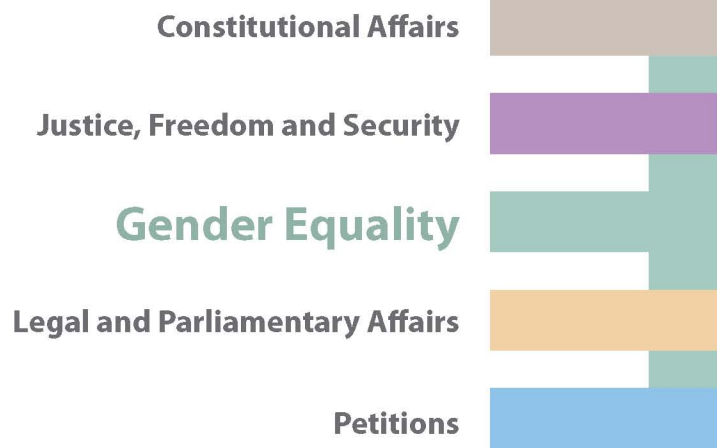


DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



How could the Convention on the elimination of all forms of discrimination Against women (CEDAW) be implemented in the EU legal framework?

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRES**

GENDER EQUALITY

**How could the Convention
On the elimination of all forms of discrimination
Against women (CEDAW)
Be implemented in the EU legal framework?**

NOTE

Abstract

The UN Convention on the elimination of all forms of discrimination against women is the principal and most comprehensive international legal instrument to advance the equal recognition, enjoyment and exercise of all human rights of women in the political, economic, social, cultural, civil and domestic fields. Gender equality, non-discrimination and protection of human rights are established as general principles of the EU and in addition all of the EU Member States are Parties to the CEDAW Convention. Some commonalities with the EU law on gender equality can be identified but also certain differences or weaknesses and strengths of the EU law in comparison to CEDAW. Finally, the challenges for accelerating full implementation of CEDAW within the EU legal and policy are tackled.

This document was requested by the European Parliament's Committee on Gender Equality.

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LIST OF ABBREVIATIONS

| | |
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| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CEDAW | Committee on Elimination of Discrimination against Women |
| CJEU | Court of Justice of the European Union |
| EU | European Union |
| NGOs | Non-governmental organisation |
| NHRIs | National human rights institutions |
| UN | United Nations |

INTRODUCTION

The purpose of the briefing paper is to present the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), identify commonalities with the EU law on gender equality, certain differences or weaknesses and strengths of the EU law in comparison to CEDAW and reflect upon accepting the challenges for accelerating full implementation of CEDAW within the EU legal and policy.

The briefing paper introduces CEDAW as the principal and most comprehensive international legal instrument to advance the equal recognition, enjoyment and exercise of all human rights of women in the political, economic, social, cultural, civil and domestic fields. Furthermore, the sustainable, dynamic and non-exclusionary nature of CEDAW is emphasized as one of its most important notions, whereby its applicability is also related to forms of discrimination not explicitly identified at the time of its drafting and is consequently being continually updated to include new insights and new issues that are brought to the attention of the CEDAW Committee. The CEDAW Optional Protocol and the CEDAW Committee are identified as specific instruments, which carry extensive weight in establishing States Parties' responsibilities for complying with obligations to which they agreed by ratifying or acceding to the Convention. Then the paper provides a state of play of ratification of the Convention and its Optional Protocol by the EU Member States and presents reservations entered and maintained by them.

In analysing the EU law on gender equality the briefing paper addresses one of the primary issues of implementing CEDAW within the EU legal framework. The predominant international practice (with a single exception) is inclined towards favouring states as principal UN conventions' parties compared to regional integration organisations (e.g. EU), therefore all possible venues should be explored within the EU for initiating a process at the UN level to explore the possibilities for adopting an equivalent approach also for the CEDAW Convention.

Hence, the briefing paper concludes with a proposal of challenges for the consideration of the Committee on Women's Rights and Gender Equality of the European Parliament on how to most effectively and efficiently strengthen the EU law on gender equality in reference to the commonalities and differences with CEDAW.

1. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on the 19th December 1979. It came into force as a treaty on the 3rd September 1981; thirty days after the twentieth member state of the United Nations (UN) became a State Party to it. The Convention is monitored by the Committee on the Elimination of Discrimination against Women (hereinafter: CEDAW Committee)¹ which operates at the UN Headquarters in Geneva.

CEDAW is one of the most highly ratified international human rights treaties, having the support of 186 States Parties (as of 13th of May 2011). This is one of the many benefits of the Convention; it can stand as a treaty that has achieved a global consensus and thus reflects the normative standards applicable to women's human rights. Regrettably, at the same time, CEDAW is also the UN human rights treaty with the highest number of reservations and declarations.

1.1. Nature and scope of the Convention on the Elimination of All Forms of Discrimination against Women

CEDAW² is the principal and most comprehensive international legal instrument to advance the equal recognition, enjoyment and exercise of all human rights of women in the political, economic, social, cultural, civil, and domestic or any other field, irrespective of their marital status, and on a basis of equality with men. The spirit and objective of the Convention emanate from principles of international law, general standards of equality and human rights and the goals of the UN as set forth in its Charter.

