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### **CEDAW 39<sup>th</sup> session – consideration of the seventh periodic report of Norway**

Reference is made to the seventh periodic report of Norway on the Convention on the Elimination of all Forms of Discrimination against Women and its Optional Protocol (CEDAW) (cfr. CEDAW/C/NOR/7).

The seventh periodic report of Norway is to be considered by the Committee on the Elimination of Discrimination against Women (the Committee / the CEDAW Committee) during its 39<sup>th</sup> session 23 July – 10 August 2007.

Please find below comments from the Norwegian Centre for Human Rights (NCHR / the Centre) on the seventh periodic report of Norway.

#### **1. Summary**

The NCHR will limit its comments to the practical impact and consequences of an eventual incorporation of CEDAW into the Human Rights Act of 1999, with precedence over Norwegian legislation (cfr. the Committee's List of issues and questions, question No. 3).

The CEDAW was in 2005 incorporated into the Gender Equality Act. Although incorporated into Norwegian legislation, CEDAW does not enjoy such "special strength" as the treaties incorporated into the Human Rights Act of 1999, with statutory precedence in the event of conflict with other Norwegian legislation. (The treaties incorporated into the Human Rights Act include the European Convention of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and, by an amendment in 2003, the UN Convention on the Rights of the Child (CRC)).

The resolution passed by the Norwegian parliament (the Storting) in 2005, incorporating CEDAW into the Gender Equality Act against the almost unanimous view of the consultative bodies, concluded an extensive political and legal debate in the Norwegian public sphere regarding the appropriate form of incorporation of human rights treaties into Norwegian law. (Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was incorporated into Norwegian law, without statutory precedence, by the new Anti-discrimination Act of 2005).

In the view of NCHR, the Government should honour its pledge of 2005 to incorporate CEDAW into the Human Rights Act with statutory precedence over Norwegian law, the main arguments of the practical impact and consequences of such an incorporation to be summarized as follows:

**i. The non-discrimination principle is one of the core human rights principles**

The non-discrimination principle is not specifically laid down in the Norwegian Constitution. Lacking constitutional protection, prohibitions against non-discrimination and discrimination based on gender are however to be found in human rights treaties incorporated into the Human Rights Act, with statutory protection over conflicting Norwegian law. Notwithstanding, CEDAW is the only human rights treaty explicitly prohibiting “discrimination against women” (cfr. Article 1). An effective incorporation of CEDAW into the Human Rights Act with statutory precedence will strengthen the non-discrimination principle and the protection of discrimination against women.

**ii. The distinction between “core” and “special” treaties is disputed**

The proposition to the Human Rights Act argued that CEDAW was not regarded as one of the “core” human rights treaties. This distinction between “core” and “special” treaties has been, and may still be, disputed. When discussing the Government’s proposition to the Human Rights Act, a majority of the Storting stated that both CEDAW and CRC belong to the “core area” of the human rights treaties, and that CEDAW (together with CRC) should be incorporated into the Human Rights Act.

With the incorporation of CRC into the Human Rights Act in 2003, it may be argued that the argument relating to “core” and “special” treaties has been further weakened.

**iii. Uniform and consistent form of incorporation**

It may be held that it is unclear whether an incorporation of CEDAW into the Human Rights Act, with precedence over statutory provisions, as opposed to the current incorporation into the Gender Equality Act, would lead to any legal consequences in individual cases. In the event of a conflict, the decision must, *inter alia*, be based on the consideration that Norwegian law must as far as possible be presumed to be in accordance with treaties by which Norway is bound (the “presumption principle”).

However, incorporation of CEDAW into the Human Rights Act would make it clear that the CEDAW obligations will prevail in cases where the “presumption principle” will not suffice to bring about an interpretation of Norwegian law consonant to CEDAW. This would again provide for less uncertainty and ambiguity for those applying the law.

**iv. Indirect effect – symbol and signal**

Even though one should take the stand that an incorporation of CEDAW into the Human Rights Act with statutory precedence will have no direct legal effect, the indirect effect of such form of incorporation should not be underestimated. Incorporation of CEDAW on the same level as the human rights treaties already incorporated into the Human Rights Act, will serve as signal and emphasize that Norwegian authorities are taking the provisions of CEDAW seriously. This can help to increase respect for women’s rights both nationally and internationally.

**v. Increased knowledge**

An incorporation of CEDAW into the Human Rights Act with precedence may lead to increased attention and knowledge of the rights and freedoms embodied in CEDAW. This again may lead to an increased focus on and an easier discovery of eventual conflicts between Norwegian law and CEDAW. Thus, laws and practice may be adapted in order to achieve full compliance between Norwegian law and the rights and

freedoms embodied in CEDAW, as these are interpreted and undergoing a dynamic development within the CEDAW Commission.

**vi. Follow-up of the CEDAW Committee's dynamic practice**

Pursuant to the proposition to the Human Rights Act, an extensive and rich treaty body practice, establishing and clarifying the scope and content of the states parties' duties under a treaty, was an argument in favour of incorporating a treaty into Norwegian law. Thus, due to (at the time) lack of individual complaint mechanisms and practice from the CEDAW Committee, the proposition to the Human Rights Act argued that CEDAW was less suitable for incorporation.

