

UNLOCKING THE POTENTIAL OF THE OP-CEDAW

ABSTRACT

There are a growing number of individual decisions under the OP-CEDAW. At this formative stage, it is important to consider to how to unlock the potential of the OP-CEDAW. The first section of this article argues for dual purposed decisions that resolve the individual claim *and* develop CEDAW. Through a case study on the decisions under Article 12 of CEDAW (equal access to health care), the second section demonstrates that without an analytical framework the decision misses assessing crucial elements of the claim. An analytical framework would allow the Committee to systematically analyze the individual decision and provide a sophisticated tool to ensure that the decisions develop women's rights. The third section of the article uses the definition of discrimination in Article 1 of CEDAW to develop a sophisticated accountability framework. The decision should analyse 1) has there been a distinction, exclusion or restriction? 2) is the distinction based on sex or gender? 3) (i) does the distinction impair the right in question and 3(ii) is the impairment on the basis of equality? Using the *Teixeria* decision the article demonstrates how the proposed framework can create persuasive decisions develop CEDAW and women's equal right to health.

Key Words: Gender Equality, CEDAW, International Human Rights Law, Right to Health, Individual Communications Procedure

The Committee on the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)¹ is at the beginning phases of developing the Optional Protocol to CEDAW (OP-CEDAW).² The OP-CEDAW empowers the Committee to consider individual communications that the state party has not fulfilled CEDAW. The jurisprudence of the Committee has been praised for, *inter alia*, holding the state accountable for failing to protect women from gender-based violence³ and for finding that customary inheritance laws discriminate against women.⁴ At the same time, individual complaints procedures have been criticized for opaque reasoning and being ‘little more than a formulaic incantation of a justificatory mantra.’⁵ At this formative stage, it is important to consider how the Committee can best develop its newest accountability mechanism. This article explores how to fully unlock the potential of the OP-CEDAW. It begins by making the case that the purpose of the individual decisions is to resolve the individual claim *and*, through discursive reasoning that interprets CEDAW, to make contributions to the development of women’s human rights. To achieve the dual purposes of the individual decisions the article proposes an analytical framework derived from the definition of discrimination in Article 1 of CEDAW so the Committee can use this new forum to explore how discrimination and inequality limits women’s rights.

The first section of this article argues that the individual decisions are dual-purposed.

Although the case for this has been made in relation to the Human Rights Committee (HRC), it is

¹(adopted 18 December 1979, entered into force 3 September 1981)1249 UNTS 13.

²(adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

³ Andrew Byrnes & Eleanor Bath, ‘Violence against Women, the Obligation of Due Diligence and the OP-CEDAW- Recent Developments’ (2008) 8(3) *Hmn Rts L Rev* 517.

⁴ Simone Cusack, ‘Committee finds inheritance laws violates CEDAW’ 3 May 2015 <<https://opcedaw.wordpress.com/2015/05/03/e-s-s-c-v-united-republic-of-tanzania/>>.

⁵ Andrew Byrnes, ‘An Effective Complaints Procedure in the Context of International Human Rights Law’ in Anne Bayesky (ed) *The UN Human Rights Treaty System in the 21st Century* (Kluwer International Law, 2000) 150.

important to assess if these arguments hold true in the context of the OP-CEDAW.⁶ It canvasses the text and drafting history of OP-CEDAW, the Committee's mandate under CEDAW, the approach of other UN human rights treaty bodies and an assessment on the role of the Committee in evaluating individual claims. It concludes that the individual decisions are meant to: (i) remedy the wrongs done to the individual and (ii) to interpret and develop CEDAW so as to strengthen women's rights. The second section of the article evaluates the approach of other treaty bodies and uses the text of CEDAW to propose an analytical framework that the Committee can employ when deciding individual claims. An analytical framework would allow the Committee to systematically analyze the individual claim and provides a sophisticated tool to ensure that the decisions develop women's rights. The third section by means of a case study on the decision under Article 12 (equal access to health care) examines how this framework can enrich the development of CEDAW.

I. THE PURPOSE OF THE INDIVIDUAL COMMUNICATIONS PROCEDURE

Drafting of the OP-CEDAW began in 1996. It was adopted by consensus by the UN General Assembly in 1999 and was entered into force in 2000.⁷ There are 105 states parties to the OP-CEDAW.⁸ The Committee has decided 47 communications: 24 have been considered inadmissible and 23 have been evaluated on their merits. This section examines the OP-CEDAW, the Committee's mandate under CEDAW and the purpose of the decisions under the other treaty bodies and concludes that the individual decisions should be understood as opportunities to resolve the individual claim *and*, through substantive reasoning, make contributions to the evolution of CEDAW and women's human rights.

⁶ Henry Steiner 'Individual Claims in a World of Massive Violations: What Role for the HRC?' in Philip Alston and Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (CUP, 2000).

⁷ UN General Assembly Resolution 54/4 (October 1999).

⁸ 'Ratifications to the OP-CEDAW' <http://indicators.ohchr.org/maps/OHCHR_Map_OP-CEDAW.pdf>.

(i) The OP-CEDAW

The OP-CEDAW is sparse and gives very little indication on the purpose of the decisions. It empowers individuals to submit communications to the Committee that the state has failed to uphold CEDAW (Article 1-2). The Committee evaluates the communication (Article 5) and its views and recommendations are to be sent to the parties (Article 7). The Committee can initiate an inquiry procedure to investigate grave or systemic violations of CEDAW (Article 8). Although the OP-CEDAW itself gives no direction on the purpose of the decisions, the drafting history does shed some light on its role. States are overwhelmingly in consensus that the OP-CEDAW is meant to ensure CEDAW is more effectively implemented.⁹ There is some indication that effective implementation is to be achieved through discursive decisions that contribute to a deeper understanding of CEDAW. For example, New Zealand observes that the ‘jurisprudence on any issue develops over time.’¹⁰ More explicitly, fifteen states are of the opinion that an individual complaints procedure ‘would allow the Committee to develop a practice that would clarify the content of rights...[and] would lead to a much more detailed understanding of those obligations...The case law would contribute to the promotion and protection of all human rights of women.’¹¹ It is unclear how much this view reflects the understanding of other states. Reading a broader purpose into the decisions on the basis of fifteen states may not be legitimate.¹² It is necessary to investigate other sources to help clarify the purposes of the decisions.

⁹ CSW, ‘Elaboration of a draft optional protocol to CEDAW’ (1996) UN Doc E/CN.6./1996/10.

¹⁰ *ibid* [49].

¹¹ CSW, ‘CEDAW, Including the Elaboration of a Draft Optional Protocol: Additional Views’ (1997) UN Doc E/CN.6./1997/5 [41].

¹² Richard Gardiner, *Treaty Interpretation* (OUP, 2008) 307.

(ii) The Monitoring Role of the Committee

The Committee's original mandate under CEDAW is similarly as vague. It is established to consider the implementation of CEDAW and has the power to 'make suggestions and general recommendations based on the examination and information received from...States.' Prior to the OP-CEDAW, the Committee has done this through two mechanisms: the General Recommendations, which provide an analysis of a specific aspect of women's rights and the Concluding Observations, which express areas of concerns and give recommendations on how to implement CEDAW. These mechanisms have generated a rich corpus on many important issues of gender equality and the Committee has 'contributed through progressive thinking to the clarification and understanding of the substantive content of [CEDAW].'¹³ This offers a precedent for developing the Committee's role under the OP-CEDAW.

There are two different explanations for the Committee's position in developing CEDAW: an inherent competency and the *de facto* practice of the Committee. First, monitoring the implementation of international human rights treaties necessarily entails engaging with the treaty's obligations. To consider how states have implemented, for example Article 12 of CEDAW (equal access to health care) inherently requires understanding the normative content of the right to health and the relationship between gender equality and health. The International Court of Justice observes that 'under international law the organisation must be deemed to have those powers which, though not expressly provided...are conferred upon it by necessary implication as being essential to the performance of its duties.'¹⁴ Drawing on this insight, Keller and Grover conclude that the treaty bodies role in interpreting the treaty is 'essential to its performing, it's... duties.'¹⁵ Otto similarly holds

¹³The Committee, 'General Recommendation No. 25: on temporary special measures' (2004) UN Doc CEDAW/C/GC/25 [3].

¹⁴ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion ICJ Reports (1949) 174, 182.

