Labour issues and the Convention on the Elimination of All Forms of Discrimination against Women

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1. Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)\(^1\) addresses labour issues from essentially two perspectives: women as economic actors and women in their reproductive role. Using the broader CEDAW context as the point of departure, this chapter examines the labour-related articles of CEDAW (chiefly Art. 11 on employment and Art. 14 on rural women) and identifies the Conventions adopted by the International Labour Organization (ILO) that are most relevant to them. It reviews labour issues addressed in General Recommendations of the Committee on the Elimination of Discrimination against Women and analyses the only individual communication touching on labour issues that the Committee has addressed to date. The chapter then argues that while CEDAW offers considerable potential for addressing structural issues that hamper women's economic empowerment in the context of work, this has not yet been fully exploited.

While some progress has certainly been made in relation to women and work since CEDAW was adopted in 1979, the situation remains one of stark inequalities in the labour mar-

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gender. To these are added inadequate social protection and public services, which have particular impacts on women – who still bear the brunt of care work – that deepen their economic disadvantage. The overall retreat from social policy has implied greater expectations from individual labour market participants and has been accompanied by increasing inequality around the globe. The conceptual cleft between paid and unpaid work – of critical importance for gender equality – has still not been bridged.

Within paid work, women's employment rates, along with their participation rates, have been rising, particularly in countries where these have been traditionally low, but progress has been considerably slower in narrowing the gender gaps in pay and in access to high-status jobs. The changes have occurred in a globalized context of increasing precariousness of all employment and with some regional variations. Within employment, men are more likely to be in core or regular positions and women in peripheral and insecure ones (such as part-time, seasonal, casual and home work). Women are over-represented in the agricultural sector, and increasingly so in the services sector as well as among own-account and contributing family workers, while they remain under-represented in manufacturing.

Occupational segregation (work in different sectors – horizontal segregation, and in different positions within the same occupational group – vertical segregation) is «evidence of inequality as it includes aspects of social stratification in power, skills and earnings.» Although some improvement has occurred in horizontal occupational sex segmentation, patterns of vertical occupational sex segregation continue. Moreover, women have overall higher unemployment rates. Their role in “family provision”, to use Williams’ term, remains largely unrecognized. This is the basic factual framework against which CEDAW operates today.

2. The CEDAW framework

CEDAW is firmly embedded in the human rights and fundamental freedoms framework (see e.g. its Arts. 1 and 3), touching on civil, political, economic, social and cultural rights. But the Convention calls for action “without delay”, in contrast to the progressive step approach of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Its labour-related provisions fall mostly, although not exclusively, within the economic and social sphere. The ILO actively participated in the negotiations of CEDAW, motivated in part by a desire to avoid potential divergence from provisions of its own international labour Conventions. Despite the affirmation that all human rights are universal, indivisible, interdependent and inter-related, the protection of social rights «remains a contentious, difficult and challenging matter». All the same the earlier distinction drawn between the judiciable of civil and political rights and that of economic and social rights has been slowly eroding, and it promises to do so in relation to rights guaranteed by CEDAW.

The relatively extensive use of reservations accompanying ratifications of CEDAW has provoked criticism. However, most countries have ratified the Convention without any reservations to its employment article. Some States have withdrawn reservations they had made initially. In certain cases, reservations registered to Art. 11 have encountered objections by other States Parties. Only one country has entered a reservation to provisions of Article 14, which concerns rural women.

2.1. The CEDAW regime of reporting and communications

The CEDAW Committee reviews periodic reports of States Parties and itself reports annually to the General Assembly through the Economic and Social Council (Art. 18). Under Art. 21 of the Convention, the Committee makes General Recommendations on chosen topics and Concluding Observations (formerly called
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Concluding Comments) on the reports of States Parties. Several of its General Recommendations relate to labour issues, as explored below. In addition, comments/observations addressed to particular countries have sometimes raised labour matters, but regrettably often in only a general way.

United Nations Specialized Agencies are invited to submit reports on the implementation of the Convention in areas falling within the scope of their activities (pursuant to Art. 22 of CEDAW). Information supplied by the ILO focuses on comments made by the supervisory system in place for its own Conventions21.

The Optional Protocol to CEDAW22 (OP) authorizes the Committee to receive and consider communications by or on behalf of individuals or groups of individuals claiming to be victims of a violation of any of the rights in the Convention by a State party that has ratified the Optional Protocol (OP, Arts. 1 and 2). Several potentially relevant communications were declared inadmissible due to failure to exhaust domestic remedies23, as required by the OP, Art. 4, § 1. The Committee can also reject at an early stage complaints that are manifestly unfounded, not sufficiently substantiated, incompatible with the provisions of the Convention, involve an abuse of the right to submit communications, or barred ratione temporis (OP, Art. 4, § 2(b) to (e)).

A communication will be inadmissible if «the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement» (OP, Art. 4, § 2(a)). This issue arose in a case involving labour issues (No. 3/2004)24. For an admissible communication, a confidential dialogue takes place with the State Party (OP, Arts. 6 and 7). The Committee then transmits its views and recommendations, if any, to the parties concerned (OP, Art. 7, § 3). Further follow-up may be through reporting under Art. 18 of the Convention. To date, Case No. 3/2004 is the only communications involving labour issues that has resulted in substantive action by the Committee. It is discussed later in relation to maternity protection.

2.2. CEDAW’s overarching provisions and labour issues

The labour issues addressed in CEDAW are situated within its broad framework. The Convention defines discrimination in Art. 1, a concept nuanced by Art. 4 on temporary special measures (discussed below). Articles 2, 3 and 5 of CEDAW set the framework for implementation of the substantive articles which follow. As explored later, the considerable potential of these provisions has been used on occasion in relation to labour issues, but not in a systematic manner.

Art. 2 condemns discrimination against women in all its forms. It requires a series of measures in order to «pursue by all appropriate means and without delay a policy of eliminating discrimination against women». The scope of accountability under Article 2 is “somewhat breathtaking”25, calling for an examination of the entire legal and policy system and the changes needed to promote equality and eliminate discrimination.
Art. 3 requires States Parties to take all appropriate measures «including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men». The second part of this phrase echoes the language in other human rights Covenants\(^8\). The first part refers in particular to legislation, but clearly is meant to extend beyond it. Indeed, the wording of this Art. opens the way for the CEDAW Committee to examine the effect of various macroeconomic policies and regulatory regimes on women\(^9\).

Measures to «modify the social and cultural patterns of conduct of men and women» are called for by Art. 5, § 1. This is 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». This provision is quite relevant for labour issues, since much job segregation is based on stereotypes or customary practices. Furthermore, the “social function” of maternity and the common responsibility of men and women in child-rearing are addressed by Art. 5, § 2. Both aspects aim at eliminating underlying causes of discrimination against women. In a number of observations on country reports, the Committee has called attention to patriarchal attitudes and stereotyping of roles and responsibilities as roots of women’s disadvantage in the labour market\(^10\).

Art. 24 reinforces the message for action in the various fields encompassed by the Convention. It provides, «States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention».

The CEDAW Committee interpreted the obligations under the Convention in its important General Recommendation (No. 25 of 2004):

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A joint reading of articles 1 to 5 and 24, which form the general interpretative framework for all of the substantive articles of the Convention, indicates that three obligations are central to States parties’ efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men. ... Firstly, States parties’ obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination – committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties’ obligation is to improve programmes. Thirdly, States parties’ obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions” (General Recommendation No. 25, §§ 6 and 7).

