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CEDAW as a Dynamic Instrument of International Human Rights Law
Extending Protection to Transgender, Intersex, Nonbinary, and Gender-Diverse Persons through
Evolutive Interpretation

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Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 as the principal international treaty devoted to eliminating discrimination against women. Its text does not expressly refer to sexual orientation, gender identity, gender expression, sex characteristics, transgender persons, intersex persons, nonbinary persons or other forms of gender diversity. Yet the absence of these terms cannot, by itself, determine the contemporary scope of the Convention. CEDAW was drafted within an international legal order that largely organised sex and gender through binary categories of women and men and did not expressly contemplate gender diversity in the terminology now used within international human rights law. The interpretive question is therefore not simply whether transgender, intersex, nonbinary or gender-diverse persons were named in 1979, but whether the gender categories presupposed at the time of drafting should be treated as fixed and historically neutral limits on the Convention's contemporary application.

Gender diversity is not historically new, and binary understandings of sex and gender cannot simply be assumed to constitute universal or politically neutral forms of social organisation. The relationship between colonialism and the regulation of sexual and gender diversity has increasingly been recognised within the United Nations human rights system. In his 2023 report to the General Assembly, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, examined the impact of colonialism and decolonisation on the formation and continuing reproduction of harmful social norms concerning sexual orientation and gender identity.¹ The report situates contemporary violence and discrimination against LGBT and gender-diverse persons within longer histories of colonial legal and social ordering, challenging accounts that treat sexual and gender diversity as recent phenomena requiring accommodation by otherwise historically neutral legal systems.

This historical perspective matters for the interpretation of CEDAW. If the binary organisation of sex and gender reflected in modern legal systems is itself historically constructed, its apparent absence of space for gender-diverse persons cannot automatically be treated as an immutable boundary of a Convention intended to transform sex- and gender-based inequality. The question then becomes whether CEDAW's substantive equality, interpreted in light of contemporary understandings of gender and intersectional discrimination, can respond to persons whose exclusion is produced by the same gendered structures that the Convention seeks to dismantle.

This *herstory* is particularly significant from a Global South perspective. Across the Philippines and other parts of Asia, gendered identities and social roles exceeding contemporary binary classifications existed before and alongside colonial rule. The *babaylan* and *asog* in the Philippines, the *bissu* among the Bugis of Indonesia, and the *hijra* of South Asia cannot simply be

¹ UNGA, 'Protection against violence and discrimination based on sexual orientation and gender identity' (25 July 2023) UN Doc A/78/227.

translated into contemporary categories such as “transgender” or “nonbinary”. Their *theirstories* nevertheless challenge the assumption that a binary organisation of sex and gender constitutes a universal and historically self-evident foundation upon which modern law operates. The contemporary exclusion of gender-diverse persons must therefore also be examined against the legal and epistemic histories through which particular understandings of sex and gender became naturalised.

CEDAW itself now operates within a legal and social context markedly different from that in which it was drafted. Over more than four decades, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has progressively developed the substantive meaning of the Convention through its General Recommendations, individual communications and Concluding Observations. General Recommendation No 28, for example, recognises that discrimination against women is “inextricably linked” with other factors affecting their lives, expressly including sexual orientation and gender identity.² In *Flamer-Caldera v Sri Lanka*, the Committee affirmed that the rights protected under the Convention belong to all women, including lesbian, bisexual, transgender and intersex women.³

The Committee's 2023 review of the Philippines illustrates this contemporary development. In its Concluding Observations, the Committee identified lesbian, bisexual and transgender women and intersex persons among groups experiencing historical and intersecting forms of discrimination, and called upon the Philippines to strengthen the application of the Convention for the benefit of marginalised groups of women.⁴

As early as 2010, the CEDAW Committee has established recommendations to the Netherlands about transgender women on their right to health under the Convention.⁵ Under the current framework of CEDAW, transgender women are women and can claim the Convention's protection, including where discrimination against them intersects with transphobia or other forms of multiple and intersecting forms of discrimination. The more difficult question arises where the CEDAW Committee addresses transgender persons, nonbinary persons, gender-diverse persons and intersex persons without limiting its recommendations to women.

Contemporary Committee practice demonstrates that this question is not hypothetical. In some Concluding Observations, the Committee has issued recommendations expressly concerning

² Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28, para 18.

³ *Flamer-Caldera v Sri Lanka* (Views) CEDAW Communication No 134/2018 (21 February 2022) [9.7].

⁴ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of the Philippines’ (23 October 2023) UN Doc CEDAW/C/PHL/CO/9, paras 9–10.

⁵ Committee on the Elimination of Discrimination against Women, ‘Concluding observations of the Committee on the Elimination of Discrimination against Women: The Netherlands’ (5 February 2010) UN Doc CEDAW/C/NLD/CO/5, paras 46–47.

“transgender persons”, “transgender students”, “intersex persons” and “intersex children”. Some formulations are especially significant because they distinguish transgender persons as a wider category from transgender women, while others apply CEDAW-related standards in areas such as education, legal gender recognition, bodily autonomy, health and discrimination to persons who are not expressly identified as women.⁶

This practice raises the central problem of the thesis: can a treaty whose expressly identified subject is women extend protection to transgender, intersex, nonbinary and other gender-diverse persons who are not women where the discrimination they experience is produced by the sex- and gender-based structures, stereotypes and hierarchies that CEDAW seeks to transform?

The thesis approaches this question neither by redefining all gender-diverse persons as women nor by treating CEDAW as a general treaty prohibiting all forms of SOGIESC-based discrimination. Rather, it examines whether the Convention's existing commitments to substantive equality and the transformation of gender hierarchy possess protective implications beyond the formal identity of the person experiencing the harm.

CEDAW within an Evolutive International Human Rights System

The interpretive development examined in this thesis is not unique to CEDAW. Human rights treaties are applied within changing social, factual and legal conditions, and international human rights bodies have recognised that the application of treaty guarantees cannot necessarily remain frozen according to understandings prevailing when those instruments were adopted.

This principle has been articulated within the United Nations treaty-body system itself. In *Judge v Canada*, the Human Rights Committee reconsidered its earlier jurisprudence concerning removal to a State where an individual faced the death penalty. While emphasising the importance of consistency and coherence in its jurisprudence, the Committee recognised that developments in international law and changing factual and legal circumstances could justify a reconsideration of an earlier interpretation. It stated that the International Covenant on Civil and Political Rights (ICCPR) “should be interpreted as a living instrument” and that its rights should be applied in context and in light of present-day conditions.⁷

⁶ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of the Dominican Republic’ (1 March 2022) UN Doc CEDAW/C/DOM/CO/8, paras 22, 31; ‘Concluding observations on the fifth periodic report of Kyrgyzstan’ (29 November 2021) UN Doc CEDAW/C/KGZ/CO/5, para 47; ‘Concluding observations on the eighth periodic report of Panama’ (1 March 2022) UN Doc CEDAW/C/PAN/CO/8, paras 11–12; ‘Concluding observations on the ninth periodic report of Peru’ (1 March 2022) UN Doc CEDAW/C/PER/CO/9, paras 9–10.

⁷ *Judge v Canada* (Views) HRC Communication No 829/1998 (5 August 2003) [10.3].

The significance of *Judge* extends beyond the particular question of capital punishment. It demonstrates that a UN treaty body may understand the contemporary application of a human rights treaty as capable of developing without treating such development automatically as amendment of the treaty.

The CEDAW Committee has expressly articulated a comparable understanding of its Convention. In General Recommendation No 25, it described CEDAW as a “dynamic instrument”, observing that progressive thinking since its adoption had contributed to the clarification and understanding of the substantive content of its provisions and of the nature of discrimination against women.⁸

The Committee's subsequent practice reflects this development. Concepts that are now central to contemporary CEDAW jurisprudence — including gender-based violence, intersectional discrimination and discrimination connected with sexual orientation and gender identity — are not enumerated in the Convention's text in those terms. Their incorporation demonstrates that the substantive application of a human rights treaty may develop as understandings of discrimination and equality evolve.

Why CEDAW?

The focus on CEDAW requires explanation because transgender, intersex, nonbinary and other gender-diverse persons may already invoke protections under general international human rights instruments, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This thesis does not proceed from the premise that gender-diverse persons require CEDAW in order to possess international human rights. Nor does it argue that CEDAW should replace the Covenants or other human rights instruments as a source of protection.

The protected subject of the ICCPR and ICESCR is already broadly constituted. Interpretive development under those treaties therefore recognise sexual orientation and/or gender identity as a prohibited ground of discrimination, or apply an existing right to circumstances affecting transgender and gender-diverse persons, without fundamentally altering the identity of those entitled to invoke the treaty. The interpretive development primarily concerns the ground of discrimination or the contemporary application of a right.⁹

⁸ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures’ (2004) UN Doc CEDAW/C/GC/25, para 3.

⁹ Committee on Economic, Social and Cultural Rights, ‘General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) UN Doc E/C.12/GC/20, para 32; *Toonen v Australia* (Views) HRC Communication No 488/1992 (31 March 1994) [8.7]; Human Rights Committee, ‘General Comment No 18: Non-discrimination’ (10 November 1989) UN Doc CCPR/C/21/Rev.1/Add.1, para 7.

CEDAW is structurally different. Article 1 defines discrimination “against women”, and the Convention's operative framework is specifically concerned with eliminating such discrimination. Extending Convention protection to persons who are not women is a challenge, as it does not look into expansion of prohibited grounds, but on the subject of the treaty.

This complexity makes CEDAW an important site of inquiry. If the question were examined only through the Covenants, the central interpretive problem addressed by this thesis would already be answered. At the same time, CEDAW provides a substantive-equality framework that provides the transformation of society to achieve equality and nondiscrimination among genders.¹⁰ The Convention addresses the structural conditions through which women's inequality is created and reproduced. Article 5(a), for example, requires States parties to modify social and cultural patterns based upon ideas of the inferiority or superiority of either sex and upon stereotyped roles for women and men.¹¹ The Committee's practice has subsequently elaborated indirect discrimination, substantive equality, intersectionality and gender-based violence as concepts concerned with structures of gendered disadvantage rather than discrete instances of differential treatment alone.¹²

This structural orientation is important for gender diversity. Transgender, nonbinary and other gender-diverse persons may experience violence, exclusion and institutional regulation because they depart from prescribed expectations concerning sex, gender, embodiment, femininity and masculinity. Intersex persons may be subjected to medical and legal interventions intended to make their bodies conform to binary classifications of sex. These experiences are not identical to discrimination against women, and this thesis does not collapse them into a single experience of oppression. They may nevertheless be produced through structures of gender regulation that are structurally continuous with those responsible for women's subordination.

The relevant question is whether the sex- and gender-based hierarchy that CEDAW is mandated to transform be fully addressed if the protective consequences of that mandate are confined exclusively to persons who identify as women?

Research Question and Central Argument

¹⁰ Committee on the Elimination of Discrimination against Women, *Draft General Recommendation No 41 on Dismantling Gender Stereotypes and the Unequal Power Relations that Sustain Them* (4 March 2026) para 2.

¹¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 5(a).

¹² Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (2010) paras 5, 18–19; Committee on the Elimination of Discrimination against Women, *General Recommendation No 33 on Women's Access to Justice* (2015) paras 8–9, 10–13; Committee on the Elimination of Discrimination against Women, *General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19* (2017) paras 9–10, 19; Committee on the Elimination of Discrimination against Women, *General Recommendation No 19 on Violence against Women* (1992) paras 1–6.

This thesis asks to what extent can CEDAW be interpreted as a dynamic instrument of international human rights law capable of extending protection to transgender, intersex, nonbinary and other gender-diverse persons, and what role can a decolonial transfeminist understanding of gender hierarchy play in that interpretation?

This thesis argues that particular CEDAW obligations may have protective application beyond women where the discrimination or harm at issue is sufficiently connected to the sex- and gender-based structures, stereotypes and hierarchies regulated by those obligations. Such application may encompass transgender, intersex, nonbinary and other gender-diverse persons without requiring them to be characterised as women or transforming CEDAW into a general SOGIESC non-discrimination treaty.

This argument does not require transmasculine people or nonbinary persons to be characterised as women, nor does it render the category of women legally irrelevant. Women remain central to CEDAW's text, structure and substantive equality project. The argument instead asks whether particular harms experienced by persons beyond women may be produced through sex- and gender-based structures that CEDAW already regulates, including stereotyping, compulsory gender roles and institutional forms of gender hierarchy.

The Convention's protective reach should therefore not necessarily be determined exclusively by the formal identity of the person experiencing discrimination. Where the harm is produced by the sex- and gender-based structures that CEDAW itself regulates — including stereotyping, compulsory gender roles and structural inequality — an evolutive application of Convention obligations may encompass persons beyond women.

This claim nevertheless has a limiting principle. It does not follow that every violation experienced by every gender-diverse person falls within CEDAW. A legally relevant nexus must remain between the harm and the Convention's substantive obligations and equality. The interpretive argument must also remain within the limits imposed by the Vienna Convention on the Law of Treaties (VCLT). The thesis therefore argues for an extension of CEDAW's protective reach through structural continuity, rather than the transformation of CEDAW into a universal SOGIESC non-discrimination treaty.

The thesis further argues that such an interpretation is not a theoretical proposition. Contemporary CEDAW Committee practice contains recommendations directed to transgender, gender-diverse and intersex persons without consistently restricting their application to women. The legal significance of that practice, and whether it provides evidence of an emerging evolutive interpretation of the Convention, is examined in Chapter 3.