¹⁵ Helen Keller and Lena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP, 2012) 128.

that treaty bodies necessarily interpret the substantive obligations in the treaty and by this function have a role in the development of international human rights norms.¹⁶

Second, a pragmatic explanation is that the Committee has *de facto* been using its mandate ‘to develop a substantial body of interpretive material on specific articles of the Convention.’¹⁷ The Committee’s monitoring activities ‘give content to broadly worded provisions’ in the treaty, provide advice on policies to achieve the goals of CEDAW and ‘develop the conceptual underpinnings of equality theory.’¹⁸ The current General Recommendations and Concluding Observations routinely address substantive matters such as women’s access to justice,¹⁹ harmful cultural practices²⁰ and disproportionate rates of HIV/AIDs.²¹ There is no indication of states formally objecting to the Committee using its mandate to develop CEDAW.²² Regardless of the precise theoretical explanation for the Committee’s role under CEDAW, it is now firmly established.²³

(iii) Individual Decisions under other Treaty Bodies

There are eight treaty bodies that can consider individual communications. Only the HRC, Committee on the Elimination of Racial Discrimination (CERD) and Committee on the Convention Against Torture (CAT) have a significant amount of decisions. The HRC has been the most self-reflective on its role in considering individual communications. It explains that the individual decisions ‘exhibit some important characteristics of a judicial decision’ such as ‘the considered interpretation of the language of the [International Covenant of Civil and Political Rights

¹⁶ Dianne Otto, ‘Gender Comment: Why does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?’ (2002) 14 Can J of W and the Law 1, 13.

¹⁷ Andrew Byrnes, ‘The Committee on the Elimination of Discrimination Against Women’ in Anne Hellum and Henriette Singding Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 39.

¹⁸ *ibid.*

¹⁹ Committee, ‘General Recommendation No. 33: women’s access to justice’ (2015) UN Doc CEDAW/C/GC/33.

²⁰ Committee, ‘General Recommendation No. 31: harmful cultural practices’ (2014) UN Doc CEDAW/C/GC/31.

²¹ Committee, ‘Concluding Observations: Myanmar’ (2016) UN Doc CEDAW/C/MMR/CO/4-5 [38].

²² *ibid.*

²³ See Anne Hellum and Henriette Singding Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013).

(ICCPR)].²⁴ Members of the HRC have explained that while they are not bound by the doctrine of precedent, they note that if the HRC ‘wishes States parties to take its jurisprudence seriously and to be guided by it in implementing the [ICCPR], when it changes course it owes...an explanation of why it chose to do so...’²⁵ The HRC conceptualizes its role when evaluating individual decisions as developing the treaty, *as well as* making a determination in respect of the individual complaint. It has yielded ‘a large body of jurisprudence touching on important aspects of most of the ICCPR...[and] has dealt with a large number of complicated issues, which have necessitated genuine findings of law.’²⁶ Similarly, although the CAT Committee explains that it is ‘not an appellate, a quasi-judicial or an administrative body,’²⁷ it has made significant contributions.²⁸ The quality of decisions has been criticised.²⁹ While there may be a disjuncture between the stated aims and the *de facto* nature of the decisions, the important point here is that these bodies conceptualise a dual-purposed individual decision.

(iv) The Purpose of Decisions under the OP-CEDAW

Drawing these strands together and turning back to the actual task of the Committee when considering individual communications clarifies that the decisions are dual-purposed. Under the OP-CEDAW, the Committee is assessing whether the state party has violated their obligations in CEDAW. To arrive at a final decision the Committee has to consider if the individual complaint falls within the *ratione materiae* of CEDAW. This inherently requires the Committee to interpret rights in CEDAW. Individuals are asking the Committee to consider, for example, if the state has an

²⁴ HRC, ‘General Comment No. 33 on the Obligations of State Parties under the Optional Protocol’ (2008) CCPR/C/GC/33 [11].

²⁵ *Thompson v Saint Vincent and Grenadines*, (2000) UN Doc CCPR/C/70/D/806/1998

²⁶ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (OUP, 2014) 26.

²⁷ CAT Committee, ‘General Comment No. 1’ (1998) UN Doc A/53/44, annex IX [9].

²⁸ Manfred Nowak and Elizabeth McArthur, *The UN Convention on Torture: A Commentary* (OUP, 2008) 737-42.

²⁹ Byrnes (n 5) 150; Steiner (n 6) 43.

obligation to provide access to therapeutic abortion?³⁰ To answer this question the Committee necessarily has to make substantive contributions to women's human rights. The task of considering and arriving at a final decision is so deeply intermeshed with the interpretation of the treaty that it is impossible to accomplish one without the other.

(v) *Risks and Rewards of a Dual Purposed Individual Decisions*

It is important to consider the implications of conceptualizing an individual complaints procedure that resolves the individual claim and develops the obligations in CEDAW. A dual-purposed decision may have an undesired effect. Comprehensive and transparent reasoning may reveal deep differences between the state and the Committee on the understanding of women's rights. The individual decisions are not legally binding and the implementation of any recommendations depends on the states willingness to follow the guidance of the Committee. There is a risk that the state may find the Committee's reasons objectionable and reject its recommendations. CEDAW has a significant number of reservations, suggesting that states have very different understandings of women's rights.³¹ Narrow decisions that simply resolve the individual claim may mask these disagreements and ensure there is consensus between the Committee and the state.

At the same time, there are many compelling reasons for the Committee to engage openly in the substantive development of CEDAW when resolving the individual claim. First, through its other activities the Committee has demonstrated how its work can be a powerful tool for gender equality. For instance, the Committee's work on gender-based violence has been drawn on by several apex

³⁰ *LC v Peru* (2011) UN Doc CEDAW/C/50/D/22/2009.

³¹ International Women's Rights Action Watch Asia Pacific, 'Reservations' <<http://www.iwraw-ap.org/cedaw/what-is-cedaw/reservations/>>.

and regional courts.³² The decisions can be used to complement the Committee's work in the General Recommendations and Concluding Observations and used as a chance to examine in great detail one specific aspect of gender equality.³³ Second, substantive decisions require the Committee to systematically organize and engage with all aspects of the claim. A thorough investigation of the claim ensures a richer development of CEDAW. It also allows the Committee to more precisely identify areas that need to be reformed and gives it a stronger basis for making more persuasive and tailored recommendations to achieve gender equality in the state.³⁴ This issue is discussed in greater detail in Section II. Third, the substantive decisions under the OP-CEDAW can fill important accountability gaps in women's human rights. Under the OP-CEDAW the Committee is empowered to decide individual communications on crucial socio-economic rights. Domestic courts may not have jurisdiction to consider these claims or when domestic courts or other international bodies can adjudicate socio-economic rights, the relationship between gender and socio-economic rights is often overlooked.³⁵ The Committee with its asymmetric mandate to examine women's human rights can fill this void.

Fourth, discursive decisions have the potential to guide and influence all states and other relevant stakeholders, not just the state involved in the individual communication.³⁶ The issues coming before the Committee under the OP-CEDAW are pressing issues all over the world. Substantive individual decisions can be a platform for the Committee to contribute to the global discussion on women's rights. Fifth, the non-binding nature of the decision is a double-edged sword. On one hand it points towards decisions that are minimalist to ensure productive working

³² *Vishaka v State of Rajasthan* AIR 1997 SC 3011 (India Supreme Ct), *Carmichele v Minister of Safety and Security and Another*, 2001 (1) BCLR 995 (South African Constitutional Court) and *R v Ewanchuk* [1999] 1 SCR 330 (Canadian Supreme Ct); *Opuz v Turkey* (33401/02) (ECtHR).

³³ Joseph and Castan (n 27) 26.

³⁴ C.F. Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271, 274.

³⁵ Leilani Farha, 'Women Claiming Economic, Social and Cultural Rights-The CEDAW Potential' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2009) 556-57.

³⁶ Byrnes (n 5) 142.

relations between the Committee and states. On the other hand, the non-binding nature of the decision means that to improve the implementation of its recommendations the Committee must provide a persuasive interpretation of CEDAW. The quality of decision making and the clarity of reasoning are important factors to consider for a complaints mechanism to influence outcomes.³⁷ Sixth, under dynamic accountability theory, when the state justifies its actions in a public review process it has ‘the legitimate right to ask for the reasons behind any opinion or decision.’³⁸ Substantive reasons, even if the state, disagrees with the decision, can meet a genuine need which in turn helps foster good relations between the treaty body and the state and ultimately helps promote further respect for human rights.

There are risks and rewards to each style of decision under the OP-CEDAW. In the past the Committee has been a strong advocate for women and has not been afraid to take progressive stances on gender equality. The Committee should continue in this tradition and see the decisions under the OP-CEDAW as a forum that both resolves the communication and makes substantive contributions to the development of CEDAW. Even if a dual-purposed decision alienates some states it can empower civil society organisations (CSOs).³⁹ Substantive decisions can provide persuasive authority and open up new lines of legal argument for CSOs to lobby for change. While there is no guaranteed method to ensure that decisions will guide state policy, the open and engaging reasoning process lends itself better to achieving this aim.

Both of the goals of a dual purposed individual communication procedure are complementary and of equal weight. Theoretically a communication may not engage with larger issues of gender discrimination. In this scenario, resolving the individual dispute becomes the only issue. The

³⁷ *ibid.*

³⁸ Jayne Mansbridge, ‘Contingency Theory of Accountability’ in Mark Boven et al (ed) *The Oxford Handbook of Public Accountability* (OUP, 2014) 64.

³⁹ Sabel and Zeitlin (n 34) 274.

remainder of the article focuses on how the Committee can use the individual decisions to contribute to the substantive development of women's rights.

