

Women

I. Introduction

[1] For most of history women have been denied human rights. This denial was justified through patriarchal gender norms based on the inferiority of women and superiority of men. The struggle for women's human rights has deep roots, and great strides forward have been achieved. In many parts of the world, for instance, women have the legal right to vote and can enforce their right to equal pay for work of equal value. Negative cultural attitudes and oppressive gendered structures, however, continue to shape the lives of women. Women and girls are still denied access to education and sexual and reproductive health services (→ Reproductive Rights). The burden of unpaid care work rests firmly on the shoulders of women. The gender division of labour in the workplace results in many women being channelled into low-paid, low-status, precarious, and informal and gig economy work, and the work women typically perform is excluded from the full range of legal protection. Family, property, social protection and inheritance laws continue to be constructed to deny women control over economic resources. Around the world and in all areas of life a disturbing and unacceptable number of women experience gender-based violence. The rise of right-wing nationalist populism, COVID-19 and the impacts of → climate change have both revealed and exacerbated the extent to which girls and women are denied their rights.

[2] The legal advocacy for women's human rights has centred upon the right to equality. Equality is an elusive right. Formal or *de jure* equality guarantees identical treatment between similarly situated groups and permits differential treatment for differently situated groups. In

practice, formal equality is a limited tool to achieve women's human rights. It forces women to conform to male norms to gain consistent equal treatment and 'fails to give proper weight to differences and diversity among' women and men (Byrnes [2012] at 54). The inattention to the value of difference came to the fore in the challenge for pregnancy rights. Pregnant women were deemed different from men and non-pregnant women. Under the formal equality model it was thus permissible to treat pregnant women differently and deny them pregnancy leave and maternity benefits (see also → Mothers, Rights of). Formal equality also does not sufficiently account for the differential impacts of consistent treatment. Physical fitness tests designed using the male aerobic standard when applied to women will disproportionately disadvantage them as they have a different physiology.

[3] In response to the failures of formal equality, feminist lawyers, academics and activists began theorizing and championing a substantive or *de facto* model of equality. Unlike formal equality, which demands consistency, substantive equality recognizes the value and need for differential treatment. While substantive equality has been criticized for being an amorphous concept and a mere rhetorical device (Supreme Court (Canada), *Fraser v Canada (Attorney General)* [2020] (Brown and Rowe JJ)), it is in fact a model of equality that is highly sensitive to background contextual realities and the impact of laws, policies and programmes on women's lives. There are overlapping meanings of substantive equality (Fredman, *Discrimination Law* [2011]). At its heart, substantive equality seeks to transform 'institutions, systems and structures that cause or perpetuate' inequalities and modify 'harmful norms, prejudices and stereotypes' against women (Cusack and Pusey [2013]). Crucially, under a substantive equality model, affirmative action or temporary special measures that seek to break cycles of gender disadvantage – such as gender quotas or gender shortlists in education, employment or political participation – rather than being anti-ethical to women's equality are a vital component (→ Positive Discrimination and Affirmative Action). Attention to the lived experiences of women also highlights the importance of adopting an intersectional substantive equality analysis (→ Intersectionality). Intersectional theory arose in response to the subordination of Black women in the United States. The racist and sexist oppression of Black women could not be captured solely through the lens of race or gender; rather, their

subordination had to be understood as unique, distinct and synergistic (Crenshaw [1991]). The concept of intersectionality has evolved to take account of how a plethora of identity characteristics – age, disability, sexual orientation, gender identity, poverty, migrant status, religion – intersect to create reinforcing webs of disadvantage and inequalities. The practice of equality and non-discrimination law has been criticized for failing to fully incorporate the insights from intersectionality theory and it is not yet fully engaged with how women's intersecting identities impact on their human rights (Atrey [2019]).

II. Legal framework

[4] There is a rich legal architecture enshrining women's human rights that stretches across the international, regional and national planes.

