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Citation

Holtmaat, H. M. T., & Tobler, R. C. (2005). CEDAW and the European Union's Policy in the Field of Combating gender Discrimination. *Maastricht Journal Of European And Comparative Law*, 12(4), 399-425. Retrieved from <https://hdl.handle.net/1887/36967>

Version: Not Applicable (or Unknown)

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SPECIAL ISSUE: THIRTY YEARS OF EU SEX EQUALITY LAW

Compiled and guest-edited by Tamara Hervey

2005, Volume 12, Number 4

MJ

■ BRUYLANT ■ GAUNT ■ HART ■
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MAASTRICHT JOURNAL of European and Comparative Law

CEDAW AND THE EUROPEAN UNION'S POLICY IN THE FIELD OF COMBATING GENDER DISCRIMINATION

RIKKI HOLTMAAT and CHRISTA TOBLER*

ABSTRACT

This paper aims to show that the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) can provide inspiration and open new avenues to solve some of the problems that are the consequence of the currently insufficient approach to gender equality under European Community law. It is argued that the approach of CEDAW should be applied in both interpreting existing EC law and in making new law. In interpreting existing EC sex equality law, the Convention's role as a source of inspiration must be taken much more seriously than is currently the case. As for the drafting of new law, it is true that the EC itself is not a signatory to CEDAW and, therefore, not bound by the Convention in a strict legal sense. However, the Member States are signatories. As such, they are under an obligation to take the Convention seriously, an obligation that also relates to the making of EU and EC Treaty law that, in turn, provides the framework for the adoption of secondary EC law.

§1. INTRODUCTION

From the very start, equality and non-discrimination have been central objectives of the policies of what was then the European Economic Community. However, the relevant law was mainly instrumental with respect to the Community's economic goals, both in the context of free movement (prohibition of discrimination on grounds of nationality) and in social law (prohibition of discrimination on grounds of sex). Indeed, European

* We wish to thank our colleagues in the equality unit of the research project 'The Protection of Fundamental Rights in an Integrating Europe' of the Faculty of Law, Leiden University, as well as Professor Tamara Hervey, University of Nottingham, for their comments on earlier drafts of this paper.

Community sex equality law started out as a matter of *economic* equality,¹ though later the Court of Justice lifted what was then Art. 119 of the EEC Treaty (now, after amendment, Art. 141 EC) on equal pay for men and women up to the level of a general principle of Community law (*Defrenne III*).² Today, respect for human rights is explicitly recognized in Art. 6 EU and at the level of soft law in the European Union Charter of Fundamental Rights.³ Nevertheless, EU social policy – of which EC sex equality legislation is a part – has long remained heavily market-oriented in its scope, in its approach and in its function in the EU legal order.⁴

As has been pointed out by Fredman,⁵ a shift from this economic or market-oriented approach to a human rights approach includes a shift from formal to substantive equality and from a reactive to a proactive approach to combating discrimination. This contribution aims to examine one possible avenue towards such a human rights approach in the field of gender equality in the European Union, namely the approach prescribed by the United Nations Convention on the Elimination of All Forms of Discrimination against Women (henceforth: CEDAW). So far this Convention has played only a small role in the academic and political discourse about the construction of EC anti-discrimination legislation.⁶ It would seem to the present writers that CEDAW's full potential to advance the case of equality for women has not yet been realized in the European Union.⁷ It must certainly be recognised that EC sex equality law has had considerable impact on the possibilities for European women to gain access to the labour market and to secure equal treatment in relation to pay, working conditions and work-related social security rights. However, the fact remains that in some respects the results have been very disappointing.

¹ The right to equal pay, as laid down in Article 119 of the EEC Treaty, was born from a fear harboured by the French government that France would not be able to compete on an equal footing with other Member States as long as France was the only Member State that had equal pay legislation; see L. Imbrechts, 'L'égalité de rémunération entre hommes et femmes', 22 *Revue trimestrielle de droit européen* 231 (1986); C. Barnard, 'The economic objectives of Article 119', in T. Hervey & D. O'Keeffe (eds.), *Sex Equality Law in the European Union* (Wiley, 1996), 320; also C. Hoskyns, *Integrating Gender. Women, law and politics in the European Union* (Verso, 1996).

² Case 149/77 *Defrenne v SABENA* [1978] ECR 1365. The Court held that 'respect for personal human rights is one of the principles of Community Law'. It added: 'There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.'

³ OJ 2000 C 364/01. In the framework of the EU Constitutional Treaty, the Charter would be binding law (part II of the Treaty establishing a Constitution for Europe, OJ 2004 C 310).

⁴ See M. Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press, 2002), Chapter 1 (European Social Policy: Between Market Integration and Social Citizenship); also J. Shaw (ed.), *Social Law and Policy in an evolving European Union* (Hart Publishing, 2000).

⁵ See Fredman's contribution to this issue.

⁶ See J. Swiebel, 'What could the European Union learn from the CEDAW Convention?', in I. Boerefijn et al. (eds.), *Temporary Special Measures. Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of all Forms of Discrimination Against Women* (Intersentia, 2003), 51.

⁷ One could say that either the glass is half full or half empty, as Hervey expressed herself at the Conference held in The Hague in November 2004; see her introduction to this issue.

Against this background, the present writers are convinced that CEDAW can provide inspiration and open new avenues to solve some of the problems that are the consequence of the current approach to gender equality in the EU. Accordingly, this paper argues that from a feminist perspective the best possible avenue to improve EC law in view of eliminating discrimination against women in the Member States is to follow the approach of CEDAW, with its sophisticated way of addressing sex discrimination. This argument relates, first, to the interpretation of existing EC law. It relies on Art. 6 EU, which states that the European Union is founded on the principle of respect for human rights and fundamental freedoms. This paper argues that based on this provision and at least within the limits of the European Union's competences, the existing sex equality law must be interpreted in the light of human rights law such as enshrined in CEDAW. In this framework, the Convention's recognised role as a source of inspiration for the interpretation of EC law must be taken much more seriously. Second, the argument of the usefulness of CEDAW concerns the drafting of new EC law. Given that the European Community is not a Signatory to CEDAW, it is not bound by the Convention in a strict, legal sense. Therefore, it cannot be argued that EC law is invalid or at least reviewable if it is incompatible with CEDAW. Instead, the argument made in this paper is that the EU Member States must take the obligations imposed on them as States Parties to the Convention seriously not only on the level of national law but also when they act as the Masters of the Treaties and make EU and EC law which, in turn, provides the framework for the adoption of secondary law.⁸

In explaining these arguments, the paper proceeds as follows: after a brief description of the content and the scope of CEDAW (*infra* 2), the Convention's approach to equality is compared to that of existing EC sex equality law (*infra* 3). In a final part, the paper describes the influence that a correct reading of the Convention could (and, in our view, should) have on EU policy and legislation in the field of gender equality (*infra* 4). The paper concludes with a short paragraph summarising the added value of this part of international human rights law for the development of an effective equal rights strategy of the European Union (*infra* 5).

⁸ The present writers are not aware of any reports on the effects of this Convention on European Community (legislative) policies. There are various Dutch reports and studies reviewing Dutch legislation and policies. For an overview of those reports the latest study, see R. Holtmaat, *Towards Different Law and Public Policy. The significance of Article 5a CEDAW for the elimination of structural gender discrimination* (Ministerie van Sociale Zaken en Werkgelegenheid/Reed Business Information, 2004).

§2. CEDAW

For reasons of space, the history and content of CEDAW are not described in this paper,⁹ and neither are the mechanisms to implement and supervise the Convention discussed.¹⁰ Below, the concept of non-discrimination which forms the basis of the Convention (A) and the Convention's scope and purpose (B) are described briefly.¹¹

A. THE ENCOMPASSING CONCEPT OF DISCRIMINATION IN CEDAW

Discrimination for the purposes of the Convention means 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (Art. 1 CEDAW).

There are three particularly important aspects to this definition. First, under the Convention the principle of equality between men and women is directly and openly linked to the enjoyment of *all human rights and fundamental freedoms*. A breach of the non-discrimination principle is by itself considered to be a breach of a human right of women. What makes CEDAW special is that under this Convention such a breach is linked to a breach of other human rights, such as in the sphere of participatory rights, freedom rights and social and economical rights. This means that it is not unequal treatment as such that is condemned, but more specifically unequal treatment that leads to a breach of fundamental rights of women.¹² This means that, under the Convention,

⁹ See for example N. Burrows, 'The 1979 Convention on the Elimination of all Forms of Discrimination Against Women', 32 *Netherlands International Law Review* 419 (1985); M. Wadstein, 'Implementation of the UN Convention on the Elimination of all Forms of Discrimination Against Women', 10 *Human Rights Quarterly* 4 (1988), 5, and M. Böker, 'Das UN-Übereinkommen zur Beseitigung jeder Form der Diskriminierung der Frau (CEDAW)', in Deutsches Institut für Menschenrechte (ed.), *Frauenrechte in Deutschland. Follow-Up-Prozess CEDAW 2004* (Deutsches Institut für Menschenrechte, 2005), 6.

