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Taking Women's Property Rights Seriously

C7S1

7.1 Why CEDAW's Jurisprudence Is About "Property" and Is "Progressive"

C7P1

As this book came together, a CEDAW expert expressed surprise at the scope of chapter 2. She noted that at least some of what that chapter (and this book) includes, such as social benefits, are not designated as "property rights" by the CEDAW Committee. She was curious (and politely skeptical) about how this book performed this "magic trick." The question raises profound questions about the topic of this book: What indeed are "property rights" and what makes what the CEDAW regime is doing "progressive"?

C7P2

Property is a social and legal construct. Many have attempted to define it without success. A leading Property casebook widely used in the United States warns students that there are competing conceptions by "essentialists" who believe that there is a single "true" quality to what is properly seen as "property" and "skeptics" for whom property lacks any essential quality but can only be defined by other laws.¹ The leading essentialist, per this definition, is of course William Blackstone, who defined the right to property as "that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe."² That casebook argues that most scholars are skeptical of the idea that property confers exclusive sovereign control over some external thing but holds a more "plastic" conception in which property consists of a "bundle of sticks" or entitlements, not all of which are necessary—not even the right to exclusively own or dispose.³ Property theorists have not allowed definitional quandaries to stand in the way. All accept that, however defined, property is foundational to all forms of government. Each state (and even subdivisions within them) decides what constitutes "property" under its national (or even municipal) laws, including what may constitute "property" for purposes of applying constitutional provisions barring or qualifying takings of property by the state.⁴

¹ THOMAS W. MERRILL ET AL., *PROPERTY PRINCIPLES AND POLICIES* 17 (4th ed. 2022).

² *Id.* (quoting Blackstone).

³ *Id.* at 17–18.

⁴ *Id.* at 1165–1325.

- C7P3 The definitional quandary applies within international law. Although some have tried to delineate the contours of a general “international law of property,” the default position is that property rights are defined by the applicable international law source, whether it be custom, treaty, general principle, or a mix of all three, and that these sources reveal definitional quandaries and indeterminacies.⁵ As discussed in chapter 5, international investment agreements tend to avoid the definitional question in favor of a broad listing of tangible and intangible assets that constitute protected “investment” or “activities associated” with it—from the securing of finance to the conclusion of contracts related to such investments. As indicated in chapter 6, the most extensive regional case law on point, under the ECHR, embraces an expansive notion of “possessions” and has ignored, over time, certain distinctions that have emerged as between common law and civil law jurisdictions.⁶
- C7P4 CEDAW's text only mentions the word “property” twice—affirming women's rights to “administer” it in Article 15(2) and the right of “both spouses” to own, acquire, manage, administer, enjoy, and dispose of it in Article 16(1)(h). That text, literally applied, would mean that chapter 2 should not include anything other than direct applications of those two provisions. This would mean that this book would not address social or other forms of benefits, rights to housing in the course of domestic violence, inherited property outside of marriage, access to all forms of financial credit or intellectual property, or denials of effective remedies in court with respect to any of the preceding rights (whether or not financial recompense would be due for those failures). Further, since CEDAW's Article 14 (addressing rural women) contains no explicit mention of property, even the land and other related rights under it would not constitute “property rights.”

⁵ See, e.g., Koldo Casla, *The Right to Property Taking Economic, Social, and Cultural Rights Seriously*, 45 HUM. RTS. Q. 171 (2023) (engaging in comparisons among international human rights regimes' property protections and concluding that international law's definition of property is defined by “indeterminacy” and “polysemy”). For an attempt to distill a harmonious international law of property despite these differences, see JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* (2014).

⁶ The ECHR case law includes social benefits as possessions. See, e.g., Ursula Kriebaum & August Reinisch, *PROPERTY, RIGHT TO, INTERNATIONAL PROTECTION* ¶¶ 34–47 (Apr. 2019), Oxford Public International Law, MPEPIL. The ECtHR has tended to ignore the formal classification of property under domestic law, including the fact that in several civil law jurisdictions, actual current possession “demarcates the province of the law of property.” Michele Graziadei, *The Structure of Property Ownership and the Common Law/Civil Law Divide*, in *COMPARATIVE PROPERTY LAW GLOBAL PERSPECTIVES* 71, 94 (Michele Graziadei & Lionel Smith eds., 2017). Accordingly, in German and Italian systems: “What cannot be possessed, namely brought under the physical control of a subject, cannot become the object of a property relationship in these legal systems, and belongs to other fields of the law, such as the law of obligations, or the law relating to intellectual property.” *Id.* at 91. By contrast, in common law jurisdictions, a property relationship includes tangibles (such as land and “choses in possession”) or intangibles (“choses in action”). *Id.* The term “property” as understood by common law lawyers is closer to the French notion of “bien,” which means any asset capable of being included in a person's patrimony, regardless of whether it is, at present, only an intangible future possession. *Id.*