[5] The leading legal instrument is the → United Nations (UN) → Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW arose out of a failure of the mainstream UN human rights → treaties to take seriously women's human rights (Charlesworth [2005]). It is a unique treaty in placing women at the centre of its legal obligations. The central aim of CEDAW is to eliminate all forms of discrimination against women so that women can enjoy their equal human rights and fundamental freedoms (→ Discrimination, Prohibition of). The text of the treaty entwines women's human rights, equality and non-discrimination. Perhaps somewhat oddly however, it only defines 'discrimination'. Article 1 holds that discrimination against women is:

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.

[6] Under this definition, CEDAW protects against both direct discrimination, a facially apparent distinction such as a law that prohibits women from certain types of employment (CEDAW Committee, *Medvedeva v Russian Federation* [2016]), as well as indirect discrimination, an apparently neutral law, policy or practice that disproportionately and negatively impacts women, such as state contributory pension schemes that fail to account for unpaid care work

(CESCR, *Trujillo Calero v Ecuador* [2018]). Although the definition refers only to sex discrimination – distinctions based on biological differences – the CEDAW Committee (the independent UN body that monitors the implementation of the treaty) holds that the treaty also prohibits gender-based discrimination – distinctions based on ‘socially constructed identities, attributes and roles for women and men’ (CEDAW Committee, *GR No 28: Core Obligations under Art 2* [2010] para 5). A distinction based on sex or gender is discriminatory against women when it impedes women’s equality. Women’s equality is both the central aim of CEDAW and the analytical framework for evaluating the state’s laws, policies and programmes (Campbell [2018]). The conception of equality within CEDAW thus is of crucial importance. The treaty is committed to a multi-dimensional model of substantive equality that seeks ‘a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’ (CEDAW Committee, *GR No 25: Temporary Special Measures* [2004] para 10).

[7] States must eliminate discrimination against women and achieve women’s equality in broad fields of life. CEDAW rejects the traditional bifurcation of civil and political rights and socio-economic rights (→ Generations of Human Rights). This implicitly recognizes that to achieve women’s equality, the entire panoply of human rights must be infused with substantive gender equality. In one instrument CEDAW protects, *inter alia*, women’s equality in political participation, employment, health, education and family life. Perhaps most importantly, it creates a wide-ranging duty on state parties to modify social and cultural patterns based on stereotyped roles for women and men. Although CEDAW is a comprehensive treaty for women’s human rights, it is incomplete. The CEDAW Committee has pioneered an evolutionary interpretation (→ Treaty Interpretation) of equality and non-discrimination that redresses key gaps in the text; most notably, it now conceptualizes gender-based violence against women as a violation of women’s equality and human rights. CEDAW and the work of the CEDAW Committee have become global focal points for legal, political and cultural advocacy for women’s rights. CEDAW is one of the treaties with the highest number of reservations (→ Reservations to Treaties) and the CEDAW Committee seeks constructive dialogue to encourage states to remove the reservations, particularly those that

strike at the core object and purpose of CEDAW (Connors [2012]).

[8] CEDAW sits alongside other international human rights instruments. These include the Beijing Declaration and Platform for Action; the Programme of Action on Population and Development (Cairo Declaration) (→ Soft Law); the UN → Sustainable Development Goals (SDGs); and several → International Labour Organization (ILO) conventions, including treaties addressing domestic workers and violence and harassment at work. There are also a range of regional instruments that protect women’s human rights, many focusing on gender-based violence against women. These include the Inter-American Convention against All Forms of Discrimination and Intolerance; the → Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; the → European Convention on Human Rights (ECHR); → Council of Europe (CoE) Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (→ Domestic Violence); and the → Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol). In comparison with the relatively weaker accountability under CEDAW, which is not strictly binding or directly enforceable, many of the regional human rights instruments have stronger enforcement mechanisms.

