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# Breaking the Glass Ceiling: Germany and its obligation to equal leadership representation under CEDAW

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## I. Introduction

‘The primary assignment of women to work in the private sphere of the family has usually resulted in severe consequences for them with respect to their equality with men in access to opportunities in labour markets: their work in the family remains largely invisible, it is not accounted for in gross national products, and does not give women economic empowerment.’<sup>1</sup>

Over 40 years after the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>2</sup> came into force, that statement on gender differences in the ‘world of work’ persists. Of 190 assessed economies, 18 allow the husband to legally prevent his wife from working, 30 economies do not prohibit gender discrimination in the workplace, and only half of the economies provide for equal pay for work of equal value.<sup>3</sup> These factors, among many others, contribute to women being economically disempowered. That means they lack access to and control over productive resources, the ability to participate equally in existing markets, access to work, and participation in economic decision-making, both at home and in the workplace, for example jobs in decision-making levels.<sup>4</sup>

Equality in employment and the right to work are recognised as a human right<sup>5</sup> and should be enforced as such. From an economic perspective there is an increasing understanding that empowering women economically will benefit not only women themselves but societies as a whole. Enforcing women’s rights in the labour sector will lead to economic development such as higher GDP, as well as social development, such as better education, poverty reduction and overall better health.<sup>6</sup> From an individual perspective, women who participate equally in the labour market are financially independent and hold more power and agency over their lives.

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<sup>1</sup> Hanna Beate Schöpp-Schilling, “Impediments to Progress: The Formal Labor Market,” in *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women*, ed. Cees Flinterman and Hanna Beate Schöpp-Schilling (The Feminist Press at CUNY, 2007), 161.

<sup>2</sup> United Nations, “Convention on the Elimination of All Forms of Discrimination Against Women,” entered into force September 3, 1981, *United Nations Treaty Series* 13, 1249 (1980) (CEDAW).

<sup>3</sup> World Bank, “Women, Business and the Law” (Washington, D.C., 2022), p 22, 23 (World Bank Report).

<sup>4</sup> UN Women, “Facts and Figures: Economic Empowerment,” What We Do, July 2018, <https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures>, last accessed October 22, 2022 (UN Women, Facts and Figures).

<sup>5</sup> Zhiyuan Wang, “‘Bringing the State Back In’: Explaining Women’s Economic Empowerment in an Era of Globalization,” *Political Studies* 66, no. 4 (November 23, 2017): 1043–66, <https://doi.org/10.1177/0032321717736743>; Article 11 (1) (a) CEDAW.

<sup>6</sup> International Centre for Research on Women, “Understanding and Measuring Women’s Economic Empowerment,” 2018, 1 (ICRW, Measuring WEE).

## 1. Background

The term ‘economic empowerment’ (EE or WEE for ‘women’s economic empowerment’) encompasses a multitude of areas that relate to women’s role within economies. These sectors can be summed up into two essential categories: power and agency, and economic advancement.<sup>7</sup> Economic advancement entails the promotion of women through skills training and equal access to resources and opportunities. Simultaneously, women need to have the ability to control those resources and profits and be able to make independent decisions. The Gates Foundation, which does a lot of research in the area of women’s economic empowerment,<sup>8</sup> divides women’s economic empowerment into similar categories: access to income and assets (coinciding with ‘economic advancement’), ‘control of and benefit from economic gains, and the power to make decisions’ (coinciding with ‘power and agency’).<sup>9</sup> ‘Economic advancement’ or ‘access to income and assets’ includes the question of which level of jobs are available to women. It is therefore of particular interest to this research. It includes factors such as increased labour participation, improved diversity of work opportunities, and a higher return on labour, which are all inter-related.<sup>10</sup> The essence these categories and in fact the term ‘empowerment’ itself, hold a transformative component.<sup>11</sup> Accordingly, there can be no one action that will achieve economic empowerment. What is needed is continuous action, be it political, legal or economic, that gives women and girls the skills, resources and opportunities to increase their power and agency.<sup>12</sup> Those changes can only be sustainably transformative if it occurs at different levels: within the individual (education and capability), in communities (social norms), in ‘resources and opportunities, and in the wider political and legal environment.’<sup>13</sup>

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<sup>7</sup> Paola Perezniето and Georgia Taylor, “A Review of Approaches and Methods to Measure Economic Empowerment of Women and Girls,” *Gender & Development* 22, no. 2 (May 4, 2014): 233–51, 233, <https://doi.org/10.1080/13552074.2014.920976> (Perezniето and Taylor, Approaches and Methods to WEE).

<sup>8</sup> The Gates Foundation, “Women’s Economic Empowerment,” [www.gatesfoundation.org](http://www.gatesfoundation.org), 2016, <https://www.gatesfoundation.org/equal-is-greater/>, last accessed October 22, 2022.

<sup>9</sup> *Ibid.*

<sup>10</sup> ICRW, Measuring WEE, 4.

<sup>11</sup> The Gates Foundation, “Women’s Economic Empowerment,” <https://www.gatesfoundation.org/equal-is-greater/>, last accessed October 22, 2022; Perezniето and Taylor, Approaches and Methods to WEE, 236.

<sup>12</sup> The Gates Foundation, “Women’s Economic Empowerment,” <https://www.gatesfoundation.org/equal-is-greater/>, last accessed October 22, 2022.

<sup>13</sup> ICRW, Measuring WEE, 3.

Women's economic empowerment can be addressed in different ways. The International Centre for Research on Women (ICRW) identified two starting points for transformation: the first one is the increase of resources, such as skills, savings and networks, achieved for example through literacy training and microcredits. The second category includes norms and institutions, meaning legal and policy structures that influence how resources are distributed and used, including international and domestic laws.<sup>14</sup> WEE can also be addressed at different stages of a woman's life. The World Bank, for example, analyses indicators ranging from education, freedom of movement, marriage, and parenthood to entrepreneurship, assets, and the workplace.<sup>15</sup> As mentioned above, the 'workplace' represents an essential factor in women's economic empowerment. Through access to equal employment opportunities, women gain financial independence, more decision-making power within the household and the ability to control the trajectory of their lives. There is no comprehensive definition of the term 'workplace' in relation to WEE, but it is continuously used to describe different areas related to labour or employment, such as access to jobs, labour force participation, entrepreneurship, and equal pay for work of equal value.<sup>16</sup> Indicators related to the 'workplace' thus fall into the public sphere of women's lives. In contrast, the broader 'world of work' can also relate to issues in the private sphere, such as the overrepresentation of women in unpaid care work and the informal economy.<sup>17</sup>

Women's (economic) disempowerment has been recognized for a long time. The Universal Declaration of Human Rights (UDHR)<sup>18</sup>, which became the basis for many subsequent human rights treaties, recognised the general right to non-discrimination on the grounds of sex.<sup>19</sup> More specifically, in its Article 23 the UDHR recognised the right to work, to free choice of employment, to equal pay and to 'just and favourable conditions of work.' The International Covenant on Economic, Social and Cultural Rights expanded on the rights enumerated in the UDHR and included for

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<sup>14</sup> ICRW, Measuring WEE, 2.

<sup>15</sup> World Bank Report, 11.

<sup>16</sup> UN Women, Facts and Figures; Esteban Ortiz-Ospina and Sandra Tzvetkova, "Working Women: Key Facts and Trends in Female Labor Force Participation," Our World in Data, 2017, <https://ourworldindata.org/female-labor-force-participation-key-facts>, last accessed November 14, 2022 (Ortiz-Ospina and Tzvetkova, Working Women).

<sup>17</sup> Ortiz-Ospina and Tzvetkova, Working Women, <https://ourworldindata.org/female-labor-force-participation-key-facts>, last accessed November 14, 2022.

<sup>18</sup> UN General Assembly, "Universal Declaration of Human Rights," 217 (III) A (Paris, 1948), available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (UDHR).

<sup>19</sup> UDHR, Article 2.

example, the right to equal opportunity for promotion.<sup>20</sup> More recently, the United Nations recognized women's empowerment within Goal 5 ('achieving gender equality and empowering all women and girls')<sup>21</sup> of the 2030 Agenda for Sustainable Development. In the light of that goal the UN Secretary-General founded his High-Level Panel on Women's Economic Empowerment, which consists of experts from around the world. The Panel makes action-oriented recommendations and devises so-called 'tool kits' on how to improve economic outcomes for women.<sup>22</sup> Women's economic empowerment and its role in achieving substantive equality is increasingly on the European agenda as well. At the beginning of this year, the EU ministers for equality met with the European Commissioner for Equality and discussed the importance of women's economic empowerment for the achievement of substantive gender equality.<sup>23</sup>

The most comprehensive global framework for fighting discrimination against women is the Convention on the Elimination of All Forms of Discrimination (CEDAW). It was drafted in 1979 and came into force two years later. It recognizes general problems of discrimination against women, as well as the importance of an equitable economic order for the promotion of equality between men and women.<sup>24</sup> Even though 'economic empowerment' is not explicitly mentioned, CEDAW does contain provisions on discrimination in the economic field.<sup>25</sup> Article 11 of CEDAW considers discrimination more specifically in all areas of employment, including *inter alia* the general right to work, equal employment opportunities, the right to promotion, and equal pay. CEDAW is also understood to be a 'dynamic instrument'<sup>26</sup>. Its content

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<sup>20</sup> UN General Assembly, "International Covenant on Economic, Social and Cultural Rights," entered into force January 3<sup>rd</sup>, 1976, resolution 2200A (XXI) (1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>, Article 7.

<sup>21</sup> UN Women, "In Focus: Sustainable Development Goal 5," UN Women – Headquarters, August 23, 2022, <https://www.unwomen.org/en/news-stories/in-focus/2022/08/in-focus-sustainable-development-goal-5>, last accessed November 14, 2022.

<sup>22</sup> UN Women, "About: The Panel," UN Women, <https://hlp-wee.unwomen.org/en/about/the-panel>, last accessed November 8, 2022.

<sup>23</sup> Council of the European Union, "Conference on Economic Empowerment, Key to Gender Equality - French Presidency of the Council of the European Union 2022," French Presidency of the Council of the European Union, January 31, 2022, <https://presidence-francaise.consilium.europa.eu/en/news/ministerialpress-release-conference-on-economic-empowerment-key-to-gender-equality/>.

<sup>24</sup> CEDAW preamble, para 9.

<sup>25</sup> For example Article 1 CEDAW.

<sup>26</sup> CEDAW Committee, "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," (August 18, 2004) (General Recommendation 25), para 3.

is dependent on interpretation and clarification through progressive thinking.<sup>27</sup> The interpretation of the rights and provisions within CEDAW is guided by the Committee on the Elimination of Discrimination against Women (CEDAW Committee or the Committee). They formulate general recommendations on specific provisions, give concluding remarks on state reports and comment on individual communications and reports on inquiries. These documents are not legally binding but provide ‘authoritative statements’ that ensure consistency and legal security and have thus been accepted as sources of interpretation by States Parties.<sup>28</sup> The principles of non-discrimination and equality are interpreted extensively by the Committee, leaving room or rather even demanding the reading-in of rights, where the wording of the Convention is not explicit enough. The Committees recommendations and communications to States Parties will be relied on extensively throughout this research.

Similar to CEDAW, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)<sup>29</sup> is seen as a milestone in the fight for women’s rights in Europe. The Convention also condemns all forms of discrimination against women and requires states to ensure the practical realisation of substantive equality, prohibit discrimination against women, and abolish laws and practices which discriminate against women. According to the Istanbul Convention ‘the realisation of de jure and de facto equality between women and men is a key element in the prevention of violence against women’.<sup>30</sup> Its drafters relied heavily on CEDAW’s understanding of equality and non-discrimination.<sup>31</sup> The signing and ratification of the Istanbul Convention by the European states, including Germany, is a reiteration of their commitment to the achievement of substantive equality.

Germany has been a member of CEDAW since 1985 and a member of the Istanbul Convention since 2018.<sup>32</sup> Women make up more than half its population and

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<sup>27</sup> CEDAW Committee, General Recommendation 25, para 3.

<sup>28</sup> Christine Chinkin and Marsha A. Freeman, “Introduction,” in *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin, and Beate Rudolf (New York: Oxford University Press, 2012), 24.

<sup>29</sup> Opened for signature 11 May 2011, *Council of Europe Treaty Series* No. 210 (2011) (Istanbul Convention).

<sup>30</sup> Istanbul Convention, preamble, Article 4 (2).

<sup>31</sup> See generally Council of Europe, “The Istanbul Convention and the CEDAW Framework: A Comparison of Measures to Prevent and Combat Violence against Women” (Council of Europe, 2012).

<sup>32</sup> OHCHR, “Status of Ratification - Interactive Dashboard,” OHCHR Dashboard, 2014, <https://indicators.ohchr.org/>, last accessed November 14, 2022; Council of Europe, “Chart of Signatures

are highly educated. However, their representation in high-level positions remains low, with only 13.4 Per cent of board members of DAX (German Share Index) companies being women. That means Germany lies behind other western competitors like France, the UK and the US.<sup>33</sup> Another example is the percentage of professors in Germany: 88,4 Per cent of university professors are male.<sup>34</sup> The gender pay gap also remains high at 18 Per cent in 2020.<sup>35</sup> The German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth recognises gender equality as a human right that Germany has committed itself to protecting by signing CEDAW and its Optional Protocol.<sup>36</sup> It claims that Germany's Gleichstellungspolitik (Gender Equality Policy) tackles inequality on the labour market, 'by ensuring equal pay for equal work' and 'promoting women's equal access to leadership positions.'<sup>37</sup> Germany's legal efforts in the Gleichstellungspolitik consist of only three laws: one pertaining to equal pay,<sup>38</sup> and two pertaining to equal leadership representation which are inter-related (First and Second Management Positions Act).<sup>39</sup> The First Management Positions Act 2015 introduced a statutory minimum quota of 30 Per cent of female representatives on supervisory boards of Germany's biggest companies. In 2021 the government introduced the Second Management Positions Act to close gaps and improve effectiveness. These two laws are the focus of the analysis.

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and Ratifications of Treaty 210 - Full List," Treaty Office, October 17, 2022, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=210>.

<sup>33</sup> AllBright, "Aufbruch Oder Alibi? Viele Börsenvorstände Erstmals Mit Einer Frau" (Berlin: AllBright Stiftung gGmbH, September 2021), [https://www.bmwk.de/Redaktion/DE/Downloads/A/allbright-bericht-herbst-2021.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmwk.de/Redaktion/DE/Downloads/A/allbright-bericht-herbst-2021.pdf?__blob=publicationFile&v=4).

<sup>34</sup> Christina Iglhaut, "How Women Live and Work in Germany," deutschland.de, March 4, 2022, <https://www.deutschland.de/en/topic/life/women-in-germany-society-politics-education>, last accessed November 14, 2022.

<sup>35</sup> *Ibid.*

<sup>36</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "BMFSFJ - Gender Equality Policy," www.bmfsfj.de, June 11, 2020, <https://www.bmfsfj.de/bmfsfj/meta/en/equality/gender-equality-policy>, last accessed November 14, 2022 (BMFSFJ, Gender Equality Policy).

<sup>37</sup> *Ibid.*

<sup>38</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "Act to Promote the Transparency of Remuneration Structures [Gesetz zur Förderung der Transparenz von Entgeltstrukturen] (Entgelttransparenzgesetz)," entered into force July 6<sup>th</sup>, 2017, available at [BMFSFJ - Frauen und Arbeitswelt](#).

<sup>39</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "BMFSFJ - Gesetz Für Die Gleichberechtigte Teilhabe von Frauen Und Männern an Führungspositionen in Der Privatwirtschaft Und Im Öffentlichen Dienst," www.bmfsfj.de, September 13, 2017, <https://www.bmfsfj.de/bmfsfj/service/gesetze/gesetz-fuer-die-gleichberechtigte-teilhabe-von-frauen-und-maennern-an-fuehrungspositionen-in-der-privatwirtschaft-und-im-oeffentlichen-dienst-119350>; Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "BMFSFJ - Zweites Führungspositionen-Gesetz - FüPoG II," www.bmfsfj.de, August 12, 2021, <https://www.bmfsfj.de/bmfsfj/service/gesetze/zweites-fuehrungspositionengesetz-fuepog-2-164226>, last accessed November 14, 2022.