¹⁰ See R. Holtmaat, 'European Women and the CEDAW Convention: The way forward', in Association Française des Femmes Juristes (AFFJ) & European Women Lawyers' Association (EWLA) (eds.), *L'égalité entre femmes et hommes et la vie professionnelle; Le point sur les développements actuels en Europe* (Edition Dalloz, 2003), 153.

¹¹ For a more detailed discussion, see Holtmaat, in 'L'égalité entre femmes et hommes'.

¹² It can be argued that this is a disadvantage if compared to a formal and neutral non-discrimination principle in which discrimination is defined as 'any form of (non-justifiable) unequal treatment on a certain suspect ground' because in the substantive view the right not to be discriminated against can only be invoked when the unequal treatment leads to an infringement of the human rights of a person (compare Art. 14 of the European Convention on Human Rights, which is explicitly formulated as a connected right). However, the present authors believe that the added value of a substantive approach compared to a purely formal approach outweighs this possibly restrictive effect. In addition, the formal view sometimes leads to questionable lawsuits. In a Dutch case, a postman claimed that he has been

the principle of non-discrimination clearly is a substantive norm that gives directions to what kind of treatment is required in order not to violate this principle.¹³

Second, CEDAW prohibits discrimination against *women* and thereby recognises the fact that it is *women* who historically have suffered and still suffer from a variety of forms of discrimination. In other words, the Convention is based on an *asymmetrical concept of equality* or non-discrimination. Indeed, the whole idea of CEDAW is to overcome the situation that *women* are discriminated against. This means that the introduction of a policy hurting the position of women under the guise of equal treatment of men would never be allowed since such a policy would evidently be in breach of the Convention's second goal (improving the position of women; see below para. 2.B.2).¹⁴ At the same time, this does not mean that the Convention only calls for actions that are solely directed towards women. For example, measures aimed at facilitating the combination of care work and paid work for men perfectly fit the Convention's framework.¹⁵

Thirdly, the concept of discrimination under the Convention is not directed towards assimilation of women to male standards or norms but rather towards the *recognition of diversity*. The usual construction under national and international sex equality law is that women have a right to treatment 'on the basis of equality with men'. This means that their situation needs to be in line with the situation of men. This has been replaced in the Convention by the formula that there is a right to be treated 'on a basis of equality of men and women'. Under a traditional and comparative approach, the male norm remains largely uncontested, meaning that women are required to 'fit into' social and economic structures and systems that are often not adequate to meet their aims and needs. In contrast, CEDAW requires that the existing male norm is first scrutinised and subsequently abolished. Accordingly, the Convention is a tool to facilitate gender diversity and to enhance structural change in which women's needs are incorporated.¹⁶

discriminated against because he was not allowed to wear shorts on warm days whilst his female colleague was allowed to wear a skirt. The Dutch Equal Treatment Commission decided the case in favour of the postman; Equal Opportunities Commission, Judgment 1999-56 (see http://www.cgb.nl/asp/zoek_resultaten_detail.asp?oordelenID=453054624&offset=).

¹³ The term substantive means that the norm contains directions as to *what needs to be done*, or *what goal or result should be achieved*. What matters is the result of a certain treatment, not the kind of treatment as such.

¹⁴ The effect of 'levelling down' is one of the notorious problems of formal equal treatment legislation; see further below, para. 3.A.

¹⁵ The CEDAW Committee commented as follows on the policy of Norway: 'The Committee applauded the Government of Norway for directing attention to the necessary changes in men's roles and tasks as an important element in achieving true gender equality, including men's encouragement to use their right to paternity leave and to increase their involvement as caretakers in the labor market.' Norway (1995), A/50/38, CEDAW/C/SR.277, para. 486. See also the comments on Finland (1995), A/50/38, CEDAW/C/SR. 272, para. 388.

¹⁶ This is discussed in more detail below, para. 2.B.3, where the third objective of the Convention (and Art. 5a CEDAW) is explained.

B. SCOPE AND PURPOSE OF CEDAW

As is already clear from the wording of Art. 1 CEDAW, cited above, the Convention addresses the political, economic, cultural, social and private life of women. Arts. 6-16 CEDAW relate to issues such as health care, immigration policies, education, participation in political parties, employment relations, social security, violence against women, trafficking in women, the rights of women in family life (and family law) and the position of rural women. All of this means that the *scope* of the Convention is very broad and covers virtually every area of human relations.

Within this broad framework, CEDAW has a threefold purpose that finds expression in a threefold obligation of States Parties to the Convention, namely:

- 1) To implement complete equality in law and in public administration, including enacting a prohibition to discriminate in private relations;
- 2) To improve the *de facto* position of women; and
- 3) To combat the dominant gender stereotypes and gender ideology.¹⁷

These obligations and the goals underlying them should not be separated or ranked, but rather must be read as three aspects of one and the same overarching purpose which is the *elimination of all forms of discrimination against women*.¹⁸ As such, they point at three different strategies that must be used in combination and that are briefly discussed in the following sections.

1. *The non-discrimination principle: a strategy for individual rights*

The aim of measures to be adopted under the first CEDAW goal is to ensure that men and women are equal before the law as well as in public and private life. Art. 2 CEDAW obliges the governments of States Parties to the Convention to make sure that the state does not discriminate against women in its laws, policies and practices and that no discrimination is allowed between citizens either. Accordingly, legal impediments excluding women from certain spheres of life must be abolished and anti-discrimination legislation must be enacted and implemented in an effective way. In practice, this has led to the adoption of legal prohibitions against sex discrimination, with a corresponding

¹⁷ A thorough study of scope and purpose of the Convention, including the present analysis of the Convention's goals, can be found in the first National Report on the CEDAW Convention to the Dutch Parliament: L.S. Groenman et al. (eds.), *Het Vrouwenverdrag in Nederland anno 1997* (Vuga, 1997). An English translation of parts of this report can be found as an appendix to Holtmaat, *Towards Different Law and Policy*. The CEDAW Committee endorsed this analysis in the Concluding Comments concerning the situation in the Netherlands, issued after the Committee's 25th session in July 2001; see Concluding Comments A/56/38, CEDAW/C/SR. 512 and 513, para. 196; see also General Recommendation No. 25, para. 6 (available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>).

¹⁸ See above, para. 2.A.

right of individual women to stand up against discrimination and to seek recognition and redress in their individual cases. The underlying idea of such an *individual rights strategy* is the empowerment of female victims of discrimination. However, important as this may be in the framework of an overall strategy for gender equality, the individual rights strategy has been criticized as insufficient by itself in order to tackle the root causes of discrimination.¹⁹ Although this strategy may be able to open some doors to women, it can never guarantee that behind these doors women will be able to participate fully. Rather, this requires an emphasis on the position of women (individuals as well as groups) as the subordinated or excluded sex, and, accordingly, a stronger focus on the systemic or structural causes of discrimination. The second and third aims of the Convention are explicitly directed at this level.

2. *A positive duty to improve the de facto position of women: a strategy for social support*

As stated above, the Convention reflects a goal-oriented or substantive principle of equality. This becomes most clear from the fact that the second aim of CEDAW is to improve the *de facto* position of women. Art. 3 CEDAW obliges the State Parties to take *all appropriate measures* 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.²⁰ The Convention's substantive provisions (Arts. 6-16 CEDAW) call for action in the fields covered by the Convention in terms of 'State Parties *shall ensure*', 'State Parties *shall grant*' and 'States *shall take all appropriate measures*' and subsequently specify what actions are necessary.²¹ Thus, the

¹⁹ E. Ellis, *European Sex Equality Law* (Clarendon Press, 2nd edition, 1998), 321, remarks: 'The right not to be discriminated against on the ground of sex means the right of an individual not be subjected to specific treatment which is less favourable than that which is or would be received by a similarly placed member of the opposite sex, where the ground or reason for the less favourable treatment is sex.' (There is now a more recent edition of Ellis' book which, however, deals not only with sex equality law: E. Ellis, *EU Anti-Discrimination Law*, Oxford University Press, 2005). See also E. Ellis, 'The Definition of Discrimination in European Sex Equality Law', 19 *Eur. L. Rev.* 563 (1994); further, S. Fredman, *Discrimination Law* (Oxford University Press, 2002), Chapter 4, where the author discusses the problems that arise in the context of this approach to legal equality.

