EUROPEAN WOMEN and the CEDAW-CONVENTION;
THE WAY FORWARD
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1 Introduction[2]

I was very happy to learn that on the EWLA Conference on *gender equality and professional life and current developments in Europe*, the CEDAW-Convention was to be one of the topics to be discussed. In my view European feminist lawyers have seriously neglected this Convention. That is to say: the potential for this Convention to advance the case of equal rights of women has not yet been realized.[3] Almost all the scholarly attention and legal actions taken over the past decades by European feminist lawyers have been directed on the levels of European Community (sex) equality law and national equal treatment laws.[4] I admit that these efforts have had some impact on the possibilities for European women to gain access to the labor market and to secure equal treatment in the field of pay, working conditions and social security rights. However, in some respects the results are very disappointing.[5]

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[2] I am most grateful to Sylvester (Danny) Ryan who has edited and corrected this text for me.

[3] I could find no publications on the effects of this Convention on the European Community (legislative) policies. In the Netherlands there have been various reports and studies. They are solely directed at the level of Dutch legislation and policies. An overview is to be found in the shadow report that was presented to the CEDAW-Committee in 2001 on behalf of Dutch ngo's: *Defective Acceleration: The Dutch Emancipation Policy*, E-Quality, Den Haag 2001.

[4] An overview of this legislation and case law can be found in Evelyn Ellis: *European Sex Equality Law*. Oxford EC Law Library, Clarendon Press Oxford, 2nd edition 1998. See also: Mark Bell: *Anti-Discrimination Law and the European Union*. Oxford University Press, Oxford. (2002) and Sandra Fredman: *Discrimination Law*. Oxford University Press, Oxford. (2002)

[5] There is a very extensive literature about this issue. See for example: Clare McGlynn and Catherine Farrelly, 'Equal pay and the "protection of women within family life"', *European Law Review*, 1999, p. 202-207. S. Fredman, 'Equality. A new generation?', *Industrial Law Journal* 2001, p. 145-168. Clare McGlynn, 'Ideologies of motherhood in European Community sex equality law', *European Law Journal* 2000, p.29-44. Rikki Holtmaat, 'The issue of overtime payments for part-time

This paper is not the place to describe the extent of the shortcomings of European[6] equal rights legislation and case law.[7] Instead, I will concentrate on the possibilities that the CEDAW-Convention offers us to explore new avenues and to make some progress in the fight against all forms of discrimination against women.

2 The object and purpose of the CEDAW-Convention

For reasons of space I will not explain in this paper the history and content of this UN-Convention in any detail.[8] The 1979 CEDAW-Convention has been ratified by 170 States. All of the 15 EU Member States have signed up to it. This means that their legislation and policies – and the legislation and policies of the European Union as well[9] – should be in accordance with the object and purpose of the Convention.

As to the object of the Convention it should be noted that the areas covered by CEDAW are much broader than those that are covered by EC-sex-discrimination legislation. The latter is until now[10] restricted to the economic activities of women, i.e. paid labor and social security rights.[11] The CEDAW-Convention has relevance for *all* aspects of political, economic, cultural, social and private life of women. In Articles 6-16 it contains provisions concerning (among others) health care, immigration policies, education, participation in political parties, labor-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.

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workers in the Helmig case. Some thoughts on equality and gender, in: Yota Kravaritou (ed.), *The regulation of working time in the European Union,* Brussels (etc.): P.I.E. – Peter Lang SA 1999, p. 411- 444. Tamara Hervey & Jo Shaw, 'Women, work and care. Women's dual role and double burden in EC sex equality law', *Journal of European Social Policy* 1998, p. 43-63.

[6] I will limit my comments to some general features of this legislation on the European Community level. I will not take into consideration European Human Rights Law (ECHR and European Charter of Fundamental Rights).

[7] You will find detailed comments on specific parts of this legislation and case law in some other contributions to this Volume.

[8] See for example: Noreen Burrows: The 1979 Convention on the Elimination of all forms of Discrimination Against Women; In: *Netherlands International Law Review*, 1985, p. 419-460 and Margareta Wadstein: Implementation of the UN Convention on the Elimination of all forms of Discrimination Against Women; in: *Human Rights Quaterly*, Vol. 4, 1988, p. 5-21.

[9] See Article 6, par. 1 of the EU-Treaty.

[10] The new 'broad' gender Directive (based on Article 13 of the EC Treaty) that will be proposed shortly by the Commission, might bring a difference in this respect.

[11] This is the result of the fact that the Community has mainly economic objectives and powers. See Mark Bell, o.c..

The very goals of the CEDAW-Convention are notably much broader than those of European anti-discrimination legislation. EC sex equality law started out as a matter of *economic* equality. The right to equal pay for women, as laid down in Article 119 EEC, was born from a fear harbored by the French government that it 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.[12] Later, the ECJ, in Defrenne III, lifted this provision up to the level of a general principle.[13] Nowadays respect for all human rights is recognized in the EU-Treaty itself (Article 6). However, European social policies – of which equality legislation forms a part – are still heavily market oriented, instead of human rights oriented.[14] The principle of equality between the sexes has been 'translated' into the (formal) right not to be discriminated against and the right to equal treatment in the sphere of paid labor and social security and pension rights.[15]

The CEDAW-Convention has a threefold purpose.[16] It obliges the adoption of appropriate and effective measures at three different levels:

1. To implement complete equality in law and in public administration
2. To improve the *de facto* position of women
3. To combat the dominant gender stereotypes and gender ideology

This threefold approach of CEDAW moves far beyond the scope of formal equal rights (or equal treatment of women as compared to men). The three objectives of the

[12] See Catherine Barnard: The economic objectives of Article 119. In: Tamara K. Hervey &David O'Keefe (eds), *Sex Equality Law in the European Union,* Chichester: Wiley 1996, p. 320-334. See also Catherine Hoskyns: *Integrating Gender; Women, law and politics in the European Union.* Verso, London-New York, 1996.

[13] The Court held that "(…) respect for personal human rights is one of the principles of Community Law (….). There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights." Defrenne/SABEN ("Defrenne III"), Case 149/77 [1978], ECR 1365.