Methodology and Scope

This thesis adopts a doctrinal legal methodology employing evolutive treaty interpretation under the VCLT, informed by a decolonial transfeminist analytical framework, and applied to a structured qualitative analysis of contemporary CEDAW Committee practice.

Doctrinal Legal Method

The primary legal materials are CEDAW, the VCLT, the CEDAW Committee's General Recommendations and Concluding Observations. The doctrinal analysis is grounded principally in Articles 31 and 32 VCLT.¹³ Chapter 1 considers the ordinary meaning, context and object and purpose of CEDAW under Article 31(1), relevant rules of international law under Article 31(3)(c), supplementary means of interpretation under Article 32, and the doctrine of evolutive interpretation.

The analysis gives particular attention to the distinction between interpretation and amendment. This is especially important because the thesis concerns a group-specific treaty. The fact that contemporary human rights treaties may be interpreted evolutively does not itself establish that the class of persons to whom a particular treaty applies can be altered without limit. The doctrinal analysis therefore establishes the legal constraints within which the thesis's broader structural argument must operate.

The Decolonial Transfeminist Framework as Analytical Method

The doctrinal methodology is informed by a decolonial transfeminist analytical framework. The framework does not constitute an independent source of treaty meaning and does not displace the interpretive rules contained in the VCLT. Rather, it performs three methodological functions.

First, it informs the analysis of the substantive concepts through which CEDAW's text, structure and object and purpose are understood. In particular, it directs attention to substantive equality, patriarchal power, gender stereotyping and the structural operation of discrimination rather than treating discrimination exclusively as differential treatment affecting a formally bounded identity category.

Second, the framework guides the qualitative analysis of CEDAW Committee practice. It asks whether recommendations concerning transgender, intersex, nonbinary and gender-diverse persons address harms produced by, or structurally connected with, the sex- and gender-based hierarchy regulated by the Convention. The analysis does not stop at identifying whether the Committee uses the term “transgender persons”. It examines why the Committee intervenes, what

¹³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 31–32.

form of gender regulation is implicated, and how the recommendation relates to CEDAW's substantive obligations.

Third, the decolonial component of the framework provides a critical lens through which apparently self-evident binary classifications of sex and gender are examined. Drawing on decolonial feminist thought, contemporary UN analysis of colonialism and SOGI, and historically situated accounts of gender plurality, the framework interrogates whether the categories through which modern law identifies gendered legal subjects can properly be treated as universal and historically neutral. The framework assists in identifying structural continuity between discrimination against women and discrimination against gender-diverse persons.

Identification and Analysis of Committee Practice

To examine contemporary Committee practice systematically, the study reviews a corpus of 230 CEDAW Concluding Observations issued between 2020 and 2025.

A keyword-based scan was undertaken to identify potentially relevant passages, using terms including “transgender”, “trans”, “intersex”, “nonbinary”, “non-binary”, and “gender-diverse”. The search functions only as an identification mechanism. The research is qualitative and doctrinal rather than quantitative; frequency is not treated as evidence of a particular interpretation of CEDAW.

For the specific inquiry concerning protection beyond women, references confined to “transgender women”, “LBTI women” or comparable formulations are treated as background evidence of the Convention's intersectional application to women but are not included as primary evidence of an extension beyond the category of women. The core analytical material consists instead of passages referring to transgender persons or people, transgender students, nonbinary persons, gender-diverse persons, intersex persons or children, or comparable formulations that are not expressly restricted to women.

The analytical categories were developed from the recurring structure of the Committee's Concluding Observations. Concluding Observations generally distinguish between the factual or social situation identified by the Committee, the concerns it draws from that situation, and the recommendations through which it specifies measures expected of the State party. On this basis, relevant passages were coded according to their normative and interpretive significance, distinguishing between: (1) acknowledgment or reference to transgender, intersex, nonbinary or gender-diverse persons; (2) an expression of concern regarding discrimination or harm affecting those persons; (3) an operative recommendation requiring the State party to take specific measures in relation to them; and (4) an operative recommendation expressly connected to a Convention provision, General Recommendation or otherwise identifiable CEDAW obligation. The categories

therefore reflect an increasing degree of normative engagement: from recognition of a group, to identification of a Convention-relevant problem, to prescribed State action, and finally to an explicit connection between that action and the normative framework of CEDAW.

Each relevant passage is then subjected to both doctrinal and decolonial transfeminist analysis through four questions:

Who is identified as the beneficiary or rights holder?

What discrimination, disadvantage or harm is being addressed?

What Convention provision, General Recommendation or substantive CEDAW obligation provides the legal basis or context for the recommendation?

Is the harm connected to the sex- and gender-based stereotypes, hierarchies, binary classifications or forms of social regulation that CEDAW seeks to eliminate?

The fourth question operationalises the decolonial transfeminist framework within the analysis of Committee practice. It allows the study to assess whether the Committee's engagement with gender-diverse persons is incidental to its mandate or whether the harm itself is being understood through structures of gender discrimination cognisable within CEDAW.

The purpose of examining 230 Concluding Observations is to cast a wider filter to identify a body of practice across different States, substantive fields and Convention obligations. The study consequently focuses on the quality, consistency, legal framing and structural significance of the relevant recommendations rather than the number of keyword occurrences alone.

The Decolonial Transfeminist Framework

Chapter 2 develops the decolonial transfeminist framework employed by the thesis in greater depth. Feminist substantive-equality theory and intersectionality provide the foundation for understanding discrimination as structural rather than exclusively individual. Transfeminism supplies the conceptual bridge between women's subordination and the regulation of transgender and gender-diverse lives by demonstrating how both may arise through shared structures of patriarchal gender enforcement while decolonial feminist theory interrogates the historical formation of those categories and their relationship to coloniality.

The framework does not seek to dissolve the category of women. Nor does it claim that all persons experience patriarchy in the same manner. Women may remain structurally subordinated as women while other persons are differently positioned and disciplined within the same gender order. The conceptual question is not whether women's experiences and those of transgender, intersex or nonbinary persons are identical, but whether the discriminatory mechanisms affecting them may derive from a common system of gender hierarchy and regulation.

The Independent Expert's 2023 report on colonialism and SOGI is important within this framework because it demonstrates that the relationship between coloniality and contemporary sexual and gender regulation has entered the discourse of the UN human rights system itself.¹⁴ Indigenous and culturally specific gender histories are used with corresponding caution. They do not provide legal definitions to be imported into CEDAW, and they are not treated as historical equivalents of contemporary transgender identities. Their theoretical significance lies instead in demonstrating the contingency of binary classifications that modern legal systems frequently take for granted.

The framework performs an analytical rather than law-making function. It explains why discrimination against gender-diverse persons may be structurally connected to CEDAW's equality project. The VCLT determines whether that structural argument can legally be accommodated within the Convention.

Positionality

I am a transpinay, or transgender Filipino woman, and a human rights advocate whose professional work has included engagement with CEDAW sessions and other United Nations human rights mechanisms. When I first encountered CEDAW General Recommendation No 28 in 2020, its recognition of sexual orientation and gender identity as factors intersecting with discrimination against women was formative in my understanding that CEDAW could provide a framework for recognising the rights of transgender women, including women like myself. That encounter later prompted a broader question: whether, and on what legal basis, the Convention's protections might extend beyond transgender women to transgender, nonbinary, intersex and other gender-diverse persons who experience discrimination rooted in the same sex- and gender-based structures. This positionality informs both the selection of the research question and the decolonial transfeminist perspective through which it is examined.

At the same time, I recognise that my personal and professional commitments to transgender rights shape the questions I ask and the interpretive possibilities I explore. In this thesis, I ground my analysis in the Convention, the VCLT and the documented practice of the CEDAW Committee.

Structure of the Thesis

The thesis proceeds from the doctrinal framework of evolutive treaty interpretation, to a decolonial transfeminist account of gender hierarchy, and finally to an analysis of contemporary CEDAW Committee practice, before drawing these strands together in the conclusion.

¹⁴ UNGA (n 1).

Chapter 1: Evolutive Interpretation and the Subject-Group Objection

Introduction

The central question of this thesis presents an unusual problem of treaty interpretation. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a group-specific human rights treaty whose text is expressly directed towards eliminating discrimination against women.¹⁵ Yet contemporary CEDAW Committee practice increasingly engages transgender, intersex, nonbinary and other gender-diverse persons, including through formulations that are not confined to transgender or intersex women. This poses a question whether particular Convention protections may extend beyond the group expressly identified in the treaty without transforming interpretation into amendment.

This chapter establishes the doctrinal framework through which that question will be assessed. It does not attempt to demonstrate that discrimination against women and harms experienced by gender-diverse persons necessarily arise from a common gender structure. That conceptual question is developed through the decolonial transfeminist framework in Chapter 2. Nor does this chapter determine whether the CEDAW Committee has in fact extended Convention protection beyond women. That question is examined through the Committee's contemporary practice in Chapter 3.

The task here is to ask how international law permits an interpreter to do with a human rights treaty whose application develops over time, while taking seriously the particular constraint created by CEDAW's women-centred character. The chapter first sets out the applicable rules of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT), including the relationship between text, context, object and purpose; systemic integration; preparatory work; and the interpretive significance of CEDAW Committee outputs. It then examines evolutive interpretation in general international law and human rights law. Particular attention is given to the distinction between the evolution of the application of treaty obligations and the alteration of a treaty's protected subject. The final section develops the subject-group objection and identifies criteria through which the Committee practice examined later in this thesis may be assessed against the boundary between interpretation and amendment.

Treaty Interpretation under the VCLT

Article 31(1): Text, Context, Object and Purpose

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 1

The interpretation of CEDAW is governed by the customary rules of treaty interpretation codified in Articles 31 and 32 VCLT.¹⁶ Article 31(1) provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose.¹⁷ These elements do not constitute separate or hierarchically ordered tests. The International Law Commission (ILC), in its commentary on the draft articles that became the VCLT, described treaty interpretation as a single combined operation in which the relevant elements interact.¹⁸

This integrated character of Article 31 is particularly important for the present inquiry. The ordinary meaning of “women” cannot simply be displaced by invoking the Convention’s object and purpose. Equally, the textual references to women cannot be interpreted in isolation from the substantive obligations contained in the Convention and the purpose those obligations serve. CEDAW is unambiguously women-centred. Article 1 defines discrimination against women, while its operative provisions require States parties to eliminate discrimination against women across political, economic, social, cultural and other fields.¹⁹ The specificity of women as the Convention’s central protected group is a constitutive feature of the treaty and must remain part of any interpretation undertaken under Article 31.

At the same time, the Convention addresses more than formal differential treatment. Article 5(a), for example, requires States parties to modify social and cultural patterns of conduct with a view to eliminating prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either sex or on stereotyped roles for men and women.²⁰ The provision addresses social and institutional arrangements through which gendered inequality is reproduced. The Committee has likewise interpreted discrimination under the Convention as encompassing direct and indirect discrimination and as operating through intersecting forms of discrimination.²¹ These two features of CEDAW create the interpretive tension at the centre of this thesis. The Convention is directed specifically towards women, while some of the obligations through which it pursues women’s substantive equality regulate social and institutional structures of sex and gender. The question then becomes, and under what conditions, the contemporary application of

¹⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 31–32.

¹⁷ *ibid* art 31(1).

¹⁸ International Law Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) II *Yearbook of the International Law Commission* 187, 219–20; Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 161–70.

¹⁹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) preamble and arts 1–3.

²⁰ *ibid* art 5(a); Alexandra Timmer and Rikki Holtmaat, ‘Article 5’ in Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A Freeman (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary* (2nd edn, OUP 2022) 221–56.

²¹ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28, paras 16, 18.

those obligations may have protective consequences beyond women without displacing women from the Convention's centre.

Article 31(3)(c) VCLT requires that, together with the context, account be taken of “any relevant rules of international law applicable in the relations between the parties”.²² The provision reflects the principle that a treaty is interpreted as part of the international legal system rather than as an entirely self-contained instrument.²³ This is potentially relevant to CEDAW because international human rights law has developed considerably since the Convention was adopted. Sexual orientation and gender identity have increasingly been recognised within equality and non-discrimination jurisprudence, while international and regional human rights bodies have developed their understanding of bodily autonomy, legal gender recognition and discrimination based upon sex and gender.²⁴

Article 31(3)(c), however, has limits. It does not authorise an interpreter to import any norm, judgment or policy development from another human rights system merely because it appears progressive or analogous.²⁵ The rule invoked must be a relevant rule of international law applicable in the relations between the parties.²⁶ Regional jurisprudence may therefore illuminate broader developments in human rights reasoning, but it does not automatically become part of CEDAW's meaning through systemic integration. For this thesis, Article 31(3)(c) performs a function as it confirms that CEDAW is interpreted within an international legal environment whose understanding of gender and discrimination has developed.

Article 32 and Original Expectations

Article 32 VCLT permits recourse to supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of its conclusion, to confirm a meaning resulting from Article 31 or to determine meaning where the Article 31 process leaves the meaning ambiguous, obscure or manifestly absurd or unreasonable.²⁷ The provision is significant because one objection to an interpretation extending CEDAW protection beyond women is historical. CEDAW was negotiated during the 1970s within an international legal order largely organised around binary classifications of women and men. Its text does not contain contemporary

²² VCLT (n 1) art 31(3)(c).

²³ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 280–81, 290–310.

²⁴ *Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Inter-American Court of Human Rights, Series A No 24 (24 November 2017) paras 68–71, 85–87; *A.P., Garçon and Nicot v France* App nos 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017) paras 92–95; *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR [GC], 11 July 2002) paras 74–75, 85, 90–93.