²⁰ See also Art. 4(1) CEDAW, which permits temporary special measures and Art. 24 CEDAW, which repeats the general obligation to take action.

²¹ In international human rights law the various kinds of obligations arising under human rights documents are classified according to their non-binding or binding nature, based on the wording of the provisions at stake. A provision in which the words *shall ensure*, *shall grant* or *shall take appropriate measures* are used is mandatory; see A. Byrnes & J. Connors, 'Enforcing the Human Rights of Women: A Complaint Procedure for the Women's Convention?', 21 *Brooklyn Journal of International Law* 679 (1996). The CEDAW Committee has specified the obligations under the Convention in its Concluding Comments after having discussed the Country Reports of the States Parties and in General Recommendations. In the future it will be able to develop jurisprudence in its judgments about individual cases brought to its attention under the Optional Protocol; see Holtmaat, in 'L'égalité entre femmes et hommes'.

Convention not only entails the negative norm to refrain from discrimination against women, but also the positive duty to do everything that is appropriate and necessary to improve the *de facto* position of women.²² This goes further than a formal equality standard that merely asserts that men and women *are* equal and thus should be treated equally. Here, *de facto differences* are taken into account, meaning that all measures and actions taken to abolish discrimination should result in a higher degree of *de facto equality* of men and women. In other words, this reflects a material or substantive equality norm.²³ In this framework, CEDAW not only provides for *individual* rights but also for the right for certain excluded, underprivileged or disadvantaged *groups* of women to gain access to all spheres of life and to participate therein on their own conditions.²⁴ The Convention is, therefore, also group-oriented. The strategy to be followed in order to implement this goal can be labelled as a *social support strategy*. On the basis of a thorough analysis of the position of women (or certain groups of women)²⁵ in society, the government should design, adopt and implement social and economic policies that will enable (groups of) women to improve their position in all fields covered by the Convention.

One particular aspect of such a strategy²⁶ is the adoption of *temporary special measures* (in other contexts often called 'affirmative action' or 'positive action' measures)²⁷ directed specifically at women in order to accelerate the process of improving their *de*

²² This is a relative obligation, in the sense that each State has to do what is within its reach. For example, Sierra Leone has less potential and resources than EU countries. The idea is that States Parties faithfully work at a gradual implementation of the Convention. In academic writing it is sometimes said that a substantive approach to equality and non-discrimination is more suitable for governments than for the judiciary. A substantive approach entails making decisions about the exact goals that one wants to achieve and to the amount of money and other resources that will be made available to implement the policies; see T. Loenen, 'Substantive equality as a right to inclusion: dilemma's and limits in law', 24 *Rechtstheorie & Rechtsfilosofie* 194 (1995); also T. Loenen, 'Indirect Discrimination. Oscillating between Containment and Revolution', in T. Loenen & P. Rodrigues (ed.), *Non-Discrimination Law. Comparative Perspectives* (Kluwer, 1999), 195.

²³ See Fredman, *Discrimination Law*, Chapter 1.

²⁴ Again, the Convention speaks of '*on a basis of equality of men and women*' (Art. 1 CEDAW) and of '*accelerating de facto equality between men and women*' (Art. 4(1) CEDAW). Accordingly, women should not be obliged to assimilate to male norms and standards (e.g. with respect to the organization of work and work and family life), but should have real influence on how they participate.

²⁵ It is important to recognize the differences among women and specify in each measure which groups of women are targeted by a given policy. For support of this interpretation, see General Recommendation No. 25 of the CEDAW Committee.

²⁶ It should be stressed that such measures should not be the main mechanism to improve women's position but are only a relatively small part of them. Other, structural and non-temporal measures are far more important. To give an example: providing free childcare facilities for all parents is more important than a temporary subsidy scheme that supports working mothers to get some kind of daycare for their children.

²⁷ The term 'affirmative action' is mostly used in the USA whilst 'positive action' is used in the EU/EC context. The difference in terminology is explained by M. Bossuyt, Special Rapporteur on behalf of the Commission on Human Rights, in his study entitled *Prevention of Discrimination: The concept and practice of affirmative action* (Commission on Human Rights, Economic and Social Council, E/CN.4/Sub.2/2002/21, 17 June 2002).

facto position (Art. 4(1) CEDAW).²⁸ Such measures can take different forms, varying from 'soft' measures (e.g. outreach programmes in education) to quite 'severe' measures (e.g. preferential treatment of women in job applications). It is clear from the combined reading of the general provisions of Arts. 1-5 CEDAW together with the specific obligations following from Arts. 6-16 CEDAW, that such measures are not only permitted under the Convention, but that they are *mandatory* where necessary to reach the aims of the Convention.²⁹ The CEDAW Committee's General Recommendation No. 25 provides detailed guidelines about the meaning and scope of 'temporary special measures' as well as about the conditions that need to be fulfilled in order to make such measures viable.³⁰

When reviewing positive action plans, it has to be asked whether the concrete plan at stake is appropriate and necessary to attain the goals set by the Convention, specifically whether it will effectively contribute to *accelerating de facto equality between men and women*. It is to be expected that the CEDAW Committee, which oversees compliance with the Convention, will consider whether such a plan is embedded in a more general social policy and other strategies aimed at improving the position of women and at tackling the structural causes of discrimination against women.³¹

3. *Banning gender stereotypes: a strategy for structural change*

Feminist legal scholars have pointed out that equal treatment norms are not capable of tackling the various forms of systemic or structural discrimination of women.³² For example, Cook³³ states that the predominant 'similarity and difference' model in equality

²⁸ For a collection of papers on this topic, see I. Boerefijn et al. (eds.), *Temporary Special Measures. Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of all Forms of Discrimination Against Women* (Intersentia, 2003).

²⁹ General Recommendation No 25, para. 24, states: 'Article 4, paragraph 1, read in conjunction with articles 1, 2, 3, 5 and 24, needs to be applied in relation to articles 6 to 16 which stipulate that States parties 'shall take all appropriate measures'. Consequently, the Committee considers that States parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's *de facto* or substantive equality.'

³⁰ In the broader context of public international law, see also the United Nations Human Rights Committee's decision of 17 August 2004 regarding a quota regulation concerning the composition, in terms of sex, of part of the members of the Belgian High Council of Justice. According to Gerards, the Committee in this case accepted the aim of representative diversity as a legitimate aim within the framework of the International Covenant on Civil and Political Rights; J. Gerards, 'Descriptive representatie als rechtvaardiging voor voorkeursbeleid', 30 *NJCM Bulletin* 626 (2005).

³¹ The CEDAW Committee will have the opportunity to evaluate such plans in detail once complaints under the Individual Protocol will be brought before it. The protocol is discussed in Holtmaat, in 'L'égalité entre femmes et hommes'.

³² See for example S. Fredman, 'Equality, a new generation?', 30 *Industrial Law Journal* 145 (2001). See also Fredman, *Discrimination Law*, 121 subs.

³³ R. Cook, 'International Human Rights Law: The Way Forward', in R. Cook (ed.) *Human Rights of Women; National and International Perspectives* (University of Pennsylvania Press, 1994), 3, 11 subs.

legislation does not allow for any questioning about the ways in which laws, cultures or religious traditions have constructed and maintained the disadvantage of women, or the extent to which institutions are male-defined and based on male conceptions of challenges and harms: 'Systemic discrimination or inequality of conditions, the most damaging form of discrimination, cannot be addressed via the rule-based sameness of treatment approach. Indeed, the use of this model virtually makes systemic disadvantage invisible.' Focusing on systemic or structural discrimination implies a more critical examination of the way in which legal, social, cultural and religious traditions make women subordinate to the male norm. The solution proposed by Cook is an asymmetric and substantive approach to equality under which the test is not whether men and women are treated comparatively equally, but whether a rule or practice is based on powerlessness and exclusion of women and whether such a rule or practice is systematically detrimental to women's needs and interests. This so-called *dominance approach* was developed by the American feminist legal scholar MacKinnon, according to whom the question in the fight against discrimination should not be whether there is a case of *sameness or difference* between women and men, but rather what are the power relations between the sexes:³⁴

'In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality ... is at root a question of hierarchy, which – as power succeeds in constructing social perception and social reality – derivatively becomes a categorical distinction, a difference.'