[14] See Mark Bell, o.c., Chapter 1: European Social Policy: Between Market Integration and Social Citizenship. See also Jo Shaw (ed.): *Social Law and Policy in an evolving European Union.* Hart Publishing, Oxford 2000.

[15] The main instruments are the so-called sex-equality Directives, of which 5 have been issued so far. (Directives 75/117/EEC, 76/207/EEC (recently amended in Directive 2002/73/EC), 79/7/EEC, 86/378/EEC and 86/613/EEC. See for a discussion of their content Evelyn Ellis, o.c.

[16] This analysis of the Convention's goals was adopted in the first National Report on CEDAW to the Dutch Parliament: L.S. Groenman et al.: *Het Vrouwenverdrag in Nederland anno 1997.* Vuga, Den Haag, 1997. The CEDAW-Committee endorsed to this analysis in the Concluding Comments that were issued on the situation in the Netherlands after its 25th session in July 2001. See: Concluding Comments A/56/38, CEDAW/C/SR. 512 and 513, para 196. The Concluding Comments can be downloaded from: www:un.org/womenwatch/daw/cedaw25/The Netherlands

Convention should not be separated or ranked, but should be read as three aspects of one and the same general purpose: the elimination of *all forms of discrimination* against women.[17] They point at three different strategies that can (and should!) be used in combination in order to reach this overall purpose of the Convention.

The aim of measures at level 1 is to ensure that men and women are equal before the law and in public and private life. (See Article 2 of the Convention.) On the basis of this Article governments are obliged to make sure that they do not discriminate against women in their laws and practices and no discrimination is allowed between citizens as well. This, legal impediments that exclude women from certain spheres of life should be abolished and anti-discrimination legislation should be enacted and implemented in an effective way.

Fulfillment of this first aim is a necessary precondition if equality between the sexes is to be achieved, but is not sufficient in itself. Measures at level 2 have to be developed to ensure that this formal equality before the law and in public administration can also be realized in every day life. (See Articles 3, 4 and 24 of the Convention.) These policy measures are intended to give *de facto* equal rights and opportunities to women and to guarantee that women have the full enjoyment of all human rights. These measures *can* involve temporary special measures (see Article 4(1) of the Convention), but they will mainly be of a structural and permanent nature.

The design, adoption and implementation of these measures is another precondition that must be fulfilled, but they too will be ineffective if the structure and culture of society continue to be based on fixed and stereotyped ideas about the different (and inherently unequal) roles of men and women. Measures at level 3 are therefor necessary as well. 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 to ensure the elimination of fixed gender stereotypes. (See Article 5a of the Convention.)

3 The multi-layered approach of the CEDAW-Convention

[17] I will return to the concept of discrimination in the Convention in paragraph 4.2 of this paper..

The three goals of the Convention merit further study. What demands do they pose on the actual equal rights legislation in EU member states and in the Union itself? Has, in other words, CEDAW been implemented fully in the existing sex equality legislation in Europe?[18]

3.1 The non-discrimination principle: a strategy for individual rights

One could say that as far as its first aim is concerned the CEDAW-Convention does not offer greater advantages to European Community sex equality law. EC-legislation and case law outlaws direct and indirect discrimination between men and women.[19] It requires that all laws, regulations and practices in Member States – at least as far as the labor market and social policies are concerned – should be free from sex discrimination. Consequently in many Member States domestic laws have been amended and anti-discrimination legislation is now operative.[20] So, – apart from its restricted field of application – one could claim that EC-law is more or less in conformity with the first aim of the Convention.[21]
The same, however, could not be said with respect to the second and third aim of the Convention. (See below.)

Although very important, a strategy that aims at non-discrimination and (formal) equal treatment is not sufficient in itself to bring about equality of men and women in reality. Such a strategy can even have some dangerous consequences if not accompanied by a more comprehensive and result-oriented substantive approach to equality. This danger results from the fact that, in the dominant understanding of legal equality, equal rights take the form of an *individual* right. One of the main criticisms of existing EC equal rights laws is that these laws define *discrimination* an individualized and essentially comparative concept.[22] "The right not to be

[18] Apart from a general clause in the EU Treaty concerning the fundamental principles that govern the Union (Article 6 EU-Treaty), this law is mainly European Community (EC) law. Therefore I talk of the Community and EC law in the remaining of this paper.
[19] After the amendment of Directive 76/207/EEC, EC law now also bans sexual harassment at the workplace. See Directive 2002/73/EC, to be found at: http://www.europa.eu.int/eur-lex/en/dat/2002/l_269/l_26920021005en00150020.pdf
[20] See Mark Bell, o.c., Chapter 6.
[21] There is one major difference in this respect. EC law outlaws sex discrimination, and is equally applicable to men as to women. This means that the norm that there should be no discrimination is in itself 'sex-neutral'. I will return to this point in paragraph 4.2. of this paper.
[22] The same criticism applies to most Anglo-American anti-discrimination laws.

discriminated against on the ground of sex means the right of an individual not be subjected to specific treatment which is less favorable 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 favorable treatment is sex." [23] It is up to the individual woman to claim that her right to equal treatment has been breached. That is why this strategy is called the *individual rights strategy.* The comparative nature of this approach to equality very often leads to assimilation to the male norm, which in itself is not contested. Women are required to 'fit into' structures and systems that are not adequate to meet their aims and needs.

Although such equality legislation may be able to open some doors to women it can never guarantee that behind these doors women will be able to participate fully. In equality legislation more emphasis should be placed on the position of women (or groups of women) as the subordinated or excluded sex, and more attention should be placed at the systemic or structural causes of discrimination. The second and third aims of the Convention are explicitly directed at this group level and at the structural causes of discrimination of (groups of) women.