With the Optional Protocol to CEDAW, which established individual complaint mechanisms and a more extensive practice from the CEDAW Committee, this argument is less valid today. Incorporation into the Human Rights Act with precedence over Norwegian law, also as recommended by the CEDAW Committee in relation to the consideration of the fifth and sixth periodic reports of Norway in 2003, could be seen as the best way of adapting for a more credible follow-up of the CEDAW Committee's dynamic practice of the Convention.

**vii. The national political scope of authority**

The resolution by the Storting on not to incorporate CEDAW into the Human Rights Act, was influenced by the final report from the Norwegian Study on Power and Democracy of 2003. The argument was that increased influence of international obligations would lead to a curtailing of the Storting's scope of action, leading to a danger to democracy and a curtailing of the national political scope of authority. However, this argument has not, to the knowledge of NCHR, been supported by solid empirical material.

Further, while the Storting will be bound by the human rights treaties already ratified by the Storting, the Storting may at any time change and choose the way and form to incorporate such treaties by statutory provisions.

**viii. Balance between the legislature and the judiciary**

The majority conclusion of the research group behind the Norwegian Study on Power and Democracy of 2003 held that the balance between the legislature and the judiciary is disturbed by incorporating human rights treaties into Norwegian law, shifting the power balance from the legislator to the judiciary system. These arguments are not, to the knowledge of NCHR, supported by solid empirical evidence and also have other considerable weaknesses. Thus, as argued in the proposition to the Human Rights Act, it will still be the responsibility of the legislature to see to it that the legislation is at all times in accordance with the requirements of the conventions. Also, the proposition to the Human Rights Act held that there is little research to believe that embodiment of the human rights conventions will in itself disturb the balance between the legislature and the judiciary.

**ix. The Government's pledge to incorporate CEDAW into the Human Rights Act**

The Government, in its political statement for the governing period of 2005 – 2009, pledged to incorporate CEDAW into the Human Rights Act. To date, after nearly two years, the pledge is still to be seen carried out. The Minister of Justice stated in March 2007 that further thinking was needed on this issue, setting off an extensive debate in the media.

There may be valid reasons in favour of a renewed thorough and principle debate and comprehensive thinking on the way forward when it comes to the status of and the way and form of incorporation of not only CEDAW, but also other human rights treaties such as ICERD, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the new Convention on the Rights of Persons with Disabilities (when in force and ratified).

However, as long as the Government has not stated its reasons and not provided empirical evidence in favour of not incorporating CEDAW into the Human Rights Act, the NCHR expects the Government to honour its pledge to incorporate CEDAW into the Human Rights Act with precedence over other Norwegian legislation.

## 2. Introduction

The Norwegian Centre for Human Rights is organized as a multi-disciplinary centre under the Faculty of Law at the University of Oslo, Norway. By Royal Decree of 21 September 2001, the Norwegian Government granted the NCHR status as a National Institution for Human Rights, as set out in the Paris Principles (General Assembly resolution 48/134) (UN E/C.12/Q/NOR/2 21 May 2004 para. 2).

The International Co-ordinating Committee for National Institutions for the Promotion and Protection of Human Rights (ICC), which oversees whether National Institutions are in compliance with the Paris Principles, endorsed the recommendations made by its Sub-Committee on Accreditation in 12 April 2006, acknowledging that the NCHR fully complies with the Paris Principles and therefore was to be granted status A accreditation.

The NCHR is an academic institution, part of the University of Oslo. In its function as the National Institution for Human Rights of Norway, the NCHR conducts research, monitoring, educational programmes within human rights education, advisory services, information and networking (see <http://www.humanrights.uio.no/omenheten/nasjonal/>).

In its mandate set out in the Royal Decree of 21 September 2001, it is stated that the NCHR shall not handle individual complaints. Further, the NCHR has not engaged in any research or educational programmes focusing specifically on the CEDAW Convention and its Optional Protocol.

On this background, the NCHR has liaised with the Equality and Anti-discrimination Ombud in relation to Norway's seventh periodic report to the CEDAW Committee. The Equality and Anti-discrimination Ombud shall, pursuant to its mandate, contribute to the promotion of equal opportunity and fight discrimination based on gender. The Equality and Anti-discrimination Ombud enforces, i. a., the Act relating to Gender Equality of 9 June 1978 No. 45 (the Gender Equality Act) and the Act relating to working environment, working hours and employment protection, etc. of 17 June 2005 No. 62 (the Working Environment Act) Chapter 13 (which regulates protection against discrimination). The Equality and Anti-discrimination Ombud has a specific responsibility for supervising that Norwegian legislation and practice is in compliance with Norway's duties under CEDAW. Further, the Equality and Anti-discrimination Ombud handles individual complaints and decides whether illegal discrimination has taken place. The Equality and Anti-discrimination Ombud also provides for general legal counselling and guidance regarding matters of discrimination based on gender.