The conclusion of this analysis of the goals of CEDAW is that whilst the design, adoption and implementation of anti-discrimination legislation (first CEDAW goal) and of measures that are directed at improving the *de facto* position of women, including positive action plans, (second CEDAW goal) are indispensable for the elimination of gender discrimination, such measures will be ultimately ineffective if the structure and culture of a given society continue to be based on fixed and stereotyped ideas about the different (and inherently unequal) roles of men and women. Measures at the third level of the Convention's goals (banning gender stereotyping) are therefore also necessary. Because stereotyped views will not change by themselves, it is necessary to develop an active policy in which every legal measure and every public policy is critically examined in order to ensure the elimination of fixed gender stereotypes.

It is against this background that Art. 5a CEDAW provides: 'The State shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all

³⁴ C. MacKinnon, 'Difference and Dominance. On sex-discrimination', in K. Bartlett & R. Kennedy (eds.), *Feminist Legal Theory; Readings in Law and Gender* (Westview Press, 1991), 81, 87.

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.' For a long time this provision has been interpreted solely as an obligation to ban gender stereotypes from the mass media and advertising and from school teaching materials.³⁵ However, Burrows presents a somewhat different view of the provision's meaning, arguing that a correct implementation of the Convention will in itself put an end to the stereotyping of women.³⁶ According to Burrows, States Parties to CEDAW are obliged to engage in an active policy in this respect. Cook³⁷ in this context makes an interesting connection between the obligations under Arts. 5a and 2f CEDAW.³⁸ A combined reading of these provisions means that States are obliged to review all their existing legislation and public policies with a view to the question whether these laws, in some respect, reinforce existing cultural and social exclusion of women. Cook explains: 'These articles strongly reinforce the commitment to eliminate all forms of discrimination, since many pervasive forms of discrimination against women rest not on law as such but on legally tolerated customs and practices of national institutions.'³⁹ Cook also mentions various examples of other (substantive) Articles of the Convention for which this reading of the Convention's obligations is decisive.⁴⁰

This means that Art. 5a CEDAW not only aims at changing deeply rooted social and cultural *ideas* and *patterns of conduct* regarding 'appropriate' male and female behaviour, but also aims at changing social *structures* that are laid down in law and in official practices, that is, 'systemic discrimination' or 'structural discrimination'.⁴¹ States must be aware of the fact that gender stereotypes are not only a matter of ideology but also embedded in the main societal and institutional structures, including law. These structures must change in order to make it possible for both women and men to freely choose in what way they will give content and meaning to their personal identity and life styles. Accordingly, in Art. 5a CEDAW the Convention calls for both a *strategy for social and cultural change* and a *strategy to facilitate diversity*.

³⁵ See e.g. Wadstein, 'Implementation of the UN Convention', 13 and 14.

³⁶ Burrows, 'The 1979 Convention on the Elimination of All Forms of Discrimination Against Women', 428: 'If a woman, for example, is given the right to earn a living, to own property, to choose the number and spacing of her children then the role stereotyping of men and women must eventually be called into question.'

³⁷ R. Cook, 'State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women', in R. Cook (ed.), *Human Rights of Women; National and International Perspectives* (University of Pennsylvania Press, 1994), 228.

³⁸ Art. 2f CEDAW obliges States Parties to the Convention to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

³⁹ Cook, in 'Human Rights of Women', 240.

⁴⁰ Cook explains that Arts. 13, 14 and 16 CEDAW have to be interpreted in such a way that an end is put to traditional practices. Similarly, Arts. 2f and 5a CEDAW play an important role in the elimination of violence against women.

⁴¹ See Holtmaat, *Towards Different Law and Public Policy*.

§3. SOME BASIC FEATURES OF EC SEX EQUALITY LAW AS COMPARED TO CEDAW

It follows from the foregoing that CEDAW obliges the States Parties to it to follow a *multi-layered strategy* to combat all forms of discrimination against women. On the basis of the Convention there exists a right not to be discriminated against, which means that individuals have the right to claim equal treatment. With that an individual rights strategy is being followed. By imposing the duty to improve the *de facto* position of women a social support strategy is being followed. Finally, the third aim of the Convention (abolishing gender stereotypes) entails a strategy for structural social and cultural change and a strategy that facilitates diversity.⁴² Again, all three strategies are complementary and should be followed at the same time in any *effective* equal rights legislative policy.⁴³ Against this background, the following paragraphs provide a brief and comparative assessment of the basic features of EC law.

A. THE CONCEPT OF DISCRIMINATION IN EC SEX EQUALITY LAW

It is well known that the starting point in EC non-discrimination law is an interpretation of legal equality as a right to comparatively equal treatment.⁴⁴ Indeed, in the most recent generation of EC sex equality legislation, direct sex discrimination is explicitly described as the situation 'where one person is treated less favourably on grounds of sex than

⁴² Compare McCrudden's views about the threefold strategy that should be followed with respect to enhancing the rights of women. McCrudden differentiates between the Individual Justice Model, the Group Justice Model and Mainstreaming; C. McCrudden, 'Regulating discrimination', in Loenen & Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives* (Kluwer Law International, 1999), 295. Legislation that involves all three strategies is being called the 'fourth generation equality legislation' by Fredman, *Discrimination Law*, 122. The first three generations involve (1) the dismantling of formal legal impediments, (2) the legal prohibition of discrimination by public or private actors and (3) the widening of the scope of unlawful discrimination and the tools to achieve also a positive duty to promote equality; Fredman, 6. According to Shaw, EU legislation and policy in the field of equality already comprise of three main strands that form a 'patchwork of models', namely 'ensuring anti-discrimination in the formal sense, working towards substantive equality and managing diversity'. However, Shaw's analysis shows that the second and third strands are underdeveloped in terms of the legal basis that they rest upon; J. Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy', in *Current Legal Problems 2004* (forthcoming, Oxford University Press, 2005).

⁴³ A model for such progressive equal rights legislation has been developed by R. Holtmaat for the governments of Kazakhstan, Bosnia-Herzegovina and Uzbekistan. These reports, written on behalf of the OSCE Department on Human Rights (OHDIR), can be obtained from the author via e-mail (rikki@rikkiholtmaat.nl).

⁴⁴ In contrast, the Court recognises an encompassing right of unequals to be treated differently only on the level of the general principle of equality under EC law. In the context of written equality law, the starting point is always that of 'treating likes alike', with only few explicit exceptions; see Ch. Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination in EC Law*, (Intersentia, 2005), 17 subs.

another is, has been or would be treated in a comparable situation'.⁴⁵ The definition of indirect discrimination is also based on a test of comparatively unfavourable treatment.⁴⁶ There is no indication of the kind of treatment that would be appropriate, just or fair. In so far, the equality norm under EC law is empty or merely procedural.⁴⁷ Since consistency (treating likes alike, i.e. formal equality) prevails over substance (bringing about real equality), there is always the risk of levelling down.⁴⁸ This danger is particularly great because EC sex equality law is symmetrical: both men and women are protected against unfair and non-justifiable unequal treatment. It is irrelevant whether the claimant belongs to a group that is historically the victim of discrimination or that he or she really is in a disadvantageous position. Indeed, many men have won cases under this legislation, often resulting in the abolition of rules or practices that were (comparably) favourable to women.⁴⁹ Further, the fact that EC law heavily stresses the comparability of the situation of men and women means that women have the right to have a treatment 'on the basis of equality with men'.⁵⁰ This can easily lead to assimilation of women's needs and perspectives to male dominated practices and rules that already exist. It is obvious that all of this is in marked contrast to the approach of CEDAW as described earlier in this paper.

⁴⁵ Art. 2(2) of the Directive 76/207/EEC 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, OJ 1976 L 39/40, as amended by Directive 2002/73/EC amending Council Directive 76/207/EEC 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, OJ 2002 L 269/15 (Second Equal Treatment Directive, as amended).

⁴⁶ Article 2(2) of the Second Equal Treatment Directive, as amended.

⁴⁷ This is not specific to EC sex discrimination law but rather more generally a feature of EC equality law; see Tobler, *Indirect Discrimination*, 19 subs.

⁴⁸ A policy of 'equally bad is also equal' and, thus, of 'levelling down' is often followed by governments of EU Member States in order to comply with EC sex equality standards. The symmetrical equal treatment approach also means that positive action plans can equally be applied to men and women. The standard set in Art. 6(3) of the former Social Agreement, that such measures should be in favour of women, has been replaced by the sex neutral provision of 141(4) EC in the framework of the Amsterdam Treaty Revision. A weak and unenforceable Declaration was adopted at the same time, stating: 'When adopting measures referred to in Article 119(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.' (Declaration 28, OJ 1997 C 340/136, using pre-Amsterdam numbering of the relevant Treaty provision). See also Fredman, *Discrimination Law*, 94.

⁴⁹ For example, in the Netherlands the protection of widows in the social security schemes was virtually abolished as a consequence of the fact that widowers were claiming the same protection.