3.2 Improving the de facto *position of women: a strategy for social support*

The second aim of the CEDAW-Convention is to improve the *de facto* position of women. This aim is quite clearly expressed in Article 3 of the CEDAW-Convention. This Article obliges States 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.[24] Its substantive provisions (Articles 6-16) call for action in the respective fields that are 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.[25] Thus, the Convention not only

[23] See Ellis,o.c., at page 321. Also: Evelyn Ellis: The definition of Discrimination in European Sex Equality Law; in: European Law Review, 1994 (19), p. 563. See further Sandra Fredman: o.c., Chapter 4, where the author discusses the problems that arise in this approach to legal equality.
[24] See also Article 4(1) of the Convention, that permits temporary special measures, and article 24 of the Convention that repeats the general obligation to take action.
[25] In International Human Rights Law the various kinds of obligations under human rights documents are classified from non-binding to binding, according to the wordings of the provisions at stake. A

entails the norm to refrain from discrimination against women (a negative obligation), but also entails the obligation to do everything that is appropriate and necessary to improve the *de facto* position of women (a positive obligation). The equality standard here is a different one from the formal standard that merely asserts that men and women *are* equal and thus should be treated equally. Here *de facto* differences are taken into account. All measures and actions taken to abolish discrimination should result in a higher degree of *de facto* equality of men and women. This is a material or substantive equality norm, as compared to the formal equal treatment norm that is set by the EC-legislation.[26]

The Convention's strategy for achieving substantive equal rights moves beyond the narrow scope of (formal) equal rights in the way it addresses the equality problem. Instead of merely providing *individual rights to equal treatment or non-discrimination,* the Convention also provides for a 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*.[27] The strategy that should be followed to implement this goal can be labeled as a *social support strategy* in that it calls for a group-oriented approach. On the basis of a thorough analysis of the position of women or certain groups of women[28] in society, the government must then 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.

In the European Community context we still do not have such a clear and outright positive obligation for Member States to improve the *de facto* position of women.[29]

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provision where the words *shall ensure* or *shall grant* or *shall take appropriate measures* is used is being seen as a mandatory provision. See Andrew Byrnes & Jane Connors, Enforcing the Human Rights of Women: A Complaint Procedure for the Women's Convention? *Brooklyn Journal of International Law* (1996), Vol. XXI, p. 679-797 at page 718-726

[26] See Sandra Fredman, o.c., Chapter 1.

[27] Often the formula goes like: *women have the right to participate on an equal footing with men*. This, however, is not the norm that the Convention sets. The Convention speaks of *'on a basis of equality of men and women'* (Article 1) and of '*accelerating de facto equality between men an d women'* (Article 4 (1).) 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 want to participate.

[28] It is important to recognize the differences among women and specify in each measure which groups of women are targeted by a certain policy.

[29] This is slightly different under the European Convention on Human Rights. The ECHR has decided in the famous Thlimmenos Case that States do have some positive obligations under this Convention. "The right not to be discriminated against … is also violated when States without an objective and

Granted, since the Treaty of Amsterdam has been ratified, we do have Articles 2 and 3(2) of the EC-Treaty, which declare that equality between the sexes is one of the 'targets' of Community policies. According to the Preamble (par. 4) of the newly adopted Directive (2002/73/EC) that amends the old Equal Treatment Directive of 1976 (1976/207/EEC) these Treaty provisions designate equality between the sexes as a *task* and *aim* of the Community and impose a positive obligation to *promote* it in all Community activities. With this 'obligation' the Community legislation comes seemingly quite close to the concept of substantive equality.[30] However, neither the amended Treaty, nor Directive 2002/73/EC fully turn away from formal equality and embrace a genuine substantive approach.[31] At the same time it must be admitted that without these new Treaty provisions the concept of substantive equality in the past was not completely absent in European sex equality law. It was linked to two different legal constructions: the concept of indirect discrimination and the concept of positive action.[32]

3.3 Intermezzo: positive action as part of a strategy for social support

As part[33] of a social support strategy a government may deem it necessary and appropriate to design, adopt and implement *temporary special measures* directed solely at women that aim at accelerating the process of improving the *de facto* position of women.[34] Often such kinds of temporary special measures are labeled as affirmative action or positive action.[35] They can take different forms, varying from 'soft' measures (like outreach programs in education) to quite 'severe' measures (like preferential treatment of women in job application). It is clear from the combined reading of the Articles 1-5 of the CEDAW-Convention, in combination with the

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reasonable justification fail to treat differently persons whose situations are significantly different." See *Thlimmenos v. Greece* (2001) 31 E.H.R.R. 15, para. 44.

[30] Substantive equality in the sense of a move from a negative obligation towards a positive obligation. See Titia Loenen, 'Substantive equality as a right to inclusion: dilemma's and limits in law', *Rechtstheorie en Rechtsfilosofie*, 1995, p. 194-203. See also the contribution of Ann Numhauser-Henning to this Volume.

[31] I will explain this with the example of positive action in the next paragraph of this paper.

[32] See also the paper by Ann Numhauser-Henning in this Volume.

[33] It should be stressed that affirmative action and positive action plans should not be the main mechanism to improve this position. They are only a relatively small part of them!

[34] See Article 4(1) of the CEDAW-Convention.

[35] The difference in terminology is explained in the study by Marc Bossuyt, Special Rapporteur on behalf of the Commission on Human Rights, *Prevention of Discrimination; The concept and practice of affirmative action.* Commission on Human Rights, Economic and Social Council,

specific obligations that follow from the Articles 6-16, that such measures are not only permitted under the Convention, but that they are mandatory when they are necessary to reach the aims of the Convention.[36]

In my view – despite the new provisions in the Treaty of Amsterdam[37]– European sex equality law still is mainly formal in its approach.[38] In such formal equal rights legislation the concept of positive action takes the form of *an exception* to the norm of non-discrimination. Special programs aimed at 'offering men and women equal opportunities' are allowed as long as they fit a set of rather rigid conditions specified in the case law of the European Court of Justice (ECJ).[39] A clear example of this 'exception-approach' is to be found in Article 2(4) in the original version of the Equal Treatment Directive (76/207/EEC): "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1."[40]

E/CN.4/Sub.2/2002/21, dd 17 June 2002. Affirmative action is mostly used in the US, positive action is a term used in the European context.