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The legal coherence that most demand of international law (and probably the rule of law in general) would suggest that if CEDAW's property rights are to be so closely circumscribed as to exclude all of these things, there needs to be good reason for it.⁷ The possibility that the CEDAW Committee is barred from considering anything other than Articles 15(1) and 16(1)(h) to be "property rights" because of the plain text of the Convention seems unlikely. As Fareda Banda has noted, "the Committee has not allowed itself to be constrained by its drafting."⁸ As chapter 4's Lesson One demonstrates, the CEDAW Committee has gone far beyond the literal text of the Convention. It has, among other things, responded to intersectional discrimination (a concept not mentioned in the CEDAW's text); affirmed states' obligations to respect property rights beyond "spouses" in formal marriages despite the text of Article 16(1)(h); affirmed that states' obligations to bar discrimination require states to prevent domestic violence by, among other things, protecting women's rights to a secure home; found that women in urban (and not merely rural areas under Article 14) areas are entitled to adequate living conditions, including housing; and recommended to states that they ensure that private companies subject to their jurisdiction respect women's equality even when such companies act abroad. The idea that a treaty body capable of doing all of the preceding is legally disempowered from recognizing the deep interconnections between these rights by recognizing them as forms of property—or that such a step would go too far—is not convincing.

C7P6

Legal coherence would demand, on the contrary, that those deep interconnections be recognized. It is coherent to recognize that social security or pension rights that many states include within legal estates for inheritance purposes be seen as (and not just treated as) no less a form of family property than other assets included in inheritance under Article 16(1)(h).⁹ It makes sense that rights to land, forms of agricultural credit, loans, or other forms of credit (whether extended to rural women under Article 14 or to others, as under the chapeau of Article 13 or 13(b)) be included under the right to administer property in Article 15(2). And if the foregoing is correct, coherence would also demand that other forms of housing enjoyed through whatever form of tenure security—from ownership to tenancy at will—would be included within women's equal property rights. At a more conceptual level, if states insist on allowing women to be treated as property, it seems appropriate for the CEDAW regime to push back on this in

⁷ See, e.g., THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 150–82 (1990) (discussing the role of coherence in legitimizing international law and eliciting compliance with it).

⁸ Fareda Banda, *The Limits of Law: A Response to Martha C. Nussbaum*, in *THE LIMITS OF HUMAN RIGHTS* 267, 278 (Bardo Fassbender & Knut Traisbach eds., 2019). See, e.g., GR No. 25 on Temporary Special Measures, HRI/GEN/1/Rev.7, ¶ 3 (2004) (describing CEDAW as a "dynamic instrument").

⁹ Including pension rights, like all other assets that may be included in a person's patrimony, is also consistent with the broad interpretation of property applied by the ECtHR as well as the Inter-American Court of Human Rights. See, e.g., *Casla*, *supra* note 5, at 180.

the most forceful way possible: namely, by challenging directly what is meant by property and property rights.

C7P7

This is made easier by the fact that property is no more a legal term of art under CEDAW than it is under general international law. The Committee could continue to call social benefits and pensions “economic” benefits, for example, but it should recognize that the *naming* of states’ obligations and of human rights matters. There are normative consequences to calling these forms of “property” and normative consequences in not doing so. Even a quintessential “property” issue such as the right to land can be seen not as only a self-standing right to property but as a unique concept grounded in the special relationship of Indigenous peoples to their lands, territories, and resources; a component of the right to food or water; a component part of each state’s right to exercise economic self-determination or an individual’s right to a livelihood or right to work.¹⁰ The right to housing might be seen only as affirming privacy or other discrete benefits resulting from the individual possession of property, while the “right to adequate housing” as a form of property right implicates the duties of financial institutions to extend credit or avoid foreclosure, the obligations of landlords not to forcibly evict, the need for special measures to protect groups facing intersectional discrimination or homelessness due to poverty, and duties put on states to place “important limits on the hierarchies of power and processes of dispossession that sustain global capitalism.”¹¹ How we characterize rights determines their normative scope.