The Convention, known also as the international Women's Bill of Rights 'expanded the understanding of international law at the time of its adoption'³. Apart from the legally binding obligations to eliminate discrimination against women in all areas of their lives the Convention has specific strength. It stems from the following obligations of the States Parties:

- CEDAW is the first and the only human rights treaty⁴ that obliges the States Parties to modify and abolish social attitudes and cultural patterns and practices which are based on the idea of the inferiority or the superiority of either sex or on stereotyped roles for men and women.⁵ Addressing prevailing gender relations and the persistence of gender-based stereotypes is one of the three obligations central to efforts to eliminate all forms of discrimination against women. This norm entails an obligation to combat gender-based stereotypes in social and cultural life and to eliminate them in law and public policies, both of which State Parties should fulfil loyally, with due diligence, in good faith and without delay.⁶

¹ See below, Section on Committee on the Elimination of Discrimination against Women – its mandate and functions.

² To read the Convention, please visit <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

³ Schöpp-Schilling, H.B., 'The nature and scope of the Convention', *The circle of empowerment*, The Feminist Press at the City University of New York, 2007, pp 10 – 29.

⁴ Treaty is used interchangeably with 'convention' and is a legally binding agreement between states.

⁵ See articles 2(f) and 5(a), CEDAW.

⁶ Holtmaat, R., 'Preventing Violence against Women: the Due Diligence Standard with respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention', *Due Diligence and Its*

- Furthermore, CEDAW requires States Parties to react actively against any act of discrimination against women, regardless of whether such acts or omissions are perpetrated by State agents or by private actors.⁷
- It further obliges States Parties to redress instances of both, direct and indirect discrimination against women,⁸ recognize, prohibit and eliminate intersecting forms of discrimination⁹ and redress their compounded negative impact on women concerned, improve the position of women and achieve de facto/substantive gender equality by all appropriate measures and without delay, including through compensating for past discrimination and different treatment of women concerned¹⁰. The obligation to 'pursue by all appropriate means', as obligation of means or conduct is expressed in the Convention,¹¹ gives a State Party certain extent of discretion in devising a policy that will be appropriate for its particular national framework and that can respond to the particular obstacles and resistance to equality of women and men. Furthermore, building on the differentiation which applies to Member States' obligation under the Convention, namely on their obligation to act by specified means towards the achievement of aspirational goals, and obligations of ends and results, makes it clear that states are obliged to achieve certain results by whatever means are determined to be appropriate. The obligation of achieving results clearly imposes that the principle of equality of women and men in all domains covered by CEDAW must be realized in practice. However, it is for the CEDAW Committee to determine whether all necessary measures were indeed adopted. The agreement of States Parties to pursue an appropriate policy without delay makes it clear that their obligation is of an immediate character. This language is unqualified and therefore a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations of constraints within the State.
- Another – perhaps the most - important notion of CEDAW is also its applicability related to forms of discrimination that had not been identified at the time of its drafting and are therefore not explicitly mentioned in the Convention or that may be emerging. Elimination of violence against women and discrimination against certain disadvantaged groups of women, such as migrant women workers, refugee and asylum seeking women, elderly women and lesbians, bisexual and transgender persons are such examples.

The substance of the Convention is based on three interrelated core principles: equality, non-discrimination and State obligation. These principles provide the framework for formulation of strategies to advance the full and equal enjoyment of human rights by all women on equal footing with men in all fields and throughout their life span, namely

Application to Protect Women from Violence, Nijhoff Law Specials, Benninger-Budel, C., ed., Leiden, Netherlands, Brill/Martinus Nijhoff Publishers, 2008.

⁷ See article 2(e), CEDAW.

⁸ See Chapeau of article 2, CEDAW.

⁹ Intersectionality as a basic concept for understanding the scope of CEDAW is explained in the CEDAW Committee general recommendation No. 28 on the Core obligations of States Parties under Article 2 of the Convention. The recommendation makes it clear that sex- and gender-based discrimination against women is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health status, age, class, caste, and sexual orientation and gender identity. To read this or any other general recommendation adopted by the CEDAW Committee, please visit : <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

¹⁰ For a State Party to CEDAW the adoption of temporary special measures in accordance with article 4(1) of CEDAW and the CEDAW Committee's general recommendation No. 25 is a necessary non-discrimination and gender equality strategy, in particular when through measures the State Party has chosen and implemented the intended effect and results were not achieved. To read this or any other general recommendations adopted by the CEDAW Committee, please visit <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

practical realization of the principle of formal and substantive gender equality¹². The fields covered by the Convention include political and public life, participation and representation of women at the international level, nationality, education at all levels, employment, health and health care, social and economic life, equal protection of the law and equality before the law and civil matters, marriage and family. Apart from these areas and in addition to the general obligations the substantive provisions of CEDAW require States Parties to suppress all forms of trafficking in women and exploitation of women in prostitution, and to ensure the benefits of the Convention to rural women.¹³

All civil and political rights as well as economic, social and cultural human rights, integrated in CEDAW under the framework of non-discrimination and equality, impose negative and positive obligations on States Parties. The concept of positive obligations has been developed and concretised by human rights treaty monitoring bodies and the regional human rights courts. It implies that the general obligation to secure human rights not only requires States Parties to refrain from acting wrongly, but that it can oblige states to take action. CEDAW, for example, obliges States Parties to embody the principle of equality of women and men in their national constitutions or other appropriate legislation and to review all areas of domestic law to eliminate or amend all provisions that are discriminatory in purpose or in effect.¹⁴

The Convention is a dynamic instrument that accommodates the development of international law. It is being continually updated to include new insights and new issues that are brought to the CEDAW Committee's attention. Updating of the meaning and scope of the CEDAW provisions is developed through general recommendations and statements which the Committee on Elimination of Discrimination against Women (CEDAW Committee) is permitted to adopt under article 21 of the Convention.