## 2. Research Problem

Inequality in the workplace is a result of unequal power structures, discrimination and societal role models. As Raday puts it in her commentary on Article 11 of CEDAW, which relates to employment rights, ‘Gender stereotyping of women as primarily housewives or as service providers, cultural practices which impose care functions on women, and social attitudes according to which women are not equally eligible for full participation in the labour market all adversely impact women’s right to work.’<sup>40</sup> Traditional gender roles, such as the man as the ‘breadwinner’ contribute to lower labour participation rates.<sup>41</sup> Similarly, the balance between childcare and work is a difficult one to strike, and it is still shouldered mostly by women.<sup>42</sup> All of those factors amount to women being underrepresented in the workforce, not being financially independent and lacking power and agency both in the public and the private sphere, making them economically disempowered. Simultaneously, discrimination against women – in the workplace and elsewhere – fosters inequality and disempowerment.<sup>43</sup> As the International Labour Organisation puts it ‘Persistent inequalities in income, assets and opportunities dilute the effectiveness of any action aimed at combating discrimination.’<sup>44</sup> The right to equal leadership representation, meaning not only a right to equal opportunity, but to equal results (a higher percentage of women in management) plays an important role in that regard. Such a right is not explicitly mentioned in CEDAW and therefore difficult to enforce. Article 11 of CEDAW, in combination with the principles of equality and non-discrimination demand a reading-in of rights that are necessary for the achievement of gender equality. The right to equal leadership representation contributes to the overall aims of eliminating discrimination against women, guaranteeing a life on equal basis with men, and effecting social and cultural change by providing female role models. It needs to be

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<sup>40</sup> Frances Raday, “Article 11,” in *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin, and Beate Rudolf (New York: Oxford University Press, 2012).

<sup>41</sup> International Labour Organization, “The Gender Gap in Employment: What’s Holding Women Back?,” [www.ilo.org](http://www.ilo.org), December 2017, <https://www.ilo.org/infostories/en-GB/Stories/Employment/barriers-women#persistent-barriers>.

<sup>42</sup> *Ibid*; Director-General of the International Labour Organisation, “Equality at Work: Tackling the Challenges - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work,” 2007, [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms\\_082607.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf) (ILO, Equality at Work), 73.

<sup>43</sup> *Ibid*, 1.

<sup>44</sup> *Ibid*.

included in CEDAW to advance women's representation in leadership positions and thus their overall economic empowerment.

The law can be a powerful tool in combating or enhancing discrimination. According to UN Women, 'gender differences in laws affect both developing and developed economies.'<sup>45</sup> In the negative, that can include women being legally restricted from having the same choice of jobs as men or husbands being able to legally prevent their wives from working.<sup>46</sup> In the positive, that can include laws providing quotas for women in leadership positions, like the Management Positions Act introduced in Germany in 2015. Strengthening women's economic power will advance overall economic, social and sustainable development.<sup>47</sup> More specifically, promoting full and productive employment can influence high rates of poverty among women and promote food security and health, all of which are also recognised as sustainable development goals.<sup>48</sup> Reducing poverty increases economic activity and thus (economic) growth, making societies more stable.<sup>49</sup> As UN Women puts it 'when more women work, economies grow.'<sup>50</sup> However, the focus on WEE as simply a means to achieve development fails to recognise that economic opportunity and decision-making is a human right and should be treated as such.

The link between WEE and development often leads to the problem that developed countries get overlooked in research pertaining to WEE.<sup>51</sup> One such country is Germany. Germany's level of leadership positions filled by women is astonishingly low both in corporate positions as well as academia at 13,4 Per cent and 11,6 Per cent respectively.<sup>52</sup> It is far from achieving its 30 Per cent quota implemented by the First

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<sup>45</sup> UN Women, Facts and Figures, <https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures>, last accessed November 14, 2022.

<sup>46</sup> World Bank Report, 22.

<sup>47</sup> See generally ICRW, Measuring WEE.

<sup>48</sup> *Ibid*, 3.

<sup>49</sup> Esther Duflo, "Women Empowerment and Economic Development," *Journal of Economic Literature* 50, no. 4 (December 2012): 1051–79, <https://doi.org/10.1257/jel.50.4.1051>.

<sup>50</sup> UN Women, Facts and Figures, <https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures>, last accessed November 14, 2022.

<sup>51</sup> Most of the papers that provide data on WEE are focused on countries in the global south. One paper that provided insight into the European context examined 26 European countries but did not include Germany.

<sup>52</sup> AllBright, Aufbruch Oder Alibi?, [https://www.bmwk.de/Redaktion/DE/Downloads/A/allbright-bericht-herbst-2021.pdf?\\_\\_blob=publicationFile&v=4](https://www.bmwk.de/Redaktion/DE/Downloads/A/allbright-bericht-herbst-2021.pdf?__blob=publicationFile&v=4); Iglhaut, How Women Live and Work in Germany, <https://www.deutschland.de/en/topic/life/women-in-germany-society-politics-education>, last accessed November 14, 2022.

Management Positions Act. Even if it would achieve that quota, it would still fall behind its European competitors.<sup>53</sup>

The issues pertaining to women and leadership in the workplace in Germany need to be addressed. As stated above, Germany has recognised its obligations under CEDAW to address existing inequalities and promote women's economic rights. If CEDAW is continued to be interpreted extensively and is read as including a right to equal leadership representation, Germany has an obligation to provide such representation. The current legislation in Germany in that regard must be examined to understand whether it is in line with what CEDAW demands and whether it is suited to fulfil the right and obligation to equal leadership representation.

### **3. Research significance**

This research will first provide an analysis of CEDAW and its provisions pertaining to non-discrimination, equality, and the right to employment in Article 11. In combination with the current practice of the CEDAW Committee to read rights into the Convention's wording, this paper will examine the possibility of reading a right to equal leadership representation into Article 11. The inclusion of that right will provide insight into the extent of state obligation in the field of economic empowerment. Further on, this paper will analyse Germany's domestic laws to address its compatibility with Germany's obligation under CEDAW. The objective of that analysis is the identification of potential legal barriers which hinder women being leaders in the workplace. This could be used as a base for further research into shortcomings of developed countries in that area. It can also provide a basis for state accountability for Germany, as the analysed shortcomings will simultaneously reveal areas of improvement.

### **4. Research question**

Germany has recognized its obligations under CEDAW to empower women economically. The problems identified above will be examined in two steps, by asking the following questions: First, what are Germany's exact obligations under CEDAW regarding the representation of women in leadership positions in the workplace? Do those obligations include only creating the 'opportunity' for advancement (such as skills training and equal access to jobs), or do they extend to factual representation in

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<sup>53</sup> Alison Smale and Claire Cain Miller, "Germany Sets Gender Quota in Boardrooms," *The New York Times*, March 6, 2015, sec. World, <https://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html>, last accessed November 14, 2022.

leadership (such as a higher percentage of women in management)? Secondly, if there is an obligation to ensure equal leadership representation in the world of work, are Germany's efforts to ensure that right through introducing the First and Second Management Positions Act, enough? I come to the conclusion that CEDAW contains an obligation to ensure equal leadership representation. Germany is currently fulfilling that obligation with the First and Second Management Positions Acts. However, there is a need for constant re-evaluation, and I recommend increasing the women's quota included in the Act from 30 Per cent to 40 Per cent.

## 5. Literature and methodology

There is an extensive amount of research concerning Women's Economic Empowerment in the world of work. The World Bank provides an extensive quantitative analysis of different indicators of WEE, including in the workplace.<sup>54</sup> The International Labour Organisation further provided a qualitative report on challenges of gender equality in employment, including definitions of discrimination and equality, but unfortunately only from 2007.<sup>55</sup> There are also several reports and papers on how to measure WEE. The World Bank Report includes several indicators, like mobility, pay, marriage, or parenthood.<sup>56</sup> The International Centre for Research on Women also published a report on how to define, understand and measure WEE.<sup>57</sup> Perezniето and Taylor conducted an extensive review through a meta-analysis of those different indicators and methods in their article.<sup>58</sup> An area of WEE that is continuously explored or at least emphasized is the connection between Economic Empowerment and (sustainable) development. Duflo<sup>59</sup> researches that interrelation directly, but most other resources mentioned here, at least aver to that connection as an argument for the importance of empowering women economically. Rudolf also focuses on that connection in the context of the Sustainable Development Goals of the UN.<sup>60</sup>

The relationship between CEDAW and WEE is less well explored. CEDAW does explicitly mention the economic sector as an area where discrimination must be fought and equality furthered. Article 11 of CEDAW clearly stipulates employment as

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<sup>54</sup> See generally World Bank Report.

<sup>55</sup> ILO, Equality at Work.

<sup>56</sup> World Bank Report, p iii.

<sup>57</sup> ICRW, Measuring WEE.

<sup>58</sup> Perezniето and Taylor, Approaches and Methods to WEE.

<sup>59</sup> Duflo, Women Empowerment and Economic Development.

<sup>60</sup> Beate Rudolf, "Freedom from Violence, Full Access to Resources, Equal Participation, and Empowerment: The Relevance of CEDAW for the Implementation of the SDGs," in *Sustainable Development Goals and Human Rights*, ed. Markus Krajewski and Heike Kuhn (Springer Open, 2020).

a human right. However, the impact of CEDAW on women's economic rights seems underexplored in comparison to social and political rights. The only paper directly related to this issue I was able to access was written by Morgan Mills, who in her thesis analyses the impact of CEDAW on women's economic opportunity and participation using case studies from Kuwait and Saudi Arabia, and Slovenia and Croatia.<sup>61</sup> A lot of research regarding CEDAW's impact revolves around minority groups, such as CEDAW's promises for rural women, which only sometimes link to economic opportunities and empowerment. That research usually focuses on CEDAW's Article 14 and rural women's overrepresentation in the agricultural workforce.<sup>62</sup> Researchers who do focus on women's economic empowerment might mention CEDAW, but don't analyse CEDAW's direct impact.<sup>63</sup> CEDAW's Article 11 related to employment seems less well explored, especially regarding women's representation in senior and leadership positions. The CEDAW Commentary only contains a few short paragraphs on a woman's right to choose her occupation,<sup>64</sup> to equal employment opportunities,<sup>65</sup> and the right to promotion,<sup>66</sup> all possible points of reference for a right to equal representation in leadership. In contrast, Article 11 (d) on the right to equal pay is over a page long.<sup>67</sup> Equally, in the book 'The Women's Convention turned 30' several authors analyse CEDAW's impact in various fields. It contains a chapter on economic rights but only related to the rights of equal job opportunities and equal pay for work of equal value, which are explicitly enumerated in Article 11.<sup>68</sup>

Germany's shortcomings in fulfilling women's economic rights in the workplace are also not well researched. Even though Germany has been a State Party to CEDAW for decades, its unfulfilled obligations under Article 11 go unexplored.

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<sup>61</sup> Morgan Mills, "Women's International Bill of Rights? Analyzing CEDAW's Impact on Women's Economic Opportunity and Participation" (2021).

<sup>62</sup> Lisa R. Pruitt, "Migration, Development and the Promise of CEDAW for Rural Women," *Michigan Journal of International Law* 30, no. 3 (2009); Shabbeer Ahmed, "International Journal of Social Impact, Volume 1, Issue 3, 2016," in *International Journal of Social Impact, Volume 1, Issue 3*, ed. Ankit Patel (RED'SHINE Publication. Inc, 2016); Marta R. Vanegas and Lisa R. Pruitt, "CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activism from the Bottom Up," *University of Baltimore Law Review* 41, no. 2 (2012).

<sup>63</sup> Ranjani K Murthy and Institute of Social Studies Trust, "After School Care, Child Development & Women's Economic Empowerment: Rationale, Progress and Challenges," *SSRN Electronic Journal*, 2020, <https://doi.org/10.2139/ssrn.3973288>; Wang, Bringing the State Back In.

<sup>64</sup> Raday, CEDAW Commentary, Article 11, 289.

<sup>65</sup> *Ibid*, 288.

<sup>66</sup> *Ibid*, 290.

<sup>67</sup> *Ibid*, 292-3.

<sup>68</sup> Anja Wiesbrock, "Equal Employment Opportunities and Equal Pay," in *The Women's Convention Turned 30 : Achievements, Setbacks, and Progress.*, ed. Ingrid Westendorp (Cambridge: Intersentia, 2012).

Interestingly, other European states have been the subject of such research. The Netherlands seems to be of interest, with several chapters dedicated to it in the book ‘The Women’s Convention turned 30’ mentioned above, as well as a chapter in ‘Women’s Human Rights: CEDAW in International, Regional and National Law’.<sup>69</sup> Other European states whose implementation of CEDAW has been explored include Finland,<sup>70</sup> the UK,<sup>71</sup> France,<sup>72</sup> and Norway.<sup>73</sup> The topic of structural barriers to being leaders in the workplace has been explored through a meta-analysis by Stuber, who combined several studies on the issue and concluded that barriers persist mainly in four clusters: the individual, societal gender norms, management, and selective processes.<sup>74</sup> The effectiveness of quotas within Germany’s legal system was researched by FidAR<sup>75</sup> and their ‘Women-on-Board-Index’.<sup>76</sup>

Women’s economic empowerment is a strongly intersectional field, touching on law, economics, politics, and sociology. Generally, a lot of research seems to take an economic, sociological, or political approach. Papers taking a legal approach seem to focus strongly on the global south. This paper, instead, will take a legal approach through desktop and literature research. It is based on both quantitative and qualitative

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<sup>69</sup> Margreet De Boer, “The Added Value of the Women’s Convention and the Dutch Case of the Christian Party,” in *The Women’s Convention Turned 30: Achievements, Setbacks, and Progress*, ed. Ingrid Westendorp (Cambridge: Intersentia, 2012); Tilly Draaisma, “Equality of Men and Women before the Law: Towards a New Dutch Law on Names,” in *The Women’s Convention Turned 30: Achievements, Setbacks, and Progress*, ed. Ingrid Westendorp (Cambridge: Intersentia, 2012); Jasper Krommendijk, “The Impact and Effectiveness of State Reporting under the Women’s Convention: The Case of the Netherlands,” in *The Women’s Convention Turned 30: Achievements, Setbacks, and Progress*, ed. Ingrid Westendorp (Cambridge: Intersentia, 2012); Marjolein Van Den Brink, “The CEDAW after All These Years: Firmly Rooted in Dutch Clay?,” in *Women’s Human Rights: CEDAW in International, Regional and National Law*, ed. Anne Hellum and Henriette Sinding Aasen (Cambridge University Press, 2013).

<sup>70</sup> Susanne Zwingel, “How Do International Women’s Rights Norms Become Effective in Domestic Contexts?” (Bochum: Ruhr-Universität Bochum, 2005); Kevät Nousiainen and Merja Pentikäinen, “Rise and Fall of the CEDAW in Finland: Time to Reclaim Its Impetus,” in *Women’s Human Rights: CEDAW in International, Regional and National Law*, ed. Anne Hellum and Henriette Sinding Aasen (Cambridge University Press, 2013).

<sup>71</sup> Sandra Fredman, “CEDAW in the UK,” in *Women’s Human Rights: CEDAW in International, Regional and National Law*, ed. Anne Hellum and Henriette Sinding Aasen (Cambridge University Press, 2013).

<sup>72</sup> Hélène Ruiz Fabri and Andrea Hamann, “Domestication of the CEDAW in France: From Paradoxes to Ambivalences and Back Again,” in *Women’s Human Rights: CEDAW in International, Regional and National Law*, ed. Anne Hellum and Henriette Sinding Aasen (Cambridge University Press, 2013).

<sup>73</sup> Anne Hellum, “Making Space and Giving Voice: The CEDAW in Norwegian Law,” in *Women’s Human Rights: CEDAW in International, Regional and National Law*, ed. Anne Hellum and Henriette Sinding Aasen (Cambridge University Press, 2013).

<sup>74</sup> Michael Stuber, “Myth Quota - Resistance and Ways to More Women in Leadership Positions [Mythos Quote – Widerstände Und Wege Zu Mehr Frauen in Führungspositionen],” *Personal Quarterly* 65, no. 1 (2013).

<sup>75</sup> Stands for ‘Frauen in die Aufsichtsräte e.V.’ [women on the supervisory boards society].