These comments are highly pertinent to labour market issues, which involve an interplay of public policy, private enterprise practices and personal decisions.

2.3. CEDAW’s definition of discrimination and approach to special measures

Under CEDAW, discrimination is described as «any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of 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 or any other field» (CEDAW, Art. 1). This of course encompasses the world of work.

In its Art. 4, § 1 of CEDAW provides that «temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination...». Nor shall
special measures aimed at protecting maternity (Art. 4, § 2). The CEDAW Committee's General Recommendation [GR] on temporary special measures (No. 25, 2004) noted, "[t]he application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than being an exception to the norms of non-discrimination and equality" (GR 25, § 13). The CEDAW Committee thus recommended the inclusion, in national constitutions or legislation, of provisions that allow for the adoption of temporary special measures (GR 25, § 31). Guidance on the type of measures «can also be contained in specific legislation on employment or education» (ibid.). The Committee has pointed out that «such measures may also be negotiated between social partners of the public or private employment sector or be applied on a voluntary basis by public or private enterprises, organizations, institutions and political parties» (GR 25, § 32). According to Boerefin, the Committee has mentioned temporary special measures aimed at reaching concrete numerical goals and timetables to overcome employment segregation.\(^{30}\)

As regards § 2 of Art. 4 (preserving maternity protection), the CEDAW Committee has noted that it «provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge referred to in article 11, paragraph 3, would warrant a review» (GR 25, § 16). These statements mix up two very different situations. The first sentence reflects the different reproductive functions of men and women, which promise to remain the norm for the foreseeable future. The second sentence, which relates to occupational safety and health hazards, confuses the issue, since women will continue to bear children whether or not there are scientific developments in relation to preventing or controlling those hazards. In the interest of equality, protection from dismissal and social protection coverage for the physical events of pregnancy, childbirth and breastfeeding are required. When maternity protection moves from this type of protection to support for caregivers more generally, the measures should not be restricted to women workers. Otherwise, the assumption that care work is "women's work" is reinforced, with all the negative consequences that this entails.

In relation to safety and health at work, a compromise was reached in CEDAW, in part to accommodate certain ILO Conventions that prohibited women's exposure to certain substances and engagement in night work (in the 1970s considered by the Organization as up to date). Art. 11, § 1(f) of CEDAW sets out the right to protection of health and to safety in working conditions, including reproductive health. It further stipulates that, «Protective legislation relating to matters covered in [Art. 11, on employment] shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary» (CEDAW, Art. 11, § 3). The second provision has been criticized as denying women agency, since the periodic review of protective legislation «...does not empower women workers to make their own decisions about where and when they will work...»\(^{30}\). It may also divert attention away from workplace improvements that would better protect the reproductive health of both men and women. In any event, the text of Art. 11, § 1(f) permitted the relevant ILO Conventions on night work and safety and health basically to remain legally intact, but stepped up the pressure for their later revision.\(^{33}\)

3. Substantive labour rights in CEDAW and relevant ILO instruments

3.1. Relevant ILO instruments

Since its inception, the ILO has been concerned with issues affecting women workers. The Preamble to the ILO Constitution (1919) referred to the protection of women and first recognized the "principle of equal remuneration for work of equal value". 
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Spanning almost a century of marked change in societal values and attitudes towards women, the ILO’s approach to equality issues has naturally evolved over time. This has also been the case for the international labour Conventions (treaties to which reservations are not permitted) and Recommendations (non-binding guidance instruments) most relevant to gender issues. The ILO has identified the 71 Conventions it considers “up to date” and has singled out certain Conventions for stepped-up promotional efforts. The ILO Declaration on Fundamental Principles and Rights at Work (1998) recognized that each ILO Member was to respect, promote and realize a set of four principles, whether or not the State had ratified the relevant Conventions. These principles include: the elimination of discrimination in respect of employment and occupation

In addition, the ILO has highlighted four Conventions as the most important for pursuing gender equality (the first two are also fundamental Conventions): the Elimination of Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Equal Remuneration Convention, 1951 (No. 100), the Workers with Family Responsibilities Convention, 1975 (No. 156) and the Maternity Protection Convention, 2000 (No. 183). They, like other ILO Conventions and Recommendations are subject to various ILO supervisory mechanisms, reports of which are fed into a database (ILOLEX). The reports of the Committee on the Application of Conventions and Recommendations (CEACR), cited in ILO reports to CEDAW, are a particularly rich source. Beyond these legal resources, the ILO secretariat produces research reports and statistics on gender and other labour issues, such as a major review of working time, that can include an important gender dimension. These sources of information could be drawn upon more systematically by the CEDAW Committee when dealing with labour questions.

In the negotiation of CEDAW, the ILO favoured versions of the two articles of CEDAW that address labour issues in particular (Article 11 on employment and Article 14 on rural workers) that corresponded more closely to ILO standards and were more oriented to labour protection of workers irrespective of sex. This influenced, but did not always determine, the outcome.

3.2. The approach of Article 11 of CEDAW

The overall obligation of States Parties under Art. 11, § 1 is to “take all appropriate measures to eliminate discrimination against women in the field of employment, in order to ensure, on a basis of equality of men and women, the same rights...”. This implies an obligation of result. A list of the rights to be ensured then follows. By stipulating a number of specified rights and measures in relation to employment, Art. 11 of CEDAW takes a comprehensive approach. Each of the specific rights and measures contained in Art. 11 is covered more extensively in several ILO Conventions, either explicitly or in the way they have been interpreted.

Foremost among them is ILO Convention No. 111 on Equality (Employment and Occupation), which focuses on policy aimed at equality of opportunity and treatment, “with a view to eliminating any discrimination in respect thereof” (Convention No. 111, Art. 2). Legislation is to secure the acceptance and observance of the policy, and any statutory provisions and modification of any administrative instructions or practices that are inconsistent with it are to be repealed (Convention No. 111, Art. 3(b) and (c)).

In Convention No. 111, the obligation is hybrid, partially of means and partially of result. It is also nuanced by reference to “methods appropriate to national conditions and practices”, a phrase echoed in many ILO instruments to provide flexibility about the way the instrument may be applied.

The general ILO approach of social dialogue is also reflected: Organizations representing employers and workers are to be involved in identifying other grounds of prohibited discrimination (Art. 1, § 1(b)) and a possible need for special measures (Art. 5, § 2). The Government is to seek their cooperation in promot-
ing the acceptance and observance of the national equality policy (Art. 3(a)).

Even though CEDAW and Convention No. 111 have different points of departure, there has been considerable convergence between the views of the CEDAW Committee and of the ILO CEACR on measures necessary to promote equality of opportunity and treatment in employment and occupation.

3.3. Categories of rights in Article 11 of CEDAW

For women as economic actors, Art. 11 of CEDAW addresses access to employment and training, terms and conditions while in employment, and social protection. Among conditions of employment, it highlights occupational safety and health (including in relation to the reproductive function of women). Maternity protection, discussed further below, is approached both in terms of women’s rights and as a social protection issue.