⁵⁰ See the definition of Art. 2(2) of the Second Equal Treatment Directive, as cited above.

B. THE SCOPE AND OBJECT OF EC SEX EQUALITY LAW

1. *The scope of EC sex equality law*

One particularly marked difference between EC law and CEDAW concerns the scope of the two legal orders. Whilst the latter covers virtually every aspect of life, EC sex discrimination cannot go beyond the limited competences of the EC vis-à-vis the Member States.⁵¹ This means that also a far-reaching obligation such as the obligation of the EC and of its Member States to engage in gender mainstreaming⁵² can apply only within the limits of the Community's competences. So far, EC sex equality law concerns only economic activities, even after the recent adoption of a Directive on goods and services, which for the first time expands the reach of EC sex equality law beyond matters of employment and social security.⁵³ These narrow limits have been reinforced through case law. Thus, the Court of Justice held that EC sex equality law does not cover social (welfare) benefits of women (e.g. *Jackson and Cresswell*)⁵⁴ and that it is not concerned with the division of roles within the family (e.g. *Bilka*,⁵⁵ *Hofmann*),⁵⁶ even where such issues are related to employment. It can be argued that some of this case law is unnecessary strict.⁵⁷ In as far as the EU deals with other topics that are covered by CEDAW, it is always by means of soft law (like Recommendations or Resolutions) or by means of policy or action programmes, and not by means of a legal prohibition against discrimination in the relevant fields.⁵⁸

⁵¹ Art. 5 EC, which states the principle of attribution of powers. However, in the case of racial and ethnic discrimination (Directive 2000/43/EC), EC law also covers further issues, such as the access to goods and services, social welfare, housing and health care. On the issue of competences, see T. Hervey, 'Sex Equality in Social Protection: New Institutional Perspectives on Allocation of Competence', 5 *Eur. L. J.* 196 (1998).

⁵² See further below 3.B.4.

⁵³ Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

⁵⁴ Joined Cases C-63/91 and C-64/91 *Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer* [1992] ECR I-4737; see the annotations by L. Luckhaus, 'New Disability Benefits: Beveridge Turned Upside Down' 21 *Industrial Law Journal* 237 (1992); P. Durston, '*Jackson and Cresswell v. The Chief Adjudication Officer*: No Help for Women in the Poverty Trap' 57 *Mod. L. Rev.* 641 (1994), and E. Traversa, 30 *Revue trimestrielle de droit européen* 277, 286, (1994)

⁵⁵ Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

⁵⁶ Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

⁵⁷ Compare AG van Gerven's different approach as expressed in his opinion on *Jackson and Cresswell*.

⁵⁸ E.g. the Daphne Programmes in the field of violence against women ; see http://europa.eu.int/comm/justice_home/funding/daphne/funding_daphne_en.htm.

2. *Anti-discrimination legislation of the EC*

As far as the first strategy of CEDAW (anti-discrimination legislation) is concerned and within the restricted field of application of EC sex equality law, it can be said that the Convention does not offer greater advantages than existing EC law.⁵⁹ EC sex equality law prohibits direct and indirect sex discrimination, and (sexual) harassment is a form of discrimination. EC law therefore requires that all laws, regulations and practices in the Member States should be free from sex discrimination. In many Member States this has led to changes in the national law and to a situation where anti-discrimination legislation is operative.⁶⁰ However, all of this applies only within the limited field of application of EC law, as mentioned in the previous paragraph. Accordingly, with regard to issues such as political participation, housing, health care and violence against women, there is no obligation to equal treatment and non-discrimination on the basis of EC law. Also, the symmetric and comparative nature of the EC sex discrimination provisions means that these are not in line with the asymmetric, non-comparative and substantive approach of the Convention.

3. *Positive duties to improve the situation of women*

According to many, positive duties for EU institutions and for the Member States to work towards the improvement of the position of women are necessary in order to overcome the limited impact of the individual rights approach that is predominant in current EC sex equality law. As Fredman puts it in the context of racial discrimination,⁶¹ it is necessary to

‘move beyond the fault-based model of existing discrimination law, where legal liability only rests on those individuals who can be shown to have actively discriminated, whether directly or indirectly; and the remedy is to compensate the individual victim. At the root of the positive duty, by contrast, is a recognition that societal discrimination extends well beyond individual acts of racist prejudice. Equality can only be meaningfully advanced if practices and structures are altered proactively by those in a position to bring about real change, regardless of fault or original responsibility. Positive duties are therefore proactive rather than reactive, aiming to introduce equality measures rather than to respond to complaints by individual victims.’

⁵⁹ Again, there is one major difference in this respect. EC law outlaws sex discrimination and is equally applicable to men as to women, which means that the norm that there should be no discrimination is in itself ‘sex-neutral’. See further below 3.B.

⁶⁰ See Bell, *Anti-Discrimination Law*, Chapter 6.

⁶¹ S. Fredman, ‘Equality: A New Generation?’, 163-164. See also Fredman’s contribution in this issue.

One of the means to implement a positive duty to improve the de facto position of women would be to design and to implement positive action plans that give women an opportunity to overcome the effects of past and present discrimination. However, this is very difficult to realise under the existing EC sex equality law. On a general level there are no 'hard' positive duties to work towards the improvement of the position of women. Certain positive duties do exist under Art. 3(2) EC⁶², and Art. 1(a) of the Amended Equal Treatment Directive,⁶³ but these provisions give no more than quite vague and soft guidelines in this regard.⁶⁴ On the specific level of positive action in favour of women, some progress can be seen in the Court of Justice's case law on this issue. However, even under the new positive action provisions (Art. 141(4) and EC Art. 2(8) of the Amended Second Equal Treatment Directive⁶⁵) the Member States are under no obligation to adopt positive action plans; this is simply a possibility. In certain circumstances this may fall short of the requirements of CEDAW under which there is a positive obligation to improve the situation of women, if necessary by way of positive action or temporary special measures. Another problematic aspect of EC law is that positive action in favour of women is still seen as an exception to sex equality, rather than its other, positive side (which is the conception of CEDAW).⁶⁶

⁶² Art. 3(2) EC provides: 'In all its fields of activity referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.' See also Art. III-118 of the Constitutional Treaty (Treaty establishing a Constitution for Europe, OJ 2004 C 310), which states: 'In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' In order to enter into force, the Constitutional Treaty needs to be ratified by all Member States. The ratification process is under way. In two Member States, France and the Netherlands, the people rejected the Treaty in popular votes.

⁶³ Directive 2002/73/EC amending Council Directive 76/207/EEC 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, OJ 2002 L 269/15. 1a of the amended Directive reads: 'Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities...'. See Shaw, in *Current Legal Problems 2004*, 35-36. As Shaw points out, the wording of this provision is quite vague, especially when compared to a rejected earlier draft of this Directive, in which it was stated that 'Member States shall introduce such measures as are necessary to enable them actively and visibly to promote the objective of equality between men and women...'

⁶⁴ Shaw links these provisions to the policy of mainstreaming equality in all of the Union's legislation and policies.

⁶⁵ Compared to the earlier provisions, the wording of Art. 141(4) EC and Art. 2(8) of the Amended Second Equal Treatment Directive ('ensuring full equality in practice between men and women') is more in line with the language of Art. 4(1) CEDAW.

⁶⁶ For some time, the ECJ's policy in this respect was very restrictive. Only under very strict conditions could positive action measures be lawful under EC-Law. More recently, the Court has emphasised the requirement of proportionality rather than that of strict interpretation; see A. Veldman, 'The lawfulness of women's priority rules in the EC labour market', 5 *Maastricht Journal of European and Comparative Law* 403 (1998); K. Küchhold, 'Badeck. The third German reference on positive action', 30 *Industrial*

A progressive and modern equal rights legislation intended to implement all three aims of the Convention should impose a positive obligation on clearly designated public actors⁶⁷ to develop positive action programmes as part of more general and structural social policy programmes. Examples of such positive duties to put an end to discrimination can increasingly be found in national constitutions and equality laws of EU Member States.⁶⁸ As such, they may one day be regarded as forming part of the constitutional tradition common to the Member States which, according to Art. 6(2) EU, is a source of fundamental rights and as such must be taken into account when interpreting EC law. This could open up an avenue for the Court of Justice to interpret Art. 141(4) EC and related secondary law in a somewhat less narrow way. In doing so, the Court could also look at other international human rights documents such as CEDAW and General Recommendation No. 25 of the CEDAW Committee, mentioned above.