<sup>76</sup> Frauen in die Aufsichtsräte e.V., “Women-On-Board-Index 185,” 2021, <https://wob-index.de/webmedia/documents/wob185/2021/epaper/>.

resources. It will analyse the content and the extent of women's rights under Article 11 of CEDAW, specifically the inclusion of a right to equal representation in senior and leadership positions. CEDAW and Germany's structural and legal barriers will be critiqued and analysed based on both primary sources, like CEDAW and the relevant German legislation, as well as secondary sources providing research in those areas.

## **6. Structure of the paper**

To provide the required analysis, the paper will be structured as follows: Chapter II will illustrate the meaning of 'equality', 'equity' and non-discrimination as well as the measures envisaged within CEDAW to strive for equality. Chapter III analyses the extent of the state obligation to empower women economically and answers the question of whether CEDAW contains a right, and simultaneously an obligation, to equal leadership representation. Chapter IV illustrates Germany's current legislation concerning equal leadership representation, focusing on the First and Second Management Positions Act. It then analyses whether that legislation is an appropriate tool to achieving the right, and fulfilling the obligation, to equal leadership representation. Chapter V will conclude the analysis and summarise the findings.

## II. CEDAW and the principles of equality

CEDAW is understood to be a milestone for international women's rights. It uses a human rights-based approach to enshrine women's rights in international law and obliges states to effectively implement them in their domestic legislation.<sup>77</sup> To examine the understanding of equality within CEDAW it is important to understand the Convention's purpose. Different to, for example, the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), the CEDAW Committee defines CEDAW not as a convention that guarantees 'equal rights per se', but whose 'purpose is to ensure the equal enjoyment of these rights.'<sup>78</sup> Differently worded, CEDAW does not guarantee equal rights, as these are guaranteed under other covenants, but provides a programme to ensure the equal application of these internationally recognised women's rights.<sup>79</sup>

CEDAW provides several understandings of equality, such as transformative equality, substantive equality and the principle of non-discrimination. The Chapter is therefore divided into two sections. The first section touches on the controversial topic of using the term 'equity' instead of 'equality' and what the use of 'equity' would mean for the interpretation of CEDAW and why 'equality' is better suited for advancing international women's rights. The terminology needs to be cleared up as it provides the base for every part of the upcoming analysis. The second section of Chapter II explores the different forms of equality in CEDAW. It analyses what understanding of 'equality' presides in CEDAW and how it extends to every right guaranteed under the Convention. That understanding is crucial to two questions: First, the question of whether there is a right to 'equal' leadership representation. Secondly, the question of whether CEDAW guarantees equality of opportunity and/or equality of results. That will provide the basis for the later analysis of Germany's legislation concerning women in leadership positions at work. Lastly, the second section explains the measures envisaged within CEDAW to achieve (substantive) equality. Those will be used to analyse Germany's chosen measures in Chapter IV.

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<sup>77</sup> See generally Helen Hintjens, "UNIFEM, CEDAW and the Human Rights-Based Approach," *Development and Change* 39, no. 6 (2007): 1181–92, <https://doi.org/10.1111/j.1467-7660.2008.00513.x>.

<sup>78</sup> CEDAW Committee, "Contribution of the Committee to International Conferences," CEDAW/C/1994/7 (1993), para 5.

<sup>79</sup> *Ibid.*

## 1. Equity vs Equality

This section gives a brief overview over the controversy of using the term ‘equity’ rather than ‘equality’. It details the misconceptions the supporters of the term equity have about the term ‘equality’ and illustrates how changing the terminology to ‘equity’ now would result in far less protection and less advancement of women’s rights.

During the drafting of the ‘Beijing Platform for Action’<sup>80</sup> at the Fourth World Conference on Women in 1995, representatives of different caucuses lobbied for the use of the term ‘equity’ rather than equality.<sup>81</sup> Even though the term equality is now consistently used in human rights language,<sup>82</sup> there is still heated discussion whether the term equity would not be better suited to achieve the fulfilment of women’s human rights. The main argument is that the achievement of equity goes beyond equality: instead of requiring equal treatment, understood by the supporters of the term equity to mean identical treatment, equity – as understood by its supporters – requires giving women what they need.<sup>83</sup> Equality is also understood by some to be androcentric, making men the frame of reference and their experience the norm. For women to be equal, they must be more like men.<sup>84</sup> Many judges and scholars have indeed interpreted equality to mean ‘only’ formal equality. That understanding of equality is too narrow. CEDAW, as will be detailed below, bases its provisions on the understanding of substantive equality. Even if equality were to mean simply formal equality, that does not necessarily entail only identical treatment. Equality in and before the law includes the fundamental principle of human rights which states that it is discriminatory to treat things that are different as equal. The first step to eliminating discrimination is always the recognition of equal rights within the law. Equality in essence requires that treatment of men and women, be it identical or different, results in the ‘full enjoyment of human rights on an equal basis.’<sup>85</sup>

There are several factors that make equity an unsuitable term for the advancement of women’s rights. UNESCO defines equity to mean ‘the process of being fair to men and women.’<sup>86</sup> It is thus an undefined social goal. In contrast, equality

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<sup>80</sup> United Nations, “Beijing Platform for Action,” adopted at Fourth World Conference on Women, Beijing, China on October 17, 1995, *U.N. Doc. A/CONF.177/20*.

<sup>81</sup> See generally Facio, *Equity or Equality*, 1135-8.

<sup>82</sup> See for example CEDAW and Beijing Platform for Action.

<sup>83</sup> Facio, *Equity or Equality*, 1136.

<sup>84</sup> *Ibid*, 1155.

<sup>85</sup> *Ibid*, 1157.

<sup>86</sup> UNESCO, “Gender Equity,” [uis.unesco.org](http://uis.unesco.org/en/glossary-term/gender-equity), June 22, 2020, <http://uis.unesco.org/en/glossary-term/gender-equity>, last accessed December 26<sup>th</sup>, 2022.

is a legal term used in human rights law language, making it an enforceable legal obligation.<sup>87</sup> Equity is also a subjective concept: Equity as a just and natural order can be interpreted in many ways to the detriment of women's human rights. The Roman Catholic Church, one of the supporters of the term equity, denies women reproductive rights because it is just and natural for them to bear children.<sup>88</sup> The fundamentalist Muslims of Afghanistan find it just and natural that women be in the world to serve men and give them children, and as a result find it just as natural that women are not educated or work.<sup>89</sup> Many African countries find it just to exclude women from the family's inheritance because they will not need to provide for the family like the men.<sup>90</sup> Equity would give states a more abstract and flexible term for the implementation of measures. While that sounds desirable for the state, it would greatly diminish the enforceability of state obligations. It would be far easier for states to resort to the argument of culture and tradition to depart from even the principle of formal equality, let alone substantive equality.<sup>91</sup> Replacing equality with equity in the international women's rights dialogue would have another grave consequence: the human rights instruments that enshrine equality could not be the basis of state obligations to achieve equity, as that term is simply not included in current human rights instruments. Simultaneously, as supporters of the term equity understand equality to mean only formal equality, the obligation to achieve equality enshrined in human rights instruments would be left to mean identical treatment.<sup>92</sup>

The Committee and the UN High Commissioner therefore stress the importance of sticking with the term equality and its broad interpretation. The Committee urges State Parties to use the Convention's understanding of equality both in their domestic strategies and in their state reports, instead of equity as a 'subjective concept'.<sup>93</sup> For example, in its 38<sup>th</sup> Session in its concluding remarks to Vanuatu, the

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<sup>87</sup> Facio, *Equity or Equality*, 1155.

<sup>88</sup> Pope Paul VI, "Humanae Vitae (July 25, 1968) | Paul VI," [www.vatican.va](http://www.vatican.va), July 25, 1968, [https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae.html](https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html).

<sup>89</sup> CBS News, "Taliban Tells Women and Girls to Stay Home from Work and School," [www.cbsnews.com](http://www.cbsnews.com), September 20, 2021, <https://www.cbsnews.com/news/afghanistan-taliban-women-girls-work-school-sharia-rules/>.

<sup>90</sup> Facio, *Equity or Equality*, 1157.

<sup>91</sup> Radhika Coomaraswamy, "Reinventing International Law: Women's Rights as Human Rights in the International Community," *Commonwealth Law Bulletin* 23, no. 3-4 (July 1997): 1249-62, <https://doi.org/10.1080/03050718.1997.9986487>, 1258.

<sup>92</sup> Facio, *Equity or Equality*, 1159.

<sup>93</sup> CEDAW Committee, "Summary Record of the 749<sup>th</sup> Meeting (Chamber A)," CEDAW/C/SR.749 (A), 36<sup>th</sup> Session, August 16<sup>th</sup>, 2006, para 20; CEDAW Committee, "Summary Record of the 749<sup>th</sup> Meeting (Chamber A)," CEDAW/C/SR.750 (A), 36<sup>th</sup> Session, August 16<sup>th</sup>, 2006, para 18, 33.

Committee stressed the distinction between the two terms and emphasized that they are ‘not synonymous or interchangeable, and that the Convention is directed towards [...] ensuring de jure and de facto (formal and substantive) equality between men and women.’<sup>94</sup> The UN High Commissioner emphasised that ‘It is clear, that the term “equity”, which is conditioned by subjective criteria, cannot become a substitute for the fundamental legal principle of equality.’<sup>95</sup>

As detailed above, the term ‘equality’ in the wide interpretation used by CEDAW is better suited for advancing women’s rights, as it is objective and enforceable. But what exactly does ‘equality’ mean? To answer that question, the next section of Chapter II turns to the principles of equality and non-discrimination in CEDAW and analyses their definition and scope, as well as the measures envisaged within CEDAW to achieve equality.

## 2. Equality and non-discrimination

The preamble to CEDAW recalls that

discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

Discrimination against women thus is a violation of not only the right to equality but more deeply, the right to live a life with dignity, a value which is inherent to every human being. The underlying presumption of ‘equality and dignity is that all human beings in principle have an authentic desire to control their own lives and are deemed capable of making rational choices.’<sup>96</sup> In order to allow them to have that control and make those choices, CEDAW’s object and purpose is to ‘eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental

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<sup>94</sup> UN General Assembly, “Report of the Committee on the Elimination of Discrimination Against Women,” CEDAW/C/VUT/CO/3, 38<sup>th</sup> Session, June 11<sup>th</sup>, 2007, para 15.

<sup>95</sup> United Nations High Commissioner for Human Rights, “Building on Achievements: Women’s Human Rights Five Years after Beijing,” Office of the United Nations High Commissioner for Human Rights, May 2000, <https://www2.ohchr.org/english/bodies/chr/special/contribeijing.htm>, last accessed December 26<sup>th</sup>, 2022, para 12.

<sup>96</sup> Rikki Holtmaat, “The CEDAW: A Holistic Approach to Women’s Equality and Freedom,” *Women’s Human Rights*, July 11, 2013, 95–123, 113, <https://doi.org/10.1017/cbo9781139540841.006> (Holtmaat, A Holistic Approach).

freedoms’.<sup>97</sup> To fulfil that object and purpose, States Parties must, as the overarching obligation, eliminate discrimination and achieve substantive equality. The Committee divides that general obligation into three sub-dimensions: eliminating discriminatory laws and protecting women against discrimination through the law; fighting other factors of discrimination, such as political, social, economic or cultural discrimination to improve the de facto position of women; and fight existing gender stereotypes within society.<sup>98</sup>

The rights to non-discrimination and equality can be found in several provisions throughout CEDAW. Articles 1 to 5 and Article 24 contain the interpretive framework for the rights to non-discrimination and equality, and the general obligation of State Parties to eliminate all forms of discrimination and achieve substantive equality. Those rights and obligations inform all other provisions of CEDAW, enumerated in Articles 6 to 16.<sup>99</sup> This section of Chapter II analyses the principles of non-discrimination and equality found in Articles 1 to 5, and 24 to be able to adequately analyse Germany’s obligations under CEDAW in Chapter III.

#### **a) Principle of non-discrimination**

In this subsection, the paper analyses the extent of the state obligation to not discriminate against women. To do so, it looks for a cohesive definition of ‘non-discrimination’, looks at the interpretation awarded to that principle by the CEDAW Committee and the state obligations that arise out of the definition ‘non-discrimination’ and its interpretation.

Article 1 of CEDAW contains a broad definition of ‘discrimination against women’, based on the definition of discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>100</sup> ‘Discrimination against women’ thus means

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

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<sup>97</sup> CEDAW Committee, General Recommendation 25, para 4.

<sup>98</sup> *Ibid.*

<sup>99</sup> Simone Cusack and Lisa Pusey, “CEDAW and the Rights to Non-Discrimination and Equality,” *Melbourne Journal of International Law* 14, no. 1 (2013): 54–92, 57.

<sup>100</sup> *Ibid.*, 60; United Nations, “International Convention on the Elimination of All Forms of Racial Discrimination,” entered into force January 4, 1969, *United Nations Treaty Series* 660, no. 9464 (1965), Article 1 (1).

of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>101</sup>

Consequently, any difference in treatment based on sex, that has the purpose of impairing or nullifying a woman's rights constitutes (direct) discrimination – meaning the difference in treatment is ‘explicitly based on grounds of sex and gender.’<sup>102</sup> Simultaneously, the Convention seeks to protect women from indirect discrimination. An example of indirect discrimination would be that a woman receives the same treatment as a male counterpart but is still impaired in their rights, because structural disadvantages are ignored. That can take the form of a ‘law, policy, programme or practice [which] appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women.’<sup>103</sup>

The Convention's overall aim to eliminate all forms of discrimination against women has been divided into three sub-aims by the Committee: Ensuring full equality ‘before the law and protection against discrimination in the public as well as the private sphere’; improving the de facto position of women; and addressing ‘prevailing gender relations and the persistence of gender-based stereotypes.’<sup>104</sup> These three aims translate into three different strategies States Parties can employ for combating discrimination: giving individuals legal rights to equal treatment before and in the law (individual rights strategy); providing social support to those with the least opportunities (Social Support Strategies); and taking away structural causes through social and structural change (Social and Cultural Change).<sup>105</sup>

The principle of non-discrimination is categorized as a form of equality.<sup>106</sup> In contrast to other covenants on gender-based discrimination, CEDAW focuses on discrimination specifically experienced by women, as opposed to the more ‘neutral’ approach of discrimination based on sex or gender, which includes both men and women.<sup>107</sup> The right to non-discrimination also covers not only the rights explicitly enumerated in CEDAW, but also those rights recognized under other human rights

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<sup>101</sup> Article 1 CEDAW.

<sup>102</sup> CEDAW Committee, “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,” CEDAW/C/GC/28, (December 16, 2010) (General Recommendation 28), para 16.

<sup>103</sup> CEDAW Committee, General Recommendation 28, para 16.

<sup>104</sup> CEDAW Committee, General Recommendation 25, para 7.

<sup>105</sup> Holtmaat, A Holistic Approach, 110.

<sup>106</sup> Alda Facio and Martha I. Morgan, “Equity or Equality for Women? Understanding CEDAW's Equality Principles,” *Alabama Law Review* 60, no. 5 (2009), 1134, <https://doi.org/10.2139/ssrn.1469999> (Facio, Equity or Equality).

<sup>107</sup> Cusack and Pusey, 59.

treaties, like the right to life and a fair trial.<sup>108</sup> In its General Recommendations, the Committee has further extended CEDAW's protection to include gender-based violence, including violence enacted by non-state actors,<sup>109</sup> and the denial of health care to (only) women.<sup>110</sup> In essence, the already broad wording of Article 1 – entailing any difference in treatment based on sex that violates a woman's rights – has been enhanced by the broad interpretation of the Committee. Simultaneously, discrimination applies to all stages of a woman's life, be it in the 'political, economic, social, cultural, civil or any other field'<sup>111</sup>, bridging the classic public life/private life distinction. That is important, because many violations of women's rights occur within the private sphere or are inflicted by private actors. That also applies to the workplace where the regulation of discriminatory practices is the responsibility of the employer, who can be either a public (state) or a private (non-state) actor.

