

The Perils of Simultaneous Adjudication and Consultation: Using the Optional Protocol to CEDAW to Secure Women's Health

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Abstract

My research illustrates the emerging issues posed by global health governance and the particular challenges for bringing individual health claims before international tribunals and related adjudicative bodies.

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") is unique among international agreements in carving out a healthcare provision exclusively for women. Under the treaty's Optional Protocol, the CEDAW Committee retains exclusive jurisdiction to consider claims brought by individuals against a State Party. Although decisions are not legally binding, the Committee engages in a quasi-legal analysis by applying the treaty to the relevant facts and articulating precise governmental violations and obligations.

I conducted the first comprehensive analysis of all 10 decisions issued thus far under the Protocol. I argue that the legal analyses have been unsound and compromised the integrity of the interpretive process. An enhanced framework is proposed to address a number of pressing women's health issues, including domestic violence, family planning, infertility treatment, and abortion.

Questions

I. Does CEDAW and its Optional Protocol afford more robust substantive and procedural safeguards to secure women's health in comparison to other international instruments?

II. In practice, has the CEDAW Committee interpreted the treaty in an objective and consistent manner?

III. What challenges exist to address pressing and emerging women's health issues under CEDAW and its Optional Protocol?

Outline

I. Proposed Legal Framework for Considering a Communication

- A. Parsing Individual and Structural Conceptions of Remedies
- B. Form and Substance of Committee Review and Deliberations
- C. On the Nature and Scope of General Recommendations

II. Examining the Optional Protocol in Practice

- A. Review of the Allegations, Violations, and Reasons Employed
- B. Interpretive Trends & the Utility of the Proposed Framework
- C. Applying the Framework to Health-Related Claims

III. Conclusion

Normative Framework: CEDAW

CEDAW, Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.



Normative Framework: Optional Protocol

- Empowers individuals or organizations on their behalf to raise claims before the CEDAW Committee alleging treaty violations
- Grants the CEDAW Committee sole jurisdiction to review claims and issue recommendations; States have 6 months to reply
- Comm. may bypass exhaustion where the application of remedies is unreasonably prolonged or unlikely to bring effective relief
- Comm. may impose interim measures to avoid irreparable harm

Normative Framework: Rules of Procedure

- Committee Rules of Procedure enhance the deliberative process and objectivity by procuring testimony from experts in a field:
- Specialized agencies [Rule 45] (e.g., World Health Organization)
- Intergovernmental organizations and U.N. bodies [Rule 46] (e.g., U.N. Commission on the Status of Women)
- Non-governmental agencies [Rule 47] (e.g., Population Council)

Figure 1. Examining the Optional Protocol in Practice: Nature and Scope of Claims Filed

Art.	Summary of CEDAW Provision	Claim Filed	Totals
1	Definition of discrimination	B.J. v. Germany	4
2	Adopt policies and laws for equality	A.T. v. Hungary	6
3	Guarantee of basic rights, freedoms	Kayhan v. Turkey	3
5	Modify social, cultural conduct	A.S. v. Hungary	4
9	Asylum, Change, Retain Nationality	Nguyen v. Netherlands	1
10	Educational opportunities	Yildirim v. Austria	1
11	Employment opportunities, protections	Goekce v. Austria	2
12	Access to healthcare services	Muñoz v. Spain	1
15	Legal capacity (Kv, property, domicile)	N.S.F. v. U.K./N. Ireland	1
16	Marriage, family life and planning	Salgado v. U.K./N. Ireland	3
Totals			3

Figure 2. Examining the Optional Protocol in Practice: Violations Found

Art.	Summary of CEDAW Provision	Claim Filed	Totals
1	Definition of discrimination	B.J. v. Germany	0
2	Adopt policies and laws for equality	A.T. v. Hungary	3
3	Guarantee of basic rights, freedoms	Kayhan v. Turkey	2
5	Modify social, cultural conduct	A.S. v. Hungary	1
9	Asylum, Change, Retain Nationality	Nguyen v. Netherlands	1
10	Educational opportunities	Yildirim v. Austria	1
11	Employment opportunities, protections	Goekce v. Austria	2
12	Access to healthcare services	Muñoz v. Spain	1
15	Legal capacity (Kv, property, domicile)	N.S.F. v. U.K./N. Ireland	1
16	Marriage, family life and planning	Salgado v. U.K./N. Ireland	3
Totals			17

Figure 3: Interpretive Trends

Case	Interpretive methodology employed?	Addressed potential irreparable harm	General Rec- cited as authority	Cited expert opinions
B.J. v. Germany	No	No	N/A	N/A
A.T. v. Hungary	No	N/A	Yes	No
Kayhan v. Turkey	No	No	N/A	No
A.S. v. Hungary	No	N/A	Yes	Yes (in the conclusion, not in the analysis)
Nguyen v. Netherlands	No	No	N/A	No
Yildirim v. Austria	No	N/A	Yes	No
Goekce v. Austria	No	N/A	Yes	No
Muñoz v. Spain	No	No	N/A	N/A
N.S.F. v. U.K./N.I.	No	No	Yes	N/A
Salgado v. U.K./N.I.	No	N/A	N/A	N/A
Totals	0	0	5	1

Enhanced 5-Step Interpretive Framework

- Admissibility: Consideration on the Facts**
- Step 1. Did the author exhaust domestic remedies?
 - Step 2. Do the facts indicate an imminent threat to the author's health or safety that demand interim measures to prevent irreparable harm?
 - Step 3. Are the issues among those raised in prior State Party Reports? Seek expert testimony where necessary.
- Substantive Consideration on the Merits**
- Step 4. Employ the general means of interpretation under the Vienna Convention on the Law of Treaties
 - Step 5. If the general means of interpretation do not resolve the issue, recourse may be had to the supplementary means of interpretation (e.g., *travaux*).

Global Updates

- I. Status of Ratification (as of March 2009)
 - o CEDAW: 185 States Parties
 - o Optional Protocol: 90 States Parties
- II. U.S. may move to ratify CEDAW in 2009
 - o Sen. Barbara Boxer pledges efforts for Senate Ratification of CEDAW

Forthcoming Publication

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Contact Information

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