The following comments from the NCHR on Norway's seventh periodic report are not exhaustive and are limited to questions relating to incorporation of CEDAW into Norwegian domestic law, cfr. the Committee's List of issues and questions with regard to the consideration of Norway's seventh periodic report, dated 4 April 2007 (CEDAW/C/NOR/Q/7), question No. 3:

*Constitutional, legislative and institutional framework*

3. Under article 2a, the report describes the incorporation of the Convention on the Elimination of Discrimination against Women into the Gender Equality Act, as

*well as the significant discussion surrounding this action. It also notes that the Government declaration of the current Government included a pledge to incorporate the Convention in the Human Rights Act. Please describe the practical impact and consequences so far of the incorporation of the Convention in the Gender Equality Act, and any differences compared to the impact of the incorporation of other human rights instruments in the Human Rights Act. Please describe any further developments, in particular in relation to the pledge of the current Government to incorporate the Convention in the Human Rights Act.*

Norway's seventh periodic report contains a presentation of the process leading up to the incorporation of CEDAW into Norwegian domestic law (cfr. article 2 a, para. 1.1.1). Recognizing that the presentation provides for an extensive description, including of the public debate surrounding the process, the NCHR will below present its summary of the incorporation process and its political and legal public debate (cfr. Section 3 below). Section 4 below will present arguments relating to impact and consequences of an eventual incorporation of CEDAW into the Human Rights Act with precedence over Norwegian law.

With regard to other issues of the report, please refer to separate submission to the Committee from the Equality and Anti-discrimination Ombud.

### **3. Incorporation of CEDAW - background**

#### **3.1 The Human Rights Act**

The question regarding ways and methods of incorporation of international human rights treaties, including CEDAW, was thoroughly examined in relation to the preparatory work to the Act relating to the strengthening of the status of human rights in Norwegian law (the Human Rights Act) of 21 May 1999 No. 30. In its report to the Government in 1993, the Human Rights Act Committee (also known as the Møse Committee) discusses ways and methods for incorporating international human rights treaties, including CEDAW, into Norwegian law.<sup>1</sup>

The Møse Committee concluded by not including CEDAW into the Human Rights Act, on the grounds that, *inter alia*, CEDAW was not regarded as one of the "core" human rights conventions, and seen less suitable for incorporation due to its (at the time) lack of individual complaint mechanisms and practice from the CEDAW Committee that could establish and clarify the scope of its provisions (see further on this subject section 4 below).

The Human Rights Act incorporated several human rights instruments, namely the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (the European Convention of Human Rights), the International Covenant of 16 December 1966 on Civil and Political Rights (ICCPR) and the International Covenant of 16 December 1966 on Economic, Social and Cultural Rights (ICESCR). By an amendment to the Human Rights Act, the UN Convention on the Rights of the Child (CRC) was incorporated into the Human Rights Act by Act of 1 August 2003 No. 86.<sup>2</sup> The Human Rights Act Sections 1 – 3 reads as follows:

#### *Section 1*

*The purpose of the Act is to strengthen the status of human rights in Norwegian law.*

#### *Section 2*

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<sup>1</sup> Cfr. Norwegian Official Report, NOU 1993:18, pp. 130-132.

<sup>2</sup> The Human Rights Act also incorporates optional protocols to the above mentioned covenants and conventions.

*The following conventions shall have the force of Norwegian law insofar as they are binding for Norway: (...).*

*Section 3*

*The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.*

Thus, pursuant to Section 3 of the Human Rights Act, the treaties incorporated by the Human Rights Act as specifically mentioned in Section 2, are given status as Norwegian law with precedence over other Norwegian legislation in situations of legal conflict.

In the debate following the Government's proposition on the Human Rights Act<sup>3</sup>, the Norwegian parliament (the Storting) requested the Government to "within reasonable time" incorporate CEDAW (as well as CRC) into Norwegian law.<sup>4</sup> In its Action Plan for Human Rights presented in 1999, the Government added ICERD and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to the conventions proposed incorporated into Norwegian law.<sup>5</sup> The proposition passed through the Storting.

### **3.2 The process of incorporating CEDAW into Norwegian law**

Norway ratified CEDAW without reservation on 21 May 1981, with entry into effect on 3 September 1981. On 5 March 2002, Norway ratified the Optional Protocol to the CEDAW Convention adopted by the UN 54th General Assembly on 6 October 1999. The CEDAW Convention and its Optional Protocol were, by Act of 10 June 2005, incorporated into Norwegian law by the Gender Equality Act. The incorporation means that the CEDAW Convention and its Optional Protocol "shall apply as Norwegian law", cfr. the Gender Equality Act Section 1b. However, in event of conflict with other Norwegian legislation, CEDAW and its Optional Protocol will not enjoy such statutory precedence over other Norwegian legislation as the treaties incorporated into the Human Rights Act (cf. Sections 2 and 3 of the Human Rights Act as described above).