The definition of non-discrimination in Article 1 includes discriminatory acts that have either the purpose or the effect of violating women's human rights. Therefore 'discriminatory acts' under the Convention are not confined to acts that intentionally discriminate but also include those that, without intent, result in discrimination against women.<sup>112</sup> As a result, state obligations extend further than in other cases, because the state must not only prevent acts that intentionally discriminate. It must also examine every other state act as to its effects to determine whether it would be considered discriminatory under CEDAW. Article 1 recognizes that discrimination can occur at different stages of a right: when the right is established (usually by creating a law that recognises it), during the enjoyment of a right (regarding the necessities or requirements for the full enjoyment), and during the active exercise of the right itself. These three stages translate into three different obligations that CEDAW imposes on states: first, states must recognise women's rights, secondly, they must provide material and spiritual conditions for their enjoyment, and thirdly, they have to provide mechanisms for addressing their violation and for obtaining redress.<sup>113</sup>

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<sup>108</sup> *Ibid*, 61.

<sup>109</sup> CEDAW, Article 2 (e); CEDAW Committee, "General Recommendation No. 19 (11<sup>th</sup> session, 1992), Violence against women," (January 30, 1992) (General Recommendation 19); CEDAW Committee, General Recommendation 28, para 13.

<sup>110</sup> CEDAW Committee, "General Recommendation No. 24: Women and health (Chapter I)," A/54/38/Rev.1, chap. I, (1999).

<sup>111</sup> CEDAW, Article 1.

<sup>112</sup> Facio, *Equity or Equality*, 1143.

<sup>113</sup> *Ibid*, 1143.

The principle of non-discrimination is interpreted widely. It gives far-reaching rights to women and simultaneously imposes far-reaching obligations on states. As the principle of non-discrimination applies to every field of life, both in public and in private, the right to not be discriminated extends into the workplace. CEDAW therefore imposes an obligation on the state to not only control its own actions but also extend the obligation to non-state actors, including employers.

## **b) Equality**

This sub-section analyses the meaning of ‘equality’ within CEDAW. Unlike the term ‘discrimination’, the term ‘equality’ is not explicitly defined in the Convention. Interpretation of the Convention’s text has revealed three stages of equality that CEDAW seeks to achieve: formal, substantive, and transformative equality. Like the principle of non-discrimination, the Committee practices a wide interpretation of the right to equality.<sup>114</sup> All three forms are treated as essential on their own but also as inter-related and complementary.<sup>115</sup> The subsection will take a closer look at each of the three stages of equality and how they translate into state obligations. It will also illustrate the difference between equality of opportunity and equality of results and which form takes precedence within CEDAW.

Formal equality means equality before and in the law. As equals, men and women should be treated the same and CEDAW imposes the ‘formal legal obligation of equal treatment of women with men.’<sup>116</sup> De jure equality, as it is also referred to, envisions the content of laws and practices to reflect the equality between men and women and wants those laws and practices to be equally applied.<sup>117</sup> For example, Article 7 (a) of CEDAW requires that states ‘ensure to women, on equal terms with men, the right [...] to vote in all elections and public referenda [...].’ Article 9 (2) requires the state to guarantee women equal power to acquire, change or retain their nationality. Any difference in treatment through law on the basis of sex or gender is forbidden. However, this model of equality has its limitations. Giving women simply the same treatment as men ignores the underlying social issues that gave rise to inequality in the first place.<sup>118</sup> Formal equality is the first step in fighting for equality

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<sup>114</sup> See generally General Recommendations 25 and 28.

<sup>115</sup> *Ibid.*

<sup>116</sup> CEDAW Committee, General Recommendation 25, annex I para 6.

<sup>117</sup> Andrew Byrnes, “Article 1,” in *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin, and Beate Rudolf (New York: Oxford University Press, 2012), 60.

<sup>118</sup> CEDAW Committee. General Recommendation 25, annex I para 10.

and non-discrimination, but it is not sufficient.<sup>119</sup> State obligation must therefore ‘extend beyond a purely formal legal obligation of equal treatment.’<sup>120</sup>

To extend beyond the obligation of purely ‘equal treatment’, CEDAW wants to achieve substantive equality. ‘Substantive’ means ‘de facto’ equality, based on the realisation that women are unequal and oppressed not only because they are ‘women’, but due to structural disadvantages because of political, social, economic and cultural discrimination. It consists of two equally important aspects: the first is equality of opportunity. Men and women must be ‘given an equal start.’<sup>121</sup> That can include giving them the same treatment (formal equality), but it extends beyond, by incorporating the realisation that women often do not have the same starting point due to the structural discrimination. Equality of opportunity thus guarantees that that underlying inequality is addressed in order to give women an equal start. To achieve equality of opportunity, states need to eliminate discrimination that already hinders the access to opportunities and choices. De facto equality ‘cannot be achieved if individuals begin the race from different starting points.’<sup>122</sup>

The other facet of substantive equality is equality of results. It demands that not only the nature of the treatment is non-discriminatory but that the result be one of de facto equality. Differently put, there is not only a negative obligation to refrain from discrimination for example in legislation, but also a positive obligation to actively promote substantive equality.<sup>123</sup> Indicators for substantive equality are not the content of laws and policies, but what those laws and policies were able to achieve. As the Committee puts it

equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence, and women enjoying freedom from violence.<sup>124</sup>

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<sup>119</sup> Cusack and Pusey, 63.

<sup>120</sup> CEDAW Committee, General recommendation 25, annex I para 6.

<sup>121</sup> *Ibid*, para 8.

<sup>122</sup> Frances Raday, “Article 4,” in *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, ed. Marsha A. Freeman, Christine Chinkin, and Beate Rudolf (New York: Oxford University Press, 2012) (CEDAW Commentary, Article 4), 134.

<sup>123</sup> Rikki Holtmaat, “Building Blocks for a General Recommendation on Article 4 (1) of the CEDAW Convention. Report of the Expert Meeting in Maastricht (Valkenburg) 10-12 October 2002,” in *Temporary Special Measures: Accelerating de Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Antwerpen; New York: Intersentia; Ardsley, N.Y., USA, 2003), 215, note 4.

<sup>124</sup> CEDAW Committee, General Recommendation 25, para 9.

In essence, substantive equality dictates that identical treatment is not enough to achieve equality. States have to take into account socially, culturally and biologically constructed differences which have to be addressed (through non-identical treatment) to achieve equality.<sup>125</sup> A clear example of substantive equality within CEDAW can be found in Article 24, which states that ‘States Parties undertake to adopt all necessary measures [...] aimed at achieving the full realization of the rights recognized in the present Convention.’

The third form of equality within CEDAW is transformative equality. Transformative equality is seen as part of substantive equality,<sup>126</sup> but for ease of analysis it will be dealt with separately here. It requires states to address the underlying causes and structures of inequality in order to transform the system and the structures which caused and perpetuated the discrimination against women.<sup>127</sup> That transformation should be achieved in two steps: first, states must transform institutions, systems and structures by redistributing power and resources amongst men and women.<sup>128</sup> Real transformation is achieved when those systems are ‘no longer grounded in historically male paradigms of power and life patterns.’<sup>129</sup> Secondly, prejudices and stereotypes need to be addressed. States must create the necessary conditions for women to ‘develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.’<sup>130</sup> Mention of this is made in paragraph 14 of CEDAW’s preamble, ‘[...] a change in the traditional role of men as well as the role of women [...] is needed to achieve full equality.’ States are explicitly obliged to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices [...]’<sup>131</sup>

The principles of equality, like the principle of non-discrimination, take a wide approach. CEDAW obliges states to achieve equality on several levels, starting with equality before the law, through de facto equality, entailing both the same opportunities as well as demanding results of equality for women, and finally transformative equality, achieving cultural and societal change to take away the root

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<sup>125</sup> Cusack and Pusey, 64.

<sup>126</sup> *Ibid.*

<sup>127</sup> Holtmaat, A Holistic Approach, 108.

<sup>128</sup> CEDAW Committee, General Recommendation 25, annex I para 8.

<sup>129</sup> *Ibid.*, para 10.

<sup>130</sup> CEDAW Committee, General Recommendation 28, para 22.

<sup>131</sup> CEDAW, Article 5 (a).

causes of inequality. These far-reaching goals of CEDAW inform all other rights within the Convention. The next subsection will analyse possible measure CEDAW envisages to achieve equality.

**c) Possible measures to achieve (substantive) equality**

CEDAW operates under the principle of state obligation.<sup>132</sup> The principles of non-discrimination and equality are thus linked to a detailed list of obligations states need to fulfil to in order to achieve substantive equality, enumerated in Articles 6 to 16 of CEDAW. Those obligations are once again linked to several measures that CEDAW envisages to advance the achievement of equality, States Parties can thus make use of different measures to fulfil their obligations under CEDAW.

One possible state measure is enacting change through laws and policies. Several articles mention legislation or the law as an appropriate tool to advance substantive equality.<sup>133</sup> When implementing legislation, states have to take biological and social differences into account not as a justification for inequality but as an indicator of where laws and policies need to operate to balance those differences.<sup>134</sup> The reason for that is the understanding that most policies and laws are based on the masculine standard, and the dismissal of the social and biological differences of women and men in the law results in inequality.<sup>135</sup> In other words, women are not unequal because they are different, but they are unequal because those differences go unrecognized in the law. For example, a policy made to give women equal opportunities for employment cannot achieve equality of results if it does not take into account the various social factors as well as other laws and policies that obstruct the advancement of equal results. Thus, CEDAW obliges states to create, in addition to the policy guaranteeing equal opportunity,

social and economic conditions and the services, such as childcare centers, safe transportation, security against sexual and gender violence, access to information, etc., that are required, whether due to women's biological conditions or gender, to enable women to take advantage of the opportunities offered.<sup>136</sup>

Another way to fulfil state obligations are temporary special measures (TSMs). Their use is permitted in Article 4 (1) of CEDAW. The Committee has published a

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<sup>132</sup> CEDAW, Article 2.

<sup>133</sup> See for example Article 2 (b), Article 6 and Article 15.

<sup>134</sup> Facio, Equity or Equality, 1147.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*, 1148.

general recommendation on the provision and the use of TSMs.<sup>137</sup> Article 4 in general addresses the need to promote women's capabilities and ensure their fulfilment, which is crucial to the existence as a dignified human being with power and agency over their life. For example, one of those capabilities is the right to seek employment on an equal basis with men.<sup>138</sup> Article 4 is then divided into two sections, with Article 4 (1) concerning temporary special measures and Article 4 (2) focusing on special measures related to maternity. As this research focuses on leadership representation and is not directly related to maternity, I will focus on the temporary special measures included in Article 4 (1).

TSMs are measures to assist, compensate and correct factors that contribute or take away from women's de facto equality. They deliberately dictate different treatment of men and women, usually giving preference to women, to advance the achievement of equality.<sup>139</sup> The provision thus adds a new dimension to the guarantee of substantive equality, by recognizing the need to 'accelerate' the achievement of such de facto equality.<sup>140</sup> Article 4 (1) makes clear that the difference in treatment is not to be considered discriminatory, if it is aimed at assisting, compensating or correcting the current situation of women.<sup>141</sup> It is important to note that they are not an exception to the norm of non-discrimination, but an inherent part of the strategy necessary 'for the achievement of de facto or substantive equality of women with men.'<sup>142</sup>

Article 4 (1) – in contrast to Article 4 (2) – provides for only 'temporary' measures. The reason for that is the purpose of TSMs to accelerate the improvement of women's equality by effecting the necessary structural, social and cultural changes, and providing them with compensation for existing inequalities. It is a means to achieve the end-goal of de facto equality. As TSMs often mandate preferential treatment of women over men in moments where structural inequality demands it, measures must only be temporary, until those inequalities have been eliminated.<sup>143</sup> To fall under Article 4 (1) and not be considered discriminatory, TSMs also have to be

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<sup>137</sup> See CEDAW Committee, General Recommendation 25.

<sup>138</sup> Raday, CEDAW Commentary, Article 4, 124.

<sup>139</sup> *Ibid*, 131; CEDAW Committee, General Recommendation 25, para 8.

<sup>140</sup> Raday, CEDAW Commentary, Article 4, 125.

<sup>141</sup> CEDAW, Article 4 (1).

<sup>142</sup> CEDAW Committee, General Recommendation 25, para 18.

<sup>143</sup> *Ibid*, para 15; in contrast, Article 4 (2) concerns biological differences which are of a permanent nature, thus the measures used to address the inequalities resulting from those differences are permanent.

‘special’ measures, meaning they have to be designed to serve a specific goal.<sup>144</sup> Importantly, the Committee has made clear that TSMs are not only permitted but mandatory:

The Committee considers that States parties are obliged to adopt and implement temporary special measures in relation to any of these articles if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women’s de facto or substantive equality.<sup>145</sup>

CEDAW thus envisages change enacted by the state mainly through legislation. Where necessary, the state must use TSMs to fight existing structural disadvantages. That is in line with the Convention’s goal of substantive equality and equality of results. As explained above, those goals can only be achieved, if existing inequalities are balanced in favour of the woman – and in doing so, ‘negatively’ affecting the man.

### **3. Conclusion**

CEDAW’s understanding of equality is the basis for all rights included in the Convention. The term equity cannot be substituted for equality as its use relies on a misconception of the term equality as understood by CEDAW. Striving for equity rather than equality would leave CEDAW’s provisions greatly diminished and allow States Parties to interpret its provisions more subjectively and use them in their own interest. Equality should therefore remain the legal term and is promoted as such by the Committee.

The broad interpretation of the principles of non-discrimination and equality result in a far-reaching protection of rights and simultaneously far-reaching obligations for member states. CEDAW’s view of equality envisages not only formal equality but substantive and transformative equality, and not only equality of opportunity but equality of results. The ultimate goal of CEDAW is not to administer a catalogue of rights and obligations that states should blindly follow but to transform the cultural understanding of women’s role in society.<sup>146</sup> To that end, CEDAW prohibits not only direct, but also indirect discrimination and not only intentional, but unintentional discrimination. As the principle of non-discrimination extends to the ‘political, economic, social, cultural, civil or any other field’, the right to not be discriminated

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<sup>144</sup> CEDAW Committee, General Recommendation 25, para 21.

<sup>145</sup> *Ibid.*, para 24.

<sup>146</sup> Holtmaat, A Holistic Approach, 100.

extends also into areas not typically controlled by the state, such as the workplace. The obligation to achieve equality of results and transform the understanding of women's role in society results in the need for positive measures in support of women reaching all areas of society, including in the workplace. The intended measures within CEDAW reflect that need, as Article 4 (1) demonstrates. States supporting women by, for example, enacting quotas for job positions in which women are underrepresented, is not only allowed for under CEDAW, but mandatory.

### III. CEDAW's right to economic empowerment in the workplace

As detailed in Chapter II, CEDAW's goal of achieving substantive equality informs all other rights within the Convention. Women should be able to live a life equal to men in every aspect of society, be it political, social, cultural, civil or economic.<sup>147</sup> The idea of 'economic empowerment' is therefore present throughout the whole Convention. Even though economic empowerment is not directly named, several articles mention women's rights or state obligations in the 'economic' field.<sup>148</sup> Equal participation in the world of employment and the correlating acknowledgement of the right to work as a human right play an important part in that economic empowerment.<sup>149</sup> Simultaneously, achieving power and agency through employment is central to CEDAW's aim of achieving substantive and transformative equality. The first conventions relating to women and work were the International Covenant on Economic, Social and Cultural Rights (ICESCR), and several conventions of the International Labour Organisation,<sup>150</sup> as well as international policy papers like the 'Beijing Declaration and Platform for Action.' The ICESCR and its treaty body, the Committee on Economic, Social and Cultural Rights (CESCR) specifically recognised the 'right to work' as a human right.<sup>151</sup> The International Labour Organization (ILO) underlined the importance of employment not only as a means to earn money, but as an essential tool for developing one's identity as well as one's role in society.<sup>152</sup> As the CEDAW Committee notes, the number of conventions related to women's rights adopted by the ILO underline the interrelatedness of employment and women's rights.<sup>153</sup> CEDAW itself standardises the right to work in Article 11 on 'employment', including several facets of economic empowerment, such as the right to equal pay and equal access to the same job opportunities. The CEDAW Committee highlighted the

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<sup>147</sup> Article 1 CEDAW.

<sup>148</sup> For example in the definition of discrimination against women in Article 1, in the general obligation to take 'all appropriate measures, including legislation, to ensure the full development and advancement of women [...]' in Article 3, or in provisions enumerating specific rights such as Article 13.

<sup>149</sup> Article 11 (1) (a) CEDAW.