²⁵ International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (Report of the Study Group of the ILC, 2006) UN Doc A/CN.4/L.682, paras 17–19.

²⁶ VCLT (n 1) art 31(3)(c); McLachlan (n 8) 290–310.

²⁷ VCLT (n 1) art 32; Gardiner (n 3) 347–81.

terminology concerning transgender, nonbinary or gender-diverse persons, and its drafting history cannot reasonably be expected to reveal an intention specifically to extend Convention protection to these groups.

The Interpretive Significance of CEDAW Committee Outputs

The CEDAW Committee's General Recommendations and Concluding Observations constitute central materials for this thesis. Their interpretive significance must be distinguished from that of the treaty itself and from subsequent practice attributable to States parties.

The CEDAW Committee's pronouncements occupy a distinct position within the interpretive framework of the Convention. They do not amend the treaty, nor are they binding judicial decisions equivalent to judgments of the International Court of Justice. At the same time, they cannot be treated as merely non-binding external commentary. The Committee is a treaty-established expert body entrusted with monitoring the implementation of CEDAW, and Article 21(1) expressly empowers it to make suggestions and general recommendations based on its examination of reports and information submitted by States parties. Its General Recommendations, individual communications and Concluding Observations therefore possess interpretive significance arising from the Committee's specialised mandate under the Convention. The weight accorded to a particular pronouncement will nevertheless depend upon its legal form, reasoning, consistency with the Convention and the circumstances in which it was adopted.²⁸

This institutional authority should be distinguished from the concept of subsequent practice under Article 31(3)(b) VCLT. That provision concerns practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The pronouncement of the Committee is therefore not, by virtue of its issuance alone, subsequent practice of the States parties.

The International Law Commission addressed this distinction in its 2018 Conclusions on Subsequent Agreements and Subsequent Practice. Conclusion 13 recognises that the relevance of a pronouncement of an expert treaty body is subject to the applicable rules of the treaty, while expressly preserving the contribution that such pronouncements make to treaty interpretation under their mandates. It further provides that such pronouncements may give rise to, or refer to, subsequent agreement or subsequent practice by States parties, but that a State's silence cannot be presumed to constitute acceptance of the interpretation expressed by the treaty body.²⁹

²⁸ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), arts 17–21, especially art 21(1).

²⁹ International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (2018) II(2) *Yearbook of the International Law Commission*, conclusion 13, paras 1–4.

Accordingly, this thesis treats CEDAW Committee practice neither as binding law nor as automatic evidence of subsequent agreement among States parties. Rather, it is examined as an authoritative interpretive practice of the Convention's designated expert body, whose significance must be assessed in light of the Committee's mandate, the reasoning and consistency of the relevant pronouncements, their relationship to the text and structure of CEDAW, and any subsequent responses by States parties. This distinction is particularly important where the thesis asks whether recurring Committee recommendations concerning transgender, intersex, nonbinary and other gender-diverse persons represent an emerging interpretation of the Convention's existing obligations.

The CEDAW Committee's outputs remain significant because they record how the expert body established under the Convention understands and applies its provisions in concrete contexts. Their interpretive weight may depend on factors including their reasoning, consistency, relationship with the text and other Committee jurisprudence, and the responses of States parties.

The method adopted in this thesis therefore avoids treating every Committee reference to a transgender or intersex person as proof that CEDAW's beneficiary class has expanded. Instead, Chapter 3 examines the normative character of the Committee's engagement: whether a passage merely acknowledges a particular group; expresses concern regarding a situation affecting that group; directs the State party to take action; or expressly connects such action to a Convention provision, General Recommendation or identifiable CEDAW obligation.

Committee practice can thus provide evidence of an emerging interpretive trajectory. Whether that trajectory represents a legally defensible evolutive application of the Convention remains a separate question to be tested under the VCLT.

Evolutive Interpretation

Evolutive Interpretation in General International Law

Evolutive, evolutionary or dynamic interpretation refers broadly to the interpretation or application of treaty language in light of conditions and legal understandings developing after the treaty's conclusion.³⁰ It is not a licence to update any treaty according to contemporary preferences. Its legitimacy remains grounded in the ordinary rules of treaty interpretation. The ILC expressly recognises the possibility that treaty terms may have meanings capable of evolving over time. Conclusion 8 of its 2018 Conclusions provides that subsequent agreements and subsequent practice may assist in determining whether the presumed intention of the parties was to give a treaty term a meaning capable of evolution.³¹ The ILC formally adopted Conclusion 8 under the title "Interpretation of treaty terms as capable of evolving over time".

³⁰ Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 1–5, 55–60; Gardiner (n 3) 290–96.

³¹ International Law Commission (n 11) conclusion 8, paras 1–3.

International Court of Justice jurisprudence provides the principal doctrinal foundation for this approach. In the Namibia Advisory Opinion, the Court held that concepts contained in Article 22 of the Covenant of the League of Nations were “by definition evolutionary” and that their interpretation could not remain unaffected by subsequent developments in international law.³² In Aegean Sea Continental Shelf, the Court considered whether the expression “territorial status” in a 1928 instrument extended to disputes concerning the continental shelf. The Court treated the expression as a generic term and considered that its meaning was capable of following subsequent developments in international law.³³

The Court gave a more systematic account in Dispute regarding Navigational and Related Rights (*Costa Rica v Nicaragua*). In interpreting the word “commerce” in an 1858 treaty, it considered whether a treaty term could be understood according to its present-day meaning. The Court identified the use of a generic term, awareness that its meaning was capable of evolution, and the continuing duration of the treaty as relevant considerations supporting an evolutionary interpretation.³⁴ The cases demonstrate that treaty interpretation is not invariably tied to the specific factual referents attached to words when a treaty was adopted. They also demonstrate that evolution is constrained: the interpreter must identify a legitimate connection between the treaty language and its contemporary application.

What May Evolve? Terms, Obligations and Contemporary Application

The ICJ jurisprudence creates an immediate difficulty for the present thesis. Much of the classic case law concerns generic terms: expressions deliberately or inherently capable of encompassing circumstances that change over time. The word “women” is not easily assimilated to that category. It identifies the particular group around which the Convention is organised. The thesis therefore does not depend upon the proposition that the ordinary meaning of “women” has evolved so extensively that transgender men, nonbinary persons or all intersex persons can themselves simply be subsumed within that term. Such an approach would evade rather than resolve the subject-group problem. The relevant evolutionary movement is better located in the contemporary application and substantive content of existing Convention obligations.

Locating the evolutionary development in the application of an obligation rather than in the meaning of “women” requires an important distinction. Contemporary application does not permit the interpreter simply to replace the group identified by the treaty with a wider beneficiary class. Rather, the question is whether the factual circumstances and regulatory structures giving rise to a particular harm fall within the substantive field governed by an existing Convention obligation.

³² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 31–32, para 53.

³³ *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, paras 77–80.

³⁴ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, paras 63–66.

A treaty obligation may regulate a practice, institution or social structure whose operation is not necessarily exhausted by the identity of the group around which the treaty is organised. The performance of such an obligation may have protective consequences for persons beyond that central group without necessarily establishing that those persons have become general rights holders under every provision of the treaty. This is a narrower proposition than altering the meaning of “women” or substituting a new beneficiary class for the one identified in CEDAW.

CEDAW makes this distinction particularly relevant because several of its obligations address structures and practices through which women’s inequality is reproduced. Article 5(a), for example, regulates prejudices and stereotyped social and cultural patterns, while other provisions address discrimination in institutions such as education and health. The fact that an obligation operates upon a structure does not make its scope universal. Any protective consequence beyond women must still be demonstrated through the text, context and purpose of the relevant provision and must remain compatible with the Convention’s overarching commitment to eliminating discrimination against women.

This distinction avoids two problematic claims. First, it does not require the term “women” to lose its legal significance. Second, it does not require CEDAW’s object and purpose itself to change. Rather, it recognises that the forms through which discrimination operates, and consequently the measures required to eliminate it, may be understood differently as social and legal knowledge develops. CEDAW’s own interpretive history demonstrates such development. Gender-based violence is nowhere expressly identified in the text of the Convention. Nevertheless, General Recommendation No 19 recognised gender-based violence as a form of discrimination that seriously inhibits women’s enjoyment of rights and freedoms on a basis of equality with men.³⁵ General Recommendation No 28 later elaborated the concepts of sex- and gender-based discrimination and intersectionality, identifying sexual orientation and gender identity among the factors that may intersect with discrimination against women.³⁶

Neither development required the textual amendment of the Convention. Instead, the Committee articulated the contemporary substantive implications of obligations already contained within it. The harder question examined by this thesis is whether a comparable process can sometimes produce protective consequences for a person who is not a woman. Article 5(a) illustrates why the question cannot be dismissed immediately. The obligation targets social and cultural patterns, prejudices and stereotyped roles. The object of the State obligation is therefore a structure or practice of gender regulation, even though the provision sits within a Convention whose overarching beneficiary class remains women.

³⁵ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 19: Violence against Women’ (1992) UN Doc A/47/38, paras 6–7.

³⁶ CEDAW Committee, General Recommendation No 28 (n 6) para 18.

The possibility that such obligations may have protective implications beyond women must be demonstrated. It requires identifying what the relevant Convention obligation regulates, how the harm experienced by the person is connected to that obligation, and whether applying the obligation in this way preserves rather than substitutes the Convention's women-centred mandate. This will be further discussed in Chapters 2 and 3.

Evolutionary Interpretation in Human Rights Law

Human Rights Treaties as Living or Dynamic Instruments

Evolutionary interpretation has particular significance in human rights law because human rights instruments are intended to govern continuing relationships between States and individuals across changing social conditions. The European Court of Human Rights gave the principle its most familiar formulation in *Tyrer v United Kingdom*, describing the European Convention on Human Rights as a “living instrument” that must be interpreted in light of present-day conditions.³⁷

More significantly for this thesis, the concept also appears within the United Nations treaty-body system. In *Judge v Canada*, the Human Rights Committee reconsidered its earlier jurisprudence concerning removal of an individual to face the death penalty. While emphasising the need for consistency, the Committee considered that its interpretation could respond to significant developments in factual and legal circumstances and stated that the ICCPR “should be interpreted as a living instrument” whose rights must be applied in context and in light of present-day conditions.³⁸

The CEDAW Committee has expressly employed comparable language. In General Recommendation No 25 it stated that CEDAW is a “dynamic instrument” and observed that progressive thinking since 1979 had contributed to clarification and understanding of the substantive content of its provisions and the nature of discrimination against women.³⁹ The proposition that CEDAW is capable of dynamic application is therefore not controversial. What remains contested is the permissible extent of that dynamism.

SOGI and the Development of Existing Human Rights Guarantees

The development of international human rights protection in relation to sexual orientation and gender identity illustrates how older treaty guarantees may be applied to circumstances or identities

³⁷ *Tyrer v United Kingdom* (1978) Series A no 26, para 31.

³⁸ Human Rights Committee, *Roger Judge v Canada*, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998 (5 August 2003) para 10.3.

³⁹ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures’ (2004) UN Doc A/59/38, annex I, para 3.

not expressly named in the treaty text. In *Toonen v Australia*, the Human Rights Committee held that the reference to “sex” in Articles 2(1) and 26 ICCPR was to be understood as including sexual orientation.⁴⁰ The decision concerned an instrument whose text did not expressly enumerate sexual orientation, yet the Committee treated discrimination on that ground as falling within existing Covenant protections. The European Court’s judgment in *Christine Goodwin v United Kingdom* provides a further example. Revisiting its earlier case law concerning transgender persons, the Court attached significance to changing social, medical and legal conditions and to an international trend towards recognition of the gender identity of transgender persons. It ultimately held that the United Kingdom’s failure to recognise the applicant’s legal gender violated Article 8 of the European Convention on Human Rights.⁴¹ These cases are relevant as they demonstrate that the fact that a particular rights claim was not expressly contemplated when a human rights treaty was adopted does not, without more, render its later recognition an amendment.

The Decisive Distinction: Grounds and Protected Subjects

Most well-known developments concerning sexual orientation and gender identity under general human rights instruments involve the expansion or contemporary interpretation of prohibited grounds of discrimination or the application of universally held rights. They do not generally involve expanding a closed class of treaty beneficiaries. The ICCPR illustrates this distinction clearly. Article 2 requires States parties to respect and ensure Covenant rights to all individuals within their territory and subject to their jurisdiction. Article 26 guarantees all persons equality before the law and equal protection of the law.⁴² Gay men did not need *Toonen* to establish that they were persons protected by the ICCPR. The interpretive issue concerned whether sexual orientation fell within the Covenant’s non-discrimination framework.

CEDAW has a different structure. Article 1 specifically defines discrimination against women, and the Convention was adopted as a specialised response to women’s inequality. The beneficiary group is therefore integral to the instrument’s architecture. Accordingly, *Toonen*, *Goodwin* and living-instrument jurisprudence establish that human rights guarantees may develop in response to contemporary understandings of sexual orientation and gender identity. They do not establish that the beneficiary class of a group-specific treaty may automatically be expanded through the same method.

This distinction is central to the originality and difficulty of the present inquiry. The question is whether particular obligations within a treaty centred upon women can generate protection beyond

⁴⁰ Human Rights Committee, *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) para 8.7.

⁴¹ *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR [GC], 11 July 2002) paras 74–75, 85, 100.