As stated in Norway's seventh periodic report para. 1.1.1, the resolution passed by the Storting incorporating CEDAW into the Gender Equality Act, was the conclusion on an extensive political and legal debate in the Norwegian public sphere regarding the appropriate form of incorporation of human rights conventions into Norwegian law.

In the seventh periodic report of Norway, para. 1.1.1, it is stated that "[t]he special strength conferred by incorporating the convention through the Human Rights Act lies in the fact that the Human Rights Act has been given precedence over other Norwegian legislation. Thus, in the event of conflict between the conventions incorporated in the Human Rights Act and other Norwegian legislation, the conventions in the Human Rights Act will have precedence over other Norwegian statutes."

The Government's proposal on incorporating CEDAW into Norwegian legislation came in 2003. In the same year, CRC was incorporated into the Human Rights Act by Act of 1 August 2003 no. 86. Thus, as stated above, CRC was given status as Norwegian law with precedence over other Norwegian legislation on the same level as the the European Convention of Human Rights, ICCPR and ICESCR, cf. the Human Rights Act, Section 3.

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<sup>3</sup> Cfr. Proposition to the Odelsting No. 3 (1998-1999).

<sup>4</sup> Cfr. Recommendation No. 51 (1998-1999) to the Odelsting, para 1.

<sup>5</sup> Cfr. Proposition to the Storting No. 21 (1999-2000), p. 21.

The Government's proposal on incorporating CEDAW into Norwegian legislation was circulated on a broad general public hearing in June 2003. The Government's proposal contained an extensive overview and discussion of the various legal methods possible for incorporating CEDAW into Norwegian legislation, without concluding. Of the 24 consultative bodies expressing their views on the proposal regarding method of incorporation, 21 stated that CEDAW should be incorporated into the Human Rights Act and be given the same precedence over Norwegian law as the other conventions incorporated into the Human Rights Act.<sup>6</sup> One of the consultative bodies argued in favour of incorporation, but did not express its view with regard to which law should be used as method of incorporation. Only 2 of the 24 consultative bodies, namely the Ministry of Justice (Legislation Department) and the Office of the Norwegian Government's Legal Counsel, argued against incorporation into the Human Rights Act and against giving CEDAW statutory precedence over Norwegian law.

As described in Norway's seventh periodic report para 1.1.1, fifth paragraph, the Government's proposal to the Storting went against the almost unanimous view of the consultative bodies, proposing that CEDAW should be incorporated into the Gender Equality Act, cfr. Proposition No. 35 (2004-2005) to the Odelsting. Further, the Government proposed to incorporate CEDAW without a statutory provision granting CEDAW precedence over Norwegian law in situations of legal conflict. The proposition was passed by the Storting by Act of 10 June 2005 no. 38, with a scant majority voting in favour for incorporating CEDAW into the Gender Equality Act without precedence. The parties constituting the present Stoltenberg II Government (the Labour Party, the Socialist Left party and the Centre Party) were in favour of incorporating the Convention into the Human Rights Act, referring to the fact that incorporation into the latter would give the CEDAW Convention precedence over other Norwegian statutes.<sup>7</sup>

Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was incorporated into Norwegian law by the new Act on prohibition of discrimination based on ethnicity, religion, etc. (the Anti-discrimination Act) of 3 June 2005 no. 33. Thus, CEDAW and ICERD were both incorporated into Norwegian legislation, however not enjoying such "special strength" with precedence over Norwegian law on the same basis as the instruments incorporated into the Human Rights Act.

The reasoning behind the Government's proposals and the difference in incorporation methods are described in Norway's seventh periodic report para. 1.1.1, fifth paragraph. The main arguments may be summarized as follows: the Gender Equality Act, with its special objective of improving the position of women, was a "natural place" in which to incorporate CEDAW, ensuring better clarity and coherence in the Norwegian legal framework. Not giving CEDAW precedence over other Norwegian law was not a decisive counterargument, since Norwegian law in any event is presumed to be in accordance with the rules of international law by which Norway is bound (the "presumption principle"), meaning that those who apply the law would have to interpret Norwegian statutory provisions to be in harmony with CEDAW.

As extensively described in Norway's seventh periodic report, the choice of incorporation statute aroused considerable public debate. The debate, as well as the Government's proposal, was influenced by the final report from the Norwegian Study on Power and Democracy, submitted to the Government on 26 August 2003 (NOU 2003:19 *Makt og demokrati. Sluttrapport fra Makt- og demokratiutredningen*).

Further, as stated in Norway's seventh periodic report para 1.1.1, sixth paragraph: "The majority of the research group behind the Norwegian Study on Power and Democracy voiced concern about the fact that

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<sup>6</sup> Cfr. Proposition No. 35 (2004-2005) to the Odelsting, pp. 75, 79.