<sup>150</sup> For example International Labour Organisation, "Discrimination (Employment and Occupation) Convention," entered into force 15<sup>th</sup> June, 1960 (1958), available at [ILO/C/111: Discrimination \(Employment and Occupation\) Convention \(un.org\)](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312313) (ILO Convention 111), and International Labour Organisation, "Underground Work (Women) Convention," adopted on June 4<sup>th</sup>, 1935 (1935), available at [Convention C045 - Underground Work \(Women\) Convention, 1935 \(No. 45\) \(ilo.org\)](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312313) (ILO Convention 45).

<sup>151</sup> CESCR, General Comment No. 18 "The Right to Work", E/C.12/GC/18 (2005), para 1.

<sup>152</sup> See preamble to ILO, "Employment Promotion and Protection against Unemployment Convention," adopted 1988, No. C168 (1988), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312313](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312313).

<sup>153</sup> CEDAW Committee, "Contribution of the Committee to International Conferences," CEDAW/C/1994/7 (1993), para 14.

importance of the economic status of women and their right to work as a ‘special concern under the Convention.’<sup>154</sup>

The right to equal leadership representation, as opposed to the right to access the work environment, is not explicitly mentioned in CEDAW. However, the Committee has been known to read rights into the Convention, that are not explicitly mentioned. This Chapter therefore aims to answer the question of whether a right to equal leadership representation can be read into CEDAW’s provisions, specifically Article 11. To do so, the first section of Chapter III analyses the explicitly enumerated obligations related to the right of work in Article 11, and examines the extent to which they have been interpreted by the Committee. The abovementioned Conventions by the ILO and the ICESCR, insofar as they relate to the world of work, will be used as sources for interpreting the obligations within Article 11. In the second section, the Chapter interprets the existing obligations within Article 11 and combines them with the principles of non-discrimination and equality examined in Chapter II, to argue for the right to equal leadership representation being read into Article 11.

### **1. Article 11 ‘Employment’**

The importance of employment for the advancement of women’s rights and for the achievement of equality in the workplace is recognised in Article 11 (‘Employment’). This section analyses the obligations to economic empowerment in the workplace under Article 11 and how the right to employment is entailed within the right to non-discrimination and the right to equality, as well as central to the achievement of those aims. Article 11 combines measures directly related to employment such as the right to work, with measures indirectly influencing equal employment rights, such as women’s reproductive capacity and maternity protection.

Article 11 provides the framework for both formal and substantive equality in employment. Within Article 11, achieving substantive equality in the world of work is divided into three categories: Article 11 (1) standardises the elimination of discrimination against women in the field of employment to ensure them equal rights in that field, Article 11 (2) concerns discrimination in employment related to marriage or maternity, and Article 11 (3) concerns protective legislation. This structure

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<sup>154</sup> *Ibid.*

highlights the ‘duality of discrimination against women’<sup>155</sup> and the overarching measures required to achieve true equality.

The relevant provisions for this analysis concerning equal representation in leadership and senior positions can be found in Article 11 (1) (a) to (d), which state that

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- [...]

Each subsection concerns a different facet of women’s rights related to employment. Article 11 (1) (a) states the right to work as an ‘inalienable’ human right. It is ‘essential for realizing other human rights and forms an inseparable and inherent part of human dignity.’<sup>156</sup> It allows for the survival of the individual and their family, is important for personal development and for societal recognition.<sup>157</sup> The importance of the ‘right to work’ as a human right has also been highlighted in the context of other conventions, such as the ILO ‘Employment Promotion and Protection against Unemployment Convention’<sup>158</sup> and by the CESCR.<sup>159</sup>

The addition of the word ‘inalienable’ is seen as describing the essential guarantee of the right to work, in step with the importance of work for women’s (economic) freedom.<sup>160</sup> The Committee, based on the wording of Article 11 and the level of importance awarded to the right to work, makes it clear the state must take measures to ensure the full realisation of the right to employment.<sup>161</sup> First and

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<sup>155</sup> Raday, CEDAW Commentary, Article 11, 284.

<sup>156</sup> CESCR, General Comment 18, para 1.

<sup>157</sup> *Ibid.*

<sup>158</sup> See preamble to ILO, Employment Promotion and Protection against Unemployment Convention.

<sup>159</sup> CESCR, General Comment 18, para 1.

<sup>160</sup> Raday, CEDAW Commentary, Article 11, 285-6.

<sup>161</sup> CESCR, General Comment 18, para 2.

foremost, that includes the reduction of women's level of unemployment.<sup>162</sup> Secondly, women must have access not only to any form of employment, but to decent work, meaning States Parties must fight the concentration of women in unpaid labour and the informal economy<sup>163</sup> by ensuring the application of general labour standards to these women.<sup>164</sup>

Article 11 (1) (b) enumerates first the right to the same employment opportunities, and secondly the right to application of the same criteria when selecting someone for employment. In order to have the same job opportunities, women need access to the same education and training as men. The Committee has therefore read the right to education and training into Article 11 (1) (b), making it a justiciable right under the Convention.<sup>165</sup> The second right contained in Article 11 (1) (b) is the right to application of the same criteria for selection in matters of employment. That means women have a right to equal treatment in acceptance for employment.<sup>166</sup> The woman who is sufficiently qualified has a right to access those employment opportunities. Consequently, subsection (b) imposes the principle of non-discrimination directly on employers. Since that prohibition of discrimination already concerns access to the job, before the beginning of employer-employee relations, employers have an obligation towards women even before the existence of a contractual relationship.<sup>167</sup>

In addition to the right of the same employment opportunities and application of the same criteria, Article 11 (1) (c) contains the right to free choice of profession and employment, and the right to promotion. Similar to subsection (b), that includes rights to education, training, and retraining, as well as the obligation to promote cultural change.<sup>168</sup> The Committee has identified women's concentration in low-paying jobs not only a result of occupational segregation (so-called horizontal segregation), but also segregation in promotion (vertical segregation).<sup>169</sup> Higher levels of education should in theory translate into higher levels of representation in senior and leadership positions. The lack thereof implies a connection between the person's

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<sup>162</sup> See for example CEDAW Report, Concluding Comments Morocco, A/58/38, 28th Session (2003), paras 174-5; CEDAW Report, Concluding Comments Sri Lanka, A/57/38, 26<sup>th</sup> Session (2002), paras 290-3; CEDAW Report, Concluding Comments France A/58/38, 29<sup>th</sup> Session (2003), paras 259-62.

<sup>163</sup> That includes workers without a formal contract, temporary agency or part-time workers and temporary agency workers.

<sup>164</sup> Raday, CEDAW Commentary, Article 11, 287.

<sup>165</sup> *Ibid.*, 288.

<sup>166</sup> *Ibid.*, 289.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*, 290.

<sup>169</sup> *Ibid.*

gender and its level of employment. Especially in those states where women have higher levels of education, the Committee has expressed concern over the lack of female representation in leadership.<sup>170</sup> States must therefore create an enabling environment for women in high-level and high-paying positions.<sup>171</sup> In the context of low representation in academia, the Committee has therefore encouraged the use of TSMs, including quotas, to advance women into leadership.<sup>172</sup>

The issue of equal pay for women for work of equal value is widely discussed. The Convention dictates the right to equal remuneration in Article 11 (1) (d). The term ‘remuneration’ includes ‘the ordinary, basic or minimum wage or salary and any additional emoluments, whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment.’<sup>173</sup> It incorporates the wide definition of pay given in the ILO Convention as per the travaux préparatoires.<sup>174</sup> Examples include: expatriation allowance, unfair dismissal compensation, contributions to retirement benefit schemes, severance pay, holiday bonuses, and free travel facilities for retired employees.<sup>175</sup> The right to equal pay for work of equal value recognizes that inequality is a result not only of direct discrimination, but of horizontal – meaning occupational – segregation. Women tend to hold jobs that are paid less and wages in feminized occupations or professions are lower than in male-dominated fields.<sup>176</sup> The Committee has brought this connection to the attention of State Parties on several occasions.<sup>177</sup> In its General Recommendation 13,<sup>178</sup> the Committee issued three recommendations to States Parties to fight the problem of unequal pay: It urges states to ratify ILO Convention No. 100 (‘Equal

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<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> CEDAW Report, Concluding Comments Greece, A/57/38, Exceptional Session (2002), para 288.

<sup>173</sup> International Labour Organization, “ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value,” entered into force May 23, 1953, 165 *UNTS* 303 (1953) Article 1 (a), available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C100](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100) (ILO Convention 100).

<sup>174</sup> Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (BRILL, 1993), 136.

<sup>175</sup> Raday, CEDAW Commentary, Article 11, 292.

<sup>176</sup> List Foundation, “The Gender Pay Gap: Why Women Earn 20% Less than Men – List Foundation,” [www.listfoundation.org](http://www.listfoundation.org), October 19, 2022, <https://www.listfoundation.org/the-gender-pay-gap-why-women-earn-20-less-than-men#:~:text=Female-dominated%20Fields%20Pay%20Less%20The%20Department%20of%20Labor>.

<sup>177</sup> See for example CEDAW Report, Concluding Comments Ukraine, A/57/38, 27<sup>th</sup> Session (2002), para 293, or CEDAW Report, Concluding Comments Hungary, A/57/38, Exceptional Session (2002), para 327.

<sup>178</sup> CEDAW Committee, “General Recommendation No. 13: Equal Remuneration for Work of Equal Value,” Eighth Session (1989) (General Recommendation 13).

Renumeration’); it employs them to study, develop and adopt job evaluation systems based on gender-neutral criteria, that would allow for the comparison of the value of jobs ‘in which women predominate with those in which men predominate, and include the results in their reports to the Committee’; and it recommends that states, as far as possible, create implementation machinery to ensure the application of the principle of equal remuneration for work of equal value.<sup>179</sup> Article 3 ICESCR on substantive equality has also been read to include the right to equal remuneration, as understood by the Equal Remuneration Convention,<sup>180</sup> underlining the importance of equal pay.

The right to work as an inalienable human right is essential for the realisation of other rights and an inherent part of human dignity, as it is important for personal development and for societal recognition. States must take measures to ensure the full realisation of that right. That includes access to the same employment opportunities, free choice of profession, promotion and to equal pay. The Committee has interpreted those rights broadly, and reading in other rights that are essential to the full realisation of the right to equality in employment, such as the right to education and training. The rights addressed within Article 11 are essential for the full implementation of the Convention, as economic empowerment in the workplace plays an important role in the overall achievement of substantive equality.

## **2. The right to equal leadership representation**

The importance of empowering women economically is understood by the CEDAW Committee. As part of that empowerment, women should in theory participate in roughly equal numbers in the economic field, including leadership positions and management. That is not the case, as women are underrepresented as leaders in the workplace, despite having the same qualifications as men. This section therefore turns to the question of whether CEDAW entails a right to equal leadership representation, meaning a right to not only have the same ‘opportunities’ as men but to a roughly equal number of women in leadership positions.

The right to equal leadership representation is not explicitly described in CEDAW. The lack of female representation in managerial positions, even in States Parties where women have high levels of education, shows the need for such a right to

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<sup>179</sup> CEDAW Committee, General Recommendation 13.

<sup>180</sup> CESCR, “General Comment No. 16: The equal rights of men and women to the enjoyment of all economic, social and cultural rights,” E/C.12/2005/4, August 11, 2005 (General Comment 16), paras 23-5.

be read into the Convention. The following reasoning to include such a right hinges on three main arguments. First, CEDAW's main goals of achieving substantive equality, including equality of results, and a life free from discrimination demand a broad interpretation of CEDAW's provisions. Secondly, the wide interpretation of CEDAW's scope as practiced by the CEDAW Committee confirms the possibility and the need to read rights into the Convention that are not explicitly mentioned. Thirdly, the extensive wording of Article 11 (1) subsections (a) to (d) are the correct connection point for the 'reading-in' of a right to equal leadership representation.

**a) CEDAW's broad interpretation of equality and non-discrimination**

The issue of women's economic empowerment is entrenched in CEDAW's object and purpose, which is to give women a life free of discrimination and on an equal basis with men – including in the economic sector.<sup>181</sup> Any act of 'distinction, inclusion or restriction made on the basis of sex which has the effect [...] of impairing [...] the recognition, enjoyment or exercise by women, [...] in the economic field'<sup>182</sup> of their human rights thus constitutes discrimination. The obligation to eliminate such discrimination includes the obligation to fight existing gender stereotypes and structural discrimination in the economic field. Discrimination is defined broadly, including any difference in treatment based on sex.<sup>183</sup> Since many states in the Global North have similar numbers of highly educated men and highly educated women, a lack of equality in leadership positions indicates structural and cultural discrimination.<sup>184</sup> Simultaneously, simply awarding women the same right to hold management positions on paper is not enough to satisfy the obligation to non-discrimination. Where structural disadvantages, including cultural stereotypes and the lack of female role-models persist, the state must implement positive measures to counter those disadvantages.<sup>185</sup> The right to non-discrimination has been interpreted by the Committee to cover not only the rights enumerated under CEDAW, but also rights recognised in other conventions, such as the rights to life and a fair trial.<sup>186</sup> The right to live a life free from discrimination extends beyond the examples included in

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<sup>181</sup> CEDAW, Article 1.

<sup>182</sup> *Ibid.*

<sup>183</sup> CEDAW Committee, General Recommendation 28, para 16.

<sup>184</sup> Within the EU, close to three fifths (57.2 Per cent) of all tertiary education graduates in 2020 were women. In all EU Member States, more women graduated from tertiary education than men. See Statistics Office of the European Union (Eurostat), "Tertiary Education Statistics," ec.europa.eu, June 2022, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tertiary\\_education\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tertiary_education_statistics).

<sup>185</sup> CEDAW Committee, General Recommendation 28, para 16.

<sup>186</sup> Cusack and Pusey, 61.

Articles 6 to 16 of CEDAW and can be read to include a right to equal leadership representation.

Similar to the principle of non-discrimination, the principle of equality is an overarching right, that encompasses and influences every provision of CEDAW. The most important facets of equality for this argument are substantive equality, transformative equality, and equality of results, which are all inter-related.<sup>187</sup> Substantive equality focuses on the issue of structural discrimination, meaning it aims to give women ‘de facto’ equality by eliminating existing disadvantages. That should give women an equal starting point to men (equality of opportunity).<sup>188</sup> However, not only should the treatment of women be the same, but the actual results of that treatment play a part in CEDAW’s evaluation of equality. Equality of results, as the name suggests, demands not only equal treatment but equal results, including ‘women enjoying their rights in various fields in fairly equal numbers with men.’<sup>189</sup> Relating this back to the matter at hand, de facto equality in the workplace, including equal participation and the right to promotion (Article 11 (1)), can only be achieved, if that includes the right to equal leadership representation, resulting in ‘fairly equal numbers’ of women and men in management. States also have the obligation to transform institutions and structures by addressing prejudices and stereotypes.<sup>190</sup> They must create the conditions for women to ‘pursue their professional careers’<sup>191</sup> and modify the social and cultural patterns in order ‘to achieve full equality.’<sup>192</sup> If the right to (transformative) equality ‘stops’ at guaranteeing access to the same opportunities but not access to the same results, a transformation of cultural patterns and prejudices will hardly be achieved in any reasonable amount of time. In the interest of breaking those stereotypes, female role-models in leadership will have a significant amount of impact. First, as literal examples for aspiring female leaders. And secondly, women in leadership will be the ones to decide who else is allowed into positions of power. And they are less likely to perpetrate the same stereotypes towards their female colleagues as men.<sup>193</sup>

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<sup>187</sup> CEDAW Committee, General Recommendation 25, annex I para 6.

<sup>188</sup> Raday, CEDAW Commentary, Article 4, 134.

<sup>189</sup> CEDAW Committee, General Recommendation 25, para 9.

<sup>190</sup> CEDAW Committee, General Recommendation 28, para 22.

<sup>191</sup> *Ibid.*

<sup>192</sup> CEDAW preamble, para 14; see also CEDAW, Article 5 (a).

<sup>193</sup> Dan Marcec, “Do Women CEOs Earn More and Have More Diverse Boards?,” The Harvard Law School Forum on Corporate Governance, May 5, 2018, <https://corpgov.law.harvard.edu/2018/05/05/do-women-ceos-earn-more-and-have-more-diverse-boards/>.