II. DERIVING AN ANALYTICAL FRAMEWORK

While the academic community has congratulated the Committee for the creation of 'a woman's human rights jurisprudence',⁴⁰ the individual decisions of the Committee are notorious for being brief opinions. The best route to ensuring the individual decision contribute to the development of CEDAW is through a rigorous analytical framework that allows the Committee to organise and identify relevant information, confront the difficulties of the case and provide arguments that justify and explain the decision reached.⁴¹ To gain insight into how the individual decisions can best develop CEDAW, this section begins by assessing how the other treaty bodies evaluate claims to gender equality. With this understanding in place, it then proceeds to use the text of CEDAW to derive a nuanced analytical framework so that the decisions are able to resolve the claims and provide compelling interpretations of CEDAW.

(i) *Prior Attempts at Developing a Gender Equality Framework*

The aim in examining the other treaty bodies is not to argue that an analytical framework for the OP-CEDAW needs to be consistent with these approaches. Any evaluative tool under the OP-CEDAW has to reflect the text and goals of the OP-CEDAW and CEDAW. At the same time, there is increasing recognition that it is crucial to increase harmonization between the treaty bodies.⁴² There is great potential to learn from the positive developments and shortcomings on how the other

⁴⁰ Jane Connors 'Optional Protocol' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *CEDAW: A Commentary* (OUP, 2012) 614.

⁴¹ Steiner (n 6) 42.

⁴² Inter-Committee meeting of Human Rights Bodies 'Concept Paper on the High Commissioner's Proposal for Unified Standing Treaty Body' UN Doc HRI/MC/2006/2.

treaty bodies decide claims of gender equality. This analysis helps enrich and refine the proposed evaluative framework for the OP-CEDAW.

To determine if there has been discrimination, the HRC and the Committee on Economic Social and Cultural Rights (CESCR) under the Optional Protocol to the International Covenant on Economic Social and Cultural Rights (OP-ICESCR) pursues a two-pronged approach. It examines: (i) if the differential treatment is ‘reasonable and objective’; and (ii) if the aim is to achieve a legitimate purpose.⁴³ In *Rodriguez v Spain*, CESCR focused primarily on assessing if *differential treatment* had occurred.⁴⁴ HRC Member, Sarah Cleveland in her individual opinion in *Mellet v Ireland* helpfully fleshes out the reasonableness standard from a gender equality perspective. In evaluating abortion laws in Ireland, she also examines *differential treatment*. Her opinion goes a step further and assesses how this difference is *based* on sex.⁴⁵ These two elements—differential treatment and grounds—are crucial in identifying discrimination and are explored in greater detail in the next subsection.

There are several problems in using a reasonableness framework to evaluate claims of gender equality. First, Joseph and Castan note that this is a ‘very subjective’ test and in practice the HRC has not used this test to coherently develop the concept of equality in ICCPR.⁴⁶ The OP-ICESCR is very new and CESCR has not yet had a chance to develop a significant body of decisions. Second, the reasonableness tool is more akin to a justification analysis than an evaluation of the state’s approach to gender equality. The focus is on the government’s reasons for the differential treatment rather than assessing why the state’s laws, policies and programmes discriminate against women. Reasonableness is a very fluid and elastic concept. It provides no concrete methods or tools to

⁴³ HRC, ‘General Comment No. 18 non-discrimination’ (1989) UN Doc CCPR/C/GC/18 [13; Article 8(4), OP-ICESCR, A/RES/63/117 (entered into force 5 May 2013); *Rodriguez v Spain*, (2016) UN Doc E/C.12/57/D/1/2013 [14.1].

⁴⁴ *ibid.*

⁴⁵ (2016) UN Doc CCPR/C/116/D/2324/2013; Concurring Opinion [13].

⁴⁶ Joseph and Castan, (n 27) [23.49].

explain when differential treatment based on sex is discriminatory.⁴⁷ Liebenberg argues that to properly assess the claims using reasonableness, it needs to be wedded to a normative concept of equality.⁴⁸ The weakness of the HRC's approach helpfully demonstrates the importance of developing an *equality-based* framework to assess claims that the state has failed to uphold CEDAW.

CESCR, HRC and the CERD Committee have discussed gender equality in the General Comments. CERD makes a concerted effort to address the gender dimensions of racial discrimination. The problem is that its framework is almost exclusively focused on the racial discrimination. It examines four factors: (i) the form and manifestation; (ii) the circumstances; (iii) the consequences; and (iv) the available remedies for racial discrimination.⁴⁹ This framework is not sufficiently calibrated to detect the complex ways gender interacts with race to discriminate against minority women. HRC and CESCR confirm that the rights in the respective treaties are guaranteed on the basis of formal and substantive equality.⁵⁰ CESCR briefly explains that substantive equality 'is concerned with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups' experience.'⁵¹ However, CESCR does not address the monitoring of gender equality.

There have been various academic proposals to fill this gap. Recently, Chinkin has proposed criteria for evaluating a girl's equal right to education.⁵² Her proposal is very specific to the education context and is not designed to evaluate state's compliance with gender equality in relation to other rights. Otto has also proposed a gender framework for ICESCR but in practice her proposal is

⁴⁷David Bilchitz, *Poverty as a Fundamental Right* (OUP, 2007) 158, 176 offers a similar critique of the South African Constitutional Court's approach to reasonableness.

⁴⁸ See Sandra Liebenberg, *Socio-economic Rights: Adjudicating Under a Transformative Constitution* (Juta, 2011).

⁴⁹ CERD Committee, 'General Recommendation No. 25 gender related dimensions of racial discrimination' (2000) UN Doc CERD/C/GC/25 [5].

⁵⁰ CESCR, 'General Comment No. 16: The equal rights of men and women to the equal enjoyment of economic, social and cultural rights' (2005) UN Doc E/C.12/2005/4; HRC, 'General Comment No. 28: Article 3' (2000) UN Doc CCPR/C/21/Rev.1/Add.10.

⁵¹ CESCR, (n 50) [8].

⁵² Christine Chinkin, 'Gender and Economic, Social and Cultural Rights' in Eibe Riedel et al *Economic Social and Cultural Rights in International Law* (OUP, 2014) 157-58.

difficult to apply. It involves a series of questions: (i) is the measure gender neutral or differentiated? Does it treat sub-groups of women differently? (ii) Is the measure aimed to achieve structural equality? She proposes a list of factors to achieve substantive equality. This list is long, slightly repetitive and unyielding. Moreover, the list isn't organized to mediate tensions in different aspects of gender equality. For instance, at-home prenatal medical care may redress women's disadvantage in maternal health care but re-enforce women's exclusion from public life, particularly in societies that are heavily gender segregated. Otto does not explain how her guidelines interact so as to identify and resolve these conflicts. The next steps, she proposes, are to ask: (iii) what is the qualitative outcome for women? for men?; (iv) what is the qualitative outcome for subgroups of women? subgroups of men?; (v) if substantive equality has not been achieved does the law need to be redesigned?⁵³ While, this is an essential component, her proposal is focused on outcome which may overlook law, policies or programmes that on their face undermine substantive equality.

In sum, the other treaty bodies are grappling with monitoring and evaluating claims to gender equality. These approaches point the way forward for evaluating individual claims under the OP-CEDAW. Specifically, this analysis emphasizes that without an equality-based analytical framework the Committee will not be able to evaluate the complex way's women experience violations of their rights.

(ii) *A Equality-Based Framework for the OP-CEDAW*

To ensure that the framework for considering decisions under the OP-CEDAW is a sophisticated accountability tool, it is necessary to examine the nature of the state's obligations under CEDAW. A majority of the substantive obligations in CEDAW require the state to eliminate discrimination against women and ensure on a basis of equality various human rights. The crucial elements the

⁵³ Otto (n 16) 44, 49.

Committee has to consider when evaluating whether the state has failed to fulfil CEDAW is: what is meant by “eliminating discrimination against women” and ensuring human rights “on a basis of equality?” The other UN treaty bodies have not developed a framework to answer these questions. The starting point is the text of CEDAW. The treaty does not define “on the basis of equality” but it does define “discrimination against women” as:

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

The definition of discrimination in CEDAW entwines equality and non-discrimination.

Discrimination against women occurs when a state has not guaranteed women’s rights on the basis of equality. Equality is at the crux of assessing if the distinctions the state has made are permissible.

Article 12, requires states to ‘take all appropriate measures to *eliminate discrimination* in the field of health care in order to ensure, *on a basis of equality of men and women*, access to health care services.’

The state is first obligated to eliminate discrimination in health which by Article 1 means that the state is obligated to ensure that distinctions in health do not impede equality. Second, the state has to eliminate discrimination ‘in order to ensure’ the equal rights for women in health. The goal of eliminating discrimination is gender equality. Equality is both the analytical frame for evaluating the state’s law and policies on health and the goal the state should be achieving, equal access to health care. Rights to public life, employment, education, economic and social life and family life in CEDAW are all similarly phrased.