<sup>7</sup> Cfr. Recommendation No. 70 (2004-2005) to the Odelsting.

the Storting's scope of action – and thus the Norwegian system of representative government – was being curtailed by the growing number of international treaties that have been ratified by Norway. The minority argued along the lines that international human rights instruments, including CEDAW, represent a form of power redistribution that challenges structural male dominance and patriarchal forms of culture and religion. Human rights become a tool, so to speak, for a fairer distribution of power and, implicitly, a means of achieving greater democracy. In Report No. 17 (2004-2005) to the Storting: Power and Democracy, the Government (Bondevik II) in power at the time discussed ranking and rules of precedence for international human rights conventions. The report concludes that the rule of precedence must only be applied in very special cases, and that caution should be exercised with regard to future use of precedence provisions when incorporating international conventions.

The different views expressed in the Norwegian Study on Power and Democracy were also echoed in the Storting debate on incorporation of the CEDAW Convention, in which a scant majority consisting of the then governing parties (the Conservative Party, the Liberal Party, the Christian Democratic Party), supported by the Party of Progress, advocated incorporation into the Gender Equality Act with reference to the grounds given in the draft statute proposed by the Government in Proposition No. 35 (2004-2005) to the Odelsting, while the Labour Party, the Socialist Left party and the Centre Party were in favour of incorporating the Convention into the Human Rights Act, referring to the fact that incorporation into the latter would give the CEDAW Convention precedence over other Norwegian statutes.”

### 3.3 The Government's pledge to incorporate CEDAW into the Human Rights Act

The CEDAW Committee considered the fifth and sixth periodic reports of Norway (CEDAW/C/NOR/5 and CEDAW/C/NOR/6) at its 597th and 598th meetings, on 20 January 2003 (CEDAW/C/SR.597 and 598). In its report, the Committee stated the following regarding incorporation of CEDAW (CEDAW/C/2003/I/CRP.3/Add.2/Rev.1, para. 21):

*“The Committee recommends that the State party amend section 2 of the Human Rights Act (1999) to include the Convention and its Optional Protocol, which will ensure that the provisions of the Convention prevail over any conflicting statutes and that its provisions can be invoked in domestic courts. It also recommends campaigns to raise awareness of the Convention and its Optional Protocol, aimed, inter alia, at parliamentarians, the judiciary and the legal profession. The Committee requests that the State party report on progress made in this regard in its next periodic report and that it provide information on instances in which the Convention has been invoked before domestic courts.”*

As seen, the Committee's recommendation was not followed through. However, when the majority Stoltenberg II Government, consisting of the same parties in favour of incorporating CEDAW into the Human Rights Act during the Storting debate (the Labour Party, the Socialist Left party and the Centre Party), came into power in 2005, the Government in its political statement for the governing period of 2005 – 2009, signed 13 October 2005 (the so-called Soria-Moria-declaration), pledged to “incorporate the UN Convention on the Elimination of All Forms of Discrimination against Women into the Human Rights Act”.<sup>8</sup>

## 4. Incorporation of CEDAW into the Human Rights Act – impact and consequences

Pursuant to the political and legal background leading up to the incorporation of CEDAW into the Gender Equality Act as described above, the NCHR will in the following aim to elaborate on the practical impact and consequences of an eventual incorporation of CEDAW into the Human Rights Act with

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<sup>8</sup> The Soria-Moria-declaration of 13 October 2005 Chapter 17, p. 71.

precedence over Norwegian legislation (cfr. the Committee's List of issues and questions with regard to the consideration of Norway's seventh periodic report (CEDAW/ C/NOR/Q/7), question No. 3). The backdrop of the examining of these issues, is, inter alia, the Stoltenberg II Government's pledge in October 2005 to incorporate CEDAW into the Human Rights. The arguments presented below are not exhaustive, and do not examine or give examples on any specific legislation or practice where provisions of CEDAW may be in conflict with Norwegian legislation.

#### **4.1 The non-discrimination principle is one of the core human rights principles**

The non-discrimination principle is among the core human rights principles. The Universal Declaration of Human Rights stipulates that human rights apply to all people equally, "without distinction of any kind such as race, colour, sex, language...or any other status". The realisation of women's rights, and thereby the promotion of gender equality, is an extract of the core non-discrimination principle, with CEDAW as the most important and most comprehensive treaty. The international instruments incorporated through the Human Rights Act contain several articles prohibiting gender-based discrimination, such as ICCPR Article 26, ECHR Article 14, ICESCR Article 3 and ICCPR Article 3. However, CEDAW is the only human rights treaty explicitly prohibiting "discrimination against women" (cfr. Article 1), as opposed to the general non-discrimination principle set out in other treaties. The articles of CEDAW define what constitutes discrimination against women, with specific provisions protecting women against discrimination in all areas of political, public and private life. The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations.

As set out in its preamble, the CEDAW explicitly acknowledges that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity". Thus, with CEDAW, the realisation of women's rights was given an international legal instrument with the purpose of strengthening and mainstreaming non-discrimination of women and gender equality. As set out in CEDAW Article 3, states parties have a duty to secure women's rights, requiring states parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

With its Optional Protocol, CEDAW enables women, subject to gender discrimination, to submit complaints in groups or as individuals, to the CEDAW Committee.

Thus, although other treaties incorporated through the Human Rights Act contain prohibitions against discrimination based on gender, an effective incorporation of CEDAW into Norwegian law may provide for a more targeted protection of discrimination against women.