[36] The CEDAW-Committee has issued one General Recommendation (GR) on Article 4(1) of the Convention in 1988 (General Recommendation number 5, *Official Records of the General Assembly*, A/43/38.) The GR re-affirms the necessity of such measures. This GR does, however, not explain much about the nature of temporary special measures. Currently the Committee is preparing a new GR on this issue. See CEDAW /C/2001/II/5. In October 2002 there was an expert meeting in Maastricht in which building blocks for such a General Recommendation were developed. Papers of this meeting will be published in 2003.

[37] See Articles 141(3) and 141(4) EC.

[38] With respect to indirect discrimination Ann Numhauser-Henning (in this Volume) comes to the conclusion that "(…), despite its potential the concept of indirect discrimination has been said to have basically failed to re-evaluate and change the underlying reference norms in working life to the benefit of substantive equality." See for a fundamental critique on the concept of indirect discrimination in EC law my article on the Helmig case: Rikki Holtmaat, 'The issue of overtime payments for part-time workers in the Helmig case. Some thoughts on equality and gender, in: Yota Kravaritou (ed.), *The regulation of working time in the European Union,* Brussels (etc.): P.I.E. – Peter Lang SA 1999, p. 411- 444. See also: Titia Loenen: Indirect Discrimination: Oscillating between Containment and Revolution; In: Loenen & Rodrigues (eds*): Non-Discrimination Law: Comparative Perspectives*. Kluwer Law International, The Hague, 2000, p. 195-212.

[39] There is some discussion among theorists whether article 2(4) of Directive 76/207/EEC is an exception to the non-discrimination norm or a justification for potential discriminatory behaviour. See the contribution of Christa Tobler to this Volume. See also Tamara Hervey's paper at the Stockholm Conference on Labour Law in Sept. 2002, to be found at the Conference's web site: http://ww.labourlaw2002.org

[40] One could say that Article 4 (1) of the CEDAW-Convention also follows this approach. However, there is a difference. The Convention does not say that by way of derogation to the principle of non-discrimination special temporary measures are (sometimes) allowed, but it says that such measures do not constitute discrimination at all. Besides the Convention does not stop at this point but also makes mandatory that effective measures are taken to improve the position of women. The CEDAW-Committee is now preparing a new General Recommendation on the subject of positive action measures. (To be published in 2003.)

A slightly more progressive approach is to be found in Article 141(3) and 141(4) of the EC Treaty, where the European Commission is empowered to promote equal opportunities and where the Member States are given permission to adopt measures "providing for specific advantages for the underrepresented sex".[41] These Treaty provisions have been incorporated in the amended Directive 76/207/EEC (now 2002/73/EC). This approach in itself does not *impose* any specific obligation on governments, public institutions or private organizations and/or enterprises to improve the position of women. It *allows* but does not make *mandatory* positive action programs. Also, the influence of the (symmetric) *individual rights approach* is still strong enough to have the effect that group oriented programs aimed at delivering social support to reach *de facto* equality are liable to be declared unlawful whenever one individual man can prove that such a program breaches his right to equal treatment.[42]

A progressive and modern equal rights legislation intended to implement all three aims of the CEDAW-Convention should impose a positive obligation on clearly designated 'public actors'[43] to develop positive action programs as part of more general and structural social policy programs. Examples of such substantive equality clauses are to be found more and more often in the national constitutions and equality laws of European Union Member States. These domestic provisions may one day be regarded as forming part of the *constitutional tradition common to the Member States* which under EU law is a source of fundamental rights (Art. 6(2) EU).[44] Besides the fact that the ECJ has to interpret article 141(4) EC and the amended sex equality Directive in the light of this general EU provision, it also has to take other international human rights documents into consideration. One of these documents is the CEDAW Convention itself.

[41] See on this subject in more detail Christa Tobler's contribution to this Volume.
[42] This is the consequence of the restrictive interpretation of positive action by the ECJ. See the end of this paragraph.
[43] The Law should list the governmental bodies, public institutions, enterprises, et cetera that have the obligation to develop positive action programs. Examples of this approach are to be found in Canada and in Northern Ireland. See: Bob Hepple c.s., *Equality: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Oxford: The University of Cambridge Center for Public Law and the Judge Institute of Management Studies/Hart Publishing 2000.
[44] See the paper by Christa Tobler in this Volume.

A final point regarding the concept of *equal opportunities* must be addressed. The term 'equal opportunities' is not part of the language of the CEDAW-Convention and the concept in European sex equality law is quite ambiguous.[45] The term often is used in the context of positive action.[46] The term equal opportunities arises in situations of disadvantage or backward positions that women experience as a result of past or structural discrimination.[47] These disadvantages should be eliminated, in order to ensure that women have the same starting position as men. Affirmative action is put in place to 'help' women overcome the hurdles that are set by past or present discrimination.[48] According to Sandra Fredman, the notion of equality of opportunity steers the middle ground between formal and substantive equality. It recognizes that granting equal rights is not enough, but it does not go as far as making equal results the most important aim of equality legislation. Putting the focus entirely on equal results would (in this view) go too far in the sense that the individual right to equal treatment would be subordinated to the goal of *de facto* equality of women. "This model therefore specifically rejects policies which aim to correct imbalances in the work force by quotas or targets whose aim is one of equality of outcome. Instead, an equal opportunities approach aims to equalize the starting point; allowing the competitors to be judged on individual merit once the race has begun."[49]

It is clear from the case law of the ECJ that in its view any positive action plan in favor of women that hampers in some way the formal equal rights (of men) is a bridge too far.[50] Under the CEDAW-Convention an evaluation of positive action plans would certainly be made in a different fashion.[51] The relevant questions in such an evaluation will be whether the plan at stake is really appropriate and necessary to

[45] This ambiguity is also described in the paper by Ann Numhauser-Henning in this Volume.
[46] See Council Recommendation 84/635/EEC on the promotion of positive action and Article 141(3) EC Treaty.
[47] Mostly the accent lies on the first justification for equal opportunities policies. Structural discrimination is hardly ever recognized by policy makers and legislators.
[48] See for a very critical examination of this language Carol Bacchi, *The politics of Affirmative Action; 'Women', Equality and Category Politics.* London, Sage 1996.
[49] Sandra Fredman, o.c., p. 14.
[50] The ECJ's policy in this respect is very restrictive. Only under very strict conditions positive action measures can be lawful under EC-Law. See: Albertine Veldman, 'The lawfulness of women's priority rules in the EC labour market', *Maastricht Journal of European and Comparative Law* 1998, p. 403-414 and K. Küchhold, 'Badeck. The third German reference on positive action', *Industrial Law Journal* 2001, p. 116-120. See also Christa Tobler's contribution to this volume.
[51] The CEDAW-Committee will get the opportunity to evaluate such plans in detail when complaints under the Individual Protocol will be brought before the Committee. The protocol will be discussed in paragraph 5 of this paper.

attain the goals set by the Convention, specifically whether such a plan will effectively contribute to *accelerating the de facto equality between men and women.*[52] Also one might expect that the CEDAW-Committee, which oversees the compliance with the Convention, will consider whether such a plan is embedded in more general social policies and other strategies that are aimed at taking away the structural causes of the so-called backward position of women.

