁹⁹ which led the Committee to conclude that the acquittal of the accused — a man in his sixties — had also been influenced by the stereotype that older men lack sexual prowess, the assumption being that they are not capable of rape.²⁰⁰ It is possible that the Committee could have reached the same conclusion in this case without also examining male stereotypes. Yet,

¹⁹⁵ Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) 68–70.

¹⁹⁶ Dowd, *The Man Question*, above n 194, 1.

¹⁹⁷ *Ibid* 14.

¹⁹⁸ See *Vertido v Philippines*, UN Doc CEDAW/C/46/D/18/2008, [8.6].

¹⁹⁹ *Ibid* [3.5.1]–[3.5.8].

²⁰⁰ *Ibid* [8.6]. See also Cusack and Timmer, ‘Gender Stereotyping in Rape Cases’, above n 126, 336.

the value of its examination of stereotypes of both women and men lies in the fuller understanding it gained of the role those stereotypes played in the acquittal of the accused.

It is perhaps too soon to tell whether the Committee perceives any value in systematically asking itself the ‘man question’ when determining individual communications. Nonetheless, the steps taken by the Committee towards incorporating the ‘man question’ into its decision-making process provide an important starting point that will enable it to further strengthen its gender analysis in future communications. Exploring masculinities theory could prove useful to the Committee as it seeks to strengthen its analysis further.²⁰¹

C *Asking the ‘Other Question’*

It is common in international human rights institutions and jurisprudence for multiple grounds of discrimination ‘to be assessed independently, leaving discrimination based on the interaction of grounds and factors undetected and thus unaddressed’.²⁰² The UN Special Rapporteur on Violence against Women has explained that

the global discourse on women’s human rights has been largely restricted to a framework of equality and non-discrimination against women versus men, ie an inter-gender focus, which is based on the male norm around which many major human rights instruments remain organized. Consequently important challenges remain in analyzing both non-discrimination and equality as implicating intra-gender differences among women.²⁰³

This suggests that although the ‘woman question’ and the ‘man question’ require attention to all aspects of our identities, they may need to be supplemented with a further methodology that specifically targets intersectional discrimination. Such further inquiry could act as a critical methodological countercheck to ensure that any gender analysis of individual communications is based on a holistic understanding of alleged victims’ multiple identities, rather than essentialist understandings of sex/gender.

²⁰¹ See generally Nancy E Dowd, Nancy Levit and Ann McGinley, ‘Feminist Legal Theory Meets Masculinities Theory’ in Frank Rudy Cooper and Ann C McGinley (eds), *Masculinities and Law: A Multidimensional Approach* (New York University Press, 2012) 25; John M Kang, ‘The Burdens of Manliness’ (2010) 33 *Harvard Journal of Law & Gender* 477; David S Cohen, ‘Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity’ (2010) 33 *Harvard Journal of Law & Gender* 509; Richard Collier, ‘Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender’ (2010) 33 *Harvard Journal of Law & Gender* 431; Dowd, ‘Asking the Man Question’, above n 194; Nancy E Dowd, ‘Masculinities and Feminist Legal Theory’ (2008) 23 *Wisconsin Journal of Law, Gender & Society* 201; R W Connell, *Masculinities* (Polity, 2nd ed, 2005).

²⁰² Joanna N Erdman, Insiya Essajee and Alanna Courtright, ‘Written Comments by: The Health Equity and Law Clinic, International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto’, Communication to the UN Committee on the Elimination of Discrimination against Women in *LC v Peru*, 9 June 2011, [5] <<http://opcedaw.files.wordpress.com/2012/01/lc-v-peru-heal-clinic-amicus-brief.pdf>>.

²⁰³ Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences on Multiple and Intersecting Forms of Discrimination and Violence against Women*, UN Doc A/HRC/17/26 (2 May 2011) [18].

A possible approach is for the Committee to ‘ask the other question’,²⁰⁴ a methodology first articulated by feminist legal scholar and critical race theorist Matsuda. Reflecting on her own analytical and methodological processes, Matsuda explained:

The way I try to understand the interconnection of all forms of subordination is through a method I call ‘ask the other question.’ When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’ When I see something that looks homophobic, I ask, ‘Where are the class interests in this?’²⁰⁵

Matsuda uses the ‘other question’ as a way to broaden her analysis, to uncover and understand the interconnectedness of different forms of subordination and how they coalesce to produce unique forms of oppression.

The value for the Committee of asking itself the ‘other question’ is that it will help to ensure that intersectional discrimination is recognised and addressed consistently in individual communications. This will, in turn, help to ensure that its decisions under the *Optional Protocol* reflect a nuanced view of different women’s individual experiences of discrimination and inequality. The answers that the ‘other question’ yields will also provide useful guidance for states parties and other actors on how to eliminate intersectional discrimination against women.

Asking the ‘other question’ in *Muñoz-Vargas y Sainz de Vicuña v Spain* would have provided the Committee with a clear framework to identify and analyse the class interests in the case. Addressing the class interests directly would have allowed the Committee to express any concerns it might have had about lending legitimacy to a regime that is unequal insofar as it bestows a privilege to certain social classes and not others and, at the same time, address the discriminatory nature of the impugned law of the state party. Had it done so, the Committee (particularly the concurring members) could then have explained that so long as the regime remains in force and continues to be endorsed by the state party it is a violation of *CEDAW* for it to discriminate against women.

V CONCLUSION

The Committee’s generous interpretation of the rights to non-discrimination and equality has breathed life into every word of *CEDAW* and ensured that it remains a dynamic and responsive instrument that women can use to advance their human rights and transform their lives. Furthermore, the Committee’s tireless efforts to articulate the content and meaning of the rights to non-discrimination and equality have greatly improved understanding of the rights violations experienced exclusively or predominantly by women and have been highly influential in shaping equality discourses at the national, regional and international levels. At the same time, the Committee’s broad application of the rights to non-discrimination and equality in individual communications concerning reproductive health and gender-based violence against women has been integral to the overwhelming success of those communications as well as

²⁰⁴ Mari J Matsuda, ‘Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition’ (1991) 43 *Stanford Law Review* 1183, 1189–90.

²⁰⁵ *Ibid* 1189.

the ongoing development of a robust body of jurisprudence on women's human rights. The trend towards a more conservative application of the rights to non-discrimination and equality in individual communications concerning civil, political or economic matters is therefore concerning, especially considering the extremely low success rate of such communications and the impact on women's ability to claim violations of their rights in the aforementioned areas. Whilst, as has been acknowledged, there have been legitimate reasons for the decisions in many such communications, the discrepancies in the Committee's application of the rights to non-discrimination and equality in individual communications concerning reproductive health or gender-based violence on the one hand and civil, political or economic matters on the other warrants further consideration. It has been suggested that the strength of the Committee's gender analysis is a key factor that has contributed to these discrepancies, though other factors also need to be examined. In the meantime, the Committee should take steps to strengthen its gender analysis in individual communications, particularly those concerning civil, political or economic matters. Doing so will help the Committee to preserve its pioneering work in articulating a broad vision of gender equality and afford women maximum opportunity to claim their rights under *CEDAW*.