**b) Manner of interpretation practiced by CEDAW Committee**

CEDAW is understood to be a ‘dynamic instrument’<sup>194</sup>. Its content is dependent on interpretation and clarification through progressive thinking.<sup>195</sup> The CEDAW Committee has always interpreted the wording of the Convention broadly, to allow for the full expression of the rights contained in CEDAW, and to achieve the most effective realisation of substantive equality. A prominent example is the reading-in of the protection from gender-based violence (GBV). It is not mentioned expressly anywhere in the Convention. The Committee’s reasoning for the inclusion of the right rested on the following arguments: the right had a serious impact on the enjoyment of the right to equality;<sup>196</sup> there are several articles throughout the Convention, that were in some form related to violence;<sup>197</sup> the protection from gender-based violence in the member states was lacking; and the full implementation of the Convention required member states to take positive measures to eliminate such violence.<sup>198</sup> According to the Committee, the right to non-discrimination includes the right to a life free from gender-based violence, because it impairs or nullifies the enjoyment by women of their human rights. As such, ‘gender-based violence may breach specific provisions of CEDAW, regardless of whether [these] expressly mention violence.’<sup>199</sup>

Another example of a right being read into CEDAW, is the right to education and training read into Article 11 (1) (b). The reasoning for such a reading-in was that a right to equal job opportunities logically meant that women needed the same education and training as men.<sup>200</sup> Other than in the example of gender-based violence, the reading-in in of the right to education and training was not primarily based on fulfilling the general right to equality. Instead, the goal was to allow the right to equal access to job opportunities to come to full fruition. According to the practice of the CEDAW Committee, a right can therefore be read into CEDAW under two (alternative) conditions: Either the right is necessary for the full expression of any of the rights enumerated in Articles 6 to 16. Or it disrupts the enjoyment of the right to equality and non-discrimination and needs to be included in CEDAW to allow for the full implementation of the Convention.

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<sup>194</sup> General Recommendation 25, para 3.

<sup>195</sup> *Ibid*, para 3.

<sup>196</sup> CEDAW Committee, General Recommendation 19, para 1.

<sup>197</sup> *Ibid*, para 3.

<sup>198</sup> *Ibid*, para 4.

<sup>199</sup> *Ibid*, paras 6-7.

<sup>200</sup> Raday, CEDAW Commentary, Article 11, 288.

In countries where women have high levels of education, their position in the labour market is still divided both in wage and in occupation.<sup>201</sup> The divide indicates prejudices and discrimination as the core problem. The conduct of denying a woman a senior position she is qualified for is a form of exclusion (from a senior position by promotion) as well as a form of restriction (of a woman's free choice of profession and her advancement in her career).<sup>202</sup> Because of that exclusion and restriction, the woman is impaired in the enjoyment of her right of equal treatment to men in the economic field, as well as in the exercise of her right to promotion and free choice of profession. The Committee has pointed out that problem to CEDAW's member states on several occasions, the first one being as early as 2002.<sup>203</sup> As the lack of representation in leadership perpetuates existing gender stereotypes, it impairs women's right to enjoy their human rights on an equal basis with men and free from discrimination.

The right to work is recognised within CEDAW as an inalienable human right.<sup>204</sup> It is inherent to life as an individual with power and agency, and its standing in society. As pointed out by the Committee, states must take measures to ensure the full realisation of the right to work.<sup>205</sup> Even though the lack of representation has been pointed out by the Committee, the problem persists. The right to work includes the right to free choice of employment and the right to promotion. Therefore, both the full expression of the right to work and the full realisation of CEDAW's goal of substantive equality demand an inclusion of a right to equal leadership representation.

**c) Anchoring the right to equal leadership representation in Article 11**

The right to equal leadership representation is not enumerated in Article 11 (1), or any other provision in CEDAW. As the right to freedom from violence and the inclusion of GBV in the agenda of CEDAW by the Committee has shown, that does not mean that the right is therefore not included in CEDAW's protection. It could and should be included in the Convention on the basis of the right to equality on its own (as was done with the right to protection from GBV). CEDAW's wording and the practice of broad

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<sup>201</sup> The Committee expressly addressed this on the example of Estonia, Concluding Comments Estonia, A/57/38, 26<sup>th</sup> Session (2002), paras 105-8.

<sup>202</sup> See definition of discrimination in Article 1 of CEDAW.

<sup>203</sup> *Ibid*; CEDAW Report, Concluding Comments Switzerland, A/58/38, 28<sup>th</sup> Session (2003), para 124; CEDAW Report, Concluding Comments Brazil, A/58/38, 29<sup>th</sup> Session (2003), para 124; CEDAW Report, Concluding Comments Saint Kitts and Nevis, A/57/38, 27<sup>th</sup> Session (2002), para 99; Raday, CEDAW Commentary, Article 11, 290.

<sup>204</sup> CEDAW, Article 11 (1) (a).

<sup>205</sup> CESCR, General Comment 18, para 2.

interpretation of that wording, however, allow for a right to equal representation to be anchored additionally onto Article 11 (1) itself. There are several subsections within Article 11 which can be read to include the right to equal leadership representation.

The CEDAW Committee has identified the lack of representation of women in senior positions as the result of a variety of different factors, including occupational segregation (women in the informal sector, unpaid care work etc) and vertical segregation (lack of promotion).<sup>206</sup> The most obvious point of contact for a right to equal leadership representation is therefore Article 11 (1) (c), which includes the right to free choice of profession and the right to promotion. The understanding of the right to free choice of profession includes a right to choose your field and the type of work you wish to do. It does not directly contain the right to choose the level of job you will obtain.<sup>207</sup> However, the full realisation of the right to free choice of profession does merit the inclusion of a right to equal leadership representation. If a woman knows she is less likely to obtain the same senior positions as a man in a certain field, despite having the same qualifications, she might be less inclined to choose that job. Article 11 (1) (c) therefore contains the obligation for states to ‘create an enabling environment for women’s presence in high-level and well-paid positions.’<sup>208</sup> The specifically enumerated right to promotion is an expression of the right to equal treatment in employment conditions.<sup>209</sup> In order to be effectively implemented, it must entail the right to be promoted into and represented in leadership. The right would otherwise fall flat. In that context, the Committee has therefore explicitly encouraged the use of TSMs including quotas.<sup>210</sup>

Article 11 (1) (b) guarantees the right to ‘application of the same criteria for selection in matters of employment.’ That includes the right to equal treatment in acceptance for employment.<sup>211</sup> That wording is usually interpreted to apply only to the hiring of new employees, but regarding the severity of the lack of female leadership representation, it could be interpreted to include a right to be accepted for certain levels of employment. The right to the same employment opportunities in Article 11 (1) (b)

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<sup>206</sup> CEDAW Report, Concluding Comments Switzerland, A/58/38, 28th Session (2003), para 124; CEDAW Report, Concluding Comments Brazil, A/58/38, 29<sup>th</sup> Session (2003), para 124; CEDAW Report, Concluding Comments Saint Kitts and Nevis, A/57/38, 27<sup>th</sup> Session (2002), para 99.

<sup>207</sup> Raday, CEDAW Commentary, Article 11, 289.

<sup>208</sup> CEDAW Report, Concluding Comments, Trinidad and Tobago, A/57/38, 26<sup>th</sup> Session (2002), paras 151-2; Raday, CEDAW Commentary, Article 11, 290.

<sup>209</sup> Raday, CEDAW Commentary, Article 11, 290.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*, 289.

includes the right of ‘access to the employment opportunities for which the woman is qualified.’<sup>212</sup> As many women are as highly qualified for managerial positions as men, this can easily be read to include access to leadership and senior positions. The right to equal pay for work of equal value in Article 11 (1) (d) recognizes that inequality in income is a result not only of direct discrimination, but of occupational segregation. Women hold jobs that are paid less, including being stuck in lower-level and thus, lower-paying positions. Awarding a right to equal leadership representation enhances the full expression of the right to equal pay.

Employers have a particularly strong influence on employment policy, but are often private entities, which are not directly bound by international treaties. Article 2 (e) therefore explicitly obliges member states to not only eliminate discrimination within their own authorities, but to ensure the right to non-discrimination extends to conduct of ‘any person, organization or enterprise.’ States must therefore take legislative action in order to achieve the equality in opportunity and treatment.<sup>213</sup>

The right to equal leadership representation can be read into several provisions of CEDAW, especially the rights to promotion, to free choice of profession, to application of the same criteria for selection in matters of employment, to the same employment opportunities, and to equal pay for work of equal value within Article 11 (1). Such an interpretation coincides with the CEDAW Committee’s practice of reading-in rights that are essential for the full realisation of the explicitly enumerated right in Articles 6 to 16. At the latest, however, the right to equal representation has to be recognised, when one considers the Convention’s aim of achieving substantive equality. Substantive equality means not only equality of opportunity (meaning the right to equal access), but equality of results. States must ensure that their legal systems and institutions, as well as any person, organisation or enterprise,<sup>214</sup> allow women to actively experience equality in their lives.<sup>215</sup> The mentioning of the issue to States parties by the CEDAW Committee shows that the Committee recognises the problem as part of their responsibility and therefore acknowledged the obligation of States parties to combat that problem.<sup>216</sup> The extent of the obligation to provide equal leadership representation can realistically not be 50 Per cent. However, states are

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<sup>212</sup> *Ibid*, 288.

<sup>213</sup> Wiesbrock, Equal Employment Opportunities and Equal Pay, 230; CEDAW, Articles 2 (b) and 2 (f).

<sup>214</sup> CEDAW, Article 2.

<sup>215</sup> Mills, Women’s International Bill of Rights, 8.

<sup>216</sup> CEDAW Report, Concluding Comments Denmark, CEDAW/C/DEN//CO/6, (2006), paras 14-5.

obliged to take appropriate measures to ensure the full realisation of women's right to employment – including representation in high-level and high-paying positions.

### **3. Conclusion**

The importance of economic empowerment in the workplace is addressed in Article 11 of CEDAW. Article 11 (1), which standardises the elimination of discrimination against women in the field of employment to ensure them equal rights, includes a wide range of rights aimed at achieving equality in the workplace, such as the right to equal pay for work of equal value, the right to promotion, to equal job opportunities, and the general right to work. The Committee has interpreted the provision broadly to ensure the full realisation of equality in the workplace. Other rights, such as the right to education and training have been read into Article 11 (1) (b) to allow for the right to the same employment opportunities to be realisable. The rights within Article 11 (1) are the basis for women to live an independent life and inherent to women's right to dignity. Simultaneously, the Committee has acknowledged persisting problems of inequality in the workplace such as the issue of underrepresentation of women in leadership positions. A right to equal representation of women in leadership is not expressly mentioned in Article 11. The broad interpretation of the Convention's text, in line with the Committee's practice, allows for and even demands a reading-in of such a right. CEDAW's aim of substantive equality includes equality of results. Women therefore have the right to enjoy their human rights in every aspect of life in fairly equal numbers as men. The rights to choose their occupation freely, to get promoted, and to have equal pay are enhanced by a right to equal leadership representation. The mention the CEDAW Committee has made on the issue of lack of representation shows the severity of the problem. In line with the practice of interpretation and in the interest of the full realisation of CEDAW, the right to equal leadership representation should be included in the Convention's provisions.

#### IV. Germany and equal leadership representation

The right to equal leadership representation can be read into the existing provisions of CEDAW. The CEDAW Committee has acknowledged the obligation of States parties to combat that problem.<sup>217</sup> Germany, one of the member states of CEDAW, has such an obligation to increase the number of women in leadership. Germany is one of the leading countries in the world on the economic empowerment of women.<sup>218</sup> However, the number of women in senior management positions in German companies has remained at a low level for many years. They in no way reflect the proportion of female employees: In 2021 46,8 Per cent of Germany's labour force participants were women,<sup>219</sup> while only 25 Per cent of Germany's leading job positions on the first management level, which includes the board of directors, the management, and the main department, were occupied by women. On the second management level, which includes executive functions in all departments subordinate to the main department, women make up 35 Per cent of the managers.<sup>220</sup> The two Management Positions Acts are two of the main pillars of Germany's legal efforts in the Gleichstellungspolitik, and the only laws relating directly to the lack of female representation in leadership.<sup>221</sup> They are therefore the focus of this analysis.

Issues of unequal representation in leadership are known to be a combination of several facets, including outdated gender stereotypes, unequal division of responsibilities in the household and family, and occupational segregation.<sup>222</sup> As this paper takes a legal analysis approach, it will not or only briefly touch on those issues

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<sup>217</sup> CEDAW Report, Concluding Comments Denmark, CEDAW/C/DEN//CO/6, (2006), paras 14-5.

<sup>218</sup> Germany scored 97.5 points out of 100, landing it in 15<sup>th</sup> place of the countries examined by the World Bank, see World Bank Report, Table 1.1, p 14.

<sup>219</sup> Statista, "Share of Women in Management Positions by Sector 2022 [Frauenanteil in Führungspositionen Nach Branchen 2022]," Statista, March 9, 2022, <https://de.statista.com/statistik/daten/studie/575509/umfrage/frauenanteil-in-fuehrungspositionen-in-deutschland-nach-branchen/>; Federal Statistical Office [Statistisches Bundesamt], "Women's Participation in the Labour Force [Teilhabe von Frauen Am Erwerbsleben]," Statistisches Bundesamt, 2023, <https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-1/teilhabe-frauen-erwerbsleben.html#:~:text=Der%20Abstand%20zu%20Den%20M%C3%A4nnern%20verringert%20sich.>

<sup>220</sup> Heather Hofmeister and Lena Hünefeld, "Women in Leadership [Frauen in Führungspositionen]," bpb.de, 2010, <https://www.bpb.de/themen/gender-diversitaet/frauen-in-deutschland/49400/frauen-in-fuehrungspositionen/>.

<sup>221</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, "BMFSFJ - Frauen Und Arbeitswelt," www.bmfsfj.de, n.d., <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt>.

<sup>222</sup> Hofmeister and Hünefeld, Women in Leadership [Frauen in Führungspositionen], <https://www.bpb.de/themen/gender-diversitaet/frauen-in-deutschland/49400/frauen-in-fuehrungspositionen/>.

and instead focus on Germany's legal landscape surrounding the issue of women in leadership and examine potential barriers in that regard.

Every right under CEDAW is interpreted in a way that allows for the full implementation of the Convention's provisions. The right to equal leadership representation therefore aims to give women not only the same employment opportunities but participation in decision-making in the workplace in fairly equal numbers with men. Germany is behind its European competitors in realising that right.<sup>223</sup> This Chapter therefore answers two questions: What is the legal landscape in Germany regarding equal leadership representation? And are those laws in form of quotas enough to drive changes to break the glass ceiling and thus, fulfil Germany's obligation to equal leadership representation?

### 1. Germany's status quo

Germany's constitution guarantees the right to equality in Article 3 of the German Bill of Rights, the Grundgesetz ('Basic Law').<sup>224</sup> The provision includes the right to non-discrimination and explicitly the obligation to ensure equality between men and women.<sup>225</sup> That obligation was the basis for a discussion surrounding the need for a women's quota to be introduced to bridge the gap in female representation in management positions of Germany's companies.<sup>226</sup> In 2015, the First Management Positions Act was implemented, introducing a quota of 30 Per cent for the composition of supervisory boards of Germany's biggest companies.<sup>227</sup> It was later supplemented by the Second Management Positions Act of 2021.<sup>228</sup>

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<sup>223</sup> Germany ranked behind France, Norway and Spain in 2019. All of them have introduced quotas of 40 Per cent for their companies' management positions. See Jennifer Abel-Koch, "Women in Leadership Positions - Germany Lags behind in International Comparison [Frauen in Führungspositionen – Im Internationalen Vergleich Hinkt Deutschland Hinterher]" (Frankfurt: KfW Research, February 18, 2019).

<sup>224</sup> "Basic Law [Grundgesetz]" (1949). English translation provided by Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, available at [Basic Law for the Federal Republic of Germany \(gesetze-im-internet.de\)](https://www.gesetze-im-internet.de/basic_law_for_the_federal_republic_of_germany/), last accessed February 1<sup>st</sup>, 2023, Article 3.

<sup>225</sup> Basic Law, Articles 3 (3) and 3 (2) respectively.

<sup>226</sup> Explanatory Memorandum I, 48.

<sup>227</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and the Youth, "Act for the Equal Participation of Women and Men in Leadership Positions in the Private Sector and Public Service [Gesetz Für Die Gleichberechtigte Teilhabe von Frauen Und Männern an Führungspositionen in Der Privatwirtschaft Und Im Öffentlichen Dienst]" (2015).