⁴² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2(1), 26.

women while remaining faithful to the treaty's text and structure. This thesis refers to that interpretive difficulty as the "subject-group objection."⁴³

The Subject-Group Objection

Textual and Structural Basis of the Objection

The subject-group objection can be stated straightforwardly: CEDAW is a Convention concerned with discrimination against women, and treaty interpretation cannot transform it into a Convention protecting persons who are not women. The objection has a strong textual foundation. Article 1 defines "discrimination against women", and the Convention's operative provisions repeatedly direct States parties to eliminate discrimination against women and secure women's equality with men. The Oxford Commentary describes discrimination against women as the core concept running through the Convention's overall scheme and provisions.⁴⁴ The objection also has a structural foundation. CEDAW's specialised character responds to the inadequacy of formally universal human rights norms in addressing the particular and systemic discrimination experienced by women. Its focus upon women therefore cannot simply be characterised as an incidental drafting choice.

An interpretation that replaced "women" with "all persons" would fundamentally alter that architecture. It would risk transforming a specialised women's rights treaty into a general instrument against discrimination based upon sex, gender, gender identity or gender expression. The subject-group objection therefore identifies a genuine interpretive boundary. The question is whether every protective application of CEDAW to a person beyond women necessarily crosses it.

Protection of Women and the Question Beyond Women

A distinction is necessary between the inclusion of transgender women within CEDAW and the more difficult question concerning persons who are not women. The Committee has already addressed the former. In *Flamer-Caldera v Sri Lanka*, it stated that the Convention applies to all women, including lesbian, bisexual, transgender and intersex women.⁴⁵

⁴³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), arts 1–3, 5; Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20(2) *Columbia Journal of Gender and Law* 98, 98–101; Berta Esperanza Hernández-Truyol, 'Unsex CEDAW? No! Super-Sex It!' (2011) 20(2) *Columbia Journal of Gender and Law* 195, 195–201.

⁴⁴ Andrew Byrnes and Puja Kapai, 'Article 1' in Patricia Schulz, Ruth Halperin-Kaddari, Beate Rudolf and Marsha A Freeman (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary* (2nd edn, OUP 2022) 79–108;

⁴⁵ Committee on the Elimination of Discrimination against Women, *Rosanna Flamer-Caldera v Sri Lanka*, Communication No 134/2018, UN Doc CEDAW/C/81/D/134/2018 (21 February 2022) para 9.7.

For purposes of the present thesis, this is not the principal interpretive difficulty. A transgender woman claiming protection under CEDAW does not necessarily require expansion of the beneficiary class beyond women. Her claim may instead involve the intersectional application of the Convention to a woman whose experience of discrimination is also shaped by gender identity. The more difficult issue concerns formulations addressing transgender persons, transgender men, nonbinary persons, gender-diverse persons and intersex persons who are not women. Here, the individual cannot plausibly be brought within CEDAW simply by applying the existing category of women more inclusively.

This distinction has methodological consequences for Chapter 3. Committee recommendations confined to transgender women or LGBTI women provide important background concerning CEDAW's intersectional application but do not, by themselves, establish protection beyond women. The more probative material consists of instances in which the Committee identifies or directs State action towards gender-diverse persons without limiting the relevant beneficiary to women.

Scholarly Responses

Existing scholarship offers competing approaches to the relationship between CEDAW's women-centred character and wider structures of gender discrimination.

Darren Rosenblum's *Unsex CEDAW* offers the most extensive challenge to the Convention's exclusive focus upon women as a beneficiary class. Rosenblum argues that the category of women may limit CEDAW's capacity to confront wider structures of sex and gender inequality and proposes reorienting the Convention towards sex and gender discrimination more broadly.⁴⁶ His argument exposes a central problem relevant to this thesis: whether protecting an identity category and regulating the structure that subordinates that category necessarily have identical boundaries. Rosenblum's proposal, however, goes further than the argument tested here. The present thesis does not seek to replace women as CEDAW's central subject. Berta Esperanza Hernández-Truyol's response illustrates the countervailing concern. While accepting that sex and gender discrimination extends beyond women, she rejects the proposal to abandon women as a legally significant category, emphasising the continuing structural necessity of women-specific protection.⁴⁷ This concern is particularly important in assessing any interpretation of CEDAW: inclusion cannot come at the cost of obscuring the material and structural discrimination that justified the Convention's adoption.

⁴⁶ Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20(2) *Columbia Journal of Gender and Law* 98.

⁴⁷ Berta Esperanza Hernández-Truyol, 'Unsex CEDAW? No! Super-Sex It!' (2011) 20(2) *Columbia Journal of Gender and Law* 195.

Giovanna Gilleri offers a narrower route from within the Convention itself. Focusing upon Article 5(a), Gilleri argues that its prohibition of harmful gender stereotyping may protect all gendered individuals affected by the hierarchies the provision requires States to dismantle.⁴⁸ Unlike an approach that redefines “women”, this argument locates possible wider protection in the operation of a particular substantive obligation. Gilleri’s interpretation nevertheless raises the same limiting question at another level. Article 5 exists within a Convention directed towards eliminating discrimination against women. Its broad and transformative character does not necessarily make it a freestanding universal prohibition against every form of gender stereotyping. The Oxford Commentary describes Article 5 as both substantive and transversal and as a significant legal basis for transformative gender equality, while locating it firmly within the architecture of CEDAW.⁴⁹ The competing scholarship therefore does not resolve the interpretation/amendment boundary. Instead, it identifies the two considerations that must be held together: the continuing specificity of women as the Convention’s central protected group and the structural reach of substantive provisions such as Article 5.

Interpretation or Amendment: Criteria for Assessment

The VCLT distinguishes treaty interpretation from treaty amendment. Articles 39 and 40 regulate amendment by agreement of the parties.⁵⁰ Evolutive interpretation cannot be used to circumvent that process by replacing the basic terms of a treaty with a substantially different instrument. The difficulty lies in determining when contemporary application becomes substitution. For the purposes of this thesis, four considerations provide a framework for making that assessment.

First, the claimed protection must possess a textual or normative foothold within CEDAW. It is insufficient to argue merely that extending protection would be desirable or consistent with contemporary values. The relevant harm must be connected to an existing Convention provision or obligation. Article 5(a), for example, may provide such a foothold where the relevant harm concerns enforcement of gender stereotypes. Other contexts may engage equality in education, health, freedom from gender-based violence, legal capacity or access to remedies.

Second, there must be a demonstrable relationship between the harm and the sex- and gender-based structures regulated by the relevant Convention obligation. The identity of the claimant as transgender, intersex, nonbinary or gender-diverse cannot by itself establish a CEDAW nexus. The analysis must identify what produces the discrimination and why that structure falls within the substantive concern of the Convention. Chapter 2 develops the conceptual tools through which this relationship can be examined; it does not presume that the relationship exists in every case.

⁴⁸ Giovanna Gilleri, ‘Women, and All of Us: Article 5(a) CEDAW as a Protection for All Gendered Individuals’ (2024) 15(2) *European Journal of Legal Studies* 137, 137–71.

⁴⁹ Timmer and Holtmaat (n 5) 221–56.

⁵⁰ VCLT (n 1) arts 39–40.

Third, the interpretation must preserve CEDAW's women-centred mandate. An interpretation that simply substitutes "all persons" for "women", or converts CEDAW into a comprehensive treaty against every form of SOGIESC discrimination, would be difficult to reconcile with the text and specialised structure of the Convention. Protection beyond women must therefore coexist with, rather than displace, the Convention's particular commitment to eliminating discrimination against women.

Fourth, the claimed extension must remain supportable through recognised methods of treaty interpretation. Theoretical approaches may illuminate the operation of gender hierarchy, expose assumptions embedded in legal categories and assist in understanding the social structures to which CEDAW obligations apply. They cannot themselves create treaty obligations. The legal conclusion must remain grounded in the VCLT, the text and structure of CEDAW, and the legally appropriate weight accorded to Committee practice and other relevant materials.

These considerations are not a mechanical four-part test capable of producing an automatic answer. They provide criteria for evaluating the strength of an interpretive claim. Their purpose is to make clear what would need to be demonstrated before protection of a person beyond women could plausibly be characterised as an application of CEDAW rather than amendment of it.

They also establish the relationship between the remaining chapters. Chapter 2 provides the decolonial transfeminist concepts through which the asserted structural relationship between discrimination against women and gender-diverse harms can be interrogated. Chapter 3 then examines whether the Committee's actual recommendations disclose such relationships and whether their legal framing supplies the required Convention foothold.

Conclusion

CEDAW's description as a dynamic instrument does not answer the question of who may fall within its protective reach. Evolutive interpretation is recognised within general international law and international human rights law, and the jurisprudence of the ICJ and Human Rights Committee demonstrates that treaty obligations are not necessarily confined to the precise circumstances envisaged when their texts were adopted. The CEDAW Committee's own General Recommendation No 25 similarly recognises the capacity of the Convention's substantive content to develop over time.

The group-specific structure of CEDAW nevertheless creates a distinct limit. Developments such as Toonen largely concern the contemporary interpretation of rights held universally or the recognition of additional prohibited grounds. Extending a specialised treaty's protective consequences to a person beyond its expressly identified group raises a different problem.

The doctrinal inquiry should therefore not be framed as whether the term “women” can evolve until all gender-diverse persons are incorporated within it. Nor is it necessary to contend that CEDAW’s object and purpose itself changes over time. The more defensible question is whether existing Convention obligations are capable of contemporary application to harms experienced by persons beyond women where those harms fall within the structures or practices regulated by the relevant obligation. Such an application is neither automatically permitted nor automatically excluded. Its defensibility depends upon a Convention-based textual or normative foothold; a demonstrable relationship between the relevant harm and the sex- and gender-based structures regulated by CEDAW; preservation of the Convention’s women-centred mandate; and consistency with recognised methods of treaty interpretation.

Chapter 2 develops a decolonial transfeminist analytical framework capable of asking how gender hierarchy, legal classification and coloniality operate, and whether discrimination against women and harms experienced by gender-diverse persons may in particular circumstances be structurally connected. Chapter 3 then tests these doctrinal and theoretical tools against the Committee’s contemporary practice.

Chapter 2: A Decolonial Transfeminist Analytical Framework

Introduction

Chapter 1 established the doctrinal parameters for assessing whether particular protections under CEDAW may extend beyond women through evolutive interpretation. In particular, it identified the need for an interpretation to remain grounded in an existing Convention obligation, to demonstrate a relevant relationship between the harm under consideration and the sex- and gender-based structures regulated by CEDAW, to preserve the Convention's women-centred mandate, and to remain consistent with recognised methods of treaty interpretation. This chapter addresses a different question. It develops the conceptual tools through which the relationship between discrimination against women and harms experienced by transgender, intersex, nonbinary and other gender-diverse persons can be examined. Its purpose is not to establish that these harms necessarily arise from the same structures, nor to determine that CEDAW legally protects persons beyond women. Those propositions are tested through the Committee's practice in Chapter 3.

The framework is decolonial and transfeminist in orientation. It draws upon three related bodies of thought. First, substantive equality and intersectionality direct attention away from formal identity alone and towards the social structures that produce disadvantage. Second, transfeminist and selected queer approaches interrogate the regulation of gender boundaries and the categories through which law renders gendered subjects intelligible. Third, decolonial feminist theory questions the apparent universality of those categories by locating modern binary understandings of sex and gender within histories of coloniality. Taken together, these approaches provide an analytical lens through which the Committee's references to gender-diverse persons can be examined without predetermining their legal significance.

Substantive Equality and Intersectionality

Feminist legal theory has long challenged the proposition that equality can be achieved simply by treating formally comparable individuals alike. MacKinnon's dominance critique, for example, shifts attention from difference towards power and asks how legal standards themselves may reflect and reproduce gender hierarchy.⁵¹ For the purposes of this thesis, the broader importance of this critique lies in treating discrimination as a problem of structures and institutions rather than only isolated unequal acts. Sandra Fredman's account of substantive equality provides a more directly useful analytical framework. Fredman argues that equality requires attention to disadvantage, stigma, exclusion and structural inequality rather than formal consistency of treatment alone.⁵² This approach changes the question asked of discrimination. Rather than

⁵¹ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 161–70, 220–24.

⁵² Sandra Fredman, *Discrimination Law* (3rd edn, OUP 2023) 29–30.

beginning solely with who possesses a protected identity, substantive equality also asks what produces the disadvantage, how institutions maintain it and what transformation may be necessary to address it.

This structural orientation is important to the present inquiry, but it does not itself resolve CEDAW's scope. That transgender or nonbinary persons experience structural disadvantage does not establish that their disadvantage falls within a Convention directed towards eliminating discrimination against women. Substantive equality performs a more limited function: it provides a conceptual basis for examining the mechanisms producing the harm, rather than treating the formal identity of the affected person as the only analytically relevant fact.

Intersectionality adds a second dimension to this inquiry. Crenshaw developed intersectionality in response to the failure of conventional anti-discrimination law to recognise harms experienced by Black women when race and sex were treated as separate and mutually exclusive categories.⁵³ The framework demonstrates that structures of disadvantage may operate simultaneously and relationally, producing experiences that cannot adequately be understood by separating the relevant grounds of discrimination.⁵⁴

Intersectionality has particular significance within CEDAW because it has been incorporated into the Committee's own understanding of discrimination. General Recommendation No 28 recognises that discrimination against women is “inextricably linked” with other factors, expressly including sexual orientation and gender identity.⁵⁵ The relevance of GR28 to the present framework must nevertheless be stated carefully. It establishes the intersectional application of CEDAW to women; it does not by itself establish that persons beyond women are Convention rights holders. Its theoretical significance is different: it demonstrates that the operation of sex- and gender-based discrimination cannot necessarily be understood through a single axis or through an abstract conception of women detached from other structures of power.