How can the Committee evaluate individual claims that the state has failed to ensure women's rights on the basis of equality so that the decisions achieve the dual goals of the OP-CEDAW? The definition of discrimination in CEDAW provides the necessary framework. To reiterate discrimination against women is defined as 'any distinction...made on the basis of sex...which has the effect or purpose of impairing...by women...on basis of equality of men and women of human rights and fundamental freedoms.' From this definition and echoing and building upon the approach of other treaty bodies, it is possible to derive a three part test for evaluating individual claims under the OP-CEDAW so that the decisions both resolve the claim and develop CEDAW:

1. Has there been, in purpose or effect, a distinction, exclusion or restriction?
2. Is the distinction based on sex or gender?
3. i) Does the distinction impair the right in question?
ii) Is the impairment on the basis of equality?

First, there must be a distinction, exclusion or restriction. The use of multiple terms suggests that differential treatment is to be broadly defined recognizing that at different times equality requires identical treatment and at others, differential treatment.⁵⁴ The words 'which has the effect or purpose of' indicates that both direct discrimination, explicit differential treatment,⁵⁵ and indirect discrimination, where identical or neutral laws, policies, or programmes that in application disadvantages women,⁵⁶ are included in CEDAW. In applying this first step, the Committee can

⁵⁴ Rebecca Cook and Simone Cusak, *Gender Stereotyping: Transnational Legal Perspectives* (PUP, 2010) 111; Andrew Byrnes 'Article 1' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP, 2012) 59.

⁵⁵ The Committee, 'General Recommendation No. 28: on the state's core obligations' (2010) UN Doc CEDAW/GC/C/28 [16].

⁵⁶ *ibid* [5].

examine: (i) if there is a facially apparent distinction or (ii) if a law, policy or programme in effect treats women differently.

Second, the distinction must be made on the basis of sex or gender. There must be a causal connection between the distinction and the individual's sex or gender. It is necessary to investigate the gender assumptions, attitudes and stereotypes that are linked to the distinction.⁵⁷ It is also at this stage that the Committee can take account of women's intersectional discrimination. Although there is reference to the different identities that women experience in the text of the treaty: race, poverty, marital status, pregnancy, nationality and rural women,⁵⁸ there is no fully formed concept of intersectionality in CEDAW.⁵⁹ It might appear there is no basis to consider intersectional discrimination. A textual analysis of CEDAW reveals that there is an implicit commitment to address intersectionality. CEDAW 'condemns discrimination in *all its forms*' (Article 2) and aims to achieve equality so that women can enjoy 'their human rights and fundamental freedoms *in all fields of life*' (Article 3). These provisions 'establish a comprehensive obligation to eliminate discrimination in all its forms.'⁶⁰ This inherently includes intersectional discrimination as it is a unique form of discrimination.⁶¹ The Committee explains 'the discrimination of women based on sex and gender is *inextricably linked* with other [identity characteristics] that affect women.'⁶² If women experience discrimination that is rooted in their sex and/or gender and this intersects with other aspects of their identity or experiences and results in a denial of human rights it is addressed through CEDAW.⁶³ It has used this approach to address the relationship between sex/gender and migrant status,

⁵⁷ Simone Cusack and Lisa Pusey, 'CEDAW and the rights to equality and non-discrimination' (2013) 14 Melbourne J of Int'l L 54, 112.

⁵⁸ See preamble, articles 1, 4(2), 11(2), 9 and 14.

⁵⁹ Cusack and Pusey (n 56) 59-60.

⁶⁰ CEDAW Committee, 'General Recommendation No. 19 violence against women' (1992) UN Doc CEDAW/C/GC/19 [10].

⁶¹ Kimberle Crenshaw, 'Demarginalising the Intersection of Race and Sex' (1989) U of Chicago Legal Forum 139.

⁶² 'General Recommendation No. 28' (n 54) [18] [emphasis added].

⁶³ Meghan Campbell, 'CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination' (2015) *Revistia Diretio GV* 479.

statelessness, age, ethnic minority, disability and homelessness.⁶⁴ The second stage of the analysis provides the necessary flag to draw attention to how different identity characteristics interact to cause the differential treatment.

The third step is the normative litmus test for determining if the distinctions based on sex or gender is discriminatory and in breach of CEDAW. The Committee is assessing (i) if a distinction in effect or purpose (ii) which is based on sex/gender and women's other intersecting identities and experiences (iii) has been made on the basis of equality. There are two parts to the third step: first, has there been an impairment of the right? This assesses if the individual's communication falls within the normative parameters of the substantive right in question. For example, does failing to provide emergency obstetrician care impair a woman's health? The second part of the third step examines whether this impairment is on the basis of equality. This leads to the challenging question: how can equality be used to evaluate impairment of rights?

The starting point for answering this question is to assess how CEDAW defines equality. Formal, substantive and transformative equality are all 'embedded in CEDAW' and can be used to evaluate individual claims and develop CEDAW.⁶⁵ Formal equality, that likes should be treated alike, is evident in numerous provisions in CEDAW. Article 15 guarantees legal capacity identical to that of men in civil matters, contracts, the administration of property, freedom of movement, residence, and in courts and tribunals. Every provision in Article 16 begins with the term 'the same right to...' and guarantees formal equality in family life. This model of equality is a useful framework for evaluating individual communications in relation to de jure obstacles to women's rights; for example, laws that directly prohibit women from inheriting.

⁶⁴ See *ibid.*

⁶⁵ Cusack and Pusey (n 56) 63; General Recommendation No. 25 (n 13) [7].

Substantive and transformative equality are also central to CEDAW. Unlike formal equality, there is no consensus on the meaning of these models of equality. There are several prominent models in the legal discourse on substantive equality.⁶⁶ This subsection examines three: equality of results, equality of opportunity and transformative equality. Equality of results examines the end-point. It ensures that socially valuable goods, jobs or places in academic institutions, are shared equally among men and women. Equality of results is not easily detected in the text of CEDAW. However, the CEDAW Committee routinely draws on this model, explaining that ‘equality of results is the logical corollary... of substantive equality.’⁶⁷ It advocates setting numerical goals and quotas for women in all public positions and other professional groups to ensure equality of results.⁶⁸ This model of is well-suited for addressing inequalities in the distribution of benefits.⁶⁹ Equality of opportunity examines the starting point. Once opportunity has been equalized everyone can be treated on the basis of merit. This model of substantive equality is directly referred to in the text of CEDAW. Article 4(1) on temporary special measures requires these measures to be discontinued when ‘equality of *opportunity* and treatment have been achieved.’ Equality of opportunity is also at the forefront in the states obligations on education. Girls and women should have equal opportunities to participate in physical education, benefit from career guidance, continuing education, and scholarships.⁷⁰ This model of equality can capture, for instance the wrongs of gender biases in job requirements.

The last model of equality in CEDAW is transformative and there are also competing definitions. Cusack and Pusey argue for a two pronged approach to transformative equality: first, the transformation of ‘institutions, systems and structures that cause or perpetuate discrimination and

⁶⁶ Sandra Fredman, *Discrimination Law* 2nd ed (Clarendon, 2011) Chapter 1.

⁶⁷ ‘General Recommendation No. 25’ (n 13) [9].

⁶⁸ *ibid* [15].

⁶⁹ Fredman, *Discrimination Law* (n 65) 14.

⁷⁰ Article 10(a), 10(d), 10(g) and 10(e), CEDAW.

inequality' and second 'the modification or transformations of harmful, norms, prejudices and stereotypes.'⁷¹ Byrnes explains that 'transformative equality denote[s] a change of fundamental and far-reaching nature.'⁷² While Fredman argues transformative equality pursues four-overlapping aims: breaking the cycle of disadvantage; promoting respect for dignity and worth; participation and accommodating difference by achieving structural change and promoting political and social inclusion.⁷³ The first element, breaking the cycle of disadvantage, recognizes that individuals and groups have suffered because of their personal characteristics. To redress this imbalance, specific and positive measures are required.⁷⁴ The second element addresses recognition harms such as: harassment, prejudice, stereotypes, stigmas, negative cultural attitudes, indignity and humiliation.⁷⁵ Third, the participation dimension requires inclusion of women in all public, private, political and social decision making processes. Fourth, with respect to structural change, rather than requiring individual conformity, this dimension requires institutions and structures to change. Placing these four elements together highlights the connection between different types of gender equality harms. This analysis can capture how social benefits that are based on a male breadwinner model, while seemingly breaking the cycle of disadvantage by supplying economic resources actually perpetuate gender relationships of financial dependency. Fredman explains 'where there are conflicts, the tension might be resolved by referring to the framework as a whole, the aim being, not so much to insist that one has priority but to create a synthesis which takes account of all dimensions.'⁷⁶ Fredman's model of transformative equality has been highly influential as it offers a sophisticated framework for monitoring progress towards achieving gender equality. It has been adopted by UN

⁷¹ Cusak and Pusey (n 56) 64.

⁷² Byrnes (n 53) 56.

⁷³ *ibid.*

⁷⁴ Fredman (n 65) 27-8.

⁷⁵ *ibid.* 29.

⁷⁶ Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *Int'l J of Con L* 712, 713.

Women in their latest flagship report⁷⁷ and is implicitly being relied upon by various UN treaty bodies.⁷⁸ In the interests of space, only this model is used to demonstrate CEDAW's commitment to transformative equality.