C7P8

Property is a foundational concept in all legal systems. Identifying CEDAW’s interventions as making critical inroads in such a foundational concept is a promising gateway to requiring the changes in the “institutions, systems and structures that cause or perpetuate discrimination and inequality” required for the “transformational change” that CEDAW promises.¹² Property rights are foundational for a reason: the concept (however defined) intersects with multiple legal fields within national law, all of which provide additional possibilities for advancing women’s equality by redefining the state’s obligations to require

¹⁰ See, e.g., Olivier De Schutter, *The Emerging Right to Land*, 12 INT’L COMMUNITY L. REV. 303 (2010).

¹¹ Stuart Wilson, *The Right to Adequate Housing*, in RESEARCH HANDBOOK ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS 180, 181 (Jackie Duggard et al. eds., 2020).

¹² See, e.g., Simone Cusak & Lisa Pusey, *CEDAW and the Rights to Equality and Non-discrimination*, 14 MELB. J. INT’L L. 54, 64 (2013). See also Nehal Bhuta, *Recovering Social Rights*, IILJ Working Paper 2023/1 (recovering the intellectual history of what today we call international economic and social rights and their connections to arguments for redefining the role of the state to enable transformative social change to promote greater equality). Unlike those who see international human rights regimes as beholden to neo-liberal political economy, Bhuta argues that many of those responsible for incorporating social rights in the Universal Declaration of Human Rights saw these as tools to redefine the state as a “public power that must organize the economy in order to ensure a “society of equals”). *Id.*, at 2–3.

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genuine equality among all persons.¹³ Identifying CEDAW's jurisprudence as dealing with "property" enables a new kind of family or marital law more resistant to patriarchy, for example.¹⁴ In addition, seeing CEDAW's embrace of economic, social, and cultural rights as redefining the very concept of property makes it easier to bring contracting rules (such as the requirement of spousal consent to sales of land or mortgages) or diverse tenure systems within CEDAW's principle of equality—while also having an impact on what it means for women to ensure "tenure security" in the first place and what is required of states to protect that right over time.¹⁵

C7P9

Categorizing the jurisprudence addressed in chapter 2 as "property rights" enables us to see the forest from the trees. As Stuart Wilson argues with respect to certain changes in South Africa law that resemble some of CEDAW's jurisprudence, legal outcomes that enable squatters to avoid forced evictions challenged "the very nature and purposes of South African property law."¹⁶ Restrictions on forced eviction undermine, he argues, the "ownership" model of structuring property relationships and expand the spaces for "property outsiders" to "reshape the terms on which property is distributed."¹⁷ As this suggests, seeing cases like the North Macedonia cases discussed in chapter 2 as not being merely about "rights to housing" but as being about property rights enables insights that might otherwise remain less visible. The deceptively simple affirmation that Roma women on the brink of homelessness have equal rights to rooms of their own, has, as Wilson argues in a different context, repercussions for common law of property's "complex structure of status hierarchies that overwhelmingly privilege the powers and rights of owners over things, and other people with subordinate rights, or no rights at all."¹⁸ These hierarchies, Wilson points out, "privilege one form of ownership over another, as in the case of mortgagors and mortgagees. The pattern is everywhere the same, however: a pattern of domination and

¹³ See, e.g., Bhuta, *supra* note 12; Ingunn Ikdahl, *Property and Security: Articulating Women's Rights to Their Homes*, in *WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW* 268, 284 (Anne Hellum & Henriette Sinding Aasen eds., 2013) (noting how protecting women's equal rights to housing require addressing diverse regulatory issues in multiple fields).

¹⁴ See, e.g., Ruth Halperin-Kaddari, *Parenting Apart in International Human Rights Family Law: A View from CEDAW*, 22 *JERUSALEM REV. LEGAL STUD.* 130 (2020) (introducing a "new field of family law" based in part on CEDAW's jurisprudence). See also Ruth Halperin-Kaddari, *Human Rights Treaty Bodies as Standard-Setting Mechanisms: The Case of Family Law*, in *STRENGTHENING HUMAN RIGHTS PROTECTIONS IN GENEVA, ISRAEL, THE WEST BANK AND BEYOND* 82 (Joseph E. David et al. eds., 2012).