Substantive equality and intersectionality therefore supply the first analytical move of this framework. When the Committee addresses a transgender, intersex or gender-diverse person, the inquiry does not stop at determining the person's identity. It also asks what social, institutional or gendered structure produces the disadvantage identified by the Committee.

Gender Regulation and the Terms of Legal Recognition

⁵³ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *University of Chicago Legal Forum* 139, 140–43.

⁵⁴ Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241, 1244–45.

⁵⁵ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28, para 18.

From Stable Categories to Gender Regulation

A structural account of discrimination still leaves unresolved the categories through which law understands gender. Selected insights from queer theory are useful here because they interrogate the apparent stability of categories such as sex, women, men and gender. Judith Butler's account of gender performativity challenges the assumption that gender simply expresses a pre-existing and stable inner truth. Gender is instead produced and sustained through repeated norms and practices that generate the appearance of naturalness.⁵⁶ For this thesis, Butler's relevance is not that CEDAW's category of women should consequently be abandoned. Rather, her critique cautions against treating legal categories as merely descriptive. Categories also participate in determining which forms of gender become socially and legally intelligible.

Dianne Otto develops a related critique within international law. Otto identifies the persistence of a binary gender subject within international legal discourse and examines how recognition of gender diversity may remain conditioned upon accommodation within already intelligible categories.⁵⁷ This introduces a question that is particularly relevant to a treaty organised around women: when a legal institution recognises a gender-diverse person, what does that recognition require the person to become within law? The framework retains queer theory for a limited purpose. It does not seek to dissolve women as a legally meaningful category. Instead, it denaturalises the assumption that the binary classifications through which law organises gender are neutral descriptions of an underlying social reality. Transfeminist analysis then shifts the inquiry from the instability of categories towards the material consequences of their enforcement.

Transfeminism and the Regulation of Gender Boundaries

Transgender scholarship provides a standpoint from which the operation of gender norms can be examined. Susan Stryker positions transgender experience not merely as an object of legal or social exclusion but as a site of knowledge capable of revealing the force required to sustain norms of gender intelligibility.⁵⁸ This perspective is particularly useful for analysing situations in which violence, exclusion or institutional regulation occurs because an individual's body, identity or expression does not conform to expected relationships between sex and gender. Transfeminism makes the relationship with feminist analysis more explicit. Emi Koyama's Transfeminist Manifesto locates trans women's liberation within a wider feminist challenge to restrictive gender

⁵⁶ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 33–34; Judith Butler, *Undoing Gender* (Routledge 2004) 2–4.

⁵⁷ Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 299, 300–07.

⁵⁸ Susan Stryker, 'My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage' (1994) 1(3) *GLQ: A Journal of Lesbian and Gay Studies* 237, 238–39; Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Routledge 2006) 1–17.

roles while simultaneously insisting upon individual autonomy in defining gender identity.⁵⁹ Julia Serano's analysis of transmisogyny further directs attention to the relationship between hostility towards trans femininity, the devaluation of femininity and the policing of gender boundaries.⁶⁰

These approaches do not require the experiences of women and all gender-diverse persons to be treated as identical. Nor do they establish, in advance, that every harm experienced by a transgender person derives from the same structure that produces discrimination against women. Their contribution is to make gender regulation available as an object of inquiry.

From this perspective, the relevant analytical questions include how femininity and masculinity are valued; how particular relationships between bodies, gender identities and social roles are prescribed; how departures from those expectations are sanctioned; and whether those sanctions participate in maintaining a broader gender hierarchy. This distinction also matters for intersex persons. Intersex status should not be collapsed into transgender identity or treated simply as another form of gender identity. The relevance of the framework arises instead where intersex persons are subjected to practices aimed at requiring bodies to conform to binary classifications of sex. The theoretical inquiry is therefore directed towards the regulation of sexed embodiment and binary norms, rather than towards assuming a common identity among the persons concerned.

Critical Trans Politics and the Limits of Recognition

Dean Spade introduces a further caution concerning legal inclusion. Spade argues that formal rights, anti-discrimination provisions and legal recognition may leave intact administrative and institutional arrangements that distribute vulnerability and disadvantage.⁶¹ His intervention moves analysis beyond the binary question of whether a person is formally included or excluded and towards the terms and effects of legal recognition. For the purposes of this thesis, Spade does not provide an argument against recognising gender-diverse persons within human rights law. His work instead generates questions for analysing Committee practice. Where CEDAW refers to gender-diverse persons, does recognition require them to be assimilated into a category already legible to the Convention? Does the Committee address the structure producing the relevant disadvantage, or only recognise the individual's identity? What forms of inequality remain invisible even when formal recognition is achieved?

Spade thereby complements Otto's critique of legal intelligibility and the transfeminist focus on gender regulation. Together, these approaches direct attention not only to whether gender-diverse

⁵⁹ Emi Koyama, 'The Transfeminist Manifesto' in Rory Dicker and Alison Piepmeier (eds), *Catching a Wave: Reclaiming Feminism for the Twenty-First Century* (Northeastern University Press 2003) 244, 244–45.

⁶⁰ Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Seal Press 2007) 14–18, 225–31.

⁶¹ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (rev edn, Duke University Press 2015) 7–18, 36–52, 58–74.

persons appear in CEDAW practice, but how they appear and what forms of gendered subjectivity that practice makes visible.

Coloniality of Gender

From Coloniality of Power to Coloniality of Gender

The decolonial dimension of the framework asks why particular categories of sex and gender acquire the appearance of universality in the first place. Aníbal Quijano's concept of the coloniality of power distinguishes coloniality from formal colonialism. Colonial administration may end while the classifications, hierarchies and epistemologies produced through colonial domination continue to structure social and political life.⁶² Of particular relevance is Quijano's critique of Eurocentrism: historically situated forms of knowledge acquire the status of universal standards through which societies and subjects are understood.

María Lugones extends this critique to gender. She argues that Quijano's account insufficiently interrogates gender itself and develops the concept of the colonial/modern gender system.⁶³ Drawing in part upon Oyèrónké Oyěwùmí's critique of the assumption that Western gender categories can be universally projected onto Yoruba social organisation, Lugones questions the treatment of a dimorphic and hierarchical gender binary as a pre-social human constant.⁶⁴

The importance of Lugones for this thesis lies less in proving a single historical origin for every contemporary gender classification than in providing an analytical challenge to their apparent neutrality. If modern legal categories of sex and gender have histories, then their contemporary legal use cannot automatically be treated as merely reflecting a universally given order. Lugones's analysis therefore introduces a distinct question into the framework: what historical and epistemic assumptions are carried by the categories through which international human rights law recognises its subjects?

This question is especially significant for CEDAW. The Convention's focus upon women responds to a material history of women's discrimination that the present thesis does not seek to displace. A decolonial analysis does not require that “women” cease to have legal or political significance. It asks instead whether the binary structure within which the categories women and men have frequently been organised should itself be treated as natural, complete and immune from historical analysis.

⁶² Aníbal Quijano, ‘Coloniality of Power, Eurocentrism, and Latin America’ (Michael Ennis tr) (2000) 1(3) *Nepantla: Views from South* 533, 533–35, 540–43, 549.

⁶³ María Lugones, ‘Heterosexualism and the Colonial/Modern Gender System’ (2007) 22(1) *Hypatia* 186, 186–209; María Lugones, ‘Toward a Decolonial Feminism’ (2010) 25(4) *Hypatia* 742, 742–46.

⁶⁴ Oyèrónké Oyěwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997); Lugones (n 13) 190–96.

A response available at this point is that the decolonial critique, however powerful as social theory, remains external to the Convention and therefore inadmissible in its interpretation. That objection has become harder to sustain. In General Recommendation No 39, adopted in October 2022, the Committee itself situates discrimination against Indigenous women and girls within colonial histories and their continuing effects.⁶⁵ The Committee identifies an obligation on States parties to address the effects of colonialism, racism and assimilation policies among the abuses perpetrated against Indigenous women and girls.⁶⁶ It states that discrimination against them is perpetuated by gender stereotypes but also by forms of racism fuelled by colonialism and militarisation.[fn: *ibid* para 20.] In addressing access to justice it observes that judicial structures tend to reflect ongoing colonialism, and it locates barriers to justice partly in the effects of colonialism itself.⁶⁷

The significance of GR39 for the present framework is methodological rather than substantive. It does not concern gender diversity, and its references to lesbian, bisexual, transgender and intersex Indigenous persons remain expressly formulated as women and girls.⁶⁸ What it establishes is that coloniality has entered the Committee's own analytical vocabulary as a cause of gendered discrimination cognisable under articles 1 and 2 of the Convention. The framework developed in this chapter therefore does not import an alien mode of analysis into CEDAW. It asks whether an analysis the Committee already applies to the racialised dimensions of gender discrimination bears also upon the historical formation of the binary categories through which the Committee identifies its subjects.

A related feature of GR39 is relevant to the doctrinal argument. The Committee treats the United Nations Declaration on the Rights of Indigenous Peoples as an authoritative framework for interpreting obligations under the Convention.⁶⁹ This is systemic integration under article 31(3)(c) VCLT operating within the Committee's own practice, and it indicates that the Committee regards the Convention as interpretable by reference to instruments addressing structures of subordination that CEDAW does not itself enumerate.

Universality and Legal Legibility

Postcolonial feminist critiques provide an additional warning concerning universal legal subjects. Chandra Talpade Mohanty has criticised the construction of the “Third World woman” as a

⁶⁵ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 39 (2022) on the Rights of Indigenous Women and Girls’ (31 October 2022) UN Doc CEDAW/C/GC/39.

⁶⁶ *Ibid* 7.

⁶⁷ *ibid* paras 24, 30

⁶⁸ : *ibid* paras 22, 23(a), 52(a).

⁶⁹ *ibid* para 13.

homogeneous subject whose identity is produced through Western representations of oppression.⁷⁰ Ratna Kapur similarly examines the production of a recognisable victim subject within human rights discourse and the possibility that access to rights may depend upon presenting oneself through legal narratives already intelligible to the system.⁷¹ These critiques are useful to a decolonial transfeminist framework because they direct attention to the epistemic conditions of inclusion. A legal system may broaden the persons it recognises while leaving intact the assumptions through which recognition is offered.

Applied as an analytical lens rather than a conclusion, this raises questions for the CEDAW material. When gender-diverse persons appear in Committee practice, are they recognised in their own terms, or only insofar as their experiences can be translated into existing binary categories? Does the Committee's language leave the relationship between sex, gender and embodiment unquestioned? Conversely, are there instances in which its reasoning acknowledges forms of gendered harm without requiring gender-diverse persons to be conceptually absorbed into the category of women? The purpose of these questions is not to evaluate CEDAW against an abstract requirement of perfect decoloniality. They allow the analysis to identify what particular formulations make visible and what they leave unexamined.

A Situated Philippine Illustration

The historical contingency of gender categories is not solely an abstract theoretical question. The Philippine context provides a situated illustration relevant to the standpoint from which this research is undertaken. Historical scholarship documents the babaylan as important spiritual and social figures in pre-colonial Philippine societies and records the asog, persons assigned male within contemporary terminology who performed feminine or female-associated social and ritual roles.⁷² Spanish colonial accounts and later historical scholarship document the regulation and suppression of such practices through Christianisation and colonial gender norms.⁷³

These materials require caution. The asog or babaylan should not simply be redescribed as “transgender” or “nonbinary” in contemporary terms. Doing so would impose precisely the kind of transhistorical classification that a decolonial framework cautions against. Nor does this historical evidence determine the meaning of CEDAW.

⁷⁰ Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003) 17–42, 18–20.

⁷¹ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (GlassHouse Press 2005) 95–104; Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harvard Human Rights Journal* 1, 3–5.

⁷² J Neil Garcia, *Philippine Gay Culture: The Last Thirty Years: Binabae to Bakla, Silahis to MSM* (University of the Philippines Press 1996) 10–24.

⁷³ Carolyn Brewer, *Shamanism, Catholicism and Gender Relations in Colonial Philippines, 1521–1685* (Ashgate 2004) 105–35; Garcia (n 17) 20–24.

Its function here is considerably narrower. It demonstrates that the categories through which contemporary law understands sex and gender should not automatically be projected backwards or treated as the only historically possible forms of gender organisation. The Philippine example therefore illustrates the question posed by Lugones: whether the apparent universality of contemporary binary classifications conceals particular historical processes through which alternative forms of gendered life were rendered unintelligible or marginal.

This situated example also explains why the framework is decolonial rather than merely an application of Western queer or transgender theory to an international legal problem. The inquiry remains attentive to the possibility that gender diversity in the Global South cannot always be adequately understood through categories developed elsewhere, even where those categories have become important tools of contemporary human rights advocacy.

The Decolonial Transfeminist Analytical Lens

The strands developed above perform distinct but complementary functions.

Substantive equality directs attention from formal identity towards the structures and institutions producing disadvantage. Intersectionality cautions against isolating those structures into mutually exclusive grounds. Selected queer insights expose the classificatory work performed by apparently natural categories of sex and gender. Transfeminism directs attention to the enforcement of gender boundaries and to the material consequences of departures from normative expectations concerning sex, gender, embodiment and social role. Spade adds scrutiny of the terms upon which legal recognition is offered. Decolonial feminist theory, finally, places those categories and processes of recognition within histories of colonial power and challenges their assumption of universality. Their combination does not establish that discrimination against women and harms experienced by gender-diverse persons necessarily arise from a common structure. That is precisely what the framework enables the analysis to investigate. Nor does the framework determine whether any resulting structural relationship is legally sufficient to bring a particular harm within CEDAW.

The framework instead guides the analysis of Committee practice through four questions.