3.4 Banning gender stereotypes: a strategy for structural change

The third goal of the Convention, concerned with banning gender stereotyping, is derived from Article 5a of the Convention: "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 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.[53] Noreen Burrows presents a somewhat different view of the meaning of this Article.[54] She is of the opinion that a correct implementation of the Convention will in itself put an end to the stereotyping of women.[55] She also thinks that signatory States may be expected to engage in an active policy in this respect. However, she is very sceptical about the impact of this provision because it does not make clear what exactly it is that the States should do to combat gender stereotypes.[56]

[See] Article 4(1) of the Convention. The wording of the new positive action clauses in EC law are more in line with this language of the CEDAW-Convention. They speak of 'ensuring full equality in practice'. See Article (4) of the Treaty and the wording of the positive action clauses in the new General Framework and Race Equality Directive (Directive 2000/78/EC and 2000/43/EC).
[53] See e.g. Wadstein, *o.c.*. at page 13 and 14. See also Liesbeth Lijnzaad: Het kussen van een kikker. In: *Nemesis*, 1991, nr 2, p 5-15, at page. 7. This author is of the opinion that Article 5a is one of the most central provisions in the Convention, but also the most difficult to enforce.
[54] Noreen Burrows: The 1979 Convention on the Elimination of all forms of Discrimination Against Women; In: *Netherlands International Law Review*, 1985, p. 419-460, at page 428-429.
[55] Idem, at page 248: "If a women, for example is given the right to earn a living, to own property, to chose the number and spacing of her children then the role stereoptyping of men and women must eventually be called into question."
[56] Idem.

A somewhat more sophisticated view on the meaning of this provision is to be found in the work of Rebecca Cook.[57] This author indicates that the obligation to put an end to gender stereotypes means that governments actively engage in a policy to end such customs and practices. At this point Cook makes an interesting connection between the obligations embedded in Article 5a and Article 2f of the Convention. Article 2f states that the "(…) States take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." On the basis of these two Articles, read together, States have the duty to revise 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. "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."[58] The author mentions various examples of other (substantive) Articles of the Convention, for whom this reading of the Convention's obligations are decisive.[59]

Nowadays there is some acknowledgement – especially within the CEDAW Committee – that Article 5a not only aims at changing deeply rooted social and cultural *ideas* and *patterns of conduct* regarding 'appropriate' male and female behavior, but also aims at changing social *structures* that are laid down in law and in official practices.[60] In feminist legal theory this phenomenon is being labelled as 'systemic discrimination' or 'structural discrimination'. States should be aware that gender stereotypes are not only a matter of ideology but are embedded in law and in the main societal and legal structures. These structures must change in order to make it possible for both women and men to freely choose in what way they will give a content and meaning to their personal (gender) identity and life styles.

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[57] Rebecca J. Cook: State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women. In: Rebecca J. Cook (ed.) *Human Rights of Women; National and International Perspectives*. University of Pennsylvania Press, Philadelphia 1994, p. 228-256.
[58] Idem, at page 240.
[59] Idem. She explains that the Articles 13, 14 en 16 have to be interpreted in such a way that there will come an end to traditional practices. In the same way the Articles 2f and 5a play an important role in the elimination of violence against women.
[60] I draw this conclusion from a study of the Concluding Comments of the CEDAW-Committee on the point of how this Committee interprets Article 5a of the Convention. I have undertaken this study on

This interpretation of Article 5a means that the Convention calls for both a *strategy for social and cultural change* and a *strategy to facilitate diversity*.

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. A strategy, aimed both at bringing about structural change and at facilitating diversity could compensate and correct this effect. Without specifically referring to Article 5a of the CEDAW-Convention feminist legal scholars heavily criticised the tendency to assimilate women to the existing male norms. They point out that equal treatment norms are not capable of attacking the various forms of systemic or structural discrimination of women.[61] For example Rebecca Cook states that the 'similarity and difference' model of the equality 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."[62] Focussing on systemic or structural discrimination would result in a more critical examination of that the way in which legal, social, cultural and religious traditions make women subordinate to the male norm. This, however, is not possible under the existing sex discrimination laws: "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."[63] The solution that Rebecca Cook sees is an asymmetric and substantive approach to equality. The test should not be whether men and women are treated equally, but whether a rule or practice is (or is not) based on powerlessness and exclusion of women and whether such a rule or practice is (or is not) not systematically detrimental to women's needs and interests.[64] This approach, called the

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behalf of the Ministry of Social Affairs and Employment (together with Janneke Plantenga from Utrecht University). The results will be published in 2003.

[61] See for example Sandra Fredman: Equality, a new generation?; In: *Industrial Law Journal*, 2001, p. 145-168. See also Fredman's *Discrimination Law*, o.c., at page 121ff.

[62] Rebecca J. Cook: International Human Rights Law: The Way Forward; In: Rebecca J. Cook (ed.) *Human Rights of Women; National and International Perspectives*. University of Pennsylvania Press, Philidelphia 1994, p. 3-36, at page 11.

[63] Idem, at page 11, where Cook discusses the contribution of Kathleen Mahoney to this collection of articles.