The first element, breaking the cycle of disadvantage, means that treating women as identical to men is not sufficient and differential treatment is required. Temporary special measures under Article 4(1) play a pivotal role in redressing disadvantage.⁷⁹ Article 10(f) recognises that girls are more likely than boys not to finish school and requires the creation of special programs for girls and women who have dropped out. In the context of employment, states are obligated to introduce maternity leave benefits.⁸⁰ Rural women, who are disproportionately excluded and disadvantaged,⁸¹ have the right to benefit directly from social security programmes and to adequate living conditions.⁸² The recognition element is also present in CEDAW. The strongest evidence of this is Article 5(a). States are 'to modify the social and cultural patterns of conduct of men and women...based on the idea of inferiority or the superiority of either of the sex or on stereotyped roles of men and women.' This is a powerful provision to address stigma, prejudice, stereotypes and the devaluation of women. The text also stresses seeing maternity as a positive value and challenges social norms which dictate that women have the responsibility for unpaid child care.⁸³ In education, states are required to revise textbooks, school programs and teaching methods to eliminate stereotypes on the role of men and women.⁸⁴

⁷⁷ UN Women, 'Transforming Economies, Realizing Rights' (2015) 42
<http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf>

⁷⁸ Sandra Fredman and Beth Goldblatt, 'Discussion Paper: Gender Equality and Human Rights for Progress of the World's Women 2015-2016' (UN Women, 2015) 12.

⁷⁹ 'General Recommendation No. 25' (n 13) [8].

⁸⁰ Article 11(2)(b), CEDAW.

⁸¹ UN Women, 'Empowering Women Through the SDGs' <<http://www.unwomen.org/en/news/in-focus/rural-women-food-poverty>>.

⁸² Article 11(1)(d), 11(2)(c), 14(2)(h), CEDAW.

⁸³ Article 5(b), CEDAW

⁸⁴ Article 10(c), CEDAW.

The participation element is apparent in Articles 7 and 8 which require states parties to include women in formulation of government policy, non-governmental and international organisations. Under Article 14(2)(a) women have the equal right to participate in the implementation and development of all rural planning. States are also required to guarantee equal participation in recreation, sports and cultural life.⁸⁵ Finally, there are numerous examples of the structural element in CEDAW. Under Article 11(2)(c) States are ‘to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities.’ Equal remuneration for work of equal value, in Article 11(1)(d) can challenge traditional conceptions of merit and can be used to address women’s low wages and horizontal and vertical gender job segregation.⁸⁶ Article 14(2)(c) gives rural women the right to directly benefit from social security models which could be used to reform head of household models of social benefits.

Equality in CEDAW is a rich concept. This pluralism is not as surprising as it first appears. CEDAW has been signed by 187 countries at various stages of development with regard to gender equality. In its work in the General Recommendations the Committee has embraced a multi-faceted concept of equality drawing on all of these models.⁸⁷ A rich understanding of equality can ensure the most effective model is used to accurately analyse the individual communication and develop CEDAW. In applying the proposed framework, the decision needs to justify which model of equality it is using to analyze the issues raised in the communication.

Before proceeding to envision how the framework helps achieve the dual-purposes of the individual decisions under the OP-CEDAW, there is one final point to address which strengthens the proposed framework. In the individual communications when the Committee finds the state has

⁸⁵ Article 13, CEDAW.

⁸⁶ Frances Raday, ‘Article 11’ in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN convention on the elimination of all forms of discrimination against women: a commentary* (OUP, 2012) 293. General Recommendation No. 25 (n 15)[23].

⁸⁷ Byrnes (n 53) 63. See General Recommendation No 25 (n 15) and General Recommendation No. 28 (n 54).

failed to uphold CEDAW, it makes both specific and general recommendations. The general recommendations are designed to ensure that rights of similarly situated women are protected and enjoyed. In the past, the Committee has recommended that Tanzania ensure that all discriminatory customary laws are repealed⁸⁸ and encouraged Denmark to research the impact of custody law on foreign mothers.⁸⁹ The framework proposed in this section is primarily designed to allow the Committee to systematically organize and assess all the aspects of the claim against the state's normative commitment to gender equality. But this process can also strengthen the recommendations of the Committee. The proposed framework requires the Committee to consider direct and indirect discrimination, intersectionality and in certain cases where transformative equality is used to evaluate the claim the interaction between disadvantage, recognition, participation and structural harms. Attention to these factors gives the Committee a strong basis to provide more tailored, meaningful and responsive recommendations to achieve greater equality in the state.⁹⁰ This potential is demonstrated in the next section when applying the framework to the Committee's decisions on women's right to health. Recommendations are always contextual and unique to each individual case, but the framework illuminates the challenges of the claim and 'points the ways in which [laws, policies and programmes] should be reformed.'⁹¹

III. ENVISIONING THE INDIVIDUAL COMMUNICATIONS

Through the use of a case study on Article 12 of CEDAW, equal access to health care, this section applies the evaluative tool proposed in Section II to mark out how the individual communications can be used not only to resolve the individual claim but also develop the rights in CEDAW. The

⁸⁸ *E.S. and S.C. v Tanzania* (2015) CEDAW/C/60/D/48/2013 [9(b)(ii)].

⁸⁹ *M.W. v Denmark* (2016) CEDAW/C/63/D/46/2012 [6(b)(iv)].

⁹⁰ Sabel and Zeitlin (n 34) 274.

⁹¹ Fredman, 'Revisited' (n 75) 727.

decisions on Article 12 are one of the few chances to examine in detail how the Committee has engaged with one substantive provision in the treaty. In these cases the Committee is being asked to determine if the state has eliminated discrimination in health in order to ensure women's equal access to health care services. The goal of this section is not to fully investigate the intricacies of women's right to health. Rather the aim, through a case study, is to demonstrate how the proposed framework can guide the Committee so that the decisions can fully develop the rights in CEDAW. This section analyses the three cases on equal access to health care to pinpoint where the decisions failed to develop the CEDAW, demonstrates how the equality-based framework can address these issues and considers the practical implications of using this framework.

(i) *A.S. v Hungary*⁹²

While on the operating table during an emergency caesarean section, A.S. was asked to and signed a barely legible hand-written form with Latin terms describing sterilisation. A.S.'s argued she was forcibly sterilised as she was unable to make an informed choice on her reproductive health. While the Committee came to the correct decision that Hungary violated Article 12, the decision does not fully develop CEDAW. Beyond a passing reference to women's dignity, there was no investigation into the relationship between gender equality and consent to medical procedures. A.S. also argued that as a Catholic, Roma woman the forced sterilisation had a profound impact on her mental health as her religion prohibits contraception and having children is a central element to her cultural value system.⁹³ The Committee completely ignored this aspect of her claim.

The proposed framework addresses these issues and ensures the decision contributes to the evolution of CEDAW. The first step asks: has there been in effect or purpose, a distinction? The factual matrix demonstrates that A.S. was treated differently as she was sterilised without consent

⁹² CEDAW/C/36/D/4/2004.

⁹³ *ibid.*

during an emergency reproductive procedure. The second stage of the analysis directs the Committee to consider how gender and Roma identity interact to cause the distinction. Performing sterilization without consent is based on patriarchal gender stereotypes that negate women's autonomy over their own reproductive health.⁹⁴ Furthermore, in Eastern Europe, Roma women have disproportionately been forcibly sterilized due to 'negative attitudes towards the...high birth rate among the Roma...often expressed as worries of an increased proportion of the population living on benefits.'⁹⁵ Deeply embedded prejudices and stereotypes on Roma and women are the basis for the differential treatment in *A.S.* The second step of the proposed framework brings this to the foreground. At the first part of the third step, the Committee can quickly conclude that sterilization is within the ambit Article 12 of CEDAW.

The focus shifts to assess if forcibly sterilizing a Roma woman was a violation on the basis of equality of women's right to health. The Committee needs to explain which model of equality it is using to assess the individual decision. Given the intersectional dimensions to *A.S.*, transformative equality which specifically focuses on relation between disadvantage and recognition harms is the most apt model for evaluating the claim. Throughout this stage of the analysis the Committee can examine the different dimensions from an intersectional perspective. The disadvantage element requires the state to take account of women's needs and pre-existing disadvantage. Roma women in Hungary are disproportionately poor and have limited access to education.⁹⁶ To meet the needs of disadvantaged women it is necessary to assess if consent is understandable so that all women regardless of their socio-economic background are able to make informed choices. The Committee can ask: does the consent form use Latin or highly technical medical jargon? A challenge arises if the state does not provide the necessary evidence to conduct this analysis. This issue arises in all three

⁹⁴ Rebecca Cook and Verónica Undurraga 'Article 12' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *CEDAW: A Commentary* (OUP, 2012).

⁹⁵ *V.C. v Slovakia*, (2011) Application No. 18968/07 [146]-[147], (ECtHR).