As a result of this innovative and forward looking approach and with a view to providing an authoritative guidance to States Parties on the meaning of CEDAW provisions and the measures needed to protect rights of women under the Convention, the CEDAW Committee has already adopted twenty-eight general recommendations on provisions of the Convention and important thematic issues. They are based on the past practice and best practice of the CEDAW Committee examination of the reports and information received from the States Parties to the Convention, as well as in the light of recent developments in human rights jurisprudence. The following general recommendations have been most often referred to in the CEDAW Committee's review process of the States Parties reports¹⁵: general recommendations no. 19 on violence against women, no. 21 on equality and marriage in family relations, no. 23 on women's equality in political and public life, no. 24 on women in health, the above mentioned general recommendation no. 25 on application

¹¹ See Chapeau of article 2, CEDAW.

¹² Different terms that are based on moving out of the limitations of conceptual framework of equal treatment and equality of opportunities, such as *de facto* equality, equality in practice or real equality, are often used as synonymous with substantive equality. For the purpose of this briefing paper substantive equality is used in the meaning of equality that takes into account context, and the reality of disadvantage experienced by women, and focuses on equality in outcome and result of policies for eliminating discrimination against women. Such interpretation has been recognized as the standard of equality in General recommendations adopted by the CEDAW Committee. The Committee has emphasized that substantive equality also connects with the enjoyment of other human rights such as personal security and socio-economic rights. This entails eliminating imposed disadvantage and protecting human rights of women rather than focusing on the stereotypical 'vulnerability' of women. See: Goonesekere, S.W.E., The Concept of Substantive Equality and Gender Justice in South Asia, <http://www.unifem.org>.

¹³ General obligations are described in Articles 2, 3 and 4, while different areas in which discrimination must be eliminated through measures that relate to the general obligations are specified in articles 6 to 16 of CEDAW.

¹⁴ See articles 2(a) and 2(f), CEDAW.

of temporary special measures, and more recently adopted general recommendations no. 26 on women migrant workers, no. 27 on older women and protection of their rights and no. 28 on the core obligations of States Parties under article 2 of the Convention.¹⁶

The CEDAW Committee is currently pursuing its work to finalize its general recommendation on economic consequences of marriage and its dissolution. In 2010 the CEDAW Committee also began to work on the general recommendation on women in armed conflict and post conflict situation. The Committee also decided to draft a general recommendation on women's access to justice, which reinforces its' view that access to suitable and effective legal remedies is the first line of defence with respect of discriminatory acts against women. Moreover, the CEDAW Committee and the Committee on the Rights of the Child are drafting a joint general recommendation on practices harmful to girls and women 'that are based on gender stereotypes and prejudices emanating from the socially established inferior/superior dichotomy between women and men'¹⁷.

The CEDAW Committee is constantly referring to its general recommendations in the dialogue with State Parties' delegations and its concluding observations¹⁸ issued upon consideration of the State Parties' reports. The Committee calls on State Parties to use them in addressing their legal obligations under the Convention to respect protect and fulfil women's rights to non-discrimination and to the enjoyment of full equality with men.

1.2. Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Perhaps the most dramatic advance in establishing the States Parties' responsibility for violation of human rights of women and states' obligations under the so called Women's Convention was the adoption of an Optional Protocol. The CEDAW Optional Protocol¹⁹ was adopted by the UN General Assembly in 1999, twenty years after the adoption of the Convention. It entered into force in December 2000 and has been ratified as of 13th of May 2011 by 102 States Parties to CEDAW.

The Optional Protocol gave to women and groups of women in those 102 countries 'the necessary tool to hold their governments accountable for alleged violations of their rights at the international level, and to have access to remedies if the Committee concludes that their rights have indeed been violated'²⁰. However, the complaint procedure under the Optional Protocol is only available to women and groups of women after the exhaustion of all domestic remedies 'unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief'²¹.

The Optional Protocol also mandated the CEDAW Committee to decide to conduct an inquiry when reliable information are received on grave or systematic violations of the Convention

¹⁵ See below, Section on Committee on the Elimination of Discrimination against Women – its mandate and functions.

¹⁶ To read these and any other general recommendation adopted by the CEDAW Committee, please visit <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

¹⁷ Text on the scope of the future general recommendation on harmful practices as adopted by both Committees in January 2011.

¹⁸ See below, Section on Committee on the Elimination of Discrimination against Women – its mandate and functions.

¹⁹ To read the Optional Protocol, please visit <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

²⁰ Flinterman, C., former member of the CEDAW Committee and former Chairperson of the Committee's Working Group on communications under the Optional Protocol, Press Release on the 100th country to ratify the Optional Protocol, 23 November 2010, Geneva.

²¹ See article 4 paragraph 1, CEDAW Optional Protocol.

in countries that have ratified both the Convention and Protocol. Being a State Party to the Optional Protocol, however, does not automatically allow for an inquiry procedure, since an opt-out clause allows for non-recognition of it by the State Party at the time of signature, ratification or accession. Compared to the communication procedure it has the advantage of not requiring the exhaustion of domestic remedies.

Both of these procedures provide for the CEDAW Committee to issue views and recommendations on measures required to address violations of women's rights in particular context or situations as a means to further promote the implementation of the Convention at the national level. The CEDAW Committee also has the authority to request the State Party to adopt provisional measures to protect the victim or victims of a human rights violation from further harm.