#### **4.2 The non-discrimination principle in Norwegian law**

Whether and how international treaties should be incorporated into Norwegian domestic law, must, as a starting point, be considered separately and with a specific view to the rights and duties established under the treaty in question, and to what Norwegian legislation already existing on the areas covered by the treaty in question.

In the Norwegian legal system, the non-discrimination principle is acknowledged in different statutes, with the Gender Equality Act and the Anti-discrimination Act as the most prominent. CEDAW is, as described above, incorporated into Norwegian law through the Gender Equality Act.

Article 110 c of the Norwegian Constitution contains a general duty for the State “to respect and ensure human rights”. However, the non-discrimination principle is not specifically encompassed in the Norwegian Constitution. Thus, it may be argued that incorporation of CEDAW with statutory precedence over Norwegian law would strengthen that the non-discrimination principle and protection of discrimination against women is a fundamental human right.

#### 4.3 The distinction between “core” and “special” treaties is disputed

In its report to the Government in 1993 on the Human Rights Act, the Møse Committee argued in favour of incorporating only the “core” human rights treaties into Norwegian law. Thus, the Møse Committee makes a distinction between “main” conventions and treaties (“*hovedkonvensjoner*”) and “special” conventions protecting specific rights or groups (“*særkonvensjoner*”). Thus, the European Convention on Human Rights, ICCPR and ICESCR were considered “core” treaties, while other international human rights treaties (such as CEDAW) were considered to be “special” conventions to be excluded from the general act of incorporation (the Human Rights Act). The Møse Committee argued that the more treaties to be included into a general act of incorporation, the easier it would be to weigh importance to the fact that other treaties are not included and to argue that some, but not all, “special” conventions should be included.<sup>9</sup>

The distinction between “core” and “special” treaties has been, and may still be, disputed. When discussing the proposition of the Møse Committee, a majority of the Storting stated that both CRC and CEDAW belongs to the “core area” (“*grunnstammen*”) of the human rights treaties, and that both CRC and CEDAW should be incorporated into the Human Rights Act.<sup>10</sup>

In 2003, CRC was included into the Human Rights Act, while CEDAW was incorporated into the Gender Equality Act, without precedence. With the incorporation of CRC into the Human Rights Act, it may be argued that the argument relating to “core” and “special” conventions and treaties has been weakened.

#### 4.4 Uniform and consistent form of incorporation

It may be held that the way and form of incorporation, on a theoretical level, will not be decisive with regard to the establishment of the content and scope of the rights embodied in CEDAW and its consequences in Norwegian internal law. In the event of a conflict, the decision must, *inter alia*, be based on the consideration that “Norwegian law must as far as possible be presumed to be in accordance with treaties by which Norway is bound” (the “presumption principle”).<sup>11</sup>

Thus, it may also be held that it is unclear whether an incorporation of CEDAW into the Human Rights Act, with precedence over statutory provisions, as opposed to the current incorporation into the Gender Equality Act without precedence, would lead to any legal consequences in individual cases. However, incorporation of CEDAW into the Human Rights Act would make it clear that the CEDAW obligations will prevail in cases where the “presumption principle” will not suffice to bring about an interpretation of Norwegian law consonant to CEDAW.

Furthermore, although it may be unclear the extent to which the way and form of incorporation into Norwegian law may not have any direct legal implications, the present situation, incorporating different human rights treaties on different legal levels in the internal law system, may constitute a lack of uniform and consistent form of incorporation, leading to uncertainty and ambiguity for those applying the law. As

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<sup>9</sup> Cfr. NOU 1993: 18 pp. 161, 162.

<sup>10</sup> Cfr. Recommendation No. 51 (1998-1999) to the Odelsting, para 1.

<sup>11</sup> Cfr. Norwegian Supreme Court (Norsk Retstidende) 1984, p. 1175 (at pp. 1179-80), cfr. NOU 1993: 18 p. 193.

stated by the Møse Committee, “[a] conceivable consequence of embodying one or more conventions could be that *the status of non-embodied conventions* will be weakened. This is not the intention. The reform can be carried out in such a way that such misunderstandings are avoided”.<sup>12</sup>

Also, the CEDAW Committee should note that the Møse Committee explicitly stated that the way and form of incorporation may have an implication on what weight shall be put on the human rights treaties in case of conflict with statutory provisions.<sup>13</sup> Thus, the Human Rights Act section 3 will clarify the place of the human rights conventions in the Norwegian legal system, making it clear to those applying the law that the convention provisions concerning rights and fundamental freedoms shall take precedence over statutory provisions which afford such rights and fundamental freedoms weaker protection.