Access to employment and training

During the negotiation of CEDAW, reference to “economic and social life” was replaced by the narrower term “employment.” In examining implementation of Art. 11, the CEDAW Committee has wisely chosen not to restrict itself to formal employment, which would have reduced the relevance of the Convention.

The first of the specific provisions of Art. 11, “The right to work as an inalienable right of all human beings” (CEDAW, Art. 11(a)), recalls but does not mimic the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. CEDAW thus moves beyond both. The Universal Declaration states simply that, “Everyone has the right to work...” (Art. 23, § 1). The ICESCR “recognizes” the right to work, but adds that it includes the right of everyone to the opportunity to gain his [sic] living by work which he [sic] freely chooses or accepts...” (ICESCR; Art. 6, § 1). The ICESCR formulation thus mirrors the approach taken by the ILO Employment Policy Convention, 1964 (No. 122), which itself does not refer to the right to work, but rather speaks of “full, productive and freely chosen employment” (in its Art. 1, § 1). This refrain is echoed in the Part-Time Work Convention, 1994 (No. 175), which emphasizes that such employment should be undertaken on a purely voluntary basis (not always the case). With women the predominant group in part-time work, this provision has special significance for gender equality.

In relation to access to and training for employment, Art. 11 of CEDAW provides:

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment... and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training.

Beyond Conventions No. 111, 122 and 175, the most important ILO instruments on access to employment and training are the Employment Policy Recommendation, 1984 (No. 169), the Human Resources Development Convention (No. 142), the Human Resources Development Recommendation, 2004 (No. 195), and the Private Employment Agencies Convention, 1997 (No. 181).

In its introductory phrase, Art. 11, § 2 of CEDAW links the effective right to work and maternity policy. Art. 11, § 2(c) calls for States Parties to “encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities...”. ILO Convention No. 156 on workers with family responsibilities addresses this issue much more specifically in its Art. 4, and casts a wider net than Art. 11, § 2 of CEDAW. It also prohibits discrimination based on family responsibilities and calls for educational measures to engender broader public under-
standing. Both instruments reflect a 1970s “work-life balance” perspective that posits the issue as one of personal choice, in a context of deeply stratifications of labour within and outside the home.43

Terms and conditions of employment
Once a woman is in employment, Art. 11 of CEDAW spells out these rights:
(c) ...the right to promotion, job security and all benefits and conditions of service [plus training as cited above],
(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

At some stages of the drafting of CEDAW, there was a direct reference to the Equal Remuneration Convention, 1951 (No. 100). Although it was dropped, agreement was reached that “remuneration” would have the same meaning as in Art. 1 of this Convention.44

In relation to job security, the Termination of Employment Convention, 1982 (No. 158) precludes dismissal based on, inter alia, sex, marital status, family responsibilities or pregnancy (Art. 5(d)). Protection from dismissal on the basis of pregnancy, maternity or family responsibilities is afforded as well in Conventions No. 156 on workers with family responsibilities and No. 183 on maternity protection.

Benefits and conditions of service are addressed by a number of ILO instruments. One that has particular significance for workers at the lower end of the labour market is the Protection of Wages Convention, 1949 (No. 95). It guards against abuses relating to payment in kind, periodicity of wage payments, and so forth. The ILO’s Part-Time Work Convention, 1994 (No. 175) and Home Work Convention, 1996 (No. 177) provide important guarantees for workers engaged in such employment, the vast majority of whom are women.

Occupational safety and health
Among the labour provisions of Art. 11 of CEDAW is «(f) The right to protection of health and to safety in working conditions...». And with good reason: an estimated 2 million work-related fatalities and 330 million work-related accidents occur each year, involving an unknown number of women. The ILO has adopted numerous instruments on occupational safety and health. Of these, the Occupational Safety and Health Convention, 1981 (No. 155) and the Occupational Safety and Health Framework Convention, 2005 (No. 187), along with their accompanying Recommendations (Nos. 164 and 197), provide the major policy orientations. (Older ILO Conventions that restricted women’s employment in work involving exposure to white lead and benzene are not considered “up to date” instruments.)

Night work is a particular form of work organization that affects workers’ health, but early ILO instruments prohibited it only for women. In 1990, the ILO Conference finally adopted the gender-neutral Night Work Convention (No. 171). It lays down standards of protection for all night workers. A Protocol to the Night Work (Women) Convention (Revised), 1948, also adopted in 1990, provided for more variations and exemptions to the prohibition, except during periods of maternity protection, and related protection of women workers against dismissal. In a 2001 General Survey on the instruments governing women’s night work, the ILO CEACR recalled that States that remained parties to the sex-specific instruments on night work were obligated under CEDAW to review their legislation periodically.

Social protection
Today, only around 20 per cent of the world’s population has access to adequate social protection. In its Conventions and Recommendations, the ILO used the term “social security”, and since the arguably narrower term was current in 1979, CEDAW adopted it.
Art. 11, § 1(e) of CEDAW sets out the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave (Measures foreseen in relation to maternity protection are discussed further below). The main ILO Convention on social protection is the Social Security (Minimum Standards) Convention, 1952 (No. 102), which is considered by the ILO as an up-to-date instrument despite its anachronistic “male breadwinner” and formal economy orientation. How to provide social protection to the vast number of workers who are currently excluded from such schemes — among them many women in the informal and formal economies — is a source of active discussion within and beyond the ILO. The lack of explicit provision in CEDAW for social security for urban women workers who are not in (paid) employment was pointed out during the its drafting. However, like the ILO, the CEDAW Committee has taken a broader approach to the notion of social protection.

4. Specific labour issues addressed by the CEDAW Committee under Article 11, § 1

Chiefly in its General Recommendations, the CEDAW Committee has highlighted three aspects of particular relevance: equal remuneration, sexual harassment, and the question of statistics. In one communication, it has addressed maternity protection in relation to allegations of discrimination.

4.1. Equal remuneration

Women’s wages for work of equal value range between 70 to 90 per cent of men’s, with even wider gaps existing in some places. «[S]ystemic gender-based discrimination in pay remains one of the labor market’s most enduring and universal features.»

While some of the gap is linked to (probably gendered) differences of education or experience, much of it relates to two factors. First, with occupational segregation of women and men into different work and perhaps different places of work, the greater the concentration of women, the lower the pay. Second, there is systemic undervaluation of the type of work performed by women compared with men’s work. Furthermore this undervaluation also affects the work and the earnings of women as entrepreneurs and own account workers.

As the first ILO Global Report on the elimination of discrimination noted, «No lasting improvements in the economic status of women... can be expected as long as the market rewards their time at a lower rate than that of the dominant groups». The persistent global gender pay gap is one of the drivers of economic inequality that perpetuates poverty across generations.

