

Women's Law and Human Rights
JUR 1910 BACHELOR AND JUS 5910 MASTER
Guidance for examiners' 2023

12. June 2023 (May be subject to adjustment in dialogue with examiners)

I GENERAL INFORMATION

The course is for bachelor and master students from different parts of the world with different academic backgrounds. The teachings constituted a mixture of lectures, group discussions and student presentation

Aim of the course and the aim of this years' exam:

The teaching of the course and the exam questions are closely related to the core topics that constitute the key learning requirements of the course. This year's exam questions are related to the following themes:

- The CEDAW's gender specific, *transformative* and holistic approach and its contribution to engenderment and queering of international law.
- Who has status as a women under CEDAW, the CEDAW's concept of sex and gender,
- *Gender stereotyping within CEDAW, Inter-American and African human rights jurisprudence.*
- The relationship between the right to gender equality and the right to religion under CEDAW and other human rights instruments such as ECHR and ICCPR.
- The relationship between the right to gender equality and non-discrimination and national laws regulating social and economic rights, such as the right to work, education or social benefits.

- Sources and principles of the interpretation of the CEDAW and on other human rights.
- Legal, political, social and cultural processes that affect the implementation and realization of women's human rights at the national and at the local level.

The overall aim of the exam is to test out the following:

- The students' insight in the key theoretical frameworks of the course and their ability to use them as a frame of reference for discussion of the different exam questions (A list of relevant literature is found at the end of this document)
- The students' ability to identify the relevant legal concepts that the exam questions pose and their ability to present them in the light of relevant legal sources
- The students' ability to discuss the exam questions in the light of the relevant principles and concepts.
- The students' ability to discuss the right to gender equality and non-discrimination under CEDAW and other conventions, such as ECHR and ICCPR and ICESCR
- The students' understanding of the CEDAW Committee's dynamic mode of interpretation and its basis, particularly that the legal text not is meant to be exhaustive – and that the term “all forms of discrimination” indicates that the terms sex discrimination not is written in stone but calls for an interpretation that responds to the social, cultural and legal development

Examination

- **Written home exam**, duration 3 days, maximum 4000 words master and maximum 3000 words for bachelor.
- **Open access**. During the exam, the students have access to the course literature that is posted in LEGANO. They also have access to the sources

posted in the course modules in CANVAS, such as recorded lectures, power points and legal sources like general recommendations from treaty bodies, concluding observations by treaty bodies and case law is made available in the course modules in CANVAS and case law.

Assessment of the home exam: Different standards for master and bachelor level

- Note that the required prerequisite knowledge for courses at the bachelor's and the master's level is different.
- Each candidate should be assessed individually in relation to **the different achievement requirements for bachelor's and master's level.**

Master level:

- Students at master level have passed 1st - 3rd year of the 5-year degree Master of Laws (Master i rettsvitenskap at UiO) (or exams that qualify for exemption for these) or hold a 5-years Master's degree in Laws (Master i rettsvitenskap at UiO) or equivalent.
- For this group, the main literature consists of approximately 600 pages.
- Students at master level should have **a thorough understanding** of the core topics listed in the achievement requirements

Bachelor level:

- At BA level, there are no compulsory requirements for prior knowledge beyond general study competence. This group of students consists both of students who have never before studied law and of law students who take Women's Law and Human Rights BA level as part of their third year of study.
- For this group, the main literature consists of approximately 400 pages.
- Students at bachelor level should have **a general understanding** of the core topics listed in the achievement requirements

II The exam questions

The exam questions address topics that constitute some the key learning requirements of the course listed above. **The students should be able to use the core concepts and theories and the course material to answer the exam questions. Very good students should be able to go one step further and make use additional relevant sources.**

The formulation of the exam questions are the same for master and bachelor students – the master students have, however, been given additional questions. Thus, the relative weight of the exams questions are not exactly the same for bachelor and master.

The students have to answer all the questions. As regards the weighting of the different questions in the overall assessment of the exam it should be had mind that the exam questions to a certain extent are overlapping and that the students may have chosen a way of structuring their essay that does not correspond to the structure of the exam questions.

Please note the exam questions are wide and that there are many ways of answering them – the guidance below is not meant to be exhaustive.

Question 1 (Master and Bachelor)

- **As an introduction to the Consultancy report, give an overview of the CEDAW Convention's transformative approach to equality and the CEDAW's understanding of the concepts sex and gender..**

The first part of the question calls for an understanding of overall theoretical perspectives provided by the course literature and teaching of the course:

The main article in this regard is Rikki Holtmaat “The CEDAW: A holistic approach to women’s equality” in *Women’s Human Rights* by Hellum and Aasen (CUP 2013). The students should be familiar with the overall perspective of this article, particularly how the goal of the CEDAW, which is to achieve substantive equality, is divided into three sub-aims:

- To ensure full equality before the law, to improve de facto position and to modify/eliminate gender stereotypes.
- This approach, which is termed the CEDAW’s transformative approach, draws together key elements in the state obligation under article 2 as developed through the Committee’s jurisprudence. The three key elements in the state obligation are:
 - Ensure equality under the law, change laws that are based on gender stereotypes and are in conflict with the principle of equality and non-discrimination
 - Take social and economic measure to ensure de facto equality
 - Take measures to modify and eliminate gender stereotypes rooted in laws, customs, social, cultural and religious beliefs etc..