Regrettably, these instruments are not well known, valued and used by women. In all States Parties there is an urgent need to enhance women's ability, as well as capacities of non-governmental organisations (NGOs) to use CEDAW and its Optional Protocol to advance full and equal enjoyment of human rights by women.

Disseminating decisions of the CEDAW Committee adopted under the Optional Protocol complaint procedures is of equal importance. Academic and other legal commentators acknowledged that the major substantive contribution thus far of the CEDAW Committee under the individual complaint procedure is with regard to the due diligence standard in relation to violence against women, in particular in the family context.²² Putting wrongful gender stereotyping at the centre of the Committee's view in respect of communication in the case of rape is also recognized as a very important example of the Committee's developing and expanding jurisprudence on stereotyping of rape victims. The Committee's view related to gender stereotypes was acknowledged as '... the leading decision of the ... Committee and arguably any international human rights treaty body, on addressing wrongful gender stereotyping...'²³

1.3. Committee on the Elimination of Discrimination against Women – its mandate and functions

Article 17 of CEDAW established a body of independent experts - the CEDAW Committee - that consists of 23 experts. State Parties elect or re-elect experts from among their nationals nominated on the basis of equitable geographical distribution and representation of the different forms of civilization, as well as of the principal legal systems. In the practice of the UN system, this means distribution according to 'regional groups'. Experts serve in their personal capacity and not as representatives of the States Parties which presented their candidature. They are elected for a term of four years and may be re-elected (the number of their mandates is not limited).

Candidates nominated for elections and experts elected to the Committee from EU Member States belong to two regional groups, namely Western European Group and Others, and Eastern European Group. Under current mandate there are five experts from EU countries serving as the Committee members (from Finland, France, Romania, Slovenia and Spain).²⁴

²² Byrnes, A., Bath. E., 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 Development, Human Rights Law Review, vol. 8, No. 3.

²³ Cusack, S. and Timmer, A. S. H., 'Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v The Philippines*', Human Rights Law Review, 20 April 2011. To read the Committee's view issued upon consideration of this communication please visit <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

²⁴ List of membership is available at <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

CEDAW Committee is mandated to review reports of State Parties at regular intervals²⁵, formulate suggestions and general recommendations, monitor implementation of the Beijing Platform for Action, consider communications received under the Optional Protocol and inquire into grave or systematic violations of CEDAW under the procedures of its Optional Protocol.

States Parties' assessments of efforts taken to comply with CEDAW contained in their reports are frequently incomplete and tend to minimize problems and maximize accomplishments. Recognizing this, the CEDAW Committee uses information provided by NGOs, national human rights institutions (NHRIs), and UN specialized agencies²⁶.

International and national women human rights activists, human rights organisations, and in particular women's organisation were the first to understand and continue to see the relevance and value of the Convention, and of the work of the CEDAW Committee in advancing the goals of gender equality and non-discrimination. They have been assisting the CEDAW Committee in the attainment of its vision and mandate. To enhance the role of NGOs in the implementation of the Convention by States Parties in February 2010 the Committee adopted a statement on its relationship with NGOs.

The Committee and independent NHRIs share the common goals of protecting, promoting and fulfilling the human rights of women. In February 2008, the CEDAW Committee issued a statement on NHRIs. The Committee expects all such institutions to comply with the Paris Principles as independent and effective national bodies for the promotion and protection of women's human rights, and to be duly accredited by the International Committee of National Institutions for the Protection and Promotion of Human Rights.

The examination of State Parties' reports by the Committee is the most effective accountability mechanism. Monitoring of the States Parties' compliance with the obligations under CEDAW takes place on the basis of States' participation in the procedure. The main characteristic of the reporting procedure is its constructive nature. The consideration of a report takes the form of a constructive dialogue with representatives of the reporting State. The aim of this dialogue is to assist States Parties in the implementation of their obligations under the Convention, rather than to condemn them for non-compliance or shortcomings of their efforts.²⁷

Upon consideration of the report the Committee adopts concluding observations in which its concerns accompanied by suggestions and recommendations aimed at achieving

²⁵ Article 18 of CEDAW requires State Parties to submit initial report to the CEDAW Committee on the legislative, judicial and administrative measures they have adopted to give effect to the Convention one year after ratification or accession. Thereafter, State Parties are obliged to submit periodic reports every four years or, in special circumstances, when the Committee requests an off-cycle report on a specific issue. Periodic reports should focus on developments that have taken place since submission of the preceding report and implementation of recommendations contained in the Committee's Concluding observations issued upon consideration of the previous report. To assist State Parties in their reporting obligations the Committee has adopted guidelines, available at <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

²⁶ Article 22 of the Convention allows certain specialized agencies of the UN system to cooperate in its work, including through submitting reports on the implementation of the Convention in areas falling within the scope of their activities. The co-operation between the Committee and NGOs as well as between the Committee and NHRIs is a well-established and recently also formalized practice.

²⁷ While the Committee experts point to what they consider a lack of implementation, they do not act as a court and do not pass "verdicts" on a State Party. Rather they encourage exchange of information, experiences, ideas and suggestions. In a joint effort with the State Party's delegation to achieve improvement in implementation of the Convention experts of the CEDAW Committee develop specific guidance for each reporting State.

improvement are formulated.²⁸ To strengthen the impact of those recommendations the Committee has recently introduced a follow-up procedure whereby it includes a request to individual States Parties in the concluding observations for information on steps taken to implement specific recommendations contained in those concluding observations. The request calls upon States Parties to provide such information to the Committee within one or two years.²⁹ The concluding observations, once formally adopted by the Committee are forwarded to the State Party concerned and made available to the public on the Website of the Office of the High Commissioner for Human Rights. They are also included in the CEDAW Committee's annual report to the UN General Assembly.