Under CEDAW, the Committee has not dealt in depth with equal remuneration. Instead, in its brief General Recommendation No. 13 (1989) on equal remuneration for work of equal value, it encouraged States to ratify ILO Convention No. 100 «in order to implement fully» CEDAW (§ 1), (this is an interesting statement in terms of public international law, with the expert body for one treaty considering implementation under another agreement as compliance with the other instrument). States were also urged to consider adopting job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of male-dominated and of female-dominated jobs. In addition, «They should support, as far as practicable, the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value» (§ 3). The Committee has also raised the gender pay gap in observations on country reports. Much more specific guidance could be provided, however, drawing on ILO and other work.
4.2. Sexual harassment

In its General Recommendation [GR] on Violence against Women (No. 19, 1992), the CEDAW Committee took as its basis women’s enjoyment of human rights and fundamental freedoms. These include “the right to just and favorable conditions of work” (Universal Declaration of Human Rights, Art. 23(1)). Gender-based violence is considered to be discrimination under Art. 1 of CEDAW (GR No. 19, § 7). With reference to Art. 11, the General Recommendation noted that «Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace». It went on to explain what sexual harassment included (GR No. 19, §§ 17 and 18). The Committee noted that steps to protect women from violence should include training and employment opportunities and the monitoring of the employment conditions of domestic workers (GR 29, § 24(p)). The ILO’s more specific focus on the workplace would be useful to the CEDAW Committee when it deals with sexual harassment issues in the future.

4.3. Statistics

In its General Recommendation No. 9 (8th session, 1989), the CEDAW Committee recommended that States make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender... » Moreover, the Committee urged collection of statistics disaggregated by gender on time spent on activities both in the household and on the labour market (General Recommendation No. 17 on Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product (10th Session, 1991). Many of the comments the Committee has made in relation to countries have also requested data about the employment situation of women and emphasized the importance of empirical studies.59

While the ILO Labour Statistics Convention, 1985 (No. 160) unfortunately does not require classification of statistics according to sex, this is encouraged by the Labour Statistics Recommendation, 1985 (No. 170). The International Conference of Labour Statisticians has offered useful guidance to States on the collection of gender-disaggregated data and on measuring informal employment.50 Data may also be necessary to demonstrate the existence of indirect discrimination on the basis of sex, as noted by the dissent in the Committee’s conclusions in communication No. 3/2004.51

5. Maternity protection

CEDAW takes a comprehensive approach to women’s reproductive role and sees maternity as a “social function” (Art.5(b). Maternity and family planning are addressed in provisions on health care (Art. 12), family benefits (Art. 13(a)), rural women (Art. 14), marriage and family relations (Art. 16(e)), family education (Art. 5(b)) and education (Art. 10(h)) as well as employment (Art. 11(2)).

Art. 11(2) links maternity protection to women’s effective right to work, identifying it as necessary to prevent discrimination against women. The measures to be taken by States Parties are:
(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

In addition, § 3 of Art. 11 calls for periodic review of protective legislation, discussed above.

In the absence of comprehensive social protection, the option of "maternity leave with pay" places the issue squarely within the trade-offs applicable to other types of leave within an employment relationship, and where applicable, in collective bargaining agreements. CEDAW presents a private option not explicitly available under ILO Conventions, which look only towards publicly provided social security to fund maternity leave. During the negotiation of CEDAW, the ILO representative pleaded unsuccessfully for excluding direct employer payment of maternity cash and medical benefits (following the approach of Convention No. 103, [revised by the Maternity Protection Convention, 2000 (No. 183)]) which specifies this in its Art. 4, § 8). In the end, CEDAW left Governments "free to work out the combination of public and private funding] most appropriate to them." 62

Yet leaving the various options open under CEDAW has not avoided disputes. In Ms. Dung Thi Thuy Nguyen vs. The Netherlands 63 the author of communication No. 3/2004 alleged that application of a social security law constituted a violation of her rights under Art. 11, § 2(b) of the Convention. Ms. Nguyen was insured under the Sickness Benefit Act (ZW) for her part-time salaried employment, and under the Invalidity Insurance (Self-Employed Persons) Act (WAZ) for work in her husband's enterprise. Under a so-called "anti-accumulation clause," section 59(4) of the WAZ (upheld by the courts) allows payment of maternity benefits under that regime only to the extent that they exceed benefits payable under the ZW. The author asked the Committee to examine whether this clause, which acted to deny her any compensation for her lost income as a co-working spouse, was a discriminatory provision in violation of Art. 11, § 2(b). Among other contentions, she asserted that this provision entitled women to maternity leave with full compensation for loss of income from their work. She also noted that the loss of income suffered by women under the Act was one that only women could experience, and thus discriminatory (§ 7.6).

The government noted that WAZ system as a whole applied the anti-accumulation rule in respect of the same risk in other cases, without any distinction according to sex (§ 6.7). It deemed its composite system of benefits as adequate under Art. 2, § 2(b), which in its view did not require full compensation (§§ 6.3 and 8.3). It argued that the State had discretionary powers as to how to pursue (rather than achieve) a goal under the Convention (§ 6.10).

The Committee found that the author had not shown that the legislation was discriminatory to her on the basis of marriage or maternity (§ 10.2). It took the view that the grounds related to the fact that she was a salaried employee and worked as a co-working spouse in her husband's enterprise at the same time. This view failed to see how this situation could involve indirect discrimination. The Committee also rejected the contention that the Convention requires full compensation, stating that, "the Convention leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits... It is within the State party's margin of discretion to determine the appropriate maternity benefits within the meaning of article 11, paragraph 2(b) of the Convention for all employed women, with separate rules for self-employed women that take into account fluctuating income and related contributions. It is also within the State party's margin of discretion to apply those rules in combination to women who are partly self-employed and partly salaried workers" (§ 10.2).

While States do indeed have leeway in the design of such schemes, they should not be structured in a way that perpetuates indirect discrimination against those most likely to fall into this group, i.e. women.

Ms. Nguyen's contention that Art. 11, § 2 of the Convention applies to any conceivable professional activity carried out for pay (§ 3.2) went without direct comment by the Commit-
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te. In referring to «all employed women», however (§ 10.2), the Committee embraced the view that the provision applies to both those with an employer and those who were self-employed. Given the high incidence of self- and informal employment among women, that was a significant point.

An individual opinion of three Committee members agreed that the restriction of the anti-accumulation clause did not involve a direct form of discrimination based on sex under the Convention (§ 10.4). However, they dissented from the majority because of concern that the provision may constitute a form of indirect discrimination based on sex, since it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husband’s enterprise. They lamented the lack of data on this point and on the related question of working hours and suggested several options to ensure harmony with their view of the Convention. But was the relevant data really publicly unavailable, or did the individual simply fail to furnish it?

In any event, the Committee as a whole gave the State considerable leeway in applying this provision of CEDAW, and declined to look into the underlying labour market issues implicit in the allegations.

In sum, while Art. 11 of CEDAW is rather comprehensive in relation to labour issues, and the Committee has raised questions in its comments on national reports, it has not addressed many of the issues in any depth.

6. Article 14 of CEDAW and relevant ILO Conventions

Art. 14 of CEDAW calls on States parties to take into account the problems of rural women, and the significant roles they play in the economic survival of their families, including their work in the non-monetized sectors. Rural poverty rates are higher than urban ones, and the depth of poverty is greater, especially for women. Women engaged in agriculture, from subsistence to commercial, generally work long hours for low monetary return. Often cultivation is combined with occasional informal work such as handicraft production or roadside selling. Yet the disadvantages recognized and the measures envisaged in Art. 14 extend well beyond rural settings. Without the word “rural,” Art. 14 could well have been a bill of rights for women in the informal economy, whether in a city or in the countryside.