First, what form of gender regulation produces or structures the harm identified by the Committee? This inquiry looks beyond the identity of the affected person to the stereotypes, hierarchies, institutional arrangements or assumptions concerning sex, embodiment and gender roles implicated in the harm.

Second, what relationship, if any, exists between that form of gender regulation and the sex- and gender-based inequality addressed by CEDAW? The question deliberately does not presume structural continuity. It requires the relationship to be identified in the particular context under examination.

Third, on what terms does the Committee render transgender, intersex, nonbinary or gender-diverse persons legally intelligible? This includes examining whether recognition depends upon assimilation into the category of women, another binary classification, or whether the Committee addresses the relevant gendered harm without requiring such reclassification.

Fourth, what assumptions about sex and gender are reproduced or unsettled by the Committee's reasoning? This question brings the decolonial dimension into the analysis by considering whether apparently universal binary classifications are taken for granted, questioned or rendered unnecessary in the formulation of the relevant recommendation.

These questions complement, rather than replace, the doctrinal analysis. Chapter 3 applies them to the Committee's contemporary practice alongside the legal criteria established in Chapter 1. The purpose is to determine not only whether gender-diverse persons are mentioned within CEDAW practice, but what the Committee is doing when it recognises them, what form of discrimination it identifies, and whether the resulting practice can be understood within the legal limits of the Convention.

Chapter 3: CEDAW Committee Practice and an Emerging Interpretive Trajectory

3.0 Introduction

Chapters 1 and 2 established the doctrinal and theoretical tools through which the possible application of CEDAW beyond women can be assessed. Chapter 1 identified the constraints arising from the Convention's group-specific character. In particular, an interpretation extending particular protections beyond women must remain grounded in an existing Convention obligation, demonstrate a sufficient relationship between the relevant harm and the sex- and gender-based structures regulated by that obligation, preserve CEDAW's women-centred mandate, and remain consistent with recognised methods of treaty interpretation. Chapter 2 supplied a decolonial transfeminist analytical lens through which the asserted structural relationship can be examined without presuming its existence.

This chapter applies those tools to contemporary practice of the CEDAW Committee. It asks whether, and in what ways, the Committee has moved beyond acknowledging transgender, intersex, nonbinary and other gender-diverse persons towards applying Convention-related obligations to persons who are not expressly identified as women.

The findings require an important qualification at the outset. The Committee's practice does not reveal a single or uniform trajectory towards a new class of "gender-diverse" CEDAW rights holders. Rather, the practice is differentiated. Recommendations expressly referring to *intersex persons* or *intersex children* recur across a comparatively wide range of State reviews and substantive areas. Recommendations concerning *transgender persons* beyond women are less numerous but include some of the clearest linguistic indications that the Committee recognises transgender persons as a category wider than transgender women. Explicit references to *gender-diverse persons* are much more limited, while the available reference to *non-binary* persons remains tied to the category of women and is therefore ambiguous for the present inquiry.

The argument developed below is consequently narrower than a claim that CEDAW has already expanded its beneficiary class wholesale. Contemporary Committee practice instead provides evidence of an emerging, uneven and obligation-specific application of CEDAW protections beyond women. The interpretive significance of that practice depends not merely upon the terminology employed, but upon the legal function performed by the relevant recommendation.

Identifying Interpretively Significant Committee Practice

The empirical corpus consists of 230 Concluding Observations adopted by the CEDAW Committee between 2020 and 2025. Relevant passages were identified through keyword searches using terminology including "transgender", "trans", "intersex", "nonbinary", "non-binary", "gender-diverse", "gender identity" and "gender expression". The search functioned only as a mechanism for identifying potentially relevant material. The research is qualitative and doctrinal

rather than quantitative: the number of appearances of a term cannot, by itself, establish the Committee’s interpretation of the Convention.

A further distinction is necessary because much of the Committee’s SOGIESC practice remains explicitly women-centred. References to “transgender women”, “LBTI women”, “lesbian, bisexual and transgender women” or similar formulations demonstrate the intersectional application of CEDAW to women. They are significant to the broader development of CEDAW jurisprudence but do not, without more, establish application of Convention protection beyond women. This position is consistent with *Flamer-Caldera v Sri Lanka*, where the Committee expressly affirmed the application of the Convention to all women, including lesbian, bisexual, transgender and intersex women.

For the specific question examined in this thesis, greater interpretive significance attaches to formulations that are not limited to women, including “transgender persons”, “transgender students”, “intersex persons”, “intersex children” and “gender-diverse persons”. The wording alone, however, is not conclusive. An isolated reference to a group does not necessarily mean that the Committee has treated its members as beneficiaries of a CEDAW obligation.

Relevant passages were therefore assessed according to the degree of normative engagement they display. The analysis distinguishes between acknowledgment or reference to a group; an expression of concern regarding discrimination or harm affecting that group; an operative recommendation requiring the State party to take action in relation to the group; and, most significantly, an operative recommendation expressly connected to a Convention provision, General Recommendation or otherwise identifiable CEDAW obligation. These are analytical categories developed for this study rather than formal stages employed by the Committee.

This distinction proves particularly important for the different groups examined here. The pattern emerging from the corpus may be summarised as follows:

Formulation	Character of the practice	Interpretive significance
Intersex persons / intersex children	Recurrent operative recommendations across multiple substantive areas	Most sustained evidence of protective application beyond women
Transgender persons / transgender students	Fewer examples, but several contain especially explicit beneficiary language or Convention-linked recommendations	Strong but more issue-specific evidence

Gender-diverse persons	Explicitly appears in Brazil, but within an expression of concern in the material examined	Evidence of expanding vocabulary; weaker evidence of operative protection
Non-binary	Explicit reference in New Zealand, but as part of “transgender, non-binary and intersex women”	Evidence that terminology has entered Committee practice, but ambiguous as evidence beyond women

The importance of this differentiated pattern is methodological as well as substantive. It prevents “transgender, intersex, nonbinary and gender-diverse persons” from being treated as a single undifferentiated category whose relationship with CEDAW develops uniformly. The Committee appears instead to encounter different populations through different harms and different Convention obligations.

Forms of Protective Application Beyond Women

Transgender Persons and Legal Gender Recognition

The clearest evidence that the Committee is capable of distinguishing transgender persons as a category broader than transgender women appears in the Concluding Observations on Kyrgyzstan and Armenia.

In its review of Kyrgyzstan, the Committee expressed concern about legislation and procedures preventing “transgender persons, including women” from changing the gender marker in their identity documents. It then recommended that the State party reinstate the right of “transgender persons, including women” to change the gender marker in passports, other identity documents and personal identification numbers.⁷⁴

The Committee subsequently employed essentially the same formulation in its review of Armenia. Although the surrounding section was entitled “Lesbian, bisexual, transgender and intersex women”, the operative recommendation directed Armenia to ensure that “transgender persons, including women” could exercise the right to change the gender marker in passports and other identity documents.⁷⁵

The formulation deserves close attention. Grammatically, “including women” treats transgender women as a subset of the broader category “transgender persons”. This differs fundamentally from

⁷⁴ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the fifth periodic report of Kyrgyzstan’ UN Doc CEDAW/C/KGZ/CO/5, paras 47–48.

⁷⁵ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Armenia’ UN Doc CEDAW/C/ARM/CO/7, paras 49–50.

the much more common formulation “transgender women”. It is therefore difficult to explain these passages solely as an intersectional application of CEDAW to women who happen also to be transgender. The operative beneficiary is formulated more broadly.

This does not mean that the recommendations establish a general Convention right to legal gender recognition for every transgender person. Their principal weakness for the purposes of the doctrinal inquiry is that the relevant passages do not expressly identify the Convention article or General Recommendation from which that right is derived. The cases therefore provide strong beneficiary language but comparatively weak explicit normative anchoring.

That distinction matters. If the mere use of “transgender persons” were sufficient to prove expansion of CEDAW’s beneficiary class, linguistic variation in a Concluding Observation would carry too much doctrinal weight. The significance of Kyrgyzstan and Armenia is narrower: the Committee demonstrates that it is capable of prescribing State action for a category of transgender beneficiaries that it expressly understands to extend beyond transgender women.

The theoretical framework developed in Chapter 2 adds a further dimension. The Committee does not make recognition contingent upon assimilating every transgender person into the category of women. “Transgender persons” remain intelligible in the recommendation as transgender persons. In this respect the formulation answers, at least partially, the question raised through Otto and Spade concerning the terms upon which law extends recognition. The subject need not become a woman in order to appear within the recommendation.

At the same time, legal gender recognition itself raises a structural question. State civil-registration systems formally classify individuals according to sex or gender and determine the circumstances in which those classifications may be altered. Restrictions on changing legal gender therefore concern not merely prejudice against a separate identity group but the State’s regulation of the relationship between bodily or assigned sex, gender identity and legal status. Whether this is sufficient to bring such regulation within a particular CEDAW obligation requires more reasoning than the Kyrgyzstan and Armenia recommendations themselves provide.

The transgender practice consequently illustrates the difference between recognising a beneficiary and establishing a complete legal basis for that recognition. It shows an opening in the Committee’s practice, but not yet a fully articulated doctrine.

Education and the Application of a Women-Centred General Recommendation

The Committee’s education recommendations provide stronger evidence of an identifiable CEDAW normative basis.

In its Concluding Observations on the Dominican Republic, the Committee addressed gender stereotypes and discriminatory educational practices and expressed concern about discrimination against lesbian, bisexual, transgender and intersex students. In the corresponding operative

paragraph, it expressly recalled General Recommendation No 36 on the right of girls and women to education and recommended the development of policies ending discrimination against those students so that they could successfully complete their education.⁷⁶

The significance of this formulation lies in the relationship between the General Recommendation invoked and the beneficiaries of the operative recommendation. GR36 is expressly formulated around the right of girls and women to education.⁷⁷ Yet the Committee does not subsequently instruct the Dominican Republic merely to protect transgender or intersex *girls and women*. Its language refers to “transgender and intersex students”.

The Committee makes a similar move in its review of Thailand. After expressing concern about “transgender students” in schools and universities experiencing bullying and cyberbullying leading in some cases to dropout, it expressly recalls GR36 and recommends official guidance for schools and academic institutions on respecting the rights of “transgender students”.⁷⁸

These cases are more difficult to dismiss as incidental references. The Committee is not simply describing a general human rights concern. In both cases it moves from an identifiable problem affecting beneficiaries who are not expressly limited to women to an operative recommendation, and it situates that recommendation within a CEDAW interpretive instrument devoted to women’s and girls’ education.

The education cases therefore come close to the highest level of normative engagement identified in this study: an operative recommendation directed beyond women and expressly linked to a CEDAW normative framework.

Chapter 2’s structural lens assists in explaining why such an application may be intelligible without assuming its correctness. Bullying and exclusion of transgender students can operate through institutional enforcement of gender norms. A student may be disciplined socially or institutionally because their gender identity, expression, appearance or conduct is perceived as inconsistent with expectations attached to their assigned sex. The relevant harm is therefore capable of being understood not simply as hostility towards an isolated identity category but as a mechanism through which gender boundaries are enforced.

This does not mean that every hostile act against a transgender student automatically falls within CEDAW. The analytical requirement identified in Chapter 1 remains necessary: there must be a sufficient nexus between the harm and the structure regulated by the relevant Convention

⁷⁶ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of the Dominican Republic’ UN Doc CEDAW/C/DOM/CO/8, paras 31–32.

⁷⁷ Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 36 (2017) on the right of girls and women to education’ UN Doc CEDAW/C/GC/36.

⁷⁸ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of Thailand’ UN Doc CEDAW/C/THA/CO/8, paras 37–38.

obligation. The education cases are significant precisely because the Committee itself appears to make that normative connection by invoking GR36.

Thailand is especially instructive when read alongside the wording of Kyrgyzstan and Armenia. In the latter cases, the beneficiary category is exceptionally clear but the explicit CEDAW basis is weak. In Thailand, the Committee provides a much clearer normative anchor. Taken together, the cases show two dimensions of the emerging practice: who the Committee is willing to protect, and through which CEDAW obligations that protection is being articulated.

Gender-Based Violence, Discrimination and Access to Remedies

A broader pattern appears in recommendations concerning gender-based violence, discrimination and remedies. Here, intersex persons recur with particular frequency.

In Zimbabwe, the Committee expressed concern regarding hate speech, stigma and discrimination against lesbian, bisexual and transgender women and intersex persons in education, health, employment and justice. It then recommended eliminating intersecting discrimination against those groups, raising public awareness of their human rights and prosecuting perpetrators of violence against them.⁷⁹

The linguistic structure is notable. “Intersex persons” are juxtaposed with “lesbian, bisexual and transgender women”. The Committee could have written “intersex women”; it did not. This creates at least a *prima facie* indication that the recommendation is not confined to women.

The Russian Federation review contains similarly broad formulations. Under discriminatory stereotypes, the Committee recommended addressing hate speech against lesbian, bisexual and transgender women and intersex persons. In a later section, it recommended awareness-raising regarding stigma affecting the same groups and called for investigation, prosecution and punishment of acts of gender-based violence and hate crimes against them, as well as reparation for victims.⁸⁰

These examples are significant but also ambiguous. They frequently appear within sections whose headings and surrounding reasoning remain explicitly concerned with women. The addition of “intersex persons” may represent deliberate broader protection, but the Committee usually does not explain whether the phrase refers to all intersex persons, only intersex persons exposed to the same gendered harms, or simply reflects a drafting convention in which intersex persons are appended to LBT women.

⁷⁹ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the sixth periodic report of Zimbabwe’ UN Doc CEDAW/C/ZWE/CO/6, paras 45–46.