4. *Abolishing gender stereotypes*

As mentioned above, existing EC sex equality legislation has a strong tendency to assimilate women to the male norms, i.e. norms that are firmly set in the 'normal' structures and organizational principles of our societies. In contrast, the substantive, result-oriented equality approach of CEDAW calls for a strategy aimed both at bringing about structural change and at facilitating diversity in order to compensate and correct this effect. However, EC sex equality law, and in particular the Court of Justice's case law, are often criticized for in fact mirroring the precise gender stereotypes which CEDAW seeks to ban.⁶⁹ In order to reflect the goals of the Convention, it would be desirable for the law of the EU and of its Member States to explicitly lay down the aims of banning

Law Journal 116 (2001); Ch. Tobler, 'Positive action under the revised second equal treatment directive', in Association Française des Femmes Juristes (AFFJ) & European Women Lawyers' Association (EWLA) (eds), *L'Egalité entre femmes et homes et la vie professionnelle. Le point sur les développements actuels en Europe* (Editions Dalloz, 2003), 59.

⁶⁷ According to the present authors, the law should list the governmental bodies, public institutions, enterprises, etc. that have the obligation to develop positive action programmes. Examples of such an approach can be found in Canada and in Northern Ireland; see B. Hepple *et al.*, *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (The University of Cambridge Center for Public Law and The Judge Institute of Management Studies/Hart Publishing, 2000).

⁶⁸ Examples can be found in Shaw, in *Current Legal Problems* 2004.

⁶⁹ See for example C. McGlynn, 'Ideologies of motherhood in European Community sex equality law', 7 *Eur. L. J.* 29 (2000); R. Holtmaat, 'The issue of overtime payments for part-time workers in the Helmig case. Some thoughts on equality and gender, in Y. Kravaritou (ed.), *The regulation of working time in the European Union* (Peter Lang, 1999), 411; T. Hervey & J. Shaw, 'Women, work and care. Women's dual role and double burden in EC sex equality law', 8 *Journal of European Social Policy* 43 (1998). A particularly problematic recent decision is Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* ECR [2004] I-5907, concerning the role played in society by military service and maternity leave, respectively. In this judgment the Court of Justice held that periods of absence from work of the employee because of parental leave and because of

stereotypes and of changing social and cultural structures that are based upon such stereotypes and to create a firm legal basis for both EU institutions and EU Member States to take action in this respect.

The obligation to ban gender stereotypes is not only a matter of taking legal or policy measures against public advertising, educational materials or cultural or religious institutions that perpetuate the image that women are inferior to men or that women have a 'different' role in life than men. As the in-depth study of Art. 5a CEDAW has revealed, this obligation also concerns the State responsibility to scrutinise its own contribution to the prevalence of such stereotypes in maintaining laws and policies that perpetuate them.⁷⁰

The main tool or mechanism that can be used in the context of implementing the third goal of the Convention is that of gender mainstreaming.⁷¹ Since the Amsterdam revision of the EU and EC Treaties,⁷² Art. 3(2) EC has been obliging the European Community to 'aim to eliminate inequalities, and promote equality, between men and women' in all its fields of activity. Art. 1(1)(a) of the amended Second Equal Treatment Directive makes this somewhat more concrete by providing that 'Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1'. The Commission explains on its website:⁷³

'Gender mainstreaming involves not restricting efforts to promote equality to the implementation of specific measures to help women, but mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situation of men and women (gender perspective). This means systematically examining measures and policies and taking into account such possible effects when defining and implementing them.'

military service are not comparable for the purposes of calculation of a termination payment in employment. The Court's reasoning implies that, unlike military service, the bringing up of children does not lie in the public interest. The same misguided approach can be found in AG Kokott's opinion on the case.

⁷⁰ See Holtmaat, 'Towards different law and policies'.

⁷¹ On mainstreaming, see the special issue of 10 *Feminist Legal Studies* (2002) (including an extensive bibliography) and, more recently, R. Pirstner-Ebner, 'Neue Gemeinschaftsentwicklungen im Bereich des Gender Mainstreaming', 14 *Europäische Zeitschrift für Wirtschaftsrecht* 205 (2004), and Shaw, in *Current Legal Problems* 2004, with further references.

⁷² See Ch. Tobler, 'Sex Equality Law under the Treaty of Amsterdam', 2 *Eur. J. of L. Reform* 135 (2000).

⁷³ See http://europa.eu.int/comm/employment_social/equ_opp/gms_en.html. See also the Commission's Communication 'Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities', COM(96) 67 fin.

According to some commentators, there is now a clear legal framework for gender mainstreaming in the European Union, which will be even stronger if the Constitutional Treaty enters into force.⁷⁴ This framework, however, lacks effectiveness not only because the Constitutional Treaty may never become binding but also since it does not describe in any detail what the Union itself or Member States should do in this respect. As Shaw points rightly out, 'a strongly worded obligation on public authorities to engage in the mainstreaming of gender, or equality, with a clear legal basis, is fundamental to the success of mainstreaming endeavours, not least because it overcomes resistance on the part of policy-makers.'⁷⁵

Apart from implementing a strong and clear mainstreaming policy, more efforts need to be made to introduce instruments to reveal and to change social and cultural structures that are based on gender stereotypes on the practical level. Such efforts include in particular a gender examination or gender assessment of all existing and forthcoming laws and official state programmes and other legislative acts. This process of gender auditing or, as it is often called, Gender Impact Assessment (GIA), would clarify the effects of the laws, policies or regulations on the *de facto* position of women and determine to what extent they reflect (and re-establish) gender stereotyped views of the respective roles of men and women.⁷⁶ It can certainly be argued that Art. 3(2) EC entails the obligation for Member States to engage in a process of gender auditing.⁷⁷ On a more general level, it is to be hoped that the planned European Gender Equality Institute⁷⁸ will be able to play an important role in the context of gender mainstreaming, for example by providing expertise.⁷⁹

In conclusion of this part on the EC approach to sex equality as compared to CEDAW, the above shows that EC law is not fully in line with the Convention for a variety of reasons. The most important reasons would appear to be the comparatively very limited scope of EC law, this legal order's symmetric approach to sex equality and the lack of sufficient efforts on the practical level towards revealing and changing social and cultural structures that are based on gender stereotypes. A further significant

⁷⁴ Regarding the mainstreaming provisions in the Constitutional Treaty see Shaw, in *Current Legal Problems* 2004, 13 subs.

⁷⁵ Shaw, in *Current Legal Problems* 2004, 29.

⁷⁶ See F. Beveridge & S. Nott, 'Gender Auditing – Making the Community Work for Women', in T. Hervey & D. O'Keeffe (eds.), *Sex Equality Law in the European Union* (Wiley, 1996), 383; more generally also J. Shaw, *Mainstreaming Equality in European Union Law and Policymaking* (European Network Against Racism, 2004), 27 subs. In the Netherlands such an instrument has been developed by the Emancipation Department of the Ministry of Social Affairs and Employment. However, its use is not prescribed by law. For a comment on this model, see Holtmaat, *Towards Different Law and Social Policy*. See also the guide to EU Gender Impact Assessment developed for the European Commission by M. Verloo et al. (available at http://europa.eu.int/comm/employment_social/equ_opp/gender/gender_en.pdf).

⁷⁷ See Beveridge & Nott, in *Sex Equality Law*, 391 subs.

⁷⁸ Proposal for a Regulation establishing a European Institute for Gender Equality, COM(2005) 81.

⁷⁹ See, for instance, the European Women's Lobby's Position Paper on the setting up of European Gender Institute (available at <http://www.womenlobby.org/Document.asp?DocID=889&tod=17932>).

shortcoming is the fact that positive action in EC law is a mere possibility but never a duty.

§4. THE INFLUENCE OF CEDAW ON EC SEX EQUALITY LAW

Given the differences between the approach of EC law and that of CEDAW, and the fact that the latter is better for women, the conclusion must be that the greater the influence of CEDAW on EC law, the better. What then, is that influence in existing law and policy, and potentially for the future?

A. THE INFLUENCE ON EXISTING LAW AND POLICY

1. *Soft law and policy documents*

On the level of *soft law*, CEDAW appears quite often, though usually only in one particular context, namely that of EU relations with third countries. The European Union's Human Rights Report for the year 2003⁸⁰ provides an example. Whilst in the part on Human Rights of Women (4.3.11) no reference to the Convention can be found in the section on 'Human Rights within the EU', it immediately appears in the part 'Actions on human rights in international affairs'. The impression thereby created is that explicit reference to CEDAW is necessary when talking about 'the others' but not for the EU itself whose internal law – it seems to be implied – creates no difficulties in this regard. However, whilst it is true that much of EC sex equality law and soft law reflects CEDAW goals, it has been shown above that an assumption according to which *all* of the current EC law is *fully* in line with the Convention would clearly not be correct.