[9] At the domestic level, constitutional or statutory bills of rights often include a right to equality that prohibits discrimination against women (Rubenstein and Young [2016]). Accountability for women’s human rights can be fractured among different levels of national government depending on the federal structure of the state. Customary or religious-based personal laws raise challenges for the constitutional or statutory protection of women’s human rights. Many constitutions hold that customary or religious-based personal laws that are discriminatory are subject to constitutional guarantees of women’s equality (Constitution of Kenya 2010, Art 2; see also Constitutional Court (South Africa), *Bhe and Others v Magistrate of Khayelitsha and Others* [2004]), while other constitutions exempt these laws from equality protection (Constitution of Zambia 1991, Art 3).

III. Current challenges

[10] The current challenges to women’s human rights are a mixture of stubborn, newly recognized

and emerging obstacles. It is not possible in this entry to undertake a comprehensive survey of the challenges to women's human rights; rather, this subsection acts as a brief survey of the crucial obstacles.

[11] Sexual and reproductive health rights are a vital component of women's equality and have long been a flashpoint in the struggle for women's human rights. There are worrying trends around the world that indicate that the gains in protecting women's sexual and reproductive health rights are being rolled back. Efforts to implement mandatory comprehensive sexuality education have faced resistance from conservative religious individuals and groups, arguing that it undermines the religious rights of children and parents (ECtHR, *Dojan v Germany* [2011]; High Court (E&W), *Birmingham City Council v Afsar and Others (No 3)* [2019]). In many jurisdictions, comprehensive sexuality education allows moral or faith-based exemptions, is minimized, inaccurate, not based on human rights and perpetuates stereotypical gender norms (UNGA, *Report of the Special Rapporteur on the Right to Education* [2010]). There continues to be little legal recognition or protection for women's menstrual and menopausal health rights (Bobel *et al* [2020]). Legal regimes are severely limiting and curtailing women's right to access → abortion and modern contraception (Constitutional Court (Poland), *K 1/20* [2020]; CEDAW Committee, *Inquiry: The Philippines* [2015]). Even where there is *de jure* legal protection for abortion and contraception, a substantive equality analysis reveals the constellation of factors – geography, cost, a range of procedural requirements often with a dubious medical basis, and conscientious objection – that operate *de facto* to deny women, particularly women with intersectional identities, their sexual and reproductive health rights (Sanger [2017]; Albertyn [2019]). Despite global commitments to end maternal mortality and morbidity, in shockingly high levels women continue to die or suffer from severe injury during childbirth. An intersectional lens is crucial in understanding women's maternal health rights. For instance, Black and ethnic minority women in certain jurisdictions are significantly more likely to suffer from maternal mortality and morbidity (Howell [2018]), and women in poverty are more likely to be detained in hospitals for being unable to pay maternal health bills (Odallo, Opondo and Onyango [2018]; High Court (Kenya), *Omuya and Another v Attorney-General and Others* [2015]). Obstetric violence, abusive and mistreatment of women in maternity care, is an emerging dimen-

sion of women's sexual and reproductive health rights (Pickles and Herring [2019]).

[12] While the future of work is both rapidly changing and uncertain, women continue to face a myriad of human rights violations within the formal, informal and gig economies. The gendered stereotypes and structures of the labour market are well-known and well-documented. In 2020, throughout the world women enjoy on average only three-fourths of the economic and labour rights of men (World Bank [2020]). There remain *de jure* legal prohibitions on the type of work women can perform; women are persistently paid less than men and are still channelled into poor quality, precarious jobs in the informal and gig economies. The types of work in which women are concentrated are consistently excluded from legal protection (HRC, *Report of the Working Group on Discrimination against Women and Girls* [2020]). A powerful explanation for women's inequality in employment is their primary role in the provision of unpaid care labour. There continues to be a dearth of transformative laws and policies to bring men into caring roles and redistribute care to the state (World Bank [2020]). A decade of austerity policies (→ Austerity Measures) combined with gendered responses to COVID-19 have only further cemented women's disadvantage in the world of work. The concentration of women in the care economy means they have been on the frontline in the pandemic, with devastating consequences. The economic shutdown has had a severe impact on sectors of the economy dominated by women and during lockdown women were spending more time than men on household responsibilities and childcare (ACAPS [2020]). State policies to mitigate the impact of COVID-19 continue to be blind to substantive inequalities in the labour market and the provision of care (UN Special Rapporteur on Extreme Poverty and Human Rights [2020]).