[64] Idem, at page 12.

dominance approach by some, has been propagated by the American feminist legal scholar Catharine MacKinnon. She states that in the fight against discrimination the question should not be whether there is a case of *sameness or difference* between women and men, but rather what are the exact power relations between the sexes. "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."[65]

One of the criticisms of European sex equality legislation is that it in effect mirrors the gender stereotypes the CEDAW-Convention seeks to ban. The case law of the ECJ is heavily criticised in this respect.[66] The aims of banning stereotypes and changing social and cultural structures that are based upon such stereotypes could (and should) be laid down in the equal rights legislation of the European Community and of its Member States. The EC legislator (through a Directive) and/or Member States (through national legislation) should clearly ban gender stereotypes that are harmful to women or hamper the individual freedom to choose different roles in life of both men and women. Further such legislation should make mandatory the use of certain instruments to reveal and to change the social and cultural structures that are based on such stereotypes.

Each State should perform a gender examination or gender assessment of all existing and forthcoming laws and official state programs and other legislative acts. This gender auditing (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.[67] In addition to GIA's a second tool or

[65] Catherine A. MacKinnon: Difference and Dominance, On sex-discrimination. In: Katehrine T. Bartlett & Rosanne Kennedy (eds). *Feminist Legal Theory; Readings in Law and Gender.* Westview Press, Boulder – San Francisco – Oxford, 1991, p. 81-94, at page 87.
[66] See for example the article by Clare McGlynn, o.c.
[67] See Fiona Beveridge and Sue Nott: Gender Auditing - Making the Community Work for Women. In: Tamara K. Hervey & David O'Keefe (eds), *Sex Equality Law in the European Union*, Wiley, Chichester etc. 1996, p. 383-398. In the Netherlands such an instrument has been developed by the Emancipation Department of the Ministry of Social Affairs and Employment. However the use of this instrument is not prescribed by law. See for a comment on this model: Rikki Holtmaat & Ineke De

mechanism exists that can and should be applied to achieve this third goal of the Convention, that of gender mainstreaming.[68]

Whereas, to my knowledge the obligation to use GIA's or to implement strategies of gender mainstreaming is nowhere explicitly to be found in European sex equality legislation,[69] EC law does offer the possibility of employing both GIA's and mainstreaming. Article 3(2) EC states that in all the activities of the Community, referred to in Article 3(1) the Community shall aim to eliminate inequalities, and to promote equality, between men and women. One can argue that this provision entails the obligation for Member States to engage into a process of 'gender auditing'.[70] In Directive 76/207/EEC in its amended form this Treaty Provision has been made more concrete.[71] Directive 2002/73/EC states in Article 1 (1a in the amended Directive) 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." This clause, however, still does not set any concrete obligations to implement the 'idea' of gender mainstreaming or gender auditing and does not prescribe the use of the instrument of GIA's (or similar instruments).

3.5 To summarize the above:

Hondt: Emancipatie-effectrapportage inzake basisstelsel huwelijksvermogensrecht. *Nederlands Juristen Blad,* 2001, nr. 41, p. 1994-2000. See also the guide to EU Gender Impact Assessment that has been developed for the European Commission by Mieke Verloo et al. This guide can be found at: http://europa.eu.int/comm/employment_social/equ_opp/gender/gender_en.pdf

[68] In the context of EC policies gender mainstreaming is defined as: "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." Definition derived from the official web site of the EU: http://europa.eu.int/comm/employment_social/equ_opp/gms_en.html
See also Mark A. Pollack and Emilie Hafner-Burton**:** *Mainstreaming Gender in the European Union*. Paper prepared for presentation at the 12th Biennial Conference of Europeanists, Chicago, 30 March-2 April 2000. To be found at: http://www.jeanmonnetprogram.org/papers/00/000201.html Revised version to appear in the Journal of European Public Policy, Vol. 7, No. 1 (September 2000).

[69] I might not be aware of the existence of such provisions. Please contact me if you are! An Example is Article 6 of the proposed Law of the Republic of Kazakhstan on Equal Rights and Equal Opportunities (draft-version of May 2002): "All newly adopted laws and regulations in the Republic of Kazakhstan shall be referred to the Competent Agency for gender examination."

[70] See Fiona Beveridge and Sue Nott, o.c. at page 391ff.

[71] According to the Preamble of the Commission's Proposal for an Amendment of Directive 76/207/EEC, Par. 38. See Commission of the EC, Brussels 7.6.2000, COM (2000) 334, Final.

The CEDAW-Convention obliges Member States 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, through which 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. The third aim of the Convention (abolishing gender stereotypes) entails a *strategy for structural social and cultural change* and *a strategy that facilitates diversity*.[72] All three strategies are complementary and should be followed at the same time in any *effective* equal rights legislation.[73] At this moment EC-sex equality law is only directed at the first aim of the CEDAW-Convention. Positive measures to improve the situation of women are liable to be considered as a breach of the equal treatment norm and must, therefore, be specifically justified. Improving the *de facto* position of women (by e.g. affirmative action plans) certainly is not yet a positive obligation for the Member States. The instruments of mainstreaming and GIA's are not well developed in EC-law at all.

4 The advantages of using the CEDAW-Convention as a legal instrument to combat all forms of discrimination against women

This paper must – as a consequence of limited space – concentrate on some main points concerning the advantages that the CEDAW-Convention has over EC-sex equality law.[74] I will concentrate on two subjects: the object and purpose of the

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[72] See also Christopher McCrudden about the threefold strategies 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*. See: Christopher McCrudden, Regulating discrimination. In: Titia Loenen & Peter Rodrigues: *Non-discrimination Law: Comparative Perspectives*. Kluwer Law International, The Hague 1999, p. 295-312. A legislation that involves all three strategies is being called the 'fourth generation equality legislation' by Fredman. See: Sandra Fredman, o.c., at page 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. See Fredman, *Discrimination Law*, o.c., at page. 6.