2. *Secondary legislation*

For a few years, the EC has been invoking CEDAW in preambles of certain secondary legislation. This first happened in a field other than sex equality, namely in the Race Directive⁸¹ (recital 3), based on the Commission's proposal for this important piece of legislation.⁸² Shortly thereafter, a reference to the Convention also appeared in the preamble of the Employment Framework Directive⁸³ (recital 4), though this time not

⁸⁰ The text of the report is available at http://europa.eu.int/comm/external_relations/human_rights/doc/report03_en.pdf.

⁸¹ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

⁸² Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(99) 566 fin.

⁸³ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

based on the Commission's proposals.⁸⁴ In the field of sex equality, the first reference to CEDAW can be found in the Directive amending the Second Equal Treatment Directive (recital 2) though here, too, it is missing in the Commission's proposals⁸⁵ (it appeared first in the Council's Common Position).⁸⁶ However, this particular reference might be lost again in the future since it is missing in the Commission's proposal for a Recasting Directive⁸⁷ which is intended to replace, among others, the Second Equal Treatment Directive. If so, the only remaining reference in the field of sex equality law will be that in another recent Directive mentioned earlier in this paper, namely the Goods and Services Directive (recital 2). It is submitted that the lack of a reference to CEDAW (or to any other international human rights instrument, for that matter) in the Recasting Directive is a very regrettable step backwards. After all, the Court's case law shows that the content of the preamble can influence the interpretation of the provisions of a measure of secondary legislation.⁸⁸ It is therefore very much to be hoped that the text of the preamble of the Recasting Directive will be changed accordingly.⁸⁹

On a more general level, it should be added that thus far the references to CEDAW in EC non-discrimination legislation are no more than mere formal invocations of the human rights background of the relevant measures. There is as of yet no statement of substance, that is, on the question whether the content of the law is in line with the

⁸⁴ Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(99) 565 fin., and amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, OJ 2001 C 62 E/152, COM(2000) 652 fin.

⁸⁵ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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, COM(2000)334 fin. An earlier proposal for a revision of this Directive concerned positive action only; Proposal for a Council Directive amending Directive 76/207/EEC 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, OJ 1996 C 179/8.

⁸⁶ Common Position (EC) No. 32/2001 of 23 July 2001 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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, OJ 2002 C 307/5.

⁸⁷ Proposal for a Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, COM(2004) 279 fin.

⁸⁸ A clear example in which the Court took into account statements in the preamble that are not reflected in the provisions of the Directive can be found in Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; see A. Iliopoulou & H. Toner, (Case note on *Grzelczyk*), 39 *C.M.L. Rev.* 610 (2002), 611, footnote 8, and 613, footnote 12. More generally, Bell argues that even though preambles are not binding on the Court, depending on the issue, it is unlikely to disregard them (Bell, *Anti-Discrimination Law*, 116.). Bell in this context refers to AG Tizzano's opinion in Case 173/99 *BECTU v Secretary of State for Trade and Industry* [2001] ECR I-4881.

⁸⁹ See e.g. the comments of the European Women Lawyers Association (EWLA) on the draft Recasting Directive (available at www.ewla.org, under 'EWLA activities', 'EWLA Resolutions and Statements 2000-2005').

Convention. It is submitted that if the banning of sex discrimination is to be taken seriously in the EU, the institutions would do well to take CEDAW much more seriously when drafting secondary legislation.

3. Case law

In the Court's case law, CEDAW is hardly ever mentioned. As far as the present writers can see, there is only one such reference, namely in the *Levy*⁹⁰ case of 1993, where the Convention was referred to by the Commission in the context of night-work. The Court simply stated this (speaking about 'the New York Convention', *Levy*, para. 18), without engaging in any substantive discussion of the Convention's provisions. There is also a case concerning the sex equality law of the European Economic Area (EEA), which in terms of substance largely corresponds to EC law (and for this very reason is also relevant in the context of that latter legal order). The *Norwegian quota* case⁹¹ concerned one measure out of an encompassing package intended to address and counteract consistent structural discrimination against women in Norway. When trying to show the lawfulness of the particular measure at issue in the *Norwegian quota* case (namely the reservation of certain academic posts exclusively for women), the Norwegian Government invoked various international agreements, including CEDAW. Whilst the EFTA Court⁹² made very valuable observations on the general equality approach that should be adopted under EC law, its statements relating to the Convention are less convincing. In the present writers' opinion, the EFTA did not sufficiently appreciate the potential of CEDAW in the context of positive action. First, the Court said that Norway could not justify the measures in question by reference to its obligations under international law because the Convention was already in force for Community Member States at the time when the Court of Justice of the European Communities rendered its positive action judgments (*Norwegian quota* case, para. 58). This seems to imply that EC law is in line with CEDAW. However, whether or not that is the case has never been truly examined by the institutions when making secondary legislation (at least there is no reflection of such an examination in the actual legislative measures, as already indicated in the previous section) and has also never been tested by the Court of Justice. The EFTA Court continued (in the same paragraph): 'Moreover, the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for

⁹⁰ Case 158/91 *Levy* [1993] ECR I-4287.

⁹¹ Case E-1/02 *EFTA Surveillance Authority v Norway* [2003] EFTA Court Reports 1.

⁹² The EFTA Court handles actions brought in relation to the EFTA States that are participating in the EEA Agreement (Iceland, Norway and Liechtenstein but not Switzerland); see e.g. P. Christiansen, 'The EFTA Court', 22 *E.L. Rev.* 539 (1997). More generally on the EEA Agreement, S. Norberg, 'The Agreement on a European Economic Area', 29 *C.M.L. Rev.* 1171 (1992), and A. Toledano Laredo, 'The EEA Agreement: an overall view', 29 *C.M.L. Rev.* 1199 (1992).

derogations from obligations under EEA law.' By making this simplistic statement, the EFTA Court was disregarding academic writing⁹³ on the meaning and reach of Art. 4(1) CEDAW, according to which under certain circumstances there exists not merely a possibility to adopt what under the Convention is called temporary special measures but indeed an obligation. Later, this view was confirmed by a General Recommendation issued by CEDAW, as mentioned above. In other words, in the *Norwegian quota* case, the EFTA Court clearly underrated the possible meaning of the Convention, though in other respects its approach to sex equality law is much more promising than that of the Court of Justice.⁹⁴

B. CONFLICTS BETWEEN EC LAW AND CEDAW

The conclusion of the above is that thus far the influence of CEDAW on EC sex equality law has been very limited. This leads to the question whether and in how far it might be possible to construe a legal argument that the EC is obliged to align its law to that of the Convention, in preventing or resolving conflicts between the two legal orders. Below, three aspects are discussed briefly: first, Art. 307 EC on the relationship between EC law and international Treaties, then the argument of Human Rights and, finally, the question of the accountability of EU Member States for breaches of international law through EC law.

1. *The formal perspective: Art. 307 EC*

When looking for a legal argument that the EC is obliged to align its law to that of CEDAW, the natural starting point is the general rules of EC law concerning the relationship between EC law on the one hand and international law in a broader sense on the other hand. In practice, some cases are easy due to particular circumstances. For example, given that the EC is a signatory party to the WTO agreement, it is clear that the European Community is bound by WTO law.⁹⁵ Another easy example concerns the European Convention on Human Rights. Here, the EC is not a signatory party, but the Convention's legal relevance within the framework of EC law is expressly stated in Art. 6 EU, as mentioned earlier.

Where no such helpful circumstances exist, as is the case with CEDAW, Art. 307 EC is relevant. According to the first part of this provision, the rights and obligations arising

⁹³ L. Mulder, 'How Positive Can Equality Measures be?', in Loenen & Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, 65; R. Cook, 'Obligations to Adopt Temporary Special Measures Under the Convention on the Elimination of All Forms of Discrimination Against Women', in I. Boerefijn et al. (eds.), *Temporary Special Measures*, 119; Ch. Tobler, 'Positive Action', 71.

⁹⁴ See Ch. Tobler, (Case note on Case E-1/02 *EFTA Surveillance Authority v Norway*), 41 *C.M.L. Rev.* 245 (2004).