The measures to eliminate discrimination against women in rural areas are to «ensure, on a basis of equality of men and women, that they participate and benefit from rural development» (Art. 14, § 2). This is linked to a host of specific rights, several of which involve important labour issues:

- The right «to organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment» (Art. 14, § 2(e)) speaks for itself.

- The right «to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications» (Art. 14, § 2(h)) is just as relevant in urban settlements as in rural areas.

- The right «to obtain all types of training... in order to increase their technical proficiency» (Art. 14, § 2(d)) echoes the provisions of Art. 11, § 1(c).

- The right «to benefit directly from social security programmes» (Art. 14, § 2(c)) is not as specific as Art. 11, § 1(e) or its § 2, but it conveys the message of social protection, including maternity protection.

- The right «to have access to adequate health care facilities...» (Art. 14, § 2(b)) would encompass occupational risks.

- Finally, the right «to participate in the elaboration and implementation of development planning at all levels», (Art. 14, § 2(g)) could spark far-reaching changes in more gender-sensitive policy making.

As widespread as it is, Art. 14 has critics as well as praisers. For example, Evart has suggested that the equality frame-
work does not necessarily countenance rural economic structures, «which do not work well for men or women».

The CEDAW Committee has mainly inquired into the situation of rural women when making remarks under other Articles of the Convention. It could do much more, inspired in part by existing ILO instruments and other relevant sources, such as the Food and Agriculture Organization of the United Nations, The ILO the Rural Workers’ Organizations Convention, 1975 (No. 141) and the Health and Safety in Agriculture Convention, 2001 (No. 184), have particular relevance to women rural workers. For rural women engaged in certain types of commercial agriculture, the provisions of the Plantations Convention, 1958 (No. 110) and its Protocol (adopted in 1982) are also relevant. Finally, women rural workers – like other workers – enjoy the rights of workers under generally applicable ILO Conventions on a wide range of labour issues.

7. Particular categories of workers under CEDAW

In addition to rural workers, the CEDAW Committee has highlighted the plight of particular groups of women in the context of labour issues.

7.1. Workers in the informal economy and workers performing unpaid work.

The problems faced by unpaid women workers in rural and urban family enterprises were addressed by the CEDAW Committee in General Recommendation No. 16 (1991). Referring to Arts. 2(c) and 11(e), (d) and (e) of the Convention, it declared that such unpaid work «constitutes a form of women’s exploitation that is contrary to the Convention». The Committee recommended that countries report on the legal and social situation of these women, including statistical data which should be collected. It further urged States to «take the necessary steps to guarantee payment, social security and social benefits for women who work without such ben-

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efits in enterprises owned by a family member». Strangely, no reference was made to this in the consideration of Communication 3/2004, which raised the issue of social security in relation to maternity protection for a woman in her husband’s business.

Women performing unpaid work in family enterprises represent only one form of economic activity in the “informal economy”, often referred to as the “informal sector”. Absent a legal definition, these terms cover a wide variety of economic activity and relationships. Within the current legal framework, one common denominator is the absence of an identifiable employer and thus of an employment relationship giving rise to certain rights under traditional labour law. Workers will often move between formal and informal work, and the crux of the problem is not their status, but how to increase their access to decent work, including rights and social protection. Women are concentrated in the more precarious types of informal work, and their average earnings are too low to lift households out of poverty. With more women than men in the informal economy, efforts to formalize the informal economy or – as explored later – to move beyond the distinction, will be of special benefit to women.

The CEDAW Convention appears to countenance the informal economy only in relation to rural women workers, but the Committee has nonetheless referred to informal work in comments under Art. 11. While many ILO Conventions are relevant to women in the informal economy, two address it more directly. These are notably the Home Work Convention, 1996 (No. 177), and the Indigenous and Tribal Peoples Convention, 1989 (No. 169). The Employment Relationship Recommendation, 2005 (No. 198) provides guidance on distinguishing disguised employment from other situations.

7.2. Migrant workers

Rights relating to the movement of persons (CEDAW, Art. 15, § 4) have gained in importance as more and more women seek jobs
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in countries other than their own. Women migrants are thus another category of workers that has won the spotlight in the CEDAW Committee. The Committee's General Recommendation No. 26 (2008) acknowledges the important work of some of the other UN human rights treaty bodies, in particular the expert committee set up under the International Convention on Protection of the Rights of All Migrant Workers and Members of their Families. However, it does not mention the 2005 ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration or two ILO Conventions which, while in need of some revision, are in force for more countries than the more recent International Convention.

Recognizing that there are different types of migrant women, the scope of the General Recommendation addresses only the situations of migrant women who are in low-paid jobs, may be at high risk of abuse and discrimination and who may never acquire eligibility for permanent stay or citizenship, unlike professional migrant workers in the country of employment. The descriptions of what can happen to women migrant workers provides a snapshot of abusive and exploitative practices. The recommendations to States are differentiated by migrants' countries of origin, transit and destination, and necessarily involve cooperation among them. However, they gloss over what is a frequent problem for migrant workers, especially those who are undocumented: collecting their wages and challenging improper employer deductions for various services or provision of lodging and/or meals.

7.3. Women workers subject to trafficking

Regrettably, movement from one country to another is not always voluntary. Among the earliest international agreements relating to women were the Paris Agreements for the Suppression of the White Slave Traffic, concluded in the early 1900s. That the underlying problem remained unsolved in 1979 is reflected in Art. 6 of CEDAW: «States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women». And although the ILO Forced Labour Convention, 1930 (No. 29), which followed the 1926 Slavery Convention of the League of Nations, was initially not directed at human trafficking, this widely ratified fundamental Convention has become one of the weapons in the arsenal to fight such practices. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, has become the lead instrument on this topic, and the CEDAW Committee has thus urged its ratification along with all international instruments relevant to the protection of the human rights of migrant workers (General Recommendation No. 26, 2008, § 29).

7.4. Domestic workers

CEDAW does not mention domestic workers (some of whom are also migrants), and so far no General Recommendation has been issued specifically on this numerous category of women workers. In developing countries, domestic work accounts for between 4 and 10 per cent of total employment, and occupies a higher share of women's employment. Should the Committee wish to develop such a recommendation, it could draw on a recent comprehensive ILO report, prepared in anticipation of standard-setting on domestic work. The case is strong for both international and national action to address the plight of the women who perform «work like any other, and work like no other». In relation to both labour legislation and laws on domestic violence, the Committee has itself drawn attention to the need for legislative protection for domestic workers against abusive employers. Furthermore, the Committee addressed the extreme vulnerability of domestic migrant workers in its General Recommendation No. 26 (2008) on migrant workers. However, aside from a minor reference in that General Recommendation, one aspect in particular has not really been grappled with by the Committee:
7.5. Women workers with disabilities

The Committee’s General Recommendation on disabled women (No. 18, 1991) mentions equal access to employment and social security among the measures recommended to deal with their particular situation. Sources it could have tapped for more detailed guidance are the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) and comments of the ILO supervisory machinery. This Convention laid the basis for the work-related provisions of the new United Nations Convention on the Rights of Persons with Disabilities (adopted on 13 Dec. 2006, with entry into force on 3 May 2008).