⁸⁰ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of the Russian Federation’ UN Doc CEDAW/C/RUS/CO/9, paras 22–23, 46–47.

Panama provides stronger doctrinal evidence. Under legislative protection from discrimination, the Committee expressed concern regarding the absence of provisions protecting lesbian, bisexual and transgender women and intersex persons from discrimination and the absence of effective remedies. Crucially, in its recommendation it stated that, in line with Article 1 of the Convention and General Recommendation No 28, Panama should amend its anti-discrimination legislation to encompass gender as a ground of discrimination and ensure that lesbian, bisexual and transgender women and intersex persons could access complaint mechanisms in cases of gender-based discrimination.⁸¹

This recommendation is particularly important because GR28 ordinarily frames intersectionality in relation to discrimination against women. Yet the Panama recommendation directs the resulting protection not only to LBT women but also to “intersex persons”. The Committee thus appears to deploy Article 1 and GR28 as part of the normative context for protecting a category not linguistically restricted to women.

Panama reinforces that move under gender-based violence. In light of General Recommendation No 35 on gender-based violence against women, the Committee recommends prompt investigations into hate crimes affecting migrant women and lesbian, bisexual and transgender women and intersex persons, together with reparation including compensation.⁸²

The formulation presents the subject-group question in unusually concentrated form. GR35 concerns gender-based violence against women; the operative recommendation nevertheless includes intersex persons. The Committee provides no explicit doctrinal explanation of that extension, but the recommendation is difficult to describe as merely a general observation outside CEDAW. It is expressly situated within the Committee’s gender-based violence framework.

Peru provides further evidence that the presence of “intersex persons” is not confined to a single substantive issue. In its review, the Committee repeatedly juxtaposed lesbian, bisexual and transgender women with intersex persons in discussions of access to justice, discriminatory stereotypes and harmful practices, gender-based violence, employment, detention and family relations. It recommended, *inter alia*, preventing and sanctioning discrimination and gender-based violence against LBT women and intersex persons, providing support services, collecting data concerning their treatment in detention and addressing their position in other substantive fields.⁸³

The repetition matters. A single occurrence could plausibly be dismissed as imprecise drafting. Recurrent use of “intersex persons” across distinct sections of the same review, combined with similar formulations across other States, makes that explanation increasingly inadequate. At

⁸¹ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of Panama’ UN Doc CEDAW/C/PAN/CO/8, paras 11–12.

⁸² *ibid* paras 21–22.

⁸³ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of Peru’ UN Doc CEDAW/C/PER/CO/9, paras 9–10, 13, 21, 23–24, 47–49.

minimum, the practice demonstrates that the Committee repeatedly permits persons not linguistically identified as women to remain within the scope of its operative concern.

Nicaragua adds further corroboration. The Committee expressly recommended that the State eliminate discrimination against LBT women and intersex persons, while separately referring to legislation recognising lesbian and transgender women.⁸⁴ The contrast within the same recommendation is striking: the Committee knows how to restrict its language to women where it intends to do so, yet formulates the intersex beneficiary as “persons”.

This pattern remains insufficient to establish that the Committee views every intersex person as a general CEDAW rights holder. It does, however, provide a substantial body of evidence that protection of intersex persons is not an isolated departure. Compared with the much thinner practice regarding nonbinary or gender-diverse persons, the intersex trajectory is recurrent, cross-sectoral and often operative.

Bodily Autonomy, Health and the Regulation of Sexed Bodies

The strongest conceptual connection between intersex protection and the decolonial transfeminist framework appears in cases concerning bodily autonomy and medically imposed conformity with binary sex classifications.

Pakistan provides an early example in the period examined. Under the heading of health, the Committee expressed concern regarding the performance of surgery on intersex persons for the purpose of legal gender recognition and the barriers faced by victims in accessing justice. In line with General Recommendation No 24 on women and health, it recommended preventing unnecessary such surgery in law and practice, eliminating barriers to justice and ensuring effective reparation.⁸⁵

Pakistan is analytically important even though the operative subparagraph itself does not repeat the phrase “intersex persons”. The recommendation directly follows the concern and addresses the surgery identified there. It therefore provides evidence that the Committee’s women-and-health framework is being used to respond to medical practices affecting persons not expressly identified as women.

Finland provides the clearer formulation. The Committee expressed concern about surgical interventions on “intersex children” performed with the aim of “normalizing” their genitalia. Recalling the joint CEDAW/CRC framework on harmful practices, it recommended that the State

⁸⁴ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined seventh to tenth periodic reports of Nicaragua’ UN Doc CEDAW/C/NIC/CO/7-10, para 54.

⁸⁵ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined seventh to tenth periodic reports of Nicaragua’ UN Doc CEDAW/C/NIC/CO/7-10, para 54.

specifically criminalise surgical interventions on the genitalia of intersex children unless medically necessary.⁸⁶

Finland is particularly significant for the subject-group objection. “Intersex children” cannot plausibly be treated simply as another synonym for “women”. Nor does the Committee reclassify the children as girls before bringing the practice within its harmful-practices analysis. The beneficiary remains an intersex child.

The nature of the harm also makes the theoretical framework especially relevant. The stated aim of “normalizing” genitalia reveals an intervention directed at bodily conformity with binary classifications of sex. The harm can therefore be examined as a form of **sexed regulation**: the body is altered because it does not conform to expectations of how male or female bodies are supposed to appear.

This is not identical to the structural subordination of women. The point is not that an intersex child undergoing non-consensual surgery experiences the same form of discrimination as a woman affected by a stereotyped gender role. The question supplied by Chapter 2 is whether the practices are nevertheless connected through the regulatory structures by which law, medicine and society enforce normative relationships among bodily sex, gender classification and social intelligibility.

The decolonial component adds a further caution. Binary classification should not be treated as a historically neutral background against which the surgery occurs. The framework asks how particular categories acquire normative authority and how law and institutions participate in making bodies conform to them. This does not itself make the practice a CEDAW violation. It explains why a harmful-practices analysis may perceive the regulation of intersex bodies as connected to the structures of sex and gender that CEDAW addresses.

The Committee’s express invocation of the harmful-practices framework in Finland supplies the doctrinal element that theory alone cannot provide.

Indonesia takes the intersex practice in a different direction. The Committee recommended measures to combat gender-based violence and discrimination against lesbian, bisexual and transgender women and intersex persons, and further directed the State to protect their human rights “in all areas covered by the Convention”.⁸⁷

This may be the broadest formulation in the corpus. Yet its breadth is also its doctrinal weakness. Unlike Finland, Indonesia does not identify one specific Convention obligation and explain its relationship with one particular form of harm. The phrase “all areas covered by the Convention”

⁸⁶ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of Finland’ UN Doc CEDAW/C/FIN/CO/8, paras 21–22.

⁸⁷ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of Indonesia’ UN Doc CEDAW/C/IDN/CO/8, paras 47–48.

seems to place intersex persons within a wide protective sphere without articulating the limiting principle that would determine when and why the Convention applies.

Indonesia therefore supports an important distinction between breadth of protective language and strength of legal reasoning. A very broad formulation is not necessarily the strongest authority for evolutive interpretation. For the argument developed in this thesis, Finland, Thailand or Panama may be more persuasive precisely because their recommendations can be tied to identifiable CEDAW obligations.

Differentiated Interpretive Trajectories

The corpus therefore does not reveal a single progressive movement from “women” to “gender-diverse persons”. Instead, the Committee’s practice develops differently across the categories examined. This asymmetry is itself an important finding.

Intersex Persons: the Most Recurrent Practice Beyond Women

Intersex persons constitute the clearest recurring category beyond women in the Concluding Observations reviewed. The Committee repeatedly uses the formulation “intersex persons” alongside language expressly limited to lesbian, bisexual and transgender women. This appears in recommendations concerning discrimination and violence in Zimbabwe and Russia; broad human rights protection in Indonesia; health and bodily autonomy in Pakistan and Finland; gender-based discrimination and remedies in Panama; multiple substantive fields in Peru; and discrimination in Nicaragua.

The recurrence is notable because “intersex persons” is grammatically distinct from “intersex women”. In numerous instances, the Committee writes in the form “lesbian, bisexual and transgender women and intersex persons”. The change of noun therefore cannot simply be ignored.

At the same time, caution is necessary before attributing a settled doctrinal intention to every occurrence. Some Concluding Observations continue to place intersex persons within sections explicitly entitled “disadvantaged groups of women” or otherwise frame the problem principally through women’s intersectional disadvantage. In such settings, it is not always possible to determine whether the Committee consciously intends to establish protection for intersex persons beyond women or whether the formulation reflects inconsistent drafting.

The stronger evidence comes from instances where three elements coincide: the beneficiary is unmistakably broader than women; an operative recommendation is directed towards that beneficiary; and the recommendation is connected to a recognisable CEDAW norm. Finland and Panama are particularly important under this standard.

The breadth of the intersex practice also matters. Intersex persons do not appear only in one specialised field such as health. The corpus places them within education, violence, justice,

discrimination, harmful practices, employment, detention and family relations. Peru illustrates this cross-sectoral character especially clearly.

This does not establish an across-the-board proposition that every intersex person can invoke every Convention article. It does, however, make intersex persons the strongest empirical challenge within the dataset to the assumption that the Committee's operative protective practice is rigidly confined to persons identified as women.

Transgender Persons: Fewer but Sometimes More Explicit Cases

The trajectory concerning transgender persons is quantitatively narrower but contains several formulations of unusually high interpretive significance.

The central examples are Kyrgyzstan and Armenia, where the Committee refers to "transgender persons, including women". The significance here does not depend upon frequency. The phrase itself explicitly establishes a relationship between the wider category "transgender persons" and the subset "women". The Committee could hardly have made the distinction clearer without expressly stating that its recommendation applies to transgender persons who are not women.

Thailand and the Dominican Republic then provide a second form of evidence. Rather than defining transgender persons as a general beneficiary category, the Committee protects transgender students within the operation of its education framework. This indicates that the emerging practice may develop not through a general declaration about who qualifies as a CEDAW rights holder, but through concrete application of particular substantive obligations.

Other material is less probative. The corpus contains references to transgender employment discrimination, legislation concerning transgender people and self-determination laws, but some of these appear within women-centred sections or are observational rather than operative. Their presence contributes to the wider context but should not be treated as equivalent to Kyrgyzstan, Armenia or Thailand.

The transgender findings consequently reinforce the obligation-specific interpretation advanced in this thesis. There are fewer clear cases than for intersex persons, but several of those cases directly challenge the proposition that Committee action must always be confined to transgender women.

Gender-Diverse Persons: an Emerging Vocabulary at the Frontier of the Practice

Brazil is important because it contains the clearest explicit reference in the corpus to "transgender and gender-diverse persons". In its examination of gender-based violence, the Committee

expressed concern regarding the stigmatization and lack of protection experienced by transgender and gender-diverse persons, high levels of homicide and low prosecution and conviction rates.⁸⁸

The formulation matters because “gender-diverse persons” is more open-ended than the earlier categories of transgender women or transgender persons. It suggests that the vocabulary through which the Committee describes gendered harm is continuing to develop.

Its legal significance must nevertheless be limited. In the material examined, the term appears in an expression of concern. The passage does not itself contain an operative recommendation specifically directing the State to protect gender-diverse persons through an identified CEDAW obligation.

Brazil therefore represents what may be described as a frontier case. It shows that the conceptual field of persons visible to the Committee has widened, but it does not yet provide the kind of Convention-linked operative protection found in Finland, Panama or Thailand.

The distinction illustrates why the analytical categories employed by this thesis are necessary. Inclusive terminology is evidence of development, but it should not be equated automatically with normative incorporation.

Nonbinary Persons: Terminological Recognition without Clear Extension Beyond Women

The evidence concerning nonbinary persons is even more limited.

In New Zealand, the Committee referred to a review of legal protections for “transgender, non-binary and intersex women”, while expressing concern about the absence of explicit legal protection against discrimination based on gender identity, gender expression and sex characteristics. It subsequently recommended amendment of the Human Rights Act to provide express protection on those grounds.⁸⁹

The reference demonstrates that non-binary terminology has entered CEDAW Committee practice. It cannot, however, straightforwardly be treated as evidence that the Committee has extended protection to nonbinary persons beyond women.

Grammatically, “women” appears to qualify the preceding descriptors. Moreover, “nonbinary women” is not necessarily a contradiction: some individuals may identify both as nonbinary and as women. The passage therefore should not be redescribed as a reference to all nonbinary persons.

The formulation is nevertheless analytically interesting when compared with Kyrgyzstan and Armenia. In New Zealand, nonbinary identity is rendered legible within a category still expressly

⁸⁸ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined eighth and ninth periodic reports of Brazil’ UN Doc CEDAW/C/BRA/CO/8-9, para 22(e).

⁸⁹ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the ninth periodic report of New Zealand’ UN Doc CEDAW/C/NZL/CO/9, paras 8–9.

tied to women. In Kyrgyzstan and Armenia, by contrast, the Committee begins with the wider category “transgender persons” and specifies that women are included within it.

These formulations illustrate two different modes of legal recognition. One expands the diversity contained within the established category of women. The other permits a beneficiary category to remain broader than women. The distinction directly reflects the question posed in Chapter 2 concerning the terms upon which gender-diverse subjects become legally intelligible.

The evidence consequently does not support treating nonbinary persons as equally situated with intersex or transgender persons within contemporary CEDAW practice. The absence itself is an empirical finding. The Committee’s interpretive development is not uniform, and the thesis should not convert sparse nonbinary references into a stronger legal trajectory than the corpus supports.