[73] I have developed a model for such progressive equal rights legislation for the governments of Kazakhstan, Bosnia-Herzegovina and Uzbekistan. These reports, written on behalf of the OSCE-Dep. On Human Rights (OHDIR), can be obtained from the author. Send an e-mail to: rikki@rikkiholtmaat.nl

[74] I have described these advantages of the CEDAW Convention in more detail in my contribution to a publication about the impact of the Convention in a pluralistic and multicultural Dutch society. See R.Holtmaat: De meerwaarde van het Vrouwenverdrag in een multiculturele samenleving. In: R. Holtmaat (ed.) *Een verdrag voor alle vrouwen.* E-Quality, Den Haag, Octobber 2002. The text of this publication will be published on the Internet as well. See: www.e-quality.nl

Convention and the different concept of discrimination that prevails in the Convention.

4.1 The object and purpose of the Convention

One can argue on the basis of the CEDAW-Convention that the EU has an obligation to ban gender discrimination not only in the field of economic relations (paid labour, social security, contractual relations and the such) but also in all other spheres of life. This means that the forthcoming proposal for a gender discrimination Directive on the basis of Article 13 of the EC Treaty should be evaluated against the background of the Convention: does it cover all areas that are covered by the Convention? Does it offer effective instruments to combat discrimination in all these areas? The CEDAW-Convention could provide the legal basis for actions in the Union concerning the development of effective instruments to combat violence against women or trafficking in women. It could offer the legal basis for new policies concerning the right to equal treatment in the sphere of education, health care, family law and immigration law. All of these subjects are hardly being tackled by the EC or are being dealt with only by means of 'soft law' measures.

Secondly, one can argue that EC sex equality policies ought to embrace the Convention's more encompassing aims. See paragraph 2 and 3 of this paper, where I have explained the threefold goals of the Convention. I will not repeat the advantages of such a multi-layered strategy here.

4.2 A different concept of equality

Apart form its broader and more developed object and purpose, the CEDAW-Convention also uses some basically different concepts as compared to EC-sex equality law. Let us have a closer look at some of them.

First it should be noted that the non-discrimination norm in the Convention is asymmetrical by definition. This is in marked contrast to the (formal) and symmetrical concept of discrimination that is used in EC-sex equality law.
EC-law states that there should be no unequal treatment on the ground of sex. (See Article 1 of Directive 76/207/EEC.) Thus, 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. Many men have won cases under this legislation, often resulting in the abolishment of rules or practices that were (comparably) favourable to women.[75] A policy of 'equally bad off is equal as well' and of 'levelling down' is often followed by governments of EU Member States in order to comply to the EC sex equality standards. The sex-neutral equal treatment approach also means that positive action plans can equally be applied to men and women. The standard, set in Article 6(3) of the Social Agreement that such measures should be in favour of women, has rapidly been replaced by the sex neutral provision of Article 119(4) (now 141(4)) in the Treaty of Amsterdam. A weak and unenforceable 'Declaration' was adopted at the same time, in which it was declared that "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."[76]
The CEDAW-Convention prohibits all forms of discrimination against *women* and thereby recognises the fact that *women* are the ones that have suffered and still suffer from a variety of forms of discrimination. A policy that would hurt the position of women under the guise of equal treatment (of men) would never be allowed by the CEDAW-Committee because such a policy would evidently be in breach of the obligation to *improve* the position of women (as reads the second goal of the Convention).

Secondly, the concept of discrimination that is used in the Convention is not directed towards assimilation of women to male standards or norms (women, in EC-law have the right to be treated equal *compared to men*!). The usual construction that women have the right to have a treatment 'on the basis of equality with men'[77] 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'. In applying the CEDAW-Convention, it can thus be argued, especially with the help of Article 5a, that the existing male norm should be

[75] In the Netherlands as a result of this the protection of widows in the social security schemes was practically abolished as a consequence of the fact that widowers were claiming the same protection.
[76] Declaration 28 can be found at OJ 1997 C 340, p. 136.

scrutinised and abolished. So, instead of aiming at assimilation of women to an already given social and economical structure (that is male dominated and does not account for the needs of women) the Convention offers a tool to facilitate gender diversity and enhance structural change in which women's 'norms' and 'needs' are incorporated.

Thirdly, the definition of non-discrimination in EC- sex equality law there is merely a right to equal treatment *per se*. This EC right does not specify in what respect (and to in relation to which other substantive) rights women should be treated equally. This equal treatment norm does not indicate what kind of treatment is appropriate or 'just' or 'fair'. In so far this norm is empty or merely procedural. Because in EC legislation consistency (treat likes alike) prevails over substance (bringing about real equality) there is always the risk of levelling down.[78] On the other hand we see that in the CEDAW-Convention the principle of equality is directly linked to the enjoyment of all human rights. The principle of non-discrimination in Article 1 of the Convention is not an empty norm. Discrimination for the purpose 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 (…) 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." This definition gives the fundamental right to equality more weight. It makes clear that a breach of the non-discrimination principle is a breach of a human right of women and that such a breach is often linked to a breach of other human rights (in the sphere of participatory rights, freedom rights and social and economical rights).

5 The instruments that the Convention offers to enhance equal rights of women

One of the great features of EC sex equality law is that this (supranational) legislation has supremacy over national law and that individual citizens can rely on it before their

[77] In EC law the definition of direct discrimination is: 'where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation. See article 2 (2) of Directive 2002/73/EC.
[78] Sandra Fredman, o.c., at page 94.

national courts.[79] The main problem with International Human Rights Treaties like the CEDAW-Convention is that such documents often are lacking concrete legal force. The CEDAW-Convention has, even in feminist legal studies, often been portrayed as an ineffective and weak instrument. This is mainly due to the fact that there is no International Court to oversee to the implementation of its provisions and that there are no sanctions should a State not fulfil its obligations under the Convention.[80] The Convention only obliges the States to take 'appropriate measures' and does not impose clearly and narrowly circumscribed obligations and deterrent sanctions.[81]

Even so, I am not as pessimistic as many of my colleagues about the possibilities that the Convention offers to feminist lawyers and activists. In my view the Convention can have a concrete impact on the rights of women in the States who are signatories to this Treaty. This optimism stems from my experience in the Netherlands where I have witnessed the effects which the implementation the Convention has had on Dutch society. It appears that this Convention can offer new perspectives on legal instruments that can and should be used to battle old and pervasive forms of discrimination of women. There are three main avenues that can be followed to enhance the equal rights of women through the CEDAW-Convention. These will be discussed below.