<sup>228</sup> Federal Ministry of Justice, "Second Act on Equal Participation of Men and Women in Management Positions [Gesetz zur Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst]" (2021).

In order to examine Germany's legal landscape surrounding equal leadership representation, this section will focus on the right to equality as guaranteed by Article 3 of the German Constitution, and the combination of the First and Second Management Positions Acts (FüPoG I and FüPoG II, respectively), which introduced the women's quota for leadership positions.

**a) Article 3 of the Basic Law**

Germany's Basic Law is the highest-ranking law of the country. Its Article 3 (1) guarantees equality before the law for all persons. Article 3 (3) prohibits discrimination on several grounds, including 'because of sex'.<sup>229</sup> Article 3 subsection (2) states that '[m]en and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.'<sup>230</sup> The German Constitutional Court interprets the scope of Article 3 widely. Any direct or indirect discrimination on grounds of sex or gender fall under Article 3 and are thus prohibited. For example, in a case concerning pension deductions for part-time employees, the Court decided that the deductions violated Article 3. The Court ruled that the deductions constituted indirect discrimination on the grounds of sex, as the part-time jobs in that sector and at that time were mostly filled by women.<sup>231</sup>

The combination of Article 3 (3) and Article 3 (2) is of special interest to this paper. The prohibition of discrimination and the concurring right to live a life free from discrimination written in Article 3 (3) is guaranteed without the possibility for legislation to make exceptions. The only way to 'legally' encroach on that right is if there is another colliding fundamental right or value, which allows for the limitation of the right to non-discrimination.<sup>232</sup> One such value is the constitutional goal of achieving equality between men and women inscribed in Article 3 (2). For the state to promote the actual implementation of equal rights and eliminate existing disadvantages, it must take positive steps. That includes preferential treatment for women over men in areas, where women experience structural disadvantages.<sup>233</sup> That

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<sup>229</sup> Translation provided by the Bundestag, supra note 213.

<sup>230</sup> Translation provided by the German Bundestag, supra note 213.

<sup>231</sup> *Pension deduction [Versorgungsabschlag]*, 2 BvL 6/07, BVerfGE 121, 241 (254), (German Constitutional Court [Bundesverfassungsgericht] 2008).

<sup>232</sup> Bundestag, "Constitutional admissibility of women's quotas [Verfassungsrechtliche Zulässigkeit von Frauenquoten]," WD 3 - 3000 - 080/18 (2018), 4, available at [WD-3-080-18-pdf-data.pdf \(bundestag.de\)](https://www.bundestag.de/SharedDocs/Druckversionen/DE/WD/WD3/WD3_3000_080_18_04.pdf?__blob=publicationFile).

<sup>233</sup> Hans-Jürgen Papier and Martin Heidebach, "More Women in Executive Positions in the Public Service through Promotion Measures - Constitutional and European Law Assessment [Mehr Frauen in

discriminatory action towards the male sex is a violation of Article 3 (3) but justified through the advancement of the fundamental value of achieving equality. Article 3 (2) of the Basic Law extends further than simply stating equality of men and women. It obliges the government of Germany to take positive steps towards eliminating existing disadvantages and guaranteeing equality. Whether that obligation entails equality of opportunity or whether it extends to guarantee equality of results is disputed by German legal scholars.<sup>234</sup>

Problems around the guarantee inscribed in Article 3 (2) often arise in the context of women's quotas established for filling new positions. These qualify as a direct discrimination on the basis of gender (against men) in terms of Article 3 (3), which is generally prohibited. Additionally, prescribing a quota for filling new positions encroaches on several fundamental rights of the companies' holders, like the freedom of property under Article 14 of the Basic Law, freedom of occupation under Article 12 of the Basic Law and freedom of association under Article 9 (1) of the Basic Law.<sup>235</sup> However, according to the Constitutional Court and legal scholars, the equal rights requirement of Article 3 (2) extends to the legislature the right and the obligation to compensate for factual disadvantages of women by means of favourable regulations.<sup>236</sup> Such favourable regulation can take the form of quotas. So far, there is no relevant case law of the German Constitutional Court regarding the constitutional requirements specifically for the introduction of quotas for women.<sup>237</sup> However, the European Court of Justice (ECJ) has developed standards for women's quotas which are likely to have a decisive influence on the development of German case law.<sup>238</sup> In *Kalanke* the ECJ decided on women's quotas for the first time. In the case, Germany had established a rule that, where fewer women than men were employed in a certain sector and management level, required employers to give preference to a female applicant who had the same qualifications as their male counterpart. The ECJ decided

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Führungspositionen Des Öffentlichen Dienstes Durch Fördermaßnahmen – Verfassungs- Und Europarechtliche Bewertung],” *Deutsches Verwaltungsblatt* 130, no. 3 (January 1, 2015), 126 n 13, <https://doi.org/10.1515/dvbl-2015-0303>.

<sup>234</sup> See for example Volker Epping, *Fundamental Rights [Grundrechte]* (Springer-Verlag, 2019), para 850.

<sup>235</sup> Bundestag, Constitutional admissibility of women's quotas, 6.

<sup>236</sup> Papier and Heidebach, More Women in Executive Positions, p 126 n 13; *Fire Brigade Tax [Feuerwehrrabgabe]*, 1 BvL 18/93, BVerfGE 92, 91 (109), (German Constitutional Court [Bundesverfassungsgericht] 1995).

<sup>237</sup> Christine Langenfeld, “Art. 3 Abs. 2,” in *Basic Law [Grundgesetz]* (Munich: C.H. Beck, 2015), para 91.

<sup>238</sup> *Ibid.*, para 93.

that the national rule had the effect of discriminating against men on grounds of sex, because it did not account for any possibilities to make exceptions.<sup>239</sup> It therefore deemed fixed quotas incompatible with EU law. Later on, the ECJ decided in *Marschall* that flexible quotas, meaning those that included hardship clauses, were permissible, as they allowed for the necessary flexibility to guarantee that neither men nor women were unfairly discriminated against.<sup>240</sup> Due to the precedence EU law takes over its member states,<sup>241</sup> the German Constitutional Court is expected to decide in a similar manner, if and when the question of the permissibility of women's quotas comes before the Court.

### b) The First and Second Management Positions Acts

As described above, the representation rate of women in leadership in German companies does not reflect the number of highly educated working women. In order to fulfil its obligation in Article 3 (2) of the Basic Law, the German government realised the need for legislation actively empowering women into senior positions.<sup>242</sup> It introduced the 'Act for the Equal Participation of Women and Men in Leadership Positions in the Private Sector and Public Service' (First Management Positions Act or FÜPoG I), which came into force in 2016. The aim of the First Management Positions Act was to increase the proportion of women in management positions in both the private and public sectors in order to promote the equal participation of women and men in these areas.<sup>243</sup> To this end, it introduced two main requirements.

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<sup>239</sup> *Eckhard Kalanke v Freie Hansestadt Bremen*, C-450/93, *European Court Reports 1995 I-03051* (ECJ, 17th October 1995), para 16.

<sup>240</sup> *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, C-409/95, *European Court Reports 1986 -00723* (ECJ, 11<sup>th</sup> November 1997), para 33.

<sup>241</sup> The principle of 'priority of application' [Anwendungsvorrang] applies for all EU member states. It states that in cases where two standards of different jurisdictions (for example German and EU law) apply to the same legal problem (for example quotas for women) and try to dictate a different solution, the European standard takes precedence over that of the member state. For example, if German jurisprudence were to find a different solution to the regulation of women's quotas than the ECJ, European law would take precedence, superseding German law.

<sup>242</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and the Youth and Federal Ministry of Justice, "Explanatory Memorandum to the First Management Positions Act [Referentenentwurf zum Gesetz Für Die Gleichberechtigte Teilhabe von Frauen Und Männern an Führungspositionen in Der Privatwirtschaft Und Im Öffentlichen Dienst]," 2014, p 47, available at [fuehrungsposition-data.pdf](https://www.bmfsfj.de/fuehrungsposition-data.pdf) [bmfsfj.de] [hereinafter Explanatory Memorandum I].

<sup>243</sup> Federal Ministry of Justice, "Second Act on Equal Participation of Men and Women in Management Positions [Gesetz Zur Ergänzung Und Änderung Der Regelungen Für Die Gleichberechtigte Teilhabe von Frauen an Führungspositionen in Der Privatwirtschaft Und Im Öffentlichen Dienst]," Aktuelle Gesetzgebungsverfahren (Federal Ministry of Justice, August 11, 2021), <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/FuepoG.html#:~:text=Mit%20dem%20%E2%80%9Eersten%20F%C3%BChrungspositionen-Gesetz%E2%80%9C%2C%20dem%20Gesetz%20f%C3%BCr%20die>. Technically, the Act speaks of the 'underrepresented' sex or gender to include both men and women. As the explanatory memorandum to the bill shows, the German government was aware that the bill would mostly (if not only) affect

The first was a fixed quota of 30 Per cent for supervisory boards of companies listed in the German stock exchange and which are parity-based codetermined companies.<sup>244</sup> There are about 108 companies that fulfil those criteria.<sup>245</sup> The quota defines that any new positions to be filled on the supervisory board are to be awarded to women, if they have the same qualifications as men. If a company fails to do so, any election process awarding the position to a man is null, leaving the position vacant.<sup>246</sup> The second requirement obliged ‘companies that are *either* listed or co-determined to set targets for increasing the proportion of women on supervisory’ boards, boards of directors and top management levels within a set time period.<sup>247</sup> The number of affected companies is about 3500.<sup>248</sup> There was no minimum target the companies had to set, nor a penalty when they failed to set a target at all. The First Management Positions Act did, however, prescribe reporting obligations regarding the target figures in order to exert pressure through transparency.<sup>249</sup>

The FüPoG I showed results where the fixed quota of 30 Per cent was introduced. The number of women in supervisory boards of the 108 companies required to meet the 30 Per cent quota increased quickly, from 21,3 Per cent in 2015 (before the FüPoG I) to 35,2 Per cent in 2020.<sup>250</sup> In contrast, the amount of women occupying positions on the board of directors – which was not required to meet a fixed quota under FüPoG I – increased less quickly, from 5 Per cent in 2015 to 10,7 Per cent in 2020.<sup>251</sup> The fixed quota therefore seems to be a step in the right direction towards equal representation of women in leadership.<sup>252</sup> The second requirement to set targets

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women (see Bundestag, Explanatory Memorandum, available at <https://www.bmfsfj.de/resource/blob/119354/4c698e0a4465ac49da33dd9393697238/fuehrungsposition-data.pdf>, 51). For clarity’s sake, this paper therefore speaks of a woman’s quota.

<sup>244</sup> Article 1, § 4 (1) First Management Positions Act, available at [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F%5B%40node\\_id%3D%27944614%27%5D&skin=pdf&tlevel=-2&nohist=1&sinst=27801FC9](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F%5B%40node_id%3D%27944614%27%5D&skin=pdf&tlevel=-2&nohist=1&sinst=27801FC9).

<sup>245</sup> Explanatory Memorandum I, 51.

<sup>246</sup> *Ibid*, 52.

<sup>247</sup> Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, “BMFSFJ - Gesetz Für Die Gleichberechtigte Teilhabe von Frauen Und Männern an Führungspositionen in Der Privatwirtschaft Und Im Öffentlichen Dienst,” [www.bmfsfj.de](https://www.bmfsfj.de), September 13, 2017, <https://www.bmfsfj.de/bmfsfj/service/gesetze/gesetz-fuer-die-gleichberechtigte-teilhabe-von-frauen-und-maennern-an-fuehrungspositionen-in-der-privatwirtschaft-und-im-oeffentlichen-dienst-119350>.

<sup>248</sup> Explanatory Memorandum I, 54.

<sup>249</sup> *Ibid*, 55.

<sup>250</sup> Women-On-Board-Index 185, <https://wob-index.de/webmedia/documents/wob185/2021/epaper/>, 4.

<sup>251</sup> *Ibid*, 5.

<sup>252</sup> Coming to the same conclusion, see for example Anja Kirsch and Katharina Wrohlich, “More Women on Top Boards of Large Companies, but Momentum Slows - Legal Requirement Could Speed Dynamic up [Mehr Frauen in Spitzengremien Großer Unternehmen, Dynamik Aber Verhalten – Gesetzliche Vorgabe Könnte Schwung Bringen]” (DIW Berlin, March 2021), 30-32.

for increasing the number of women in leadership positions was mostly circumvented. Three quarter of the companies obliged to set a target either did not set one or set the target figure at zero.<sup>253</sup>

Before the introduction of the Second Management Positions Act, the rise of the number of women in leadership slowed, with Germany's 30 biggest companies not seeing any growth for the first time since 2013.<sup>254</sup> Based on that and on the gaps revealed in the First Management Positions Act, German legislators decided to readjust their approach by introducing the Second Management Positions Act.<sup>255</sup> For the 108 companies that are both listed in the stock market and parity-based codetermined, the FÜPoG II introduces a minimum quota for the board of directors. If the board consists of four members or more, at least one member has to be female.<sup>256</sup> This is not a quota in the technical sense, as it does not prescribe a certain percentage. The goal of the government in introducing this minimum participation rate is not to directly increase the number of female members of boards of directors in the way it has done for the supervisory boards. Instead, the representation of women in those high-ranking positions is first meant to provide role models. Secondly, the participation of women in these positions is crucial in bringing about the cultural change necessary for achieving equal leadership representation in the future.<sup>257</sup> The requirement to set targets for a company which is either listed or codetermined is extended as well. The companies are still free to set their target figure at zero. If they do so, however, they are now required to provide a valid justification. For example, a valid justification would be that all relevant positions are currently occupied by men, and it is not to be expected that a position will become vacant within the time period that the target figure is supposed to be fulfilled.<sup>258</sup> The justification – or a notice of the lack thereof – will be published. Should a company fail to set a target figure or set the figure at zero and fail to justify that accordingly, the FÜPoG II introduces sanctions in the form of fines.<sup>259</sup>

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<sup>253</sup> Federal Government, “Explanatory Memorandum to the Second Management Positions Act [Entwurf eines Gesetzes zur Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst],” 2021, p 1, available at [gesetzentwurf-aenderung-fuepog-data.pdf \(bmfsfj.de\)](https://www.bmfsfj.de/SharedDocs/Anlagen/DE/Anlagen/2021/07/20210701-entwurf-gesetz-ergaenzung-und-aenderung-der-regelungen-fuer-die-gleichberechtigte-teilhabe-von-frauen-an-fuehrungspositionen-in-der-privatwirtschaft-und-im-oeffentlichen-dienst.pdf?__blob=publicationFile) [hereinafter Explanatory Memorandum II].

<sup>254</sup> Kirsch and Wrohlich, More Women on Top Boards of Large Companies, Table 1, p 2.

<sup>255</sup> See Explanatory Memorandum II, 1-3.

<sup>256</sup> *Ibid.*, 2.

<sup>257</sup> *Ibid.*, 52.

<sup>258</sup> *Ibid.*, 53.

<sup>259</sup> *Ibid.*, 54.

Article 3 of the German constitution requires the government to take positive steps towards the elimination of discrimination. According to ECJ jurisprudence, that the German Constitutional Court is expected to follow, that can include preferential treatment for women in certain situations, such as quotas for leadership positions. The First and Second Management Positions Acts introduced such preferential treatment for positions on supervisory boards and boards of directors. The First Management Positions Act introduced a quota of 30 Per cent for supervisory boards and a target-setting requirement for increasing representation in management of Germany's biggest companies. It showed results in increasing the representation rate of women. After momentum slowed, the government re-evaluated the legislation and introduced the Second Management Positions Act. The FÜPoG II introduced sanctions for companies that set their targets at zero and did not provide sufficient justification. It also introduced a minimum participation rate for boards of directors. The next section will consider whether the FÜPoG I and FÜPoG II are adequate measures to reduce the lack of female leadership in the workplace.

## **2. Fulfilment of the obligation to equal leadership representation**

In 2013, shortly before the introduction of the First Management Positions Act in 2015, the need for women's quotas was highly controversial in Germany.<sup>260</sup> Those who opposed the quota often saw it as a perpetuation of gender stereotypes, painting women as the weaker sex who needed help in order to make it to the top. Those who supported it saw it as the necessary tool to break up barriers to women being leaders in the workplace.<sup>261</sup> The government decided that in order to fulfil its obligations under Article 3 of the Basic Law, it would introduce a women's quota for the supervisory boards of Germany's biggest companies.