[13] Gender-based violence against women is one of the most pervasive and pernicious forms of discrimination against women and violates a cluster of human rights. Women with intersectional identities – race, disability, sexual orientation, sex work, poverty, gender identity – are at a heightened risk of violence. There are ongoing debates on what constitutes gender-based violence against women. While the CEDAW Committee expansively defines violence and recognizes that it takes multiple forms (CEDAW Committee, *GR No 35: Gender-based Violence* [2017]), domestic legal definitions of violence often exclude certain forms of violence such as sexual harassment or

domestic violence (CEDAW Committee, *Belousova v Kazakhstan* [2015]; *ibid.*, *ST v Russian Federation* [2019]). The law has also been slow to account fully for new forms of violence such as image-based sexual abuse (McGlynn and Rackley [2017]). Many forms of gender-based violence against women are justified in the name of culture or religion, and austerity-motivated fiscal policies have ‘further weaken[ed] the state response’ (CEDAW Committee, *GR No 35: Gender-based Violence* [2017] para 7). The lockdown rules to prevent the spread of COVID-19 have increased the incidents of gender-based violence against women, including intimate partner → femicide, and have hampered measures to prevent and mitigate violence (UNGA, *Report of the Special Rapporteur on Violence against Women* [2020]). There continue to be high rates of impunity for gender-based violence against women and concerns that criminal accountability for violence replicates substantive gender inequalities (CEDAW Committee, *X v Timor-Leste* [2018]; *ibid.*, *RPB v The Philippines* [2014]). In response to the failure of the law to fully eliminate gender-based violence against women, there has been an explosion in renewed calls for accountability via online social political movements, epitomized by #MeToo.

IV. Trends

[14] The contemporary challenges to women’s human rights are daunting. There are three pivotal insights from substantive equality that can guide future legal and political advocacy for women’s human rights.

[15] First, substantive equality brings sharply into focus the intricate, intersecting web of gender stereotypes and structures that inherently shape women’s lived experiences. To achieve women’s right to equality and human rights, it is imperative that all fields of life are engendered, not just the traditional ‘women’s areas’ of sexual and reproductive health, work and violence. In the words of Lady Hale in the UK Supreme Court, there are no ‘no-go’ areas for women’s substantive equality (Supreme Court (UK), *R (on the Application of DA and Others) v Secretary of State for Work and Pensions* [2019] para 133). It needs to be at the centre of measures to address climate change, the practice of science and technology, the development of national fiscal policies, the design of measures to reduce global economic inequalities, and all efforts to manage, mitigate and recover from the global pandemic. The need to engender

all fields of life also points to increasing women’s participation in every type of decision-making process.

[16] Second, the rise of conservative religious, cultural and nationalist populism poses a significant threat to gender equality and courts must act as a bulwark against these movements. The strength of the commitment to substantive equality requires that courts rigorously interrogate government acts or omissions that perpetuate inequalities against women, and require very weighty and significant reasons to justify gender discrimination (ECtHR, *JD and A v United Kingdom* [2020]). Legal doctrines that are highly deferential to government are inappropriate for adjudicating claims for women’s equal human rights.