⁹⁶ The Committee, 'Concluding Observations: Hungary' (2013) UN Doc CEDAW/C/HUN/CO/7-8 [36].

cases and is discussed at the end of this section. The recognition element requires seeing the individual as an autonomous human being capable of making choices regarding her own life. It is necessary to examine how the interaction of gender and ethnic minority stereotypes influenced the differential treatment A.S. experienced. The decision needs to ask: are there entrenched biases in meeting the health needs of Roma women? The Committee can stress the importance of recognising women's, particularly minority women's, autonomy over her reproductive health. The structural element examines the procedures around sterilization to ensure that the process is understandable, that there is time for consultation and reflection so that women's consent is protected and upheld. Finally, the participation element requires, at the micro-level that the decision regarding a woman's reproductive health requires her full knowledge and agreement and at the macro-level the consultation of women in the design of consent procedures. By using this framework, the decision can more meaningfully contribute to the evolution of women's right to health, particularly in relation to intersectional discrimination. It directs the Committee to examine how institutional structures and gender stereotypes and ethnic and socio-cultural disadvantage interact to undermine women's consent.

Using this analytical tool can also positively influence the Committee's recommendations on how to achieve equality. The Committee did recommend that Hungary ensure the legislation conform to international standards of consent, that it monitor health centers so that they adhere to these requirements and that appropriate sanctions are in place if there has been a breach.⁹⁷ Using the equality-based evaluative tool allows the Committee to go a step further. It can propose recommendations that correspond to the different stages of the analysis. For instance, the Committee can propose that hospital staff receive training on gender and minority issues; that consent forms be revised so as to be easily understood; that consent procedures include time for

⁹⁷ A.S. (n 91) [11.5].

reflection and discussion; and to publically apologize and make reparations to other Roma women who have been forcibly sterilized.

(ii) *L.C. v Peru*

Similar to *A.S.*, *L.C.* emphasizes the role of stereotypes and prejudices in undermining women's right to health. *L.C.*, a 13 year old girl, attempted suicide when she discovered she was pregnant after years of suffering sexual abuse. She survived but due to injuries was scheduled for surgery. The hospital discovered she was pregnant and postponed her surgery. She requested a therapeutic abortion which is legal in Peru.⁹⁸ The medical board denied *L.C.* an abortion because they concluded her life was not in danger. She appealed the hospital's decision, but then she spontaneously miscarried. It was not until three and half months after her injuries that *L.C.* had the surgery. She is now paralyzed from the neck down. The Committee concluded that Peru has violated CEDAW.

The substantive merits of the decision do engage with the interpretation of the treaty. The Committee noted the hospital did not evaluate the effects that the continuation of the pregnancy would have on *L.C.*'s physical *and* mental health.⁹⁹ This is significant because it means mental health is an important factor to consider when accessing an abortion.¹⁰⁰ The Committee also observed 'it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women.'¹⁰¹ This hints that under CEDAW, as a matter of gender equality, the state has to respect women's rights to access an abortion.

Notwithstanding these crucial developments, the decision could have provided a clearer understanding on the link between gender equality and accessing health. *L.C.* argued that the state

⁹⁸ *L.C.* (n 29) [2.5].

⁹⁹ *ibid* [8.14]; [9.2].

¹⁰⁰ Charles Ngwena, 'A Commentary on *LC v. Peru*: The CEDAW Committee's First Decision on Abortion' (2013) 57(2) *Journal of African Law* 310, 316.

¹⁰¹ *L.C.* (n 29) [8.11].

party placed primacy on her reproductive capacity and ignored other aspects of her identity, such as her youth, her physical health and mental integrity.¹⁰² The Committee concluded that this violated Article 5 of CEDAW (cultural attitudes) because the ‘decision to postpone the surgery...was influenced by the stereotype that protection of the foetus should prevail over the health of the mother.’¹⁰³ The problem is that the Committee did not explicitly clarify if the negative stereotypes underpinning the denial of access to a therapeutic abortion were exclusively situated in Article 5 of CEDAW. *L.C.* could be read as implying that negative stereotypes that limit women’s access to abortions are not an aspect of *equality* in health. *L.C.* also argued that Peru did not have sufficient procedures in place to ensure timely access to abortion or an appeal procedure.¹⁰⁴ The Committee concluded that this violated Article 2(c), the obligation to establish legal protections of women’s rights through national tribunals and public institutions and Article 2(f), the obligation to modify existing laws, regulations, customs and practices. There was no analysis if *equal* access to health care services also included de facto access. As a result it is unclear if the procedural aspects of abortions are part of an ensuring Article 12 of CEDAW.

The analysis in *L.C.* is fractured among the different provisions in the treaty which results in a thin conception of equality. The proposed framework, particularly the third step, draws the different dimensions of equality together resulting in richer interpretation of CEDAW. Restricting access to abortion means that there has been a distinction based on sex, fulfilling the first two stages of the analysis. The first part of the third step, impairment of health is also made out. *L.C.*’s inability to access an abortion and the surgery she needed resulted in her being permanently paralysed. The final step asks: how does restricting access to abortion limit women’s right to health on the basis of the equality? The recognition and structural dimensions of *L.C.*’s claim point towards using

¹⁰² *ibid* [7.6].

¹⁰³ *ibid* [8].

¹⁰⁴ *ibid* [2.14], [5.2]-[5.3], [5.7].

transformative equality to answer this question. Turning to the disadvantage element, this requires the Committee to recognize the sexual and reproductive health needs of women. In a recent statement the Committee notes that ‘unsafe abortion is a leading cause of maternal mortality and morbidity.’¹⁰⁵ The World Health Organization estimates that 22 million unsafe abortion are performed, resulting in 47 000 deaths and 5 million complications.¹⁰⁶ Forcing women to remain pregnant leaves the vulnerable to ‘revictimization by [their family] and society.’¹⁰⁷ Moreover, ‘prohibition does not reduce the need and the number of abortions; it merely increases the risk of health and life of women and girls who resort to unsafe and illegal services.’¹⁰⁸ *L.C.* highlights specific sub-areas of disadvantage. Poor women and adolescent ‘often resort to unsafe abortion when they cannot access safe abortion.’¹⁰⁹ By more closely assessing the health needs of women, the decision can more strongly emphasize rather than merely hint that the state has to take positive measures to ensure that women are able to access legal and safe abortion, especially in cases of ‘rape, incest, and threats to the life and/or health of the mother.’¹¹⁰ The participation dimension points the Committee to assess whether the *L.C.*’s voice and opinion were respected in decisions about her reproductive health and inquire whether the state’s has meaningfully consulted with women so that the law responds to actual needs. The Committee can use this assessment to encourage Peru to consult and listen to women when redesigning access to abortion.

The Committee correctly identified the recognition and structural harms at stake in denying *L.C.* an abortion but it situated them outside of an equality frame. The proposed framework requires the

¹⁰⁵ The Committee, ‘Statement of the Committee on the Elimination of Discrimination Against Women on sexual and reproductive health and rights: Beyond 2014 ICPD Review’

<<http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf> >

¹⁰⁶ World Health Organization (WHO), ‘Preventing Unsafe Abortion’

<<http://www.who.int/mediacentre/factsheets/fs388/en/>>.

¹⁰⁷ Office of the High Commissioner for Human Rights, ‘Practices in adopting a human rights-based approach to eliminate preventable maternal mortality and human rights’ (2011) UN Doc A/HRC/18/27 [28].

¹⁰⁸ ‘Unsafe abortion is killing tens of thousands of women around the world’

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E>

¹⁰⁹ WHO(n 105).

¹¹⁰ ‘Unsafe abortion’ (n 107)

Committee to link these stereotypes and institutional structures to *equality* in health care. The decision can emphasize that prejudices and stereotypes on women's reproductive roles violate Article 5 (cultural attitudes) *and* Article 12 (equality in health care). Similarly, the Committee can stress that as a matter of its commitment to the core obligations in CEDAW (Article 2) *and* equality in health care (Article 12) the state needs to address structural barriers—such as cost, stigma, unnecessary procedural requirements and conscientious objection of health care providers—so that there is a legal and practical framework in place for rapid decision-making.¹¹¹ The proposed framework is able to accurately detect the connection between equality, recognition harms and procedural requirements for abortions and ensure a robust development of equality and women's health in CEDAW.

(iii) *da Silva Pimentel Teixeira v Brazil*¹¹²

Teixeria raises very challenging issues on structural gender inequality. Alyne da Silva Pimentel Teixeira died during childbirth and her mother claimed that her death was due discrimination against women in health. Teixeira was a rural, Afro-Brazilian woman who lived in poverty. She delivered a stillborn foetus and underwent surgery in a private health centre to remove the placenta fourteen hours after delivery. After severe delays she was transported to a public hospital. There she was left largely unattended in the hallway for twenty-one hours until she passed away. The Committee concluded Brazil violated Article 12 of CEDAW.

The Committee's finding of a violation was monumental because 'it is the first time that a human rights committee identified and analyzed the discriminatory gaps in a country's health care

¹¹¹ WHO (n 105).