⁹⁵ On the relationship between EU law and WTO law, see generally J.H.H. Weiler, *The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?* (Oxford University Press, 2000).

from treaties concluded with third States before 1 January 1958⁹⁶ or, for acceding states, before the date of their accession, are not affected by the EC Treaty. For present purposes it is important to note that this provision is limited in various respects. First, it concerns only 'old Treaties', that is Treaties signed by the Member States before they joined the EC/EU. CEDAW dates from 1979. As such, it is an old Treaty only for some Member States, namely those that joined the EC/EU later and at that point of time were already States Parties to the Convention (this includes in particular the new Member States). For such states, Art. 307 EC establishes the principle that, in the case of a conflict between EC law and other international Treaties, the rights of third parties are protected. However, that is only for the time being, as in the event of an incompatibility between the two legal orders the Member States have the duty to take all appropriate steps to eliminate the incompatibility (second part of Art. 307 EC). For example, in his opinion on the *Stoeckel*⁹⁷ case (point 11 of the AG's opinion) AG Tesauero took the view that if France was bound by the ILO Convention 89 on night-work by women it could avoid an incompatibility with the Second Equal Treatment Directive by prohibiting night-work for *all* workers, women and men alike. In this way, the requirements of both legal orders could be satisfied. Where such an approach is not possible, the Member States may simply have to withdraw from the conflicting Treaty.⁹⁸

This shows that ultimately the idea behind Art. 307 EC is clearly that of the precedence of EC law over other and conflicting international law. In the framework of the duty to sincere cooperation, enshrined in Art. 10 EC, the principle of precedence applies all the more in the case of so-called new Treaties, that is, where a Member State became a party to CEDAW only after having joined the EC, as is the case with the original six Member States. Overall, the conclusion is that Art. 307 EC does not go very far in obliging the Member States to respect international law that is in conflict with EC law. Finally, it should be noted that, under the Court's case law, the protection of third parties to old Treaties under Art. 307 EC does not mean that the EC itself is bound in its relationship with such parties (*Burgoa*,⁹⁹ para. 8 and 9).

2. *The substantive perspective: Human Rights*

Given that the technical, doctrinal approach offers no help in the present context, a more substantive approach should be considered, relying on the special nature of CEDAW as part of the larger body of human rights law. The Court of Justice recalled in *Grant*¹⁰⁰ (para. 44) that, in applying the fundamental principles of Community law, the Court

⁹⁶ This was the date of the entry into force of the EEC Treaty.

⁹⁷ Case C-345/89 *Criminal Proceedings against Alfred Stoeckel* [1991] ECR I-4047.

⁹⁸ See most recently Case C-203/03 *Commission v Austria*, judgment of 1 February 2005, not yet reported.

⁹⁹ Case 812/79 *Attorney General v Juan C. Burgoa* [1980] ECR 2787.

¹⁰⁰ Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621.

takes account of international instruments relating to the protection of human rights. However, it should be noted that the EC itself is not a party to CEDAW, which, in addition, is not explicitly mentioned in Art. 6 EU. Indeed, when interpreting and applying EC law that binds the Member States, the Court of Justice considers the broader international human rights law merely as a source of inspiration. As the Court said in *Grant* (para. 45), the fundamental rights under international law 'cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community'. In other words, the Court is willing to take international law into account only within the limits of EC law. *Mutatis mutandis*, the same will be true for other institutions. This touches upon an issue mentioned earlier in this paper, namely the limits imposed by the distribution of powers between the Member States and the EC.¹⁰¹ In the present writers' view, this is one of the most important issues in EC non-discrimination law. To take again the example of positive action, under such an approach the Court might argue that the Member States gave away powers to the EC only insofar as positive action is allowed but not in the sense of an obligation, and that therefore there can be no obligation under EC law, whatever the approach of the Convention.

Accordingly, the human rights approach does not seem to be very promising when it comes to changing the approach to sex equality under EC law. Nevertheless, it is submitted that within the existing framework it is important to consistently invoke CEDAW before the Court of Justice in the hope that the Court will actively take account of this important instrument of international human rights law and that, in this way, the Convention will have a positive effect on the Court of Justice's case law.¹⁰²

3. *The pragmatic approach – or turning around the argument*

Finally, if the approaches mentioned so far are not very promising, perhaps the argument can be turned around: if the EC as such is not bound by CEDAW so as to be obliged to align its law to the Convention, it might be argued that the Member States are obliged to change EC law in the light of the Convention. In theory at least, such a change is easily possible: after all, and as the German Constitutional Court has emphasised in its famous Maastricht judgment,¹⁰³ the Member States are the Masters of the Treaty, which means that the reach, shape and content of EC law depends on them and them alone. The Member States might ask why they should work for such a change. In the present writers' view, the answer is simple: under public international law there is the principle that Treaties have to be observed (*pacta sunt servanda*). If the Member States have decided to be signatory states at the same time to the EC Treaty and to CEDAW, this clearly requires

¹⁰¹ See also Hervey, in this issue.

¹⁰² For example, taking into account Art. 5a CEDAW might have been able to positively influence statements made by the Court in cases such as *Bilka* and *Hofmann*, mentioned earlier in this paper.

¹⁰³ 89 BVerfGE 155, English translation provided in *C.M.L. Rep.* [1994] 57.

that they avoid conflicts between the two legal orders. Other than withdrawing from the Convention or from EU membership, the only possible approach is to align EC law to the Convention. It is submitted that the Member States should come to understand that there is an obligation under CEDAW to do so. When the first EU Convention worked on the text of the Charter on Fundamental Rights, it received a warning letter by the UN Committee on Economic, Social and Cultural Rights. In this letter, the Committee told the Convention that if the EU were to adopt a Charter consisting of 'a retrogressive step contravening the existing obligations of Member States of the EU under the International Covenant on Economic, Social and Cultural Rights the Committee might have to raise this issue when examining reports by States parties, as a violation of the obligation under article 2(1) ICESCR', which is to achieve progressively the full realization of the rights recognized in that Covenant. In other words, the Committee announced that it might be prepared to hold the Member States accountable if the EU were to adopt law falling short of the obligations under the Covenant.¹⁰⁴ The same approach is reflected in some of the case law on the European Convention of Human Rights (*Matthews*).¹⁰⁵ It is submitted that this approach must also apply in the case of CEDAW: if the Member States do not make sure that EC law is in line with the Convention, they can be held accountable for that failure. Their legal position in international law thus provides an incentive for the Member States to work through the EU institutions for a change for the better.

¹⁰⁴ Doc. CHARTE 4315, CONTRIB 182, of 24 March 2000.

¹⁰⁵ *Matthews v. the United Kingdom*, Application no. 24833/94, judgment of 18 February 1999 (see <http://www.echr.coe.int/Eng/Judgments.htm>). See H. Schermers, 'European Remedies in the Field of Human Rights', in C. Kilpatrick et al. (eds.), *The Future of Remedies in Europe* (Oxford and Portland, Oregon, 2000), 205, 207 subs.; also R. Lawson, 'The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments', in Ph. Alston & O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Hart Publishing, 2005), 229. As Lawson explains, the argument was raised several times under the Convention. As far as complaints addressed against all Member States are concerned, the European Commission of Human Rights and the Court first adopted a rather restrictive approach, but the Court was more assertive in the *Matthews* case where it stated (para. 32): 'The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be "secured". Member States' responsibility continues even after such a transfer.' As far as complaints addressed against individual states are concerned, Lawson observes that the case law is somewhat ambiguous and that clarification might be expected from two cases pending at the time of writing. However, the decisions in these cases did not bring the hoped for clarity. In *EMESA SUGAR v. Netherlands* (application no. 62023/00, judgment of 13 January 2005), the Court declared the action relating to the relevant point inadmissible under Art. 6 ECHR. In *Bosphorus Airways v. Ireland* (application n. 45036/98, decision of 30 June 2005) the Court found that there had been no violation of the Human Rights Convention.

§5. SOME CONCLUDING OBSERVATIONS

For many years, feminist legal activists have had mixed feelings about EC sex equality law. On the one hand, it has given them the tools to press unwilling governments of Member States to legislate against sex discrimination. This led to considerable improvement in the legal situation of women, in particular on the level of individual rights. On the other hand, EC sex equality law continues largely to be based on a concept of discrimination that has considerable negative effects, including in particular the need to have to justify positive action because it is seen as a derogation from the equality principle. Against this background, this present contribution presented CEDAW as a possible avenue towards a more human rights-oriented approach to gender equality in the European Union. The argument was that, even though there is no formal legal obligation of the EU institutions to comply with the Convention, this Convention can offer a refreshing and new perspective, as is evident in particular from the fact that it defines discrimination against women in a far more substantive way than current EC legislation, and, further, from the Convention's clear human rights perspective. Although CEDAW does not have the same immediately binding force as EC law, it does offer considerable advantages for European women and feminist lawyers to work with this important piece of international human rights law with its multi-layered strategy towards the elimination of discrimination against women and its substantive approach to equality. In particular, the Convention does not stick to a reactive and prohibiting (or negative) approach to equality issues, but is truly proactive and imposes positive obligations on governments to put an end to discrimination. It is to be hoped that in the future, more intense use is made of CEDAW by women activists, policy makers, lawyers and the judiciary in the European Union.