#### 4.5 Indirect effect - symbol and signal

Even if one should argue that incorporation with precedence over statutory provisions will have no legal effect in practice, the indirect effect of such form of incorporation should not be underestimated. As held by the Møse Committee, supported by the Government and the Storting in the consideration of the report of the Møse Committee, incorporation into Norwegian law will “help to ensure that Norwegian law satisfies the requirements of the human rights conventions and to increase knowledge of them. The reform will serve as a signal and emphasize that the Norwegian authorities are taking human rights seriously. This can help to increase respect for such rights both nationally and internationally”.<sup>14</sup>

It may be held that this argument is valid also with respect to the level of incorporation. Incorporation of CEDAW on the same level as the human rights treaties already incorporated into the Human Rights with precedence, will serve as signal and emphasize that the Norwegian authorities are taking the provisions of CEDAW seriously. This can help to increase respect for such rights both nationally and internationally. Also, this may lead to stronger effect to the work of Norwegian state authorities and non-governmental organisations with women’s rights internationally. A recent example is the Stoltenberg II Government’s *Action Plan for Women’s Rights and Gender Equality in Development Cooperation 2007 – 2009*, launched on 8 March 2007. Voices in the public debate following the Action Plan has expressed that the legitimacy and weight of the work of Norwegian authorities in this area is dependent upon to what extent Norway put the provisions of CEDAW into practice and follow the recommendations of the CEDAW Committee. Although this stand may be disputed, it highlights that incorporation into the Human Rights Act may have other effects than direct legal effect in Norwegian domestic legislation.

#### 4.6 Increased knowledge

It may be argued that incorporation of CEDAW into the Human Rights Act with precedence would lead to increased attention and knowledge of the rights and freedoms embodied in CEDAW. This again may lead to an increased focus on and an easier discovery of eventual conflicts between Norwegian law and CEDAW. Thus, laws and practice may be adapted in order to achieve full compliance between Norwegian law and the rights and freedoms embodied in CEDAW, as these are interpreted and undergoing a dynamic development within the CEDAW Commission.

CEDAW has seldom been invoked before a Norwegian court (cfr. Norway’s seventh report). This may support the argument that incorporation of CEDAW into the Human Rights Act may increase knowledge and invocation of CEDAW in the Norwegian judiciary.

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<sup>12</sup> Cfr. NOU 1993: 18 pp. 87, 194.

<sup>13</sup> Cfr. NOU 1993: 18 pp. 166, 167, 194.

<sup>14</sup> Cfr. NOU 1993: 18, pp. 82, 83.

#### 4.7 Dynamic development of the statutes of the CEDAW Convention

Another argument against incorporating CEDAW into the Human Rights Act is found in the Møse Committee's report to the Government in 1993. Pursuant to the Møse Committee, an extensive and rich practice from the human rights body set to monitor a treaty is an argument in favour for incorporating the treaty in question into Norwegian law.<sup>15</sup> Seeing that CEDAW did not (at the time) include an individual complaints mechanism, there would be no complaints practice or decisions from the CEDAW Committee that could establish and clarify the scope of its provisions. On these grounds, although the CEDAW Committee's general recommendations could provide some guidance, the Møse Committee held that CEDAW was less suitable for incorporation into Norwegian law.<sup>16</sup>

Further, the Møse Committee questioned the need for incorporation on the grounds that the Gender Equality Act, with its enforcement mechanisms (the then Gender Equality Ombud and Gender Equality Complaints Board), seemed to take care of essentially all needs and would, in any case, have to be interpreted in the light of CEDAW. If, after all, the conventions should be incorporated, the Møse Committee suggested incorporation into the Gender Equality Act.

Today, after the ratification of the Optional Protocol, establishing an individual complaints procedure, the arguments made by the Møse Committee no longer holds validation. Also, as stated by the Government in the Proposition to the Odelsting on the Human Rights Act, since the content of the states parties duties under the conventions will be developed and more explicitly defined through practice from the treaty bodies, incorporation through domestic law could be seen as the best way of adapting for a more credible following-up of the state party's duties.<sup>17</sup> Further, it may be argued along these lines that an incorporation of CEDAW into the Human Rights Act with precedence over Norwegian law would provide for a more credible follow-up of the dynamic development of CEDAW – as well as a follow-up of the CEDAW Committee's recommendation to incorporate CEDAW into the Human Rights Act with precedence, presented in relation to the consideration of the fifth and sixth periodic reports of Norway in 2003.

#### 4.8 The national political scope of authority

When passing the resolution not to incorporate CEDAW into the Human Rights Act with precedence over Norwegian legislation, an argument given considerable weight was the majority conclusion of the research group behind the Norwegian Study on Power and Democracy and its concern about the alleged curtailing of the Storting's scope of action by the growing number of international treaties ratified by Norway (see Norway's seventh report Section 1.1.1 and Section 3.2 above).

However, in the view of the NCHR, a general reference to the majority conclusion of the research group behind the Norwegian Study on Power and Democracy is not sufficient. The minority research group behind the Norwegian Study on Power and Democracy emphasized that international human rights law has considerable significance when it comes to secure a true realisation of equality of gender, and that the realization of women's rights and freedoms is made, *inter alia*, through statutory rights.

Further, the argument relating to the curtailing of the Storting's scope of action was not supported by solid empirical material. Thus, it may be argued that it is not documented that the incorporation of international human rights treaties into the Human Rights Act, with precedence over other Norwegian legislation, actually leads to a danger to democracy and a curtailing of the national political scope of authority. As to the knowledge of NCHR, such empirical evidence is yet to be presented.