Substantive equality and transformative equality is also addressed in Andrew Byrnes article “Article 1” in the CEDAW commentary by M.A Freeman, C. Chinkin and B. Rudolf (Oxford University Press 2012) and Sandra Fredman’s article on substantive equality (

The second part of the question calls for a conceptual understanding of who has status as a women in relation to CEDAW. The students should show they are familiar with how the Convention’s concepts of sex and gender has evolved.

The students should demonstrate that they are able to interpret the term “women” with reference to General recommendation 28. 5 stating that:

“5. Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles

for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favoring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. "

They should also be familiar with General recommendation 28. 18 stating that:

"18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. "

They may also draw on the discussion of gender and sex in the curriculum, for example, Holtmaat and Post (2015) Otto (2015)

Question 2 (2/5 of Master and 2/4 of Bachelor)

Master and Bachelor:

- **In the light of relevant sources, discuss whether the "male activation requirement" in Norland's Social Insurance Act is in line with CEDAW Article 1 and CEDAW Article 5 (b).**

"The male activation requirement" may be discussed from different legal perspectives: It may be seen as direct discrimination against men or structural discrimination against women. How to accommodate discrimination against men and male stereotypes are given some attention in the literature on the CEDAW and have been discussed in class. The CEDAW Committee has to little extent dealt

with these questions in its general recommendations, concluding observations or individual complaints. The students should, however, be able to discuss the CEDAW position in the light of the overall aim of promoting substantive equality and discussions in legal theory.

The starting point for the discussion is that the “male activation requirement” constitutes direct differential treatment of men. A man applying for paid leave for more than the father’s quota has to demonstrate that the child’s mother is ‘active’ in work or in education, the so-called “male activation requirement”. No similar requirement exists for women applying for paid leave for more than the mother’s quota.

The subject of CEDAW, according to the wording of Article 1 is “women”. According to the preparatory works, referred to by Andre Byrnes (2013) the asymmetric distribution of resources and power, necessitated a woman specific approach. The woman specific approach, according to the preparatory works, was necessary to promote substantive (real equality) between women and men.

“The male activation requirement” thus begs the question whether men who are denied the same rights to paid parental leave as women should be protected by the CEDAW. In this regard it should be had in mind that the Convention should be interpreted in the light of its objective and purpose, which is to promote substantive equality. A central source in this regard is the Preamble to the Convention stating that: “Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,”. This statement emphasizes the need to transform the rights and duties of both women and men in order to achieve substantive equality. In the light of the aim of the Convention, as defined in the preamble, it can thus be argued that the state, to transform the unequal gender roles regarding rights and duties to take care of children, must ensure that men have equal rights and duties regarding paid parental leave. Following from this it can be argued that men who are denied equal rights regarding paid parental leave, are protected by the CEDAW.

Furthermore, the legal literature on gender stereotyping”, for example Cusack (2013, 3.1.4) argues that the framers of CEDAW have understood gender stereotypes as “relational in nature” and that “wrongful stereotyping not only disadvantage women but also men” and that focusing exclusively on women will leave basic problems regarding gender stereotyping unresolved.

It should be had in mind that state accountability is limited to “harmful” stereotypes (Cusak, section 3.1.5) . It can be argued that the “male activation requirement constitutes a “harmful” stereotype” because it leads to direct differential treatment of male carers. A related argument is that it upholds the traditional “male breadwinner” ideology that sees women as the main caring person.

Whether the “male activation requirement” has an objective justification is a related question can also be discussed. The distinction between legitimate and permissible and illegitimate and impermissible stereotypes is discussed in the legal literature (Cusack 2013 section 5). With reference to CEDAW 5b, which in line with the Preamble reiterates the State’s duty of “the recognition of the common responsibility of men and women in the upbringing and development of their children,” it can be argued that the “male activation requirement” not can be justified because it is based on a stereotypes that serve to uphold a traditional division of work between men and women whereby men are seen as financial providers and women as care-givers. According to CEDAW 5 b) state laws and policies should recognize the common responsibility of men and women in the upbringing and development of their children. The CEDAW Committee have, in its concluding observations to many countries, been concerned about the persistence of the male breadwinner model and the lack of incentives that stimulate the sharing of responsibility within the family (Austria 2007), Luxembourg (2018). It can thus be argued that the “male activation requirement” lacks legal legitimacy.