Assessing the Emerging Interpretation

The findings can now be assessed against the doctrinal considerations developed in Chapter 1.

A Convention-Based Normative Foothold

The first requirement is that protection beyond women possess a textual or normative foothold within CEDAW.

The evidence is uneven but, in several cases, substantial. The Dominican Republic and Thailand expressly invoke GR36 when recommending measures concerning transgender or intersex students. Finland recalls the joint harmful-practices framework when recommending protection of intersex children. Pakistan situates surgery affecting intersex persons within its consideration of GR24 on health. Panama invokes Article 1 and GR28 in connection with access to remedies for gender-based discrimination affecting intersex persons and GR35 in connection with violence.

These cases demonstrate that the Committee’s practice is not limited to free-standing statements that transgender or intersex persons possess human rights. The Committee is acting through legal frameworks developed under CEDAW.

That finding is crucial because general international human rights protection of transgender or intersex persons would not itself answer the thesis question. A recommendation may be desirable as a matter of international human rights law while remaining outside the proper interpretation of CEDAW. The strongest examples in the corpus avoid that problem by situating protection within recognisable Convention obligations.

By contrast, Kyrgyzstan and Armenia show the opposite configuration: unusually explicit beneficiary language but relatively little express explanation of the CEDAW provision from which the right to legal gender recognition follows. Brazil is weaker still for doctrinal purposes because the broader category “gender-diverse persons” appears at the concern stage rather than within the operative recommendation.

The practice is therefore better understood through degrees of interpretive strength than through a binary distinction between inclusion and exclusion.

The Structural Nexus

The second requirement concerns the relationship between the harm and the sex- and gender-based structures regulated by the relevant CEDAW obligation.

The cases do not involve one uniform form of discrimination. Legal gender recognition concerns State classification of sex and gender. Education cases concern the policing of gender identity and expression within institutions. Intersex surgery concerns the regulation and physical alteration of bodies to conform to binary expectations. Violence and discrimination cases concern stigma, punishment and exclusion directed towards persons whose bodies, identities or relationships may fall outside normative gender arrangements.

The decolonial transfeminist framework does not make these harms interchangeable. An intersex child subjected to medically unnecessary surgery, a transgender student bullied at school and a woman experiencing gender-based violence occupy different social and legal positions.

The relevant question is instead whether the mechanism producing the harm falls within structures that CEDAW already regulates.

This is clearest in Finland. Surgery intended to “normalize” an intersex child’s genitalia directly enforces a normative binary classification of sex. It is also clear in the education context where transgender students are sanctioned because their gender identity or expression does not conform to institutional expectations. The connection may be more difficult to establish in other cases, such as generic hate crimes, where the Committee would need to explain why the particular violence falls within CEDAW rather than merely within general guarantees of non-discrimination and security of person.

This is one reason the Committee’s lack of express reasoning matters. The broader its protective language becomes, the more important it is to explain the CEDAW nexus.

Preserving the Women-Centred Mandate

The third criterion asks whether broader protective application preserves rather than substitutes CEDAW’s women-centred mandate.

The corpus does not show the Committee abandoning women as the Convention’s central protected group. On the contrary, the overwhelming structure and language of the Concluding Observations remain directed towards women and girls. Broader formulations are embedded within this women-centred practice.

This is especially evident in the language “transgender persons, including women”. The Committee does not claim that transgender persons are all women. Nor does it remove women from the recommendation. It identifies a broader category while expressly retaining women within it.

Similarly, application of GR36 to transgender students does not convert CEDAW into a universal education treaty. The wider protective effect occurs within one specific obligation addressing a particular form of gendered exclusion.

The findings therefore support a distinction between beneficiary-class replacement and obligation-specific protective application.

The first would require understanding CEDAW as no longer principally a treaty concerning discrimination against women. Nothing in the corpus supports such a conclusion.

The second is narrower. A Convention obligation adopted to eliminate women’s inequality may, when applied to a particular structure or practice, require State action whose protective consequences extend to a person who is not a woman. The Committee’s practice provides significantly more support for this second formulation.

This distinction also resolves part of the tension between Rosenblum’s broader challenge to women-only CEDAW and the concern articulated by Hernández-Truyol about preserving women-specific protection. The findings do not require “unsexing” the Convention. They suggest instead that the group around which a treaty is organised and the complete range of persons protected through the performance of particular obligations need not necessarily be coextensive in every circumstance.

Rights Holder or Beneficiary of an Obligation?

A related distinction should be drawn between establishing that a person is a general rights holder under CEDAW and establishing that the person is a beneficiary of the performance of a particular CEDAW obligation.

For transgender women, *Flamer-Caldera* supplies the clearer rights-holder model: transgender women fall within the Convention as women.

The cases examined here do not necessarily make the equivalent proposition for transgender men, all intersex persons or other gender-diverse persons. Thailand does not expressly declare that every transgender student is a rights holder under every CEDAW provision. Finland does not declare every intersex child a general Convention rights holder. What these recommendations do establish more clearly is that performance of particular obligations may require States to protect them.

This distinction helps avoid an unnecessarily binary debate. The legal possibilities are not restricted to either excluding persons beyond women entirely or reconstituting them as a new general class of CEDAW rights holders.

The Committee's contemporary practice suggests an intermediate model: CEDAW remains a women-centred treaty, while the performance of certain substantive obligations can generate protective consequences beyond women where the relevant gendered structure makes that protection necessary.

This model is consistent with the finding that the trajectory develops differently across substantive areas. If CEDAW had already created one general gender-diverse beneficiary class, one might expect relatively uniform recognition across categories and Convention provisions. The corpus instead shows the opposite: protection emerges through particular issues.

Interpretive Weight and Remaining Limits

Finally, the legal significance of the practice must be distinguished from its existence.

The Concluding Observations examined demonstrate that the CEDAW Committee itself is repeatedly willing to formulate recommendations beyond women. This practice is not confined to one country, one session or one substantive field. Intersex-related formulations in particular recur across multiple States and areas, while transgender-person formulations appear in legal gender recognition and education.

Repetition strengthens the argument that these examples cannot all be reduced to isolated linguistic accidents. Yet consistency remains incomplete. The Committee alternates among "intersex women", "intersex persons", "transgender women", "transgender persons", "transgender students" and broader formulations. It rarely explains the doctrinal significance of changing from one formulation to another.

The practice is also weak in explicit reasoning. Indonesia's reference to intersex persons "in all areas covered by the Convention" is potentially expansive but offers little explanation of the limits of that claim. Kyrgyzstan and Armenia clearly identify transgender persons beyond women but do not articulate the precise Convention basis for legal gender recognition. Brazil expands the vocabulary to "gender-diverse persons" but does not, in the material analysed, complete the move into an operative recommendation.

Nor do the Concluding Observations themselves establish subsequent practice of States parties under Article 31(3)(b) VCLT. As Chapter 1 explained, pronouncements of an expert treaty body must be distinguished from subsequent agreement or practice attributable to States parties. The present corpus does not establish that CEDAW States parties collectively agree that the Convention protects all persons included in these recommendations.

The evidence should therefore be described neither as legally irrelevant nor as conclusive.

Its significance is that it reveals how the expert body responsible for monitoring CEDAW is already applying the Convention in practice. That practice can support an evolutive interpretation where it remains grounded in the Convention and satisfies the interpretive constraints identified in Chapter 1. It cannot independently amend the treaty or overcome those constraints.

The resulting trajectory is consequently best characterised as emerging, differentiated and under-articulated.

It is *emerging* because operative recommendations extending beyond women now recur in the Committee's practice.

It is *differentiated* because intersex persons, transgender persons, nonbinary persons and gender-diverse persons do not appear with equivalent frequency, clarity or legal significance.

It is *under-articulated* because the Committee rarely explains why a women-centred Convention obligation applies to persons beyond women or what limits govern that application.

Within those limits, however, the practice supports a legally significant conclusion. CEDAW's contemporary application is not absolutely exhausted by the formal identity category "women". Particular substantive obligations are already being applied to persons beyond women where the Committee understands the relevant harm as falling within the Convention's normative field.

The evidence is strongest in relation to intersex persons, where the practice is recurrent and cross-sectoral, and to a smaller number of particularly significant recommendations concerning transgender persons. It remains substantially weaker for gender-diverse persons, and the available reference to nonbinary persons does not yet establish a clear trajectory beyond women.

The empirical findings therefore reinforce, rather than undermine, the limiting principle developed in Chapter 1. The most defensible evolutive interpretation is not that CEDAW has become a general SOGIESC treaty or that all gender-diverse persons have been absorbed into the category of women. It is that particular CEDAW obligations may have protective application beyond women where the harm is sufficiently connected to the sex- and gender-based structures, stereotypes, classifications or forms of regulation that the relevant obligation requires States parties to address.

That formulation accounts both for what the Committee's practice demonstrates and for what it does not.

Conclusion

This thesis asked to what extent CEDAW can be interpreted as a dynamic instrument of international human rights law capable of extending protection to transgender, intersex, nonbinary and other gender-diverse persons, and what role a decolonial transfeminist understanding of gender hierarchy can play in that interpretation. The answer is to a limited but legally significant extent. CEDAW's women-centred character does not prevent particular Convention obligations from having protective application beyond women. Such application is most defensible where the relevant harm possesses a clear normative foothold within the Convention, is sufficiently connected to the sex- and gender-based structures regulated by that obligation, preserves women as CEDAW's central protected group, and remains supportable through recognised methods of treaty interpretation. These conditions reflect the doctrinal limits developed in Chapter 1 rather than a general power to expand the Convention according to contemporary understandings of gender.

The argument therefore does not depend upon interpreting the term "women" as encompassing every transgender, intersex, nonbinary or gender-diverse person. Nor does it require CEDAW to become a general treaty prohibiting all discrimination based on sexual orientation, gender identity, gender expression or sex characteristics. The more persuasive route is through the evolutive application of existing substantive obligations. Human rights treaties may encounter circumstances, forms of discrimination and structures of disadvantage that were not expressly contemplated at the time of drafting. CEDAW's capacity to respond to those developments, however, remains constrained by its text, structure and specialised purpose. Evolutive interpretation permits development; it does not eliminate the distinction between interpretation and amendment.

The decolonial transfeminist framework developed in Chapter 2 performs a different but complementary role. It does not constitute an independent source of treaty meaning. Its contribution is analytical: it makes visible structures of gender regulation that might be obscured if Convention protection were examined exclusively through the formal identity of the person experiencing harm. Substantive equality directs attention towards structures of disadvantage; transfeminism towards the enforcement of relationships among sex, embodiment, identity, femininity and masculinity; and decolonial feminism towards the historical contingency of classifications that modern law may otherwise treat as universal. This framework therefore helps answer the structural question required by the doctrinal analysis: whether a particular harm affecting a person beyond women is produced through the sex- and gender-based structures that the relevant CEDAW obligation regulates. It does not predetermine that answer.

The empirical analysis demonstrates why this distinction matters. The Committee's practice between 2020 and 2025 does not reveal a uniform expansion towards a single new category of gender-diverse rights holders. Instead, it reveals differentiated interpretive trajectories. Intersex persons provide the most recurrent evidence of protective application beyond women. The Committee repeatedly employs the formulation "intersex persons" in operative recommendations

across areas including discrimination, gender-based violence, education, health, harmful practices, access to remedies and family relations. Particularly significant examples connect protection of intersex persons or children with identifiable CEDAW frameworks concerning discrimination, health, harmful practices and gender-based violence.

The practice concerning transgender persons is less extensive but contains some particularly explicit formulations. References to “transgender persons, including women” distinguish the wider category of transgender persons from transgender women, while recommendations concerning transgender students demonstrate the application of CEDAW’s education framework without limiting the beneficiary to women or girls. By contrast, the explicit reference to “gender-diverse persons” in the Brazilian review remains at the level of an expression of concern in the material examined. The reference to “non-binary” persons in New Zealand is more ambiguous still because it appears within the formulation “transgender, non-binary and intersex women”. The evidence therefore does not justify claiming equivalent development across all of the populations considered in this thesis.

This unevenness is not a weakness in the findings. It clarifies the nature of the interpretive development. The Committee does not appear to be replacing “women” with a new universal beneficiary category. Its practice instead develops through particular populations, harms and substantive obligations. The findings consequently support an obligation-specific rather than beneficiary-class model of extension: a person need not necessarily become a general CEDAW rights holder under every provision for the performance of a particular Convention obligation to generate protection for them.

There remain important limits. Concluding Observations are not treaty amendments and do not themselves establish subsequent practice of States parties under Article 31(3)(b) VCLT. The Committee also rarely explains why a women-centred Convention obligation extends to a beneficiary identified beyond women. Its terminology is inconsistent, and explicit practice concerning nonbinary and broader gender-diverse persons remains sparse. Future Committee practice would be strengthened by identifying more clearly the relevant Convention obligation, the gendered structure producing the harm and the basis upon which protection beyond women follows from that obligation.

The contribution of this thesis is therefore neither to “unsex” CEDAW nor to defend an immutable boundary around its contemporary application. It proposes a third possibility. Women remain at the centre of CEDAW, but they need not constitute the outer limit of every protective consequence generated by its substantive obligations. Where persons beyond women are harmed through the very structures of sex and gender that CEDAW requires States parties to transform, an obligation-specific extension of protection can be consistent with both the Convention’s dynamic character and its women-centred mandate.

CEDAW's continuing relevance as a dynamic instrument may therefore lie not in abandoning the category of women, but in recognising that the gendered structures it requires States to dismantle do not regulate women alone.

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