7.6. Women workers living with HIV/AIDS

In 1990, the CEDAW Committee issued a General Recommendation on avoidance of discrimination against women in national strategies for the prevention and control of acquired immuno-deficiency syndrome (AIDS) (General Recommendation No. 15 (9th session, 1990). It called on governments to give special attention to the rights and needs of women, and referred to measures to enhance the role of women as care providers, health workers and educators in the prevention of infection with HIV, but did not otherwise address the labour dimension. Even at that time, information on it in relation to HIV/AIDS was available. At the 2010 International Labour Conference, ILO constituents adopted a Recommendation on HIV and AIDS and the World of Work (No. 200) in the contemporary context.

8. Other Articles of CEDAW most relevant to labour issues

While Arts. 11 and 14 are the most closely concerned with labour issues, other provisions of CEDAW are relevant to guaranteeing women workers’ rights.

8.1. Article 7 and participation in trade unions and employer organizations

Given the importance that trade unions and collective bargaining can play in improving the lot of women workers, it is somewhat surprising that CEDAW does not mention the precondition for this: their freedom of association. All the same, an indirect reference may be seen in the protection of human rights and fundamental freedoms found in Arts. 1 and 3 of CEDAW. In addition, Art. 7(e) includes the right of women, on equal terms with men, «To participate in non-governmental organizations and associations concerned with the public and political life of the country». Unlike self-help groups and co-operatives (referred to in Art. 14, § 2(e), for rural women), trade unions and employers’ organizations are not mentioned in CEDAW. On the other hand, CEDAW clearly addresses the treatment of women within such organizations in its Art. 2(e): Governments undertake to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. The jurisprudence of the ILO CERACR and of the ILO Governing Body Committee on Freedom of Association provide useful guidance in this highly specialized area of international labour law.

In its General Recommendation No. 21 (1997) on Article 7 (political and public life), the CEDAW Committee noted that «organizations such as trade unions and political parties have an obligation to demonstrate their commitment to the principle of gender equality in their constitutions, in the application of those rules and in the composition of their memberships with gender-balanced representation on their executive boards» (§ 34). However, in line with freedom of association principles, trade unions...
themselves, rather than governments, should decide how those organizations will implement national equality policies.

8.2. Article 8 on participation in the work of international organizations

Article 8 of the Convention, which refers to participation in the work of international organizations, was the topic of CEDAW Committee’s General Recommendation No. 23 (1997). It noted that the provision requires the inclusion of women «in official delegations to international and regional conferences». In the body that makes global labour policy, the International Labour Conference, the delegations of Member States include representatives of Governments, Employers and Workers; all delegates can be assisted by advisors. The ILO Constitution has since 1919 stipulated that when questions especially affecting women are on the agenda, at least one advisor should be a woman (Art. 3, § 2)87. This is now interpreted as applying to any item on the Conference Agenda, and for this reason the International Labour Office regularly appeals to governments, employers’ organizations and trade unions to include more women in their delegations. Despite these efforts and regular reporting on the gender distribution of delegations at each session, the underrepresentation of women at the International Labour Conference (it hovers around 20%) has proved intractable.

8.3. Articles 15 and 16 on civil rights and marriage88

Other provisions of CEDAW are essential to the exercise of rights relating to employment and self-employment. Art. 15 on equality of civil rights is especially important. Equal rights to conclude contracts, provided by Art. 15, § 2, extend to contracts of employment and loan agreements to fund businesses. Equal rights to administer property (idem and see also Art. 16, § 1(b)) are critical for a woman who is self-employed or runs a business. The

CEDAW Committee recognized this in its General Recommendation on Equality in Marriage and Family Relations (No. 21, 1994). Restriction on a woman entering into a contract or accessing financial credit, it noted, «precludes her from the legal management of her own business» (GR No. 21 (1994), § 7).

9. The relevance of Articles 11 and 14 to other provisions of CEDAW

Just as Arts. 11 and 14 need to be read in the light of other articles, the relevance of respect for these provisions to other provisions should also be countenanced. For instance, strengthening women’s position in the labour market will make it more likely that the family will have the wherewithal to send their children to school (cf. CEDAW, Art. 10 on education). In another context, the CEDAW Committee has already taken a similar approach. In its General Recommendation on Violence against Women (GR No. 19, 1992), it noted in relation to Art. 16 of the Convention that «Lack of economic independence forces many women to stay in violent relationships» (GR § 23). Similarly, in its General Recommendation on Women and Health (No. 24, 1999), the Committee stated, «unequal power relationships between women and men in the home and workplace may negatively affect women’s nutrition and health» (§ 12(b)). Strengthening the economic position of women through work would clearly have ripple effects on the exercise of their other rights.

10. Beyond enforcement? A need for deeper analysis?

Together, CEDAW and ILO instruments constitute a strong international legal platform for women to achieve self-realization and economic security through work. But the reality of most women remains far from that goal. Why?
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For both CEDAW and ILO instruments, there is concurrence that law will be only part of the solution to women’s disempowerment. Boersfijn has rightly observed that CEDAW places high priority on legislation, but that it goes beyond it. She has offered a reading of the Concluding Comments suggesting that Art. 11 requires specific measures such as:

- providing effective enforcement procedures and remedies under anti-discrimination legislation,
- adopting job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate,
- paying attention to the special needs of women from vulnerable groups such as migrant women, domestic workers, women in the informal sector, older women, women with disabilities and women with sole responsibility for families, and
- preventing violence against women in the workplace (i.e. sexual harassment) and providing effective legal measures, including criminal sanctions, civil remedies and compensatory provisions.
- eliminating stereotypes with the help of affirmative action and, in cooperation with the private sector, to help women cope with both family and work responsibilities as well as integrate women in full-time employment.

Where the gap between the international obligations and national legislation persist, it is often a question of political will and priorities. Advocacy by main economic actors enhances the chances of winning adoption of such legislation. Yet even when adequate legislation is in place, lack of enforcement is a major problem.

As regards closing the gender pay gap, Cornish has reached conclusions that would apply more generally: «The laws that are in place are often inaccessible to women who lack the resources to access the legal system. Most enforcement systems are complaints-based and thus rely on individual workers, their representatives, or administrative officials to trigger their operation. Given the systemic nature of labor market gender discrimination and the limited available resources, a complaint-based approach is generally ineffective and too slow to achieve significant equality results.»

The enforcement problem is shared by both men and women when it comes to the range of subjects covered by labour legislation. This is why the ILO has adopted Conventions setting out the parameters for effective labour inspection and labour administration, and why these have been given renewed emphasis. It also explains the promotion of social dialogue and the collective bargaining agreements as a means of achieving better outcomes for women in the world of work. But more fundamentally, regulatory frameworks and labour institutions generally have been running against the tide of the “market efficiency” paradigm. Many international and national labour lawyers (e.g. Conaghan, Fudge, Hepple, Kittich and Owens) share the view that more far-reaching questions need to be posed in order to more effectively tackle women’s disempowerment in the context of work. Otto has argued that, «The entire notion of productivity... is founded on the availability of the labour of women, which is taken to be free, flexible and willing.»

Feminist labour law theorists have argued for a new paradigm of labour law as being comprised of many different equality mechanisms involving both state and non-state actors and moving beyond the traditional parameters of labour law as contracts, collective bargaining and statutory regulation. An essential element of it would be recognizing that “standard” work includes many different types of work and self-employment relationships, leading to more varied mechanisms for promoting equality.