2. EUROPEAN UNION GENDER EQUALITY LAW

In the course of more than 50 years, gender equality, non-discrimination and protection of human rights have been established as general principles of the EU law and an essential task of the European Union institutions and its Member States. The first and for 15 years the only gender equality provision was set forth in the Treaty establishing the European Economic Community adopted in 1957³⁰. However, this provision was only related to equal pay for women and men for equal work and was not transposed into national law of the Member States.

The importance of the right to equal pay was manifested in 1974 when the Member States adopted a directive on equal pay for men and women³¹. This equal pay directive provided both, for equal pay for equal work and for work of equal value. It also laid down general provisions, such as an obligation to provide information on right to equal pay to employees and enforcement of this right.

Since the adoption of the first gender equality related directive significant progress was achieved in setting legal standards on equality of women and men in EU legislation. In 1976 a directive on equal treatment of women and men in employment was adopted in which Member States agreed to ensure the equal treatment of women and men in access to employment, vocational training, promotion and in working conditions.³² The Directive allowed exceptions to the equal treatment principle in occupational activities for which sex of the worker is a determining factor, protection of women during and after pregnancy and introduction and implementation of positive actions aimed to establish equal opportunities for women and men. Two years later protection of persons against discrimination on the grounds of sex in social security was ensured by adoption of the directive covering the application of equal treatment of women and men in statutory social security schemes³³, while the same protection against sex-based discrimination in occupational social security schemes was guaranteed as late as 1986 with the adoption of the equal treatment directive applying to this domain. On the basis of the case law of the Court of Justice of the

²⁸ Although the concluding observations have the status of recommendations, this may not imply that they can easily be ignored. As stated in the 2005 Report of the UN Secretary General *In Larger Freedom: Towards Development, Security and Human Rights for All* (UN Doc. A/59/2005/Add.3. Paragraph 95) the reporting procedure should be seen as 'a means for States to assess achievements and identify implementation gaps'.

²⁹ The CEDAW Committee adopted a follow-up procedure to its concluding observations at its forty-first session in 2008. Usually two sets of recommendations on issue identified by the Committee as most pressing are selected for the procedure. Information on the follow-up reports is available at: <http://www.ohchr2.org/english/bodies/cedaw/index.htm>.

³⁰ Article 119, EEC Treaty.

³¹ Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principles of equal pay for men and women.

³² Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

³³ Council Directive 97/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

European Union (CJEU) the latter was amended by 1996 directive.³⁴ In 1986 legal protection against sex-based discrimination in relation to self-employed persons was introduced by adoption of the Council Directive 86/613 EEC.³⁵ Discrimination against women on the basis of pregnancy and maternity was prohibited under the so called Pregnant Workers Directive adopted in 1992, in which improvements in the safety and health at work of pregnant women workers and those who have recently given birth or who are breastfeeding are envisaged, maternity leave of at least 14 weeks ensured and rights related to employment during pregnancy and maternity leave protected.³⁶ The parental leave directive, adopted in 1996, granted parents a non-transferable right to parental leave, thus advancing the creation of conditions for reconciling family and private life of parents with their professional life.³⁷

The elimination of inequalities between women and men and promotion of gender equality gained additional momentum upon the entering into force of the Treaty of Amsterdam in 1999. The treaty laid down the legal base for the promotion of gender equality throughout the EU³⁸, obliged the EU to pursue equality of women and men as one of its essential tasks and defined the elimination of inequalities and promotion of gender equality as the aim of all activities listed in Article 3 of the Treaty³⁹. The last named provision imposes obligation on both the EU and its Member states to take the objective of gender equality fully into account in EU actions in domains where the Member States have decided to delegate decision-making to the EU institutions and in areas of intergovernmental cooperation, such as formulation and implementation of laws, policies and activities, including in external EU actions. For the practical realization of the principle of gender equality the Treaty provision allowing the maintenance or adoption of positive action aimed to ensure full equality of women and men in working life in practice is of significant importance.⁴⁰

Along with non-discrimination on the grounds of sex and gender equality related provisions the Treaty of Amsterdam introduced a legal base for EU action to combat discrimination on five other grounds, namely on the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.⁴¹ In 2000, two directives prohibiting discrimination on grounds other than sex were adopted.⁴² The complementarity between the right to equal treatment of women and men contained in the gender equality directives and the right to non-discrimination on other grounds in the non-discrimination directives extends the EU law to cover intersectional/multiple forms of discrimination against women. However, it is worse noting, that there is no adequate correspondence between provisions of the two sets of directives. As mentioned above, the scope of 2004 directive on equal treatment of women and men in the access to and supply of goods and services is narrow and in comparison with the Racial Equality Directive does not guarantee equal treatment in the broader social protection system and education.

³⁴ Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

³⁵ Council directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.

³⁶ Council Directive 92/85/EEC of 19 October on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

³⁷ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

³⁸ Article 2, EC Treaty.

³⁹ Article 3(2), EC Treaty.

⁴⁰ Article 141(4), EC Treaty.

⁴¹ Article 13, EC Treaty.