¹⁵ See, e.g., Ikdahl, *supra* note 13, at 284–85 & n. 57.

¹⁶ STUART WILSON, *HUMAN RIGHTS AND THE TRANSFORMATION OF PROPERTY* 7 (2021).

¹⁷ *Id.* Wilson argues that requirements that bar evictions that lead to homelessness, insistence that terminations of leases be fair, requirements that creditors attempting to execute against defaulting debtors propose alternatives, and demands that any termination of rights to housing be subject to a proportionality analysis are all novel limitations on a property insider's ordinary common law right to dispossess an outsider. *Id.*

¹⁸ *Id.* at 127.

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control by reference to status. That status is membership of a pre-social common law category that affords its members privileged rights.”¹⁹ Those debating the CEDAW regime’s contribution to transformational change need to consider the consequences of naming what the CEDAW Committee does.

C7P10 As is suggested by many of the critiques surveyed in chapter 3, a number of scholars resist associating “property rights” with CEDAW precisely because they fear the normative consequences. As indicated in chapter 3, a number of critical scholars argue that property rights hinder social justice for women and bolsters international law’s colonialist legacies.²⁰ Gabriele Wadlig forcefully articulates these concerns.²¹ Like others, she contends that the very concept of “property” is connected, inescapably, to ideas of leading figures in the West such as John Locke and Blackstone, and therefore attempts to protect “property rights” inescapably “naturalize” private individual property, along with the proposition that equal property rights, must entail equal rights to alienate it.²² While Wadlig acknowledges that the concept of property under international law has expanded beyond individualized property to include, for example, the rights of Indigenous peoples “to own, develop, control and use their communal lands, territories, and resources,”²³ she suggests that this imposes an inappropriate “reductive view” of the actual relationships to land held by non-Western peoples.²⁴

C7P11 Under this view, property is a historically shaped concept that *necessarily* affirms “the ‘Western’ concept of property (based on exclusion and alienability) as the ‘norm’ and the ‘othering’ of ways to relate to land that do not conform to this.”²⁵ The “language of property is not neutral—and can never

¹⁹ *Id.* The broader ramifications of the CEDAW Committee’s emerging jurisprudence on the due diligence obligations imposed on states relating to forced evictions is further demonstrated in its Views concerning *X v. Cambodia*, CEDAW/C/85/D/146/2019 (2023) and discussed at notes 141–142 in chapter 5. In that case, the Committee noted with apparent approval the communicant’s contention that “forced evictions are not a gender-neutral phenomenon” (*id.* ¶ 3.2) and considered the un-remedied threats faced by the communicant to constitute discriminatory harassment against a human rights defender. See *id.* ¶ 8 (vi) (recommending that Cambodia provide training to its judicial institutions to “raise awareness of the human rights of rural women and women human rights defenders”).

²⁰ See, e.g., MARIA MIES, *PATRIARCHY AND ACCUMULATION OF A WORLD SCALE: WOMEN IN THE INTERNATIONAL DIVISION OF LABOR* (2014) (arguing that private property hinders rather than promotes social justice for women); Poul Wisborg, *Human Rights Against Land-Grabbing? A Reflection on Norms, Policies, and Power*, 26 *J. AGRIC. ENVIRON. ETHICS* 1199, 1202 (2013) (expressing skepticism about treating rights to land as human rights).

²¹ Gabriele Wadlig, *The International (Un)Making of “Tenure Security,”* 27–41 (2022) (J.S.D. Dissertation, New York University) (on file with author).

²² *Id.* at 29–31. But see Bhuta, *supra* note 12, at 22–35 (arguing that natural rights, including to property, were not always associated with “possessive individualism” but were instead part and parcel of, for example, English radical thought that combined the “natural right of self-property” (ownership over one’s self as the *sine qua non* of liberty) with a challenge to the justice of enclosure and unconstrained private property accumulation).

²³ Wadlig, *supra* note 21, at 36 (quoting International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and GR XXIII).