In CEDAW, Art. 11 only partially takes on the “rules of the game” when it comes to labour issues. Its equal rights approach appears to be one of equality within the existing parameters of the labour market. Rightfully so, CEDAW places value on employment, but it does so without questioning how work is struc-
tured. The instrument refers to "all benefits and conditions of service" and rights to training, without directly challenging the gender bias these may entail as currently organized. It calls for "supporting social services to enable parents to combine family obligations with work responsibilities..." but does not directly challenge dominant family-hostile working schedules, unequal distribution of tasks within households or existing social welfare systems.

However, Art. 11's basic perspectives of equality and of measures to eliminate discrimination, read with Arts. 2, 3 and 5 of CEDAW, could well lay the basis to do a more fundamental analysis of gender bias in labour markets to identify measures necessary to address issues that disadvantage women. CEDAW's avowed aim to modify social and cultural patterns based on stereotyped roles for men and women (Art. 5(a)) paves the way to delve into the underlying impediments to women's economic empowerment through their labour.

In the CEDAW Committee's General Recommendation No. 17 (1991), which called for measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product, one can see insights into the critical nature of reconceptualizing work and family to address the structural causes of gender inequality. One of its suggestions was that States conduct time-use survey and collect statistics disaggregated by gender on time spent on activities both in the household and in the labour market.

Moreover, the term "equality" does not entail a mechanistic application. Schöpp-Schilling points out that the Convention stipulates different forms of equality. "First, it demands the achievement of purely formal equality, e.g. equality of women with men in and before the law with respect to formal opportunities and treatment. Second, the Convention stipulates de facto or substantive equality, meaning that women enjoy equality with men in practice. The Convention explicitly and implicitly recognizes both biological and socially constructed differences between women and men. ... Achievement of substantive equality also requires a redistribution of resources and power between women and men as well as changes in the public and private environments to provide for equality of results."

Fredman's work explores this idea more deeply by looking at positive rights and positive duties. She notes that "substantive equality transcends equal treatment, recognizing that treating people alike despite pre-existing disadvantage or discrimination can simply perpetuate inequality... Substantive equality expressly addresses the interaction between recognition and redistribution, focusing not on status per se, but on those groups for whom status differentiation is correlated with disadvantage... It is usual to frame the objectives in terms of equality of opportunity or equality of results. Both, however, are too vague to provide a secure enough guide... Providing equal opportunities could consist of simply changing procedures, such as removing exclusionary criteria from job specifications. At the other end of the spectrum, it could entail a radically substantive approach, requiring structural change and socio-economic equality. She argues that more fruitful than the opportunity-results conceptual framework would be one involving four potential aims of equality: respect for the equal dignity and worth of all, accommodation and positive affirmation and celebration of identity within community, breaking the cycle of disadvantage associated with out-groups, and facilitating full participation in society with genuine choice.

Similarly, recent debate over theories and practical approaches to social protection have involved an important gender dimension. These will necessarily include the implications of CEDAW's view of maternity as a social function. Discussions in the CEDAW Committee of ideas like these could enrich interpretations of the Convention and enhance its continuing relevance.
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11. In conclusion

Although the CEDAW Committee has on occasion referred to the work of the ILO, its Conventions and CEACR observations, it could make greater use of this specialist knowledge to breathe life into Arts. 11 and 14 of the Convention. The Committee could, for example, announce well in advance the topics of its planned General Recommendations, and invite all UN agencies having responsibility for relevant conventions to provide specific inputs to it. Without adding delay to the overall process, once an individual communications is declared receivable, a similar invitation could be extended to the agencies. The Committee could also make systematic use of information provided to it from such agencies to enable it to make more specific comments to countries. This would enhance policy coherence at the national level as well, since labour and gender issues often fall under different ministries.

In its General Recommendation No. 25 (2004) on temporary special measures, the CEDAW Committee recognized that the Convention is a dynamic instrument. That dynamism needs to continue when it comes to labour issues. Political, economic and social empowerment must move forward in tandem. An understanding of links between gender and economic empowerment, informality, global production systems, the care economy and other topics has grown, but is still incomplete. Further interdisciplinary research is needed to grasp the ways in which gender interacts with a range of other axes of social differentiation such as race, ethnicity, class, age, religion and ability. Equality in work is not just about prohibiting discrimination; it is about transforming the idea of work to make it more inclusive and nurturing of societal needs.

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Notes

8 Ibid., pp. 46-47.
10 L. Williams, Poor Women’s Experiences: Gaps in the Work/Family Discussion, in Conaghan and Ritsch, op. cit., pp. 193 et seq.
16 See e.g. R. Cook, Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, 3 Virginia Journal of International Law (1990), p. 643 et seq.
17 The CEDAW Committee has requested States parties having made reservations to reconsider them (General Recommendation No. 20 (11th Session, 1992). The current situation with regard to reservations to Art. 11 is as follows. In its reservation, «The Government of Australia advises that it is not at present in a position to take the measures required by article 2, paragraph 2(b) to introduce maternity leave with pay or with comparable social benefit throughout Australia. Austria, in a reservation registered to Art. 11, § 1(f), reserved its right to apply the provision of article 11 as far as night work of women and special protection of working women is concerned, with the limits established by national legislation». Ireland maintains a reservation to part of Art. 11(1), i.e. the right for the time being to maintain provisions of Irish legislation which are more favorable to women. It also listed certain national legislation on employment opportunities and pay as being sufficient implementation of Arts. 11(1)(b), (c) and (d). The following reservation was registered by Malaysia: «In relation to article 11, Malaysia in-
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terprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women. In its reservation, "The Government of Malta interprets paragraph 1 of article 11, in the light of the provisions of paragraph 2 of article 4, as not precluding prohibitions, restrictions or conditions on the employment of women in certain areas, or the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus." (CEDAW/SP/2006/2, p. 19). Singapore made a similarly worded reservation and added that legislation in respect of Art. 11 (as a whole) was unnecessary for the minority of women who do not fall within the ambit of Singapore's employment legislation. CEDAW/SP/2006/2, p. 27. The Government of the Federated States of Micronesia advised that it was not in a position to take the measures required by article 11, § 1(d) to enact comparable worth legislation or article 11, § 2(b) to enact maternity leave with pay or with comparable social benefits throughout the nation. CEDAW/SP/2006/2, p. 29. In relation to Art. 11, the United Kingdom entered a reservation regarding pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement, whether or not derived from a social security scheme (CEDAW/SP/2006/2, p. 32). This was as well to its independent territories (ibid., p. 33), for which further reservation was made in relation to specific social security benefits, family income supplements, etc. (ibid., p. 34). In relation to § 2 of Art. 11, the United Kingdom reserved the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance. Information on reservations to CEDAW is available at <www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

18. The following States have withdrawn reservations to Art. 11: Canada (Art. 11(1)(b)), Mauritius (Art. 11, § 1(b)) and (d), New Zealand on behalf of Cook Islands and Niue (Art. 11, § 2(b)), Thailand (Art. 11, § 1(b)), United Kingdom (Art. 11, in part). Ireland has withdrawn part of the reservation it had made to Art. 11, § 1.