¹¹² UN Doc CEDAW/C/49/D/17/2008.

system from the perspective of a poor, pregnant minority woman.¹¹³ Cook argues this decision ensures that maternal mortality is perceived not as a random act of fate but ‘laid the necessary normative foundation for the legal application of human rights to improve access to maternity care.’¹¹⁴ Although the conclusions in the decision mark an important development in women’s rights, on three crucial aspects the Committee missed using the individual claim to develop CEDAW. First, Brazil argued her death was not related to her pregnancy.¹¹⁵ Teixeira’s mother pointed out that denying this link revealed a chronic problem of misclassifying maternal deaths.¹¹⁶ In the decision, the Committee recognized that Teixeira’s death was maternal but it missed establishing more broadly what qualifies as a maternal death under Article 12 of CEDAW. Second, the central claim is that her death was due to discriminatory health care budgets and policies. Brazil responded that Teixeira’s death was due to individual professional misconduct not systemic gender inequality.¹¹⁷ The Committee deals with this complex issue in a single paragraph. It held that in Brazil there was a ‘lack of appropriate maternal health services [which] fail[ed] to meet the specific, distinctive needs and interests of women.’¹¹⁸ This is a conclusion; the decision did not analyse how the health policies, implementation strategies or budgets entrench gender inequality or pinpoint precisely where Brazil’s failed to account for women’s needs. Third, the Committee concluded that Teixeira was discriminated against because she was ‘of African descent and on the basis of her socio-economic background.’¹¹⁹ While the Committee is correct to take account of Teixeira’s unique experiences, it does not assess the implications of this finding. There is no detailed examination of how her

¹¹³ Rebecca Cook, ‘Human Rights and Maternal Health: Exploring the Effectiveness of the *Ahye* Decision’ (2013) 41(1) *Journal of Law, Medicine & Ethics* 103, 108.

¹¹⁴ *ibid.* 109.

¹¹⁵ *Teixeira* (n 111) [4.8].

¹¹⁶ *ibid.* [7.16].

¹¹⁷ *ibid.* [4.7], [4.13].

¹¹⁸ *ibid.* [7.6].

¹¹⁹ *ibid.* [7.7].

intersecting identities resulted in the differential treatment nor do the Committee's recommendations touch upon this aspect of the claim.

Applying the proposed framework to *Teixeria*: first, has there been a distinction in effect or purpose? Drawing on the facts of the case, specifically the delays in receiving treatment, it is evident that there has been differential treatment. Second, similar to *A.S.* the decision can also probe the interaction between race, poverty and gender to establish a causal link between the medical errors committed and the harms she suffered. The first part of the third step is straightforward. The maternal health is clearly within Article 12. The crucial issue in *Teixeria* is whether Brazil has eliminated discrimination in its maternal health care policies so that all women, including poor, Afro-Brazilian women are able to enjoy their right to health? To evaluate her claim it is necessary to assess the state's health laws, policies and practices. Transformative equality is again the best model as it is designed to uncover unequal structures.

The first element of transformative equality, the disadvantage element, requires the state to demonstrate that maternal health care facilities are in place to address the needs of vulnerable women. This requires some understanding of how marginalised women experience child birth. The UN Special Rapporteur on the right to health notes that women living in poverty, in rural areas and women belonging to ethnic minorities or indigenous populations are most at risk of maternal mortality. Physical access, cost of care, and delay in seeking and receiving have been identified as key factors contributing to maternal mortality in developing countries.¹²⁰ The Committee can use these insights to evaluate the blockages in Brazil's system in relation disadvantaged women accessing emergency maternal health care. Has the state ensured that there are medical centres in rural areas? Is there speedy and affordable access to emergency medical services? Do user fees act as barrier to

¹²⁰UN Special Rapporteur on the right to health, 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (2006) UN Doc A/61/338 [17(b)]; Alicia Yamin, 'Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health' (2008) 10(2) Health and Human Rights: An International Journal 1, 9.

women in poverty? Are women able to access information on available health services and family planning? Are health services of high-quality with trained resources and equipment? Are they culturally acceptable?¹²¹ By asking these questions, the decision is able to ‘identify very concrete ways in which ministries of health can fulfil the right to maternal health’¹²² and more fully develop the state’s obligations.

The recognition element allows the Committee to fully take account of the intersectional aspects of Teixeira’s claim. Recognition harms in relation to maternal health care policies manifests in two ways in this case. First, the Committee concluded and Brazil acknowledged that the fact that the individual was Afro-Brazilian and poor contributed to her death. It is imperative to go beyond this and actually assess the impact of negative stereotypes and prejudices. How do negative stereotypes affect the location, funding and quality of maternal health facilities where ethnic, indigenous or poor women live? Did prejudices and stereotypes on race and poverty result in the severe delays in her receiving medical care? Second, Brazil recognized that there is a lack of properly trained obstetrician medical staff.¹²³ The decision should probe whether this shortage is a result of women’s health being perceived by the medical community as a lower status speciality. The Committee can use this analysis to recommend that the state address negative cultural attitudes towards poor Afro-Brazilian woman and to improve perception of obstetrician. The next element of transformative equality requires women’s participation. While Brazil did mention that policies include women’s participation it would be helpful for the Committee to hold that any changes to health care are only made after consultation with all relevant stakeholders.¹²⁴ This would include voices that are usually marginalised: poor, indigenous and rural women.

¹²¹ Yamin, ‘Beyond Compassion’ (n 120) 94-95.

¹²² *ibid.*

¹²³ *Teixeira* (n 111) [3.7], [4.7].

¹²⁴ *ibid.* [4.12].

There are two structural elements to *Teixeria*: (i) the classification of maternal deaths and (ii) the design, delivery and funding of Brazil's health policies.¹²⁵ To fully develop CEDAW, the Committee can assess not only how the medical errors resulted in Teixeria's death but also more broadly investigate the state's systematic problems in misclassifying maternal deaths.¹²⁶ In her submission to the Committee, Teixeria's mother argued that doctors rarely record on the certificate that the patient was pregnant and medical staff often fails to relate immediate cause of death to the patient's pregnancy.¹²⁷ The WHO notes that many countries lack a registration system which properly records the cause of death and this can mask the extent of maternal mortality.¹²⁸ The decision can question whether hospital structures, record-keeping and personnel are properly trained to be able to identify maternal deaths and propose recommendations to address any shortcomings.

The central question the Committee has to determine is: was Teixeria's death due to individualized negligence or systemic failures of the health system? This is not an easy consideration. In cases where maternal health is grossly under-funded or over-looked this may not be so challenging but in cases where there are policies in place and certain level of funding this can be a difficult assessment. One possible way forward would be to evaluate the state's maternal health policies on a minimum core or progressive realisation standard. However, the obligations in CEDAW are categorically different. There is no basis in the text of the treaty to use the minimum core framework. Moreover, women's 'right to equality...is substantive, immediate and enforceable', as such the state needs to be concerned about 'the division of existing resources, not the

¹²⁵Dianne Elson, 'Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW' (UNIFEM, 2008) 7.

¹²⁶*Teixeria* (n 111) [5.16].

¹²⁷*ibid.*

¹²⁸Suzanne Cross et al, 'What you count is what you target: the implications of maternal death classification for tracking progress towards reducing maternal mortality in developing countries' <<http://www.who.int/bulletin/volumes/88/2/09-063537/en/>>.

development of resources, and therefore the principle of progressive realisation does not apply.¹²⁹

The Committee is not determining what the minimum core or progressive realization of women's access to health care is but rather assessing whether the state's existing laws and policies on maternal health have given priority to its commitment to gender equality.

A gender equality approach to health requires the state 'to treat men and women by reference to their relative incidence levels of conditions of ill-health diseases in their population.'¹³⁰ To properly conduct this analysis the Committee needs to ask a series of questions. Does the Brazil have an accurate assessment of the maternal health needs of women? Does the budget give priority to the needs of pregnant Afro-Brazilian women who live in poverty? And is the state effectively implementing its plan and policies? Here the state may reply that an imposition to fund and implement maternal health policies to a greater degree could preclude spending on these other socially valuable endeavours, such as funding other human rights. It simply cannot afford to devote further resources to maternal health care. The issue of resource-trade off has plagued the monitoring and enforcement of socio-economic rights.¹³¹ Yamin and Nordheim note that the 'human rights framework does not provide clear lines as to where those boundaries are to be drawn.'¹³² There 'is no single answer as to how much priority to give the worst off in terms of lifetime health deprivation or how much weight to assign to the magnitude of a health benefit from a given treatment.'¹³³

Although the human rights framework does not always provide precise answers to challenging systemic questions, it does demand that the health care budget and policies pay attention to the most

¹²⁹ Working Group on Discrimination Against Women, 'Discrimination against women in economic and social life, with a focus on economic crisis' (2014) UN Doc A/C/26/39 [8].

¹³⁰ Cook and Undurraga (n 93) 325.

¹³¹ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (OUP, 2008) 162.

¹³² Alicia Yamin and Ole Nordheim, 'Taking Equality Seriously: Applying Human Rights Framework to Priority Setting in Health' (2014) 36(2) Human Rights Quarterly 296, 304.

¹³³ *ibid* 313.