[17] Third, the great insight from substantive equality is that women’s disadvantage is not anchored in the moral blameworthiness of one individual but is the result of often imperceptible structures and cultural attitudes. The architecture of human rights accountability mechanisms, however, is predominantly individualized. This is most pronounced in using criminal law to obtain accountability for gender-based violence. Individualized processes can place a great financial and social burden on women in trying to vindicate their rights, and these processes struggle to identify and redress the structural roots of gender inequality. Accountability mechanisms need to be designed to attack these deeply embedded roots. There are best-practice examples. Instead of requiring individual women to shoulder the costs of obtaining accountability, there needs to be a proactive duty upon the government to have due regard to women’s equality (see Equality Act 2010 (UK), s 149). In theory, these types of *ex ante* positive duty can inoculate a culture of women’s substantive equality into government decision making (Fredman, *The Public Sector Equality Duty* [2011]). Another promising mechanism is the inquiry procedure under the Optional Protocol to CEDAW. Under this mechanism the accountability process shifts from seeking an individual wrongdoer to identifying larger systemic norms and systems that underpin violations of women’s human rights (Campbell [2019]).

V. Conclusion

[18] There have been successes and failures in achieving the full recognition that women’s rights are human rights. The path to women’s equality may not be linear, but the theoretical and doctrinal

innovations in response to violations of women's human rights is the greatest strength in using law to remedy gender disadvantage.

MEGHAN CAMPBELL

Bibliography

Literature: Albertyn C, 'Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts' (2019) University of Oxford Human Rights Hub Journal 88; Atrey S, *Intersectional Discrimination* (OUP 2019); Bobel C, Winkler I, Fahs B, Hasson KA, Kissling EA and Roberts T-A (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave 2020); Byrnes A, 'Article 1' in Freeman M, Chinkin C and Rudolf B (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012); Campbell M, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018); id., 'Beyond the Courtroom: Accountability for Grave and Systemic Human Rights Violations' (2019) University of Oxford Human Rights Hub Journal 56; Charlesworth H, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 Harvard Human Rights Journal 1; Chinkin C and Yoshida K, 'The CEDAW Committee: Global Leader in Tackling Violence Against Women and Girls' (2020) 4 European Human Rights Law Review 347; Cohen J, 'The Political and Risks of the New Legal Pluralism in the Domain of Intimacy' (2012) 10(2) International Journal of Constitutional Law 380; Connors J, 'Article 28' in Freeman M, Chinkin C and Rudolf B (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012); Crenshaw K, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' (1991) 43(6) Stanford Law Review 1241; Cusack S and Pusey L, 'CEDAW and the Rights to Equality and Non-discrimination' (2013) 14 Melbourne Journal of International Law 54; Fredman S, *Discrimination Law* (2nd edn, Clarendon 2011); id., 'The Public Sector Equality Duty' (2011) 40(4) Industrial Law Journal 405; Howell E, 'Reducing Disparities in Severe Maternal Morbidity and Mortality' (2018) 61(2) Clinical Obstetric Gynecology 387; MacKinnon C, *Sexual Harassment of Working Women* (Yale UP 1979); Masengu T, 'Customary Law Inheritance: Lessons Learnt from *Ramantele v Mmusi and Others*' (2016) 24(4) African Journal of International and Comparative Law 582; McGlynn C and Rackley E, 'Image-Based Sexual Abuse' (2017) 37(3) Oxford Journal of Legal Studies 534; Musembi CN, 'Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol' in Hellum A and Aasen HS (eds), *Women's Human Rights* (CUP 2013); Odallo B, Opondo E and Onyango M, 'Litigating to Ensure Access to Quality Maternal Health Care for Women and Girls in Kenya' (2018) 26(53) Reproductive Health Matter 123; Pickles C and Herring J (eds),

Childbirth, Vulnerability and Law: Exploring Issues of Violence and Control (Routledge 2019); Rubenstein K and Young KG, *The Public Law of Gender* (CUP 2016); Sanger C, *About Abortion* (Harvard UP 2017); Solanki G, *Adjudication in Religious Family Laws* (CUP 2011).