The “male activation” controversy also actualizes a discussion of whether it constitutes a form of structural discrimination against women. CEDAW Article 1 encompasses all forms of discrimination against women on the basis of their gender. “Gender” discrimination is in General Comment 28 understood as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favoring men and disadvantaging women”. From this perspective it can be argued that the “male activation requirement” by upholding

stereotypes that serve to uphold a traditional division of work between men and women, constitutes a form of structural discrimination against women. The Committee has, in its general recommendations taken a broad approach to structural discrimination for example in GR 25 and GR 36. In the light of CEDAW Article 5 b) it can be argued that the “male activation requirement” lacks an objective justification, is reasonable and proportionate.

- **What measures would you, in the light of CEDAW’s three pronged approach to gender equality recommend that Norland take regarding the division of parental leave between parents to be in consonance with the state obligation under Article 2.**

The Second question calls for a discussion of what the three pronged approach to gender equality require regarding the division of parental leave between women and men. The aim is to test out the student’s ability to reflect on what is required in relation to a concrete situation and show that they are able to apply the framework.

With regard to ensure equality under the law and change laws that are based on gender stereotypes that are in conflict with the principle of equality and non-discrimination the students may reflect on the following:

- Introduce, in line with the CEDAW Committee GR. 33 para 3 a “comprehensive strategy to eliminate discriminatory stereotypes with regard to the roles and responsibilities of women and men in the family and in society”.
- With regard to legal change, the following elements may be addressed:
 - What should be done with the “male activation requirement”?
 - Does substantive equality require that both parents are given equal shares – or may/ should women who give birth be given a longer period with paid leave.
- With regard to economic/social measures:

- What responsibility does the state have to carry out impact studies to find out how the existing rules concerning parental leave work out in practice. (For example: to what extent are parental decision-making regarding the sharing of parental leave based on gender stereotypes where men are bread winners and women take the main brunt of homework and care)
- Are economic resources to ensure paid parental leave for both parents in place

With regard to promote cultural change the students may reflect on:

- The existence of information programs encouraging and facilitating the use of schemes for paid parental leave
- The existence of public policies and programmes ensuring that parental roles are portrayed as equal in education at all levels
- The existence of dialogue with religious communities that see men as breadwinners and women as housewives.

Question 3 Bachelor and Master (1/5th of Master and 1/4th of Bachelor)

- **In the light of relevant sources, discuss whether the introduction of obligatory separate swimming lessons for girls and boys is in line with CEDAW Article 5 a).**

This specific question has not been directly dealt with by the CEDAW Committee. It actualizes a discussion about the relationship between the aim of substantive gender equality and social, cultural and religious diversity. A key question is how to balance the aim of substantive gender equality with religious norms that demand separation of the sexes in situations like swimming and showering, where the body of women and girls is made publicly visible. There is no right or wrong answer to this question – the aim of this question is to test out the students' ability to discuss this complex and contested issues in the light of existing legal sources.

The starting point for the discussion is CEDAW Article 10 stating that girls and boys have the same right to education. According to CEDAW Article 5a) and

CEDAW Article 10 c) the state is obliged to ensure “ The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim (the aim of equal education)...”

It should be noted that the CEDAW, unlike the ECHR or the ICCPR, not have any provisions that protect the right to religion or the right to culture. Good students (particularly at master level) may discuss the relationship between CEDAW article 1, 10 c and 5a) in the light of the case of *Osmanoğlu and Kocabaş.v Switzerland*, where the European Court of Human Rights (ECtHR) concluded that mixed swimming lessons did not entail a breach of the right to religious freedom for Muslim girls after ECHR art 9. The Court, in this case emphasized that the state had a wide margin of discretion striking a balance between religious freedom and the state’s duty to provide education in line with the pupils religious beliefs.

The CEDAW implies that the state is obliged to ensure that boys and girls, regardless of their religious background, get an equal education, including survival skills like swimming lessons. Whether the introduction of legislation that introduce separate swimming lessons for girls and boys can be reconciled with the state’s duty to eliminate social, cultural and religious stereotypes after 5 a) is a difficult question calling for a discussion of elimination of gender stereotypes as a means of promoting substantive equality. A key question in this regard is whether the introduction of obligatory separate swimming lessons, which takes the religious demands on Muslim girls into consideration, has an objective justification, whether it is necessary and whether it constitutes a disproportionate interference with the right to freedom from stereotypes for all girls into consideration. A theoretical foundation for this discussion is provided in Cusack’s discussion of what constitutes a harmful gender stereotype (2013 section 5).