‘poor and marginalized groups’¹³⁴ such as poor, rural Afro-Brazilian women and cannot ‘merely be targeted at producing greatest aggregate advances.’¹³⁵ The Human Rights Council provides helpful technical guidance the Committee can draw on when examining Brazil’s budget. It holds that ‘if the overall available budget increases, resources from maternal health should increase accordingly insofar as a significant need in that area remains.’¹³⁶ If the budget for maternal health has decreased the state must justify these cuts.¹³⁷ Given the magnitude of maternal death and the ease at which it can be prevented, the Committee must thoroughly investigate the reasons why the state’s budget does not meet the needs of women.¹³⁸ Yamin helpfully notes that lack of funding may not be the only reason for the failures in the health system. It may be due to ‘lack of capacity to absorb resources, ineffective investment of funds, weak financial management, poor procurement practices, limited oversight and poor district level management in decentralized health systems.’¹³⁹ The submissions by Teixeira’s mother and Brazil both indicate that there was a lack of oversight in private health services that resulted in severe delays in treatment and a mismanagement of human resources.¹⁴⁰ The proposed framework requires the Committee to examine the available evidence to precisely diagnosis where they are defaults in the system. If the Committee finds the state’s justifications for the level of funding not based on evidence or unsupportable in light of available evidence or concludes its implementation strategies have failed and as such is not consistent with a commitment to structural gender equality, its task to advocate for a stronger implementation of CEDAW.

¹³⁴ *ibid* 324.

¹³⁵ Alicia Yamin, ‘From Ideals to Tool: Applying Human Rights to Maternal Health (2013) 10(11) PLOS Medicine.

¹³⁶ Office of the High Commissioner for Human Rights ‘Technical guidance on the application of a human rightsbased approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality’ (2012) UN Doc A/HRC/21/22[47(a)].

¹³⁷ *ibid.* [47(b)]

¹³⁸ UN Special Rapporteur on the right to health (n 120) [9].

¹³⁹ Alicia Yamin, ‘Toward Transformative Accountability: A Proposal for Rights-based Approaches to Fulfilling Maternal Health Obligations’(2012) 7 (12) *Sur: An International Journal* 95, X.

¹⁴⁰ Teixeira (n 111) [7.6][7.7].

(iv) *Practical Implications*

All three cases bring to the fore practical issues in using the framework to develop women's human rights. What if the state does not provide the necessary information so that the Committee can evaluate the claim? The OP-CEDAW and Committee provides limited guidance on the information the state needs to provide in response to an individual communication. Article 6 of the OP-CEDAW requires the state to 'provide a written explanation or statement to the complaint.' The Committee can request additional written explanations or statements.¹⁴¹ This still depends on the willingness of the state to provide the necessary detail. The Committee does not have the power to compel the state to provide this information. If it does not have the necessary information, it can only evaluate the decision as best as possible on the available evidence. This institutional limitation can significantly undermine the potential of the OP-CEDAW.

There are several methods by which the Committee can off-set this limitation. First, it can openly acknowledge the limits of the decision by including in the final decision the fact that the Committee asked for crucial information that was not provided by the state. It is hoped that this naming and shaming technique would encourage states in the future to provide high quality responses. Second, under the Rules of Procedure, when coming to a decision the Committee may obtain 'any documentation from organizations in the United Nations system or other bodies that may assist in the disposal of the communication.'¹⁴² For instance, in *Teixeria*, the Committee could look to reports by various UN special mandate holders or the Millennium Development Reports on the progress of reducing maternal mortality. It must be acknowledged that relying on outside

¹⁴¹ The Committee, 'Model Complaint Form'

<<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>>

¹⁴² Committee, 'Report of the CEDAW Committee—Twenty-Fourth Session' (2001) A/56/38, Annex I, Parts XVI and XVII. Amendments to the rules were adopted the Committee, 'Report of the CEDAW Committee—Thirty-Ninth Session' (2007) UN Doc A/62/38, Chap V, [653–5] and Appendix, Rule 71.

sources will extend the time frame for deciding the decision as the Committee has to give both parties a chance to comment on the new information.

A further challenge, which often arises in socio-economic adjudication, is the competency of the Committee. Socio-economic rights, especially the right to health ‘present unique challenges to evidence production...because of the technical nature of evidence ...for example data regarding both clinical and cost-effectiveness...budgetary and resource allocation.’¹⁴³ In *Teixeria*, to properly assess the disadvantage element the Committee needs to understand both the quantitative and qualitative experiences of maternal mortality in Brazil. Similarly, to evaluate the structural elements of the claim, the Committee needs to examine the budget and the organization and functioning of the health system. This complex information ‘may lie beyond the normal expertise of international lawyers.’¹⁴⁴ Yasmin and Duger argue that to fill the knowledge gap the Committee can rely on information from CSOs.¹⁴⁵ The Committee has a fruitful relationship with CSOs. In the Concluding Observations and General Recommendations numerous CSOs provide crucial information so the Committee has a clear understanding of the factual and legal issues at stake. The individual decisions can continue in this trend and rely on their expertise to provide ‘factual information [and] normative arguments concerning public interest matters [especially on] systemic issues requiring structural reform.’¹⁴⁶ The Rule of Procedure allows the Committee to seek information from other bodies, not only UN organizations. In *A.S., L.C.*, and *Teixeria* and other future individual claims, the Committee can seek the necessary knowledge from a wide array of reliable sources so as to enrich the equality analysis and more effectively secure women’s rights.

¹⁴³ Alicia Yasmin and Angela Duger ‘Adjudicating Health-Related Rights: Proposed Considerations for the UN Committee on Economic, Social and Cultural Rights, and Other Supranational Tribunals’ (2016) 17 *Chicago J of Int’l Law* 80, 99.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

The limited ability of the Committee to engage in fact-finding when evaluating individual decision does not mean the dual-purposed individual communication procedure argued for in Section I should be abandoned. Even an imperfect individual communications procedure that resolves an individual violation of CEDAW and contributes as much as possible to the substantive development of women's rights fulfils an important accountability role. The individual, and in the case of *A.S., L.C.* and *Teixeria*, the most marginalised and vulnerable individuals are able to hold the state accountable, receive individual redress and shine the international spotlight on systemic gender inequalities that are often overlooked within the domestic arena. To fully achieve the dual aims of the OP-CEDAW the state needs to provide high quality submissions. If the state does not provide all the necessary information, the Committee can expose the state's reluctance to participate and turn to other sources to supplement any knowledge gaps and make the best possible decision it can with the information provided. The individual communications procedure as it currently stands, even with its limitations is a crucial step forward in the international protection of women's right.

In conclusion, using the analytical framework derived from the definition of discrimination in Article 1 of CEDAW, ensures that the decisions develop the treaty. It gives the Committee a tool to ask the necessary questions so that it can analyze, as best as possible, the challenges raised by the individual's claim. The final decision should develop the text of CEDAW and provide persuasive reasons that precisely explain where the state failed to ensure equal access to health care services. This would ensure a richer understanding of what Article 12 requires of Brazil, other states and relevant stakeholders.

IV. CONCLUSION

The effects of these decisions have been inconsistent. Although the state has compensated A.S.,¹⁴⁷ forced sterilization is still permitted in Hungary.¹⁴⁸ On a more optimistic note, Brazil has ‘established an inter-ministerial group to oversee the implementation of the Committee’s recommendations.’¹⁴⁹ But there remain concerns on its effectiveness.¹⁵⁰ In July 2014, Peru released guidance on accessing an abortion when the woman’s life was at risk.¹⁵¹ There are many inter-locking factors that contribute to positive structural change. The Committee can make a greater contribution to this process by conceptualising the decisions of the OP-CEDAW as dual-purposed. The decisions should be used to resolve the individual claim as well as developing CEDAW. There are many compelling reasons for the decisions to openly engage with the development of the treaty. Mostly important, substantive decisions have great potential to be persuasive contributions to the development of women’s human rights. An analytical framework is necessary to ensure the decisions provide considered and comprehensive reasons. Under the OP-CEDAW the Committee is called to assess if the State has eliminated discrimination against women and achieved gender equality. The definition of discrimination against women in Article 1 of CEDAW provides a nuanced equality-based evaluative standard. Using the proposed framework from the definition of discrimination against women in CEDAW will allow the Committee to properly assess all aspects of the individual’s claim and create persuasive reasons that can serve as a guide for eliminating discrimination against all women.

¹⁴⁷ *ibid* 116.

¹⁴⁸ The Committee, ‘Concluding Observations: Hungary’ UN Doc CEDAW/C/HUN/CO/7-8 [32].

¹⁴⁹ Plataforma Brasileira de Direitos Humanos Econômicos, Sociais, Culturais e Ambientais, ‘A Victory in Alyne’s Case’ (Media Release, 5 September 2012) <<http://www.dhescbrasil.org.br>> as cited in Cusack and Pusey (n 52).

¹⁵⁰ Yamin and Duger (n 143) 117.

¹⁵¹ Human Rights Watch, ‘Dispatches: New Abortion Rules in Peru’ <<http://www.hrw.org/news/2014/07/01/dispatches-new-abortion-rules-peru>>.