Case law, International: *Belousova v Kazakhstan*, CEDAW Committee (25 August 2015) UN Doc CEDAW/C/61/D/45/2012; *Medvedeva v Russian Federation*, CEDAW Committee (25 February 2016) UN Doc CEDAW/C/63/D/2013; *RPB v The Philippines*, CEDAW Committee (12 March 2014) UN Doc CEDAW/C/57/D/34/2011; *ST v Russian Federation*, CEDAW Committee (8 April 2019) UN Doc CEDAW/C/72/D/65/2014; *X v Timor-Leste*, CEDAW Committee (25 April 2018) UN Doc CEDAW/C/69/D/88/2015; *Trujillo Calero v Ecuador*, CESCR (14 November 2018) UN Doc E/C.12/63/D/10/2015. **Regional:** *Dojan v Germany* App no 319/08 (ECtHR, 13 September 2011); *JD and A v United Kingdom* Apps no 32949/17 and 34614/17 (ECtHR, 24 February 2020). **Domestic:** *Fraser v Canada (Attorney General)* [2020] SCC 28 (Supreme Court of Canada, 16 October 2020); *Omuya and Another v Attorney General and Others* (High Court of Kenya, 17 September 2015) Petition No 562 of 2012; *Planowanie rodziny, ochrona płodu ludzkiego i warunki dopuszczalności przerywania ciąży* (Constitutional Tribunal of Poland, 22 October 2020) K 1/20 22 X 2020; *Bhe and Others v Magistrate of Khayelitsha and Others* (CCT 49/03) [2004] ZACC 17, 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (Constitutional Court of South Africa, 15 October 2004); *Birmingham City Council v Afsar and Others (No 3)* [2019] EWHC 3217 (QB) (High Court of England and Wales, 15 May 2019); *R (on the Application of DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21 (UK Supreme Court, 15 May 2019).

UN Documents: CEDAW Committee 'General Recommendation No 25 on Temporary Special Measures' (January 2004) UN Doc CEDAW/C/GC/25; CEDAW Committee 'General Recommendation No 28 on Core Obligations' (16 December 2010) UN Doc CEDAW/C/GC/28; CEDAW Committee 'General Recommendation No 35 on Gender-Based Violence Against Women' (26 July 2017) UN Doc CEDAW/C/GC/35; CEDAW Committee 'Summary of the Inquiry concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women' (22 April 2015) UN Doc CEDAW/C/OP.8/PHL/1; HRC 'Report of the Working Group on Discrimination against Women and Girls: Women's Human Rights in the Changing World of Work' (16 April 2020) UN Doc A/HRC/44/51; UNGA 'Report of the Special Rapporteur on the Right to Education' (23 July 2010) UN Doc A/65/162; UNGA 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Dubravka Šimonović: Intersection

MEGHAN CAMPBELL

between the Coronavirus Disease (COVID-19) Pandemic and the Pandemic of Gender-based Violence against Women with Focus on Domestic Violence and ‘Peace in The Home’ Initiative’ (24 July 2020) UN Doc A/75/144; Constitution of Kenya 2010 (Republic of Kenya); Constitution of Zambia 1991 (as amended 2016) (Republic of Zambia); Equality Act 2010 (United Kingdom).

Documents, *International*: ILO, *Women and Men in the Informal Economy: A Statistical Picture* (3rd edn, ILO 2018) <www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/publication/wcms_626831.pdf> accessed 5 March 2021; UN Special Rapporteur on Extreme Poverty and Human Rights, ‘A Rights-Based Approach to Social Protection in the Post-COVID-19 Economic Recovery’ (11 September 2020) <<https://www.ohchr.org/Documents/Issues/Poverty/covid19.pdf>> accessed 5 March 2021; World Bank, *Women, Business and the Law: 2020* (World Bank 2020) <<https://openknowledge.worldbank.org/handle/10986/32639>> accessed 5 March 2021. **Other:** Assessments Capacities Project (ACAPS), ‘Global Gender Analysis COVID-19’ <https://www.acaps.org/sites/acaps/files/products/files/20201023_acaps_global_gender_analysis_on_livelihood.pdf> accessed 27 October 2020.