Using the Convention in Court and bringing complaints to the Committee

Women can bring forward the Convention's norms in lawsuits before national courts in which practices and norms are contested as discriminatory against women.[82] Since December 2000 there also is the possibility to issue a complaint to the CEDAW-

[79] Evelyn Ellis, o.c., at page 12.
[80] See Hilary Charlesworth & Christine Chinkin: *The bounderies of international law; A feminist analysis*; Juris Publishing, Manchester University Press, Manchester, 2000, p. 221.
[81] See Aaron Xavier Felmeth: Feminism and International Law: Theory, Methodology and Substantive Reform; in *Human Rights Quaterly*, Vol 22, 2000, pag. 658-733, at page 710 en Hillary Charlesworth, Christine Chinkin and Shelley Wright: Feminist Approaches to International Law; in: *The American Journal of International Law*, Vol 85, 1991, p. 613-645, at page 634: "In sum, the Women's Convention (…) is an ambiguous offer. It recognizes discrimination against women as a legal issue but is premised on the notion of progress through good will, education and changing attitudes and does not promise any form of structural, social or economic change for women."
[82] Provided that they live in a State with a 'monistic' system of law. In the Netherlands there are few examples of Court cases in which the Convention has been invoked. In all of these cases the judges ruled that the Convention does not contain self-executing provisions. This certainly is not true. One of the targets of feminist lawyers who advocate for the use of the Convention in legal practice should be to 'educate' the judges in this respect.

Committee in New York.[83] Due to the fact that the Optional Protocol with respect to the individual complaints procedure was adopted and signed by a sufficient number of Member States, now individual women, who feel that they have been discriminated against and who do not get a favourable court order in their own country, can turn to the New York Committee for an opinion as to whether there has indeed been a breach of the Convention. Not all of the Convention's articles contain clear individual rights that can be enforced in this way, but some articles certainly do. One can argue that States that sign up to the Protocol implicitly recognise that the Convention does indeed contain rights that have direct effect (or are self executing). Otherwise, the fact that they allow their citizens to complain at the Committee about a breach of the Convention's provisions would make no sense. Although the Committee can not impose sanctions, the process of 'naming and blaming' is generally considered as a mechanism that could lead to some considerable improvement regarding women's rights. Governments don't like being embarrassed before International Tribunals. Feminist lawyers and activists must use this fact to their advantage.

Using the reporting procedure

The possibility exists for the women's movement to be actively involved in the procedure through which Member States bring their reports to the Committee[84] and in discussing these reports with the Committee. Ngo's have the right to deliver so-called shadow-reports to the Committee, and the Committee encourages them to do so.[85] In the process of drafting such a report women's organisations are encouraged to evaluate the extent to which their country's legislation or their government's policies are in accordance with the obligations that are set by the Convention. After the Committee has issued its Concluding Comments, the ngo's can actively follow up on the recommendations made by the Committee. In the Netherlands this process has resulted in much activity by women's groups which have put some of the most blatant

[83] See: http://www.un.org/womenwatch/daw/cedaw/protocol/
[84] According to Article 18 of the Convention each country has to send an initial report within one year after signing up to the Convention and every four years thereafter. Very often governments do treat these country reports as kind of 'state secret' and do not involve the general public or ngo's in the process of drafting these reports.
[85] The Dutch Shadow report on the 2nd and 3rd Dutch report to CEDAW has been published on the Internet. See: www.vrouwenverdrag.nl IWRAW-Asia-Pacific runs a program (G*lobal to Local*) in which ngo-representatives are trained in the process of drafting shadow reports and presenting them in New York. See: www.IWRAW-AP.org

points of non-compliance on the political agenda.[86] In addition this process has stimulated lawyers to refer more often to the Convention's norms in court cases and to ask judges to declare discriminatory practices as unlawful.

A source of inspiration for new legislation

The Convention can inspire legislators and public policy makers to develop new strategies.[87] Most (aspirant) EU countries are now in the process of developing gender equality laws or adapting their existing laws to the latest EC Directives. Also the European Commission is now in the process of drafting a new and broad gender equality Directive on the basis of Article 13 EC-Treaty. One of the yardsticks that the women's movement and the European Parliament should use to evaluate the Commission's proposal is whether all three goals of the Convention are effectively implemented and whether the personal and material scope of this Directive is as broad as that of the Convention. In the process of developing this new Directive the Convention could be a great source of inspiration to overcome some of the problems (and the ineffectiveness) that we have encountered with the traditional (formal, individualistic, assimilatory and fault-based) approach to sex equality within the Community. Also, in order to live up to the principle of equality as championed in the CEDAW-Convention, the continuing work on the Charter of Fundamental rights of the EU should be evaluated against the question whether this document not only prohibits discrimination of women but also calls for effective strategies for social support and social and cultural change and diversity.

In political and legal practice the CEDAW-Convention could be used to make the move in Europe towards so-called 'fourth generation equality laws'.[88] That is a type of equality law that not only encompasses the negative duty to refrain from discrimination and unequal treatment, but that also encompasses the positive duty to

[86] An issue that has raised much public debate is that the Committee has concluded in its 2001 Concluding Comments on the Netherlands that this country is in breach of Article 7 of the Convention by allowing a political party to exclude women from membership.
[87] In that respect some countries that have recently become signatories to the Convention have the advantage of coming relatively late to the stage of developing equal rights legislation. It was very instructive for me to work with governments of countries like Kazakhstan and Uzbekistan, who are in the process of implementing the Convention and are now developing gender equality laws that are in that sense more complete than many current European sex equality laws.
[88] Sandra Fredman, o.c., at page 122.

effectively make an end to all forms of discrimination, including systemic or structural discrimination.

6 Conclusion

It is time that we broaden our perspective and that we have a look across the EU-borders, especially in the direction of the UN. This paper only highlights some features of the CEDAW-Convention as compared to the instruments to combat discrimination of women that we currently have in EC law. Until now, very little work has been done in this respect. European feminist lawyers have concentrated mainly on EC law. Especially now, since the Optional Protocol has been accepted, this Convention deserves greater attention from EWLA-members. I hope this paper has cleared to ground to start this work at full speed.