⁴² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Since the Treaty of Amsterdam entered into force two gender equality directives had been adopted. In 2004 the first directive applying the principle of equal treatment of women and men beyond the field of employment was adopted, namely the directive on equal treatment of women and men in the access to and supply of goods and services.⁴³ Unfortunately the material scope of the 2004 directive is too narrow, since its provisions do not apply neither to content of media and advertising nor to education. The explicit exclusion of these two areas is certainly limiting the role of EU gender equality legal instruments in addressing the persistence of gender-based stereotypes and power imbalances which significantly impact individuals' ability to shape their own identities. Gender-based stereotyping and unequal division of power between women and men maintain structural causes of discrimination on the grounds of sex which are mirrored in laws, policies and practice, and operate at individual level and on the level of structures and institutions in society. Furthermore, the directive permits Member States exceptions to the principle of equal treatment of women and men in individual insurance premiums and benefits where the use of sex is a determining factor in the assessment of risk, so long as they can ensure that underlying data on which the calculations are based are reliable, regularly up-dated and available to public. However, it is important to emphasize that in the judgment from the CJEU in the *Test-Achats* this exception was declared to work against the objective of elimination of discrimination based on sex and achieving equality between women and men in all areas. The CJEU therefore declared that the provision permitting the derogation from the equal treatment of men and women would be invalid after 21st December 2012.⁴⁴

Provisions of different gender equality directives prohibiting discrimination on the grounds of sex in relation to access to employment, including promotion, and vocational training, working conditions, including pay, and occupational social security schemes were brought together, consolidated and updated, and certain jurisprudence of the CJEU, which had clarified and developed key gender equality related concepts, incorporated in the so-called Recast Directive, adopted in 2006.⁴⁵

EU policies, programmes and institutional structures that are aimed at achieving gender equality provide a framework for the practical realization of legal provisions enshrined in the EU law on equality of women and men. Although not enforceable, they guide the EU institutions and Member States in addressing sex- and gender-based differences which result in asymmetrical experience of women's disparity and disadvantage in their enjoyment of rights in areas that are not covered by the EU gender equality law.

3. THE STATE OF PLAY OF RATIFICATION OF CEDAW AND ITS OPTIONAL PROTOCOL BY THE EU MEMBER STATES

Today all 27 EU Member States are Parties to the CEDAW Convention. Four of them, namely Hungary, Poland, Portugal and Sweden ratified the Convention as early as 1980, the year in which it was opened for signature. Austria, Bulgaria, Romania joined them in 1982 and Denmark, Finland and, Greece in 1983. By 1994 all of the current EU Members States were Parties to CEDAW. With exception of Estonia, Latvia and Malta all of them are also State Parties to the Optional Protocol to CEDAW. European Member States tend to

⁴³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁴⁴ CJEU 1 March 2011, Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil de ministres*, paragraphs 32 and 33.

⁴⁵ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

comply with the reporting obligations, although there are a few countries whose reports are overdue by as much as four or five years.

Majority of the EU member states have no reservations on any of the substantive articles of the Convention (articles 1 to 16). At the time of ratification of the Convention several current EU Member States have made a declaration or entered a reservation to definite article(s) or its subparagraph(s), namely Austria, Belgium, Cyprus, France, Germany, Ireland, Malta, and United Kingdom of Great Britain and Northern Ireland (UK).

Many of the reservations entered upon ratification, accession or succession have been completely or partially withdrawn. At the time of consideration of EU Members States last reports under CEDAW the following countries had still kept their reservations: Austria on article 11 with regard to the special protection of working women; Ireland on article 11(1) concerning employment opportunities and pay; Malta its declaration on article 11 with regard to employment provisions concerning protection of health and safety of women or the human fetus, and reservations on article 13 with regard to tax and social security legislation, article 15 with regard to family and property law, and article 16, paragraph 1(e) in so far as the same may be interpreted as imposing an obligation to legalize abortion; and UK, including in respect of its Overseas Territories and Crown Dependencies on article 1 concerning more favourable treatment of women compared to men, article 2 concerning succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or acts aimed of ensuring the combat effectiveness of the armed forces, article 9 with regard to certain temporary or transitional provisions in reference to nationality of women or their children, article 11 with regard to pension schemes and other benefits in relation to death or retirement, article 13 on social security, article 15 (3) in regard to contracts and other private instruments, and article 16 in regard to the child's interests.

A number of these reservations are considered by the CEDAW Committee incompatible with the object and purpose of the Convention and thus impermissible in accordance with article 28(2). The EU Member States that maintain such reservations are requested by the Committee to explain the practical effect of those reservations on the implementation of CEDAW and to indicate steps taken to keep the reservations under review, with the goal of withdrawing them as soon as possible.

Concerns expressed by the CEDAW Committee in concluding observations adopted upon consideration of the last report of each of the EU member states indicate that discrimination against women is not a random phenomenon in EU region. While much has been done to bring about the legal recognition of the equal status and value of women and various disadvantaged groups of women, redistributive policies and programmes that address the material consequences of inequality as well as the transformation of societal norms that facilitate and perpetuate the uneven distribution of resources, responsibilities and power between women and men are often not adequately supported by law and subject to the discretion of policy makers. Full implementation of the EU Member States' obligations under CEDAW and therefore de facto, substantive gender equality remain elusive, even in those EU Member States with the most advanced gender equality laws and policies.