The German government justified its use of a quota mainly based on fulfilling its obligation under Article 3 (2) of the Basic Law to actually implement equal rights for women and men.<sup>262</sup> Considerations regarding obligations under CEDAW are only

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<sup>260</sup> See for example Nicole Bracht-Bendt, "Equality: More Women - without a Quota - in Leadership Positions [Gleichstellung: Mehr Frauen — Ohne Quote — in Führungspositionen]," *Innovative Verwaltung* 35, no. 1 (January 2013): 20–21, <https://doi.org/10.1007/s35114-013-0014-0> and M. Schenk, "'Pro Quota Medicine' - More Women in Leadership Positions [„pro Quote Medizin“ - Mehr Frauen in Führungspositionen]," *DMW - Deutsche Medizinische Wochenschrift* 138, no. 33 (August 2, 2013): 1644–45, <https://doi.org/10.1055/s-0032-1330205>.

<sup>261</sup> Mareice Kaiser and Anna Schneider, "Do We Need a Women's Quota? [Brauchen Wir Eine Frauenquote?]," fluter.de (Federal Agency for Civic Education, March 31, 2021), <https://www.fluter.de/frauenquote-pro-contra-streit>.

<sup>262</sup> Explanatory Memorandum I, 1.

briefly discussed in the Explanatory Memorandum to the FfPoG I. This section of Chapter two therefore compares the obligations under Article 3 of the Basic Law with the obligations under CEDAW. It analyses whether the Acts are permissible measures under CEDAW and shows whether the way Germany has made use of the quotas fulfils its obligations under CEDAW and dismantles barriers to break the glass ceiling.

#### a) CEDAW and Article 3 Basic Law

The German government has argued for the necessity of the First and Second Management Act mainly on the basis of Article 3 (2) of the Basic Law, which imposes a positive obligation on the state to eliminate structural disadvantages and promote the actual implementation of equality. CEDAW guarantees a right to substantive equality. The wording of Article 3 of the Basic Law suggests the same. Article 3 (2) in the official translation reads ‘[t]he state shall promote the actual implementation of equal rights for women and men [...]’ The addition of the word ‘actual’ implies that formal equality is not enough to satisfy the obligation under Article 3 (2). Other translations of the German word in Article 3 (2) (‘tatsächlich’) include ‘effective’ and ‘factual’.<sup>263</sup> Therefore, Article 3 demands a tangible change for women and men in their everyday lives. Differently worded, Article 3 guarantees the right to ‘de facto’ equality. Whether Germany’s understanding of ‘actual’ equality includes a right to equality of results or is limited to guaranteeing equality of opportunity is controversial.<sup>264</sup> The Convention indisputably guarantees equality of results. Insofar, it offers more comprehensive protection of women’s rights than Germany’s Article 3.

CEDAW focuses on women’s rights, making it possible to take into account women’s specific challenges and needs for the achievement of substantive equality. Germany’s basic law chooses the more ‘neutral’ approach of guaranteeing equality between men and women and eliminating structural disadvantages for any gender.<sup>265</sup> As a result, both Management Positions Acts also speak of enacting quotas for the ‘underrepresented’<sup>266</sup> sex, or of a quota of at least 30 Per cent women and 30 Per cent men.<sup>267</sup> That fails to represent the victims of inequality in the workplace, which are mostly women. In practice, the government does see the Management Positions Act

<sup>263</sup> PONS Dictionary, “Tatsächlich - Deutsch-Englisch Übersetzung | PONS,” Pons.com, 2023, <https://de.pons.com/%C3%BCbersetzung/deutsch-englisch/tats%C3%A4chlich>.

<sup>264</sup> Volker Epping, *Fundamental Rights [Grundrechte]* (Springer-Verlag, 2019), para 850.

<sup>265</sup> See wording of Article 3 Basic Law.

<sup>266</sup> For example Article 2 § 6 FfPoG I.

<sup>267</sup> Article 1 § 4 (1) of the FfPoG I.

as a law to strengthen women's rights, as evidenced by the Explanatory Memorandum.<sup>268</sup> Speaking directly of a women's quota would symbolise greater commitment to women's equality and show a better understanding of the victims of inequality. Were Germany to base their efforts in achieving equal leadership representation on CEDAW, in addition to its Basic Law, their measures would be better suited to protect women's rights and fulfil Germany's obligations under CEDAW. The further-reaching obligations under the Convention also give Germany more ways to justify more in-depth measures.

**b) Is FüPoG a permissible 'measure' under CEDAW**

FüPoG I and II introduce a 30 Per cent quota for supervisory boards, a minimum participation rate of one woman or man on boards of directors, and an obligation to set targets to increase the number of women in senior positions. Under CEDAW, differences in treatment of men and women aimed at accelerating de facto equality are regulated as temporary special measures (TSMs) in Article 4 (1). Such measures are only permissible under the Convention if their goal is to assist, compensate or correct the current situation of women and thus to affect the necessary cultural and social change.<sup>269</sup> Such acts are then not considered discriminatory.<sup>270</sup> Additionally, for measures to fall under the category of TSMs and not be considered discriminatory, they must only be temporary. The understanding of temporary is wide, allowing for TSMs as long as the structural inequalities it is trying to balance, persist.<sup>271</sup>

In the justifications for the legislation, the German government acknowledges the 'glass ceiling' that still exists.<sup>272</sup> The aim of the First Management Positions Act is to achieve a significant increase in the proportion of women in management positions in the private sector and the federal administration, as well as in appointments to boards, to ultimately achieve gender parity.<sup>273</sup> The Second Management Positions Act is intended to increase the effectiveness of the FüPoG I and to further develop the existing regulations for both the private and the public sector.<sup>274</sup> The measures under the First and Second Management Positions Acts are thus aimed at accelerating the advancement of women into leadership positions in the workplace. The German

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<sup>268</sup> See generally Explanatory Memorandum I, for example 1, 2, 52, 54.

<sup>269</sup> CEDAW Committee, General Recommendation 25, para 8.

<sup>270</sup> CEDAW, Article 4 (1).

<sup>271</sup> CEDAW Committee, General Recommendation 25, para 15.

<sup>272</sup> Explanatory Memorandum I, 49.

<sup>273</sup> *Ibid.*

<sup>274</sup> Explanatory Memorandum II, 51.

government does not explicitly state if the measures are meant to be temporary, nor has it attached a time limit to the validity of the measures. The government does, however, refer to the wording of CEDAW regarding temporary special measures. According to the Explanatory Memorandum, the use of temporary measures for the advancement of de facto equality would not classify as discrimination, because CEDAW allowed for it in the Convention's text.<sup>275</sup> That is an indication that they qualify the quota as a temporary measure. The First and the Second Management Positions Act qualify as TSMs under Article 4 (1) of CEDAW. They are therefore not discriminatory measures and do not breach Germany's obligations under the Convention. As TSMs are classified as obligatory to overcome structural inequalities by the Committee, Germany is in fact fulfilling its obligation under CEDAW by implementing the legislation.<sup>276</sup>

### c) The design of the FÜPoGs

Achieving substantive equality necessitates using effective measures. The way legislative measures are designed and implemented is therefore important for the evaluation of the question fulfilling the obligations under CEDAW. The FidAR has examined the effects of the First Management Positions Act on 186 German companies in their Women-On-Board-Index 185.<sup>277</sup> 106 companies were subject to the fixed quota of 30 Per cent for supervisory boards. In 2015 21,3 Per cent of the positions in the supervisory boards were filled by women. That number increased to 35,9 Per cent in 2021, after the introduction of the First Management Positions Act.<sup>278</sup> That is a yearly growth rate of 2,4 Per cent. In comparison, companies who were not subject to the fixed quota increased their participation rate of women from 13,7 Per cent in 2015 to 24,5 Per cent.<sup>279</sup> That is a yearly growth rate of only 1,8 Per cent. This is an indication of the effectiveness of the gender quota in supervisory boards.<sup>280</sup>

The FÜPoG I showed several areas in which it was not effective. The voluntary target setting goals were circumvented by setting the number zero as a goal in 39,2 Per

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<sup>275</sup> Explanatory Memorandum I, 61. The government unfortunately links the wording to Article 7 of CEDAW even though TSMs are dealt with in Article 4.

<sup>276</sup> CEDAW Committee, General Recommendation 25, para 21.

<sup>277</sup> Frauen in die Aufsichtsräte e.V., "Women-On-Board-Index 185," 2021, <https://wob-index.de/webmedia/documents/wob185/2021/epaper/> (Women on board Index).

<sup>278</sup> *Ibid.*, 4.

<sup>279</sup> *Ibid.*

<sup>280</sup> D.I.W. Berlin, "DIW Berlin: Frauenquote," [www.diw.de](http://www.diw.de), April 20, 2021, [https://www.diw.de/de/diw\\_01.c.412682.de/frauenquote.html](https://www.diw.de/de/diw_01.c.412682.de/frauenquote.html)

cent of the affected companies.<sup>281</sup> The 30 Per cent quota also affected only 106 companies. However, through constant evaluation the German government identified these gaps and introduced the Second Management Positions Act.<sup>282</sup> The minimum participation requirement incited an increase of 2,7 Per cent in a year, from 13,7 Per cent in 2020 to 16,4 Per cent at the end of 2021.<sup>283</sup> However, the momentum has slowed, with a growth of only 1,1 Per cent from 2021 to 2022.

Both Management Positions Acts have brought improvements in the leadership representation of women. The continuing evaluation and the implementation of the Second Management Positions Act show commitment of the government to drive effective changes. The effectiveness of quotas is proven. As acknowledged by the inclusion of TSMs in CEDAW and the use of quotas by Germany, TSMs can have an impact on breaking up cultural and stereotype patterns, thus advancing the substantive and transformative equality within a society. Germany is on its way to fulfilling that obligation. Constant re-evaluation and adjusting of the relevant legislation is needed to keep in step with the obligation to equal leadership representation under CEDAW. However, as the obligations under CEDAW demands a participation of women in ‘fairly equal numbers with men’, a quota of 30 Per cent does not seem appropriate. The number is not specifically justified in either Explanatory Memorandum. The government has acknowledged the possibility and the effectiveness of higher quotas in other countries.<sup>284</sup> Introducing a higher quota of 40 Per cent, like other European countries, could reignite the momentum of growth we saw from the Second Management Positions Act.

It needs to be said that quotas and other TSMs are not the only measure Germany needs to implement to fulfil their obligations under CEDAW, as they are more a tool to break up harmful cultural patterns. The barriers consist of many different factors and need to be addressed as such to be effectively broken down. Other possible strategies include mentoring and education for women, increasing compatibility of

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<sup>281</sup> *Ibid.*, 6.

<sup>282</sup> Explanatory Memorandum II, 51.

<sup>283</sup> Anja Kirsch, Virginia Sondergeld, and Katharina Wrohlich, “Number of Women on Boards of Large Companies Keeps Growing; Momentum from Inclusion Requirement, However, Is Waning” (DIW Berlin, February 3, 2023), [https://www.diw.de/documents/publikationen/73/diw\\_01.c.864253.de/dwr-23-3-2.pdf](https://www.diw.de/documents/publikationen/73/diw_01.c.864253.de/dwr-23-3-2.pdf), 21.

<sup>284</sup> Explanatory Memorandum I, 49.

career and family for both men and women and dismantling prejudices about women's quotas and other measures through gender and diversity trainings.<sup>285</sup>

In conclusion, Germany is currently fulfilling its obligations under CEDAW. Quotas as introduced by the FüPoGs are explicitly allowed for and even demanded by Article 4 of CEDAW. The effectiveness of the FüPoGs has been proven to a certain extent. Where the effectiveness was lacking or decreasing, Germany's government re-evaluated and reintroduced new measures, which also proved to be effective. Therefore, Germany is currently fulfilling its obligations to increase the number of women in leadership positions. The need for constant evaluation and adjustment, especially of the quota itself, remains. A quota of 40 Per cent seems more appropriate given the still low numbers of representation and the already slowing momentum after the Second Management Positions Act. The higher quota would bring Germany up to par with other European competitors and could reinvigorate the rising numbers of women in leadership positions.

### **3. Conclusion**

Germany's legislation regarding equality in the workplace, and specifically equal leadership representation, is based on Article 3 of the Basic Law. Article 3 (2) requires the state to take positive measures for the advancement of women's equality with men. That includes taking steps to dismantle structural discrimination and inequalities. The extent of this obligation is similar to the obligation arising out of CEDAW, as it aims to achieve de facto equality. However, it is controversial whether the German Constitution guarantees equality of results or whether it is confined to equality of opportunity. In that regard, CEDAW's protection is more comprehensive.

The measures implemented by both Management Positions Acts include a quota of 30 Per cent for supervisory boards, a target-setting requirement for increasing representation for Germany's biggest companies, sanctions for failing to provide justifications if targets were set at zero, and a minimum participation rate for boards of directors. The measures fall under TSMs within CEDAW and proved effective in increasing the share of women in leadership positions in the short term. However, the momentum slowed a few years after introducing each Management Positions Act. The German government re-evaluated its measures and filled regulatory gaps. Therefore, it is currently fulfilling its obligations to fulfil the right to equal leadership

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<sup>285</sup> Stuber, Myth Quota [Mythos Quote], 14-5.

representation. The government needs to keep evaluating the effectiveness of the TSMs in order to keep its obligations under CEDAW. A higher quota of 40 Per cent would prove more effective in keeping the growth of number of women in management consistent.

## V. Conclusion

CEDAW conveys a broad understanding of equality and non-discrimination. The Committee aims for the full implementation of CEDAW's provisions and for the full protection of the rights guaranteed therein. The Convention is seen not only a catalogue of rights but as a tool for transforming the understanding of women's role in society. The term equality thus means de facto equality and equality of results. In order to achieve that to its full extent, CEDAW envisages measures such as legislation and TSMs. Any preferential treatment for women in form of TSMs therefor does not constitute discrimination.

CEDAW's provisions also extend into the economic field and into areas typically controlled by private entities, like the workplace. Economic empowerment in the workplace is regulated mainly within Article 11 on employment. The provision includes a wide range of rights aimed at achieving equality in the workplace, such as the right to equal pay for work of equal value, the right to promotion, to equal job opportunities, and the general right to work. Those rights are interpreted in a way that allows their full expression. For example, the rights to education and training have been read into Article 11 (1) (b) to allow for the right to same employment opportunities to be realisable. The rights within Article 11 (1) are the basis for women to live an independent life and inherent to women's right to dignity.

The issue of underrepresentation of women in leadership positions in the workplace has been acknowledged by the CEDAW Committee on multiple occasions. For the right to employment to be fully realisable, including the right to choice of occupation, the right to promotion, and the general right to work, Article 11 demands a reading-in of a right to equal leadership representation. The goals of substantive and transformative equality, and equality of results allow for the right to be included in the Convention, as does the Committee's practice of broad interpretation. The right to equal leadership representation is therefore included in Article 11 on employment.

Germany struggles with equal representation of women in management in the workplace. The state has been a member of CEDAW since 1985 and is under the obligation to strive for equal leadership representation of women. Article 3 of Germany's constitution guarantees the fundamental right of equality. Article 3 (2) obliges the state to take positive measures to dismantle structural disadvantages of women to achieve de facto equality. Insofar it guarantees equal protection to CEDAW.

However, it is controversial whether Article 3 of the Basic Law guarantees equality of results, making CEDAW the more comprehensive legal obligation.

Germany has taken measures to increase the number of women in management, based mainly on the requirements in Article 3 (2) of its Basic Law through the First and Second Management Positions Act. Measures include a quota of 30 Per cent for supervisory boards, a target-setting requirement for increasing representation for Germany's biggest companies, sanctions for failing to provide justifications if targets were set at zero, and a minimum participation rate for boards of directors. They are TSMs under CEDAW and have effectively increased the number of women in leadership positions. Germany has been successful in evaluating the measures and increasing effectiveness by closing regulatory gaps in the FöPoG I. As the measures have proven effective and Germany keeps adapting them where necessary, they are currently fulfilling their obligations under CEDAW. The next steps to increasing the effectiveness of the measures would be to increase the quota to 40 Per cent in order to keep up with the obligations to drive changes to break the glass ceiling.

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