²⁴ *Id.* at 36–37.

²⁵ *Id.* at 38.

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be."²⁶ Wadlig argues that given property's historical baggage—including the socially constructed "whiteness" of property in former slave-holding countries like the United States²⁷—it is naive to assume that such legacies can be overcome.²⁸ Her arguments resonate deeply with the subject of this book given longstanding feminist critiques of what Mary Wollstonecraft called "the demon of property."²⁹

C7P12 Ronald Sackville makes the same kind of argument from the opposite end.³⁰ He argues that social benefits are not properly regarded as property rights *because they are distinct from the essence of private property*. A property right, he argues, "describes a right enforceable by appropriate legal remedies to exclude other persons from the object."³¹ Those seeking to enhance entitlements to social benefits by transforming a right to a revenue stream into a right to material things, namely property, do "violence" to the concept of property.³² Entitlements to social security, he contends, need to be addressed like all other government entitlements. They need to be secured through laws that establish appropriate bureaucratic procedures that permit the independent review of such claims to ascertain that qualified claimants receive the payments to which they are entitled.³³ Whereas Wadlig criticizes property because, in her view, it cannot escape Blackstone's concept of "despotic" exclusive possession, for Sackville that is the one virtue of property that should not be undermined by confusing it with radically different things like entitlements for social benefits that are best handled through administrative, not property, law.

C7P13 It is hard to recognize the CEDAW Committee's treatment of the entitlements surveyed in chapter 2 in these descriptions of traditional property law. As chapter 6 indicates, the CEDAW Committee does not treat social benefits as subject only to administrative law or procedural rules to secure equal treatment. It has recommended that states take these benefits as seriously as all the other property rights it addresses—and accordingly recommends that states reform

²⁶ *Id.* at 39.

²⁷ See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1721 (1993).

²⁸ Wadlig, *supra* note 21, at 30.

²⁹ Mary Wollstonecraft, *A Vindication of the Rights Of Women*, in THE WORKS OF MARY WOLLSTONECRAFT (Janet Todd & Marilyn Butler eds., 1989). See also Lena Halldenius, *Mary Wollstonecraft's Critique of Property: On Becoming a Thief from Principle*, 29 HYPATIA 942 (2014). The concern is understandable given how property rights have been used to advance the commodification of women. See generally Patricia Crawford, *Women and Property: Women as Property*, 19 PAREERGON 151 (2002) (discussing the relationship between women's rights to property in early modern England and the status of women in that society). For a survey of the many scholars who have conflated the idea of property with exclusive and private ownership whether in the course of condemning this "natural right" or praising it, see, e.g., Casla, *supra* note 5, at 192–94.

³⁰ Ronald Sackville, *Property, Rights and Social Security*, 2 U.N.S.W. L.J. 246 (1978).

³¹ *Id.* at 250.

³² *Id.* at 248 & 252.

³³ *Id.* 252–66.

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the legal-institutional, social, and cultural structures that make women either ineligible to receive such benefits or less “worthy” to receive the same amounts as men. If Sackville’s views are taken seriously, the CEDAW Committee should adjust its remedial approach to conform to his rigid demarcation of legal categories. As this suggests, Sackville’s insistence that social benefits are not “property” may have a normative consequence: it slots these entitlements into administrative law, thereby circumscribing from the outset CEDAW’s liberating possibilities.

C7P14 Despite their different rationales, Wadlig and Sackville agree on one thing: “property” cannot be anything other than what scholars like Locke and Blackstone said it was.

C7P15 That is precisely what the CEDAW’s jurisprudence challenges. As chapters 4 through 6 indicate, the CEDAW regime avoids many of the criticisms directed at traditional conceptions of property and international legal regimes closely associated with them (such as the international investment regime). CEDAW’s property rights do not depend on ownership or what Blackstone considered its one essential feature: “despotic” exclusive possession. The Committee’s fluid approach to protecting tenure security—an entitlement that the Committee addresses only when needed to secure women’s equality—recognizes the right to exclude others only when that is needed to protect the security of individual women, the family unit, or the rights of others.³⁴ While CEDAW is not the only regime to recognize that the right to property does not have to include the right to exclude others, it is unique in insisting that the deployment of that particular stick in property’s bundle of entitlements needs to be justified on the basis of women’s equality.

C7