4. EUROPEAN UNION GENDER EQUALITY LAW *VIS-A-VIS* CEDAW

CEDAW and the EU gender equality law create obligation for EU Member States for the establishment of equality of treatment, opportunities and access to opportunities of women and men and to equality of ends and results. Yet, the overview of CEDAW and EU gender equality law presented in the two previous sections indicates that although there are certain commonalities between them differences, strengths and weaknesses of the EU gender equality law in comparison with standards and objectives of CEDAW and their application may be observed.

Certainly, both CEDAW and EU gender equality law stem from the same principles and values and aim to achieve the same ultimate goal, i.e. non-discrimination on the grounds of sex and gender equality.

However, there are some differences which indicate that effective EU legal framework through which the practical realization of women' right to equality with men in all areas of their life and through out their lifespan is still not adequate.

First, CEDAW prohibits discrimination against women not discrimination on the grounds of sex and aims to improve the real – *de facto* position of women and achieve *de facto*, substantive equality of women and men in all areas and situations covered by the Convention.

Second, CEDAW is about protection of women's human rights and non-compliance with the principle of non-discrimination and equal treatment is established as violation of women's rights. The EU law prevailing principle of equal treatment and equal opportunities of women as compared to men does not adequately reflect the *de facto* position of women, in particular women belonging to the disadvantaged groups.

While differential treatment of women and men is permitted under the EU law in the form of provisions allowing Member States to take positive action measures or specific measures to ensure full equality of women and men in practice, the law does not impose positive obligation to introduce such measures. Furthermore, the permissibility of such measures is the subject of continuing consideration by the CJEU⁴⁶.

During the past 25 years the CJEU case law has provided several expressions of permissibility, objective or justifying arguments and proportionality in application of positive action. First, the CJEU established that positive action is unlawful discrimination, if the measure introduced is very general and applies for and indefinite period, or, if the method selected is disproportionate to the aim pursued. The general nature of special measures and their application for an indefinite period were the object of the CJEU in the *Commission v France* case regarding special advantages given to women by collective agreements and individual employment contracts as regards maternity leave, shortened working hours, child leave and other special employment related rights of women in France.⁴⁷ Positive action measures were also disallowed in the judgements of the CJEU in the *Kalanke* case⁴⁸ and the *Abrahamsson* case⁴⁹. In the *Kalanke* case the CJEU held that a

⁴⁶ McCrudden, C. and Prechal, S.: *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, 2009, p. 38.

⁴⁷ ECJ 25 October 1988, Case 312/86 *Commission v France*.

⁴⁸ ECJ 17 October 1995, Case C-450/93 *Kalanke v Freie Hansestadt Bremen*.

⁴⁹ ECJ 6 July 2000, Case C-407/98 *Abrahamsson and others v Fogelqvist*.

German State law guaranteeing women automatic priority over men in the labour market was contrary to the Equal Treatment Directive that prohibits sex-based discrimination. The ruling provoked critical reactions by several EU member states and women's or gender equality NGOs. In the *Abrahamsson* case, the Court found that giving the automatic and absolute preference, as regards access to employment, to a candidate of the underrepresented sex who had a sufficient but lower qualification was incompatible with the principle of equal treatment.

Contrary to these judgments, several decisions of the CJEU, such as in the *Marschal*⁵⁰, *Badeck*⁵¹, *Schnorbus*⁵² and *Lommers*⁵³ cases interpreted national rules on giving priority to one of the sexes as permissible. In the *Marschal* case the Court stressed that, '... unlike the provisions concerned in the *Kalanke* case, the provisions in question in this case contain a clause to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour ...'⁵⁴. Furthermore, the Court held that national provisions, subject to the application of the saving clause mentioned above, providing for preferential treatment of women who are equally qualified as the male candidates in sectors where they are under-represented fall within the meaning of Article 2(4) of the Equal Treatment Directive. The Court also noted with approval the observation of the Council in its Recommendation on the Promotion of Positive Action for Women⁵⁵ that existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments ... to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures. In the *Badeck* case, again, the question was the compatibility between a German State equality law designed to ensure equal access for men and women to public sector posts and EU law provision on positive action. The judgment pronounced that although the provisions under scrutiny contain binding targets on the representation of women, those provisions are not applied automatically and unconditionally, but take into account the specific personal situations of all candidates. In the *Schnorbus* case the automatic preference accorded to male candidates who had completed compulsory or civilian service for positions as legal advisers the CJEU found that such preference was not contrary to the Equal Treatment Directive and that it was proportionate to compensate for the disadvantages entailed due to compulsory military or community service of men. In the *Lommers* case the CJEU reviewed and upheld a scheme of the Minister of Agriculture of Netherlands governing access to the Ministry's subsidized nursery places. The scheme provided that female employees of the Ministry were prioritized in obtaining places in subsidized nursery facilities, thus, making them accessible to men only in an exceptional situation. The Court regarded the scheme as compatible with EU law because the employment situation in the Ministry was characterized by a significant under-representation of women and the insufficiency of suitable nursery facilities was more likely to induce female employees to give up their jobs.

Last but not least, the scope of gender equality directives is much narrower than the scope of CEDAW and is thus leaving women's rights to equality in domains such as public and

⁵⁰ ECJ 11 November 1997, Case C-409/95 *Hellmut Marschal v Land Nordrhein-Westfalen*.

⁵¹ ECJ 28 March 2000, Case C-158/97 *Georg Badeck and Others v Hessischer Ministerpräsident and Landesanwalt beim Staatgerichtshof des Landes Hessen*.