Objective ground: The aim of obligatory separate swimming lessons for girls and boys, is to ensure that all children, regardless of sex and religious background learn to swim. From this perspective obligatory separate swimming lessons can be seen as a way of promoting substantive equality by means of

recognizing diversity. In line with this it can be argued that obligatory separate swimming lessons has an objective and legitimate justification. The need to take difference into account to ensure equal education rights for Muslim girls has, for example, been emphasized by the CEDAW Committee in its concluding observations to France and Turkey's state reports. The Committee here called upon the state parties to monitor the prohibition of headscarves in schools with a view to observe whether it lead to a situation where girls dropped out of school because they were not allowed to wear headscarves. Recognition of religious diversity, such as Muslim norms obliging women and girls to cover they bodies in public, may have short-terms benefits, such as ensuring that girls learn to swim. Their long-terms consequences in terms of upholding religious norms that restrict women's freedom should, however, be had in mind.

Necessity: Whether it is necessary to make separate swimming lessons obligatory should also be discussed. The state must consider whether the aim of ensuring that all girls learn to swim, can be achieved by other measures than making separate swimming classes obligatory for all school children regardless of religion. An important consideration in this regard is whether the aim to ensure that Muslim girls learn to swim, may be achieved by allowing them to use swimming outfits that cover their bodies.

Proportionality: It should also be discussed whether the introduction of separate swimming lessons constitute a disproportionate interference of the right to equality for all girls. It should be had in mind that the background of the introduction of separate swimming classes for girls and boys was the dominant view among conservative Muslims that women should cover their bodies in public spaces. It can thus be argued that the introduction of obligatory separate swimming lessons imposes and legitimizes religious stereotypes that limit all women's bodily freedom.

Question 4 Only Master (1/5th)

- **In the light of relevant sources, discuss whether the Social Insurance Act's rule that strikes out parental benefits when a second child is borne, constitutes a breach of CEDAW Article 1 and CEDAW Article 5 a.**

This question gives rise to different problems, such as:

- *How should the terms discrimination against "women" on the basis of "sex" in Article 1 be understood?*
- *Does the Social Insurance Act's rule that strikes out parental benefits of the first mother when the second mother gives birth constitute a breach of CEDAW 5 a ?*
- *Does the Social Insurance Act's rule that strikes out parental benefits of the first mother when the second mother gives birth constitute discrimination ?*

The starting point for the discussion is the wording of article 1 stating "women" are protected against discrimination on the basis of "sex". The students should show that they are familiar with how the CEDAW Committee through its interpretation of Article 1 of the Convention in GR 28 has recognized that "discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity". The students should also be able to show how the Committee in its concluding observations to states parties has required that protection against gender discrimination is extended to women who experience discrimination on the basis of sexuality.

According to the wording of CEDAW 5a) states parties shall take all appropriate measures to "To modify the social and cultural patterns of conduct of men and women,". The students should be familiar with the way in which the Committee's interpretation of gender stereotypes has evolved in the light of the changing understanding of gender in social science and law. They may, in the light of the social and legal development taking place, argue that States parties must legally recognize discrimination based on the intersection of sex and sexuality, Legal theory (Holtmaat and Post, 2015), argue that CEDAW 5a, in line with the changing understanding of gender in law and society, may go beyond the heteronormative

male/female binary. The students have, in the course, been made aware of concluding comments where the Committee calls upon the states to change stereotypes that see biological men and women as the natural family unit. In the light of this development, it can be argued that the Social Insurance Act's rule that strikes out parental benefits of the first mother when the second mother gives birth is in conflict with the state obligation to eliminate gender stereotypes.

Whether the Social Insurance Act constitutes discrimination calls for a discussion of the following elements:

- Does the Act lead to differential treatment?
- Who is the comparator?
- What is the prohibited ground: sex, gender, sexuality, intersectional
- Does the differential treatment result in a disadvantage: direct, indirect
- Can the differential treatment be justified: objective ground, reasonable, proportionate

Reference to relevant literature:

- Holtmaat, Rikki (2013): "The CEDAW: a holistic approach to women's equality and freedom", In A. Hellum and H. Sinding Aasen. *Women's Human Rights*. Cambridge University Press, p.95-124.
<https://doi.org/10.1017/CBO9781139540841>
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- Fredman S, Sandra: "Substantive equality revisited" *International . Constitutional Law* (2016), Vol. 14 No. 3, 712-738: Available online:
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<http://opil.ouplaw.com/view/10.5422/fso/9780199565061.001.0001/actrade-9780199565061>

- Otto, Dianne (2016) "Queering Gender [Identity] in International Law", in *Nordic Journal of Human Rights*, 1 issue 2016. Available online: <http://www.tandfonline.com/toc/rnhr20/34/1?nav=toCList>
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- Raday, Frances : "Traditionalist Religious and Cultural Challenges – International and Constitutional Human Rights Responses", in *Israel LawReview* Vol. 41, pp 596-634 Available: <http://www.humanrights.org.il/articles/traditional%20religious%20and%20cultural%20challengers.pdf>

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