19. These are the reservations made to Art. 11 by Malaysia (full Article), the Federated States of Micronesia (Art. 11, § 1(d) and § 2(b)), Singapore (Art. 11, § 1), and the United Kingdom on behalf of British Virgin Islands, Falkland Islands (Malvinas), South Georgia and South Sandwich Islands, and Turks and Caicos Islands (Art. 11, part of § 1 and § 2). In addition, several States have raised objections to the general reservations made upon ratification and still maintained by Libyan Arab Jamahiriya, Mauritania, Oman, Pakistan and Saudi Arabia. No objections have been registered in relation to the reservations made by Austria (Art. 11, § 1(b) or Malta (Art. 11, § 1)) concerning labour issues.

20. France ratified the Convention with reservations to Art. 14, paras. 2(e) and (f). The reservations stated that § 2(e) should be interpreted as guaranteeing women who fulfill the conditions related to family or employment required by French legislation shall acquire their own rights under social security, and that 2(h) should not be read as implying the provision of free services.


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24. Ms. Deng Thi Thuy Nguyen v. The Netherlands (Communication No. 3/2004), CEDAW/C/36/D/3/2004. Without giving reasons, the Committee agreed with the author's contention that a matter raised under art. 11, § 2 of CEDAW differed from comments that the Netherlands Trade Union Confederation FNV had made under ILO procedures in relation to application of the ILO Maternity Protection Convention (Revised), 1952 (No. 103), concerning the same legislative provision. The author had also pointed out that both ILO procedures and those available under the European Social Charter differed from the individual rights of complaint (§ 3.7). The CEDAW Committee did not state any view on this point.


26. Ibid., § 288.


28. See ICESCR, Art. 3 and ICCPR, Art. 3.

29. Specific questions that could be asked can be derived from, inter alia, United Nations Research Institute for Social Development, Gender equality: Striving for Justice in an Unequal World (2005), esp. pp. 56-60.

30. See, e.g., comments made in relation to Ireland, Italy, Lichtenstein, analysed in E. Seppett, Confronting the 'Sacred and Unchangeable': The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty, in 30 University of Pennsylvania Journal of International Law (2009), pp. 585-639.


33. See also in this regard the wording and legislative history of Art. 23(b) of CEDAW, in particular in Rehaf, op. cit., pp. 216-222.

34. The principal legal rationale for this was the Declaration concerning the aims and purposes of the International Labour Organization, also known as the "Declaration of Philadelphia", incorporated into the ILO Constitution in 1946. In § II(a), it declared, "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. This move has generated some controversy see P. Alston, Core Labour Standards and the Transformation of the International Labour Rights Regime, 13 European Journal of International Law, (2004) p. 457 et seq., F. Maupain, Renationalisation ou Détailisation? The Real Potential of the 1998 Declaration for the Universal Protec-
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whatssoever payable directly or directly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.


47. ILO, Up-to-date Conventions and Protocols, at <www.ilo.org>. The list does not include the White Lead (Painting) Convention, 1921 (No. 13), in force for 63 States, or the Benzene Convention, 1971 (No. 136), in force for 38 States. Convention No. 13 contains a 'total ban on women's employment in relation to industrial painting involving lead (Art. 3, § 5), whereas Convention No. 136 prohibits only the employment of women medically certified as pregnant and nursing mothers from work processes involving exposure to benzene or products containing it (Art. 11, § 1).


49. Ibid., § 196.

50. ILO, Heart, op. cit., p. 45.


54. ILO, Heart, op. cit., p. 119.


56. ILO Global Report 2007, op. cit., p. 20; Cornish, op. cit., pp 224-25 (who divides the first factor into two parts).

57. Ibid., op. cit., p. 225.

58. ILO, Global Report 2003, cit., p. 48. See also p. 50, citing the work of Jill Rubery.


60. See examples cited in Sepp, op. cit.


63. Sepp, op. cit., p. 141. For the ILO position, see p. 139.


65. Text introducing what was to become Art. 14 was not put forward until Draft 5 of CEDAW. See Sepp, op. cit., p. 153.


67. Indeed, the idea of adequate living conditions for all women was proposed but not adopted. See Sepp, op. cit., p. 161.
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67 Otto has said that sex assumes that the integration of women into the free market economy is the way that development will proceed. All too often, attracting women into an uneven and risky market economy through the provision of low-interest loans and credit, has threatened their survival and that of their families, rather than improving their status. D. Otto, Discerning Masculinities: Reimagining the Gendered Subject(s) of International Human Rights Law, in D. Buss and A. Manji (eds.), International Law: Modern Feminist Approaches Hart, Portland, 2005, p. 119.


70 Boereffijn, State obligations, op. cit., p. 16.

71 For example, Art. 18 of Convention No. 184 provides, measures shall be taken to ensure that the special needs of women agricultural workers are taken into account in relation to pregnancy, breastfeeding and reproductive health.

72 The Convention includes obligatory provisions protecting wage payments (direct payment at regular intervals, limits on deductions, etc. - Art. 20.35), the right to organize and collective bargaining (Arts. 54-70), and labour inspection (Arts. 71-84). Ratifying States may accept additional obligations in relation to other working and living conditions. These include provision for paid maternity leave and nursing breaks (Arts. 46-49), and prohibition of dismissal of a woman solely because she is pregnant or a nursing mother or while she is absent on maternity leave (Art. 50).


75 States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile, CEDAW, Art. 15, § 4.

76 The International Convention, adopted on 18 Dec. 1990, entered into force on 1 July 2003 and as at 21 Nov. 2009 had 42 ratifications. The ILO Migrant Workers Convention, 1949 (No. 97) has been ratified by 49 states and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) by 23 States (with some overlap with those having ratified Convention No. 97). In a General Survey by the CERACM, some revision of these instruments was recommended, and one outcome of that discussion was the Multilateral Framework. The ILO’s 2008 report to CEDAW unfortunately did not mention the ILO instruments or the Framework.

77 LNTS, vol. 1, p. 83.

78 ILO, Eradicating of Forced Labour, Committee of Experts on the Application of Conventions and Recommendations, General Survey, International Labour Conferences, 2007, Report III (Part II), pp. 39-47 and 113. In addition, the Worst Forms of Child Labour Convention, 1999 (No. 182) prohibits, inter alia, trafficking of children (defined as anyone under age 18), and the use, procuring or offering of a child for prostitution (Art. 3). In the recently developed Toolkit to Combat Trafficking in Persons, Conventions No. 29 and 182 – both widely ratified – are two of several labour instruments listed.


81 Ibid.


83 E.g., Concluding comments of the Committee on the Elimination of Discrimination against Women: Indonesia, in CEDAW/C/IND/N/CO/5, 10 Aug. 2007, §§ 22-23.


85 Ibid., § 15, with reference to payment of domestic workers’ wages into an employer’s bank account.


87 Consideration is being given, from a gender equality perspective, to the amendment of such provisions.

88 In the negotiation process of CEDAW, draft text which eventually emerged as Art. 17 of the Convention included reference to marital status, an element that was ultimately removed from that Article but included elsewhere. See Rehbock, op. cit., pp. 133-134. This probably reflected Art. 6(3) of the 1975 ILO Declaration on Equality of Opportunity and Treatment for Women Workers.


90 Cornish, op. cit., pp. 239-240.


95 E.g., Cornish, op. cit., pp. 234-235.

96 Schöpp-Schülling, op. cit., p. 18.

97 Freedman, op. cit., p. 178.