⁵² ECJ 7 December 2000, Case C-79/99 *Schnorbus v Land Hessen*.

⁵³ ECJ 19 March 2002, Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij*.

⁵⁴ Numhauser-Henning, A., 'On Equal Treatment, Positive Action and the Significance of a Person's Sex', *Legal perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, 2001, pp. 213-245, available at http://works.bepress.com/ann_numhauser-henning.

⁵⁵ Council recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women.

political life, education, health, nationality, family and private life without adequate EU legal protection.

Without prejudice to the scope of equal treatment of women and men directives the EU framework provides an explicit advantage in enforcing gender equality provisions contained in EU law. The CJEU acting as a guardian of EU law on gender equality adopts judgements, which are legally binding for the Member States and offer a strong basis in existing case law for predicting outcomes. Compared to this European dimension of access to justice, the Optional Protocol under CEDAW Convention does not offer an equal degree of legal security to women claiming their right under the Convention.

Moreover, the EU law does not contain obligation to proactively address gender-based stereotypes that may continue to permeate the values and laws of EU Member States. The CEDAW Convention advantage in this respect is contained in its anti-stereotyping obligation which is not just a declaration of intent but is a binding legal norm. Article 2(f) of the Convention requires the States Parties '[T]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'. As provided for in Article 5(a) this obligation entails proactive measures '[T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

Finally, the ongoing negotiations on the necessary legal instrument for the EU's accession to the European Convention on Human Rights (ECHR) and the subsequent accession of the EU to the Convention will establish an additional basis for enhancing development and implementation of policies conducive to the de facto or substantive gender equality and extend the level of protection of the fundamental human rights and freedoms of women in Europe, including their right to full and equal enjoyment of all human rights and freedoms on equal footing with men.

5. CHALLENGES FOR IMPLEMENTING CEDAW IN THE EU LEGAL FRAMEWORK

Traditionally, international human rights treaties have been open for ratification or accession to States only. However, this tradition was overcome in 2006 with the adoption of the UN Convention on the Rights of Persons with Disabilities⁵⁶, which is the first human right treaty open to membership by regional integration organisations.

Under Article 47 of The Lisbon Treaty the EU got full legal personality separate from and superior to its Member States. The EU may thus conclude international treaties in all its areas of competence. The EU has already utilized its competence to sign and ratify an international treaty which provides for the membership by regional integration organisations. Following the formal ratification, last January the EU for the first time in its history became a Party to an international human rights treaty, namely the UN Convention on the Rights of People with Disabilities. Article 3 of the Convention identifies a set of overarching and foundational principles, including the principle of non-discrimination and equality between women and men.

⁵⁶ UN doc. A/61/611, 13 December 2006.

Gender equality, non-discrimination and protection of human rights are established as general principles of the EU and in addition all of the EU Member States are Parties to the CEDAW Convention. It might be therefore an appropriate challenge for the EU and its Member States to initiate a process at the UN level to explore the possibilities for adopting an equivalent approach also for this Convention.

Constitutional traditions and international obligations of EU Member States form the principle of EU law and the fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁷. In view of this principle the standards of CEDAW should be considered as an obligation of the Union in general.

Although CEDAW is the principal and most comprehensive international legal instrument its transformative potential has been under-used in the formulation of EU law. The EU law and policies aimed at achieving gender equality would gain an added value if CEDAW is used as a substantive international legal framework in formulating EU gender equality legislation. Furthermore, the Union should have a more uniform approach in referring to CEDAW in its policy programmes strategies and internal and external actions.⁵⁸

EU law on non-discrimination on the grounds of sex and equality of women and men has been primarily driven by its added value to 'economic growth, prosperity and competitiveness'⁵⁹. This leaves women's rights to equality under CEDAW out of the scope of EU law. Appropriate steps, which would *inter alia* include the substantive and multifaceted equality approach, requiring not only equality of opportunity but also equality of results and addressing intersectional (multiple) discrimination in all areas of public, private and family life, are therefore paramount for effectively addressing structural gender and sex-based inequalities.

Without underestimating the progress achieved during last 50 years in setting EU legal gender equality standards, history of their formulation and adoption manifests a slow path in improving EU equality law and its reactive character. A pro-active and dynamic approach to existing inequalities of women and men would certainly enhance the EU potential to reflect in its law the sustainable, dynamic and non-exclusionary nature of gender equality principle and effectively, timely and adequately address emerging forms of sex-based discrimination, including gender stereotyping, in contemporary society.

In EU law on gender equality positive action or special measures are framed as an exception to the principle of equal treatment rather than an integral part of a gender equality strategy. Attributes ascribed to women and men by society are the fabric of discrimination based on sex and gender, of unequal treatment, unequal opportunities and unequal result and impact of policies and strategies. The positive obligation obliges states to do more than just refrain from discriminatory acts, therefore it is not enough that positive actions are permitted by law but they should be viewed as an obligation on the European Union and its Member States to fully comply with the obligation to eliminate inequalities and promote equality of women and men laid down in the EU treaty.

⁵⁷ See Article 6, paragraph 2, TEU and Preamble, paragraph 5, Charter of Fundamental Rights.

⁵⁸ See European Commission, Strategy for equality of women and men 2010-2015, Luxembourg: Publications Office of the European Union, 2011, in which CEDAW is only referred to within the EU commitments to assist and support the implementation of standards of the Convention in the framework of its external actions.

⁵⁹ See Council conclusions on the European Pact for gender equality for the period 2011 – 2020, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/119628.pdf.

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