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<sup>15</sup> Cfr. NOU 1993:18, page 108.

<sup>16</sup> Cfr. NOU 1993:18, p. 132, see also p. 13.

<sup>17</sup> Cfr. Proposition to the Odelsting No. 35 (2004-2005) p. 78).

It should be noted that since the precedence provision is laid down by statute, this may at any time be amended or annulled by a new statute. Thus, the precedence provision laid down in the Human Rights Act, Section 3 (or, if so, a precedence provision laid down in the Gender Equality Act or any other act), will not curtail the power of the Storting to set aside or annul the precedence provision at a later stage. Thus, while the Storting will be bound by the human rights treaties already ratified by the Storting, the Storting may at any time choose the way and form to incorporate those treaties by statutory provisions.

#### **4.9 Balance between the legislature and the judiciary**

A close line of argument, presented by the majority conclusion of the research group behind the Norwegian Study on Power and Democracy, is the question whether the balance between the legislature and the judiciary is disturbed by incorporating human rights treaties into Norwegian law, shifting the power balance from the legislator to the judiciary system. In the public hearing following the proposition to incorporate CEDAW into Norwegian legislation, the Ministry of Justice expressed that incorporation contributes to make political questions judicial, cfr. the Norwegian Study on Power and Democracy, Chapter 6. This entails that caution should be made.” The view of the Ministry of Justice was supported by the Office of the Norwegian Government’s Legal Counsel.

These arguments are still to be seen supported by solid empirical evidence. Also, the arguments have considerable weaknesses, as argued by the NCHR in its comment in the public hearing following the Norwegian Study on Power and Democracy.<sup>18</sup>

Also the Møse Committee, when considering whether the balance between the legislature and the judiciary would be disturbed by incorporating human rights treaties into Norwegian law, argued against such point of view. “The Committee emphasizes that it will still be the responsibility of the legislature to see to it that the legislation is at all times in accordance with the requirements of the conventions. Altogether there is in the Committee’s opinion little research to believe that embodiment of the human rights conventions will in itself disturb the balance between the legislature and the judiciary.”<sup>19</sup>

#### **4.10 The Government’s pledge to incorporate CEDAW into the Human Rights Act**

An effective implementation of international human rights standards in Norwegian society does not only presuppose incorporation on a legal level, but also an effective implementation in practice of the rights and freedoms embodied in the human rights treaties. There is a need for better knowledge of the rights embodied in CEDAW and their practical implications, both within public authorities and the private individuals enjoying such rights and freedoms.

When the Government, in its political platform formed in 2005, pledged to “incorporate the UN Convention on the Elimination of All Forms of Discrimination against Women into the Human Rights Act”<sup>20</sup>, the pledge received support from, amongst many others, the NCHR.

To date, nearly two years after the Stoltenberg II Government came into power, the pledge is still to be seen carried out. In March 2007, the Minister of Justice stated that the question regarding incorporation of CEDAW into the Human Rights Act, with precedence over Norwegian law, is also relevant in relation to other conventions, such as ICERD and CAT. Therefore, he proclaimed that the Government during spring 2007 would debate these questions with a comprehensive view and while recognizing the possible

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<sup>18</sup> Comment to the Norwegian Study on Power and Democracy from the Norwegian Center for Human Rights, 28 May 2004 (in Norwegian only).

<sup>19</sup> Cfr. NOU 1993:18, page 194.

<sup>20</sup> Cfr. the Soria-Moria-declaration of 13 October 2005 Chapter 17, p. 71).

consequences for the Norwegian legal system if further human rights treaties should be incorporated into the Human Rights Act with precedence.<sup>21</sup> The statement from the Minister of Justice set off a debate in the media, with contributions from, amongst others, the Equality and Anti-discrimination Ombud, Department of Womens' Law of the University of Oslo and the NCHR.

There may be a need for a thorough and principle debate and comprehensive thinking on the way forward when it comes to the status of and the way and form of incorporation of not only CEDAW but also other human rights treaties such as CAT, ICERD and the new Convention on the Rights of Persons with Disabilities (when in force and ratified). However, notwithstanding an eventual need of such a process, this should not, in the view of NCHR, exclude a loyal follow-up on the part of the Government of its pledge to incorporate CEDAW into the Human Rights Act.

On 26 June 2007, the NCHR submitted a letter to the Legislation Department, Ministry of Justice, requesting information on the status of the incorporation process pursuant to the Government's pledge in the Soria-Moria-declaration. To date, the NCHR has not received a reply to said request.

As long as the Government has not stated its reasons and not provided empirical evidence in favour of not incorporating CEDAW into the Human Rights Act, the NCHR expects the Government to honour its pledge to incorporate CEDAW into the Human Rights Act with precedence over other Norwegian legislation.

Yours sincerely

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Researcher

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<sup>21</sup> See article from the Minister of Justice in Norwegian daily newspaper Dagbladet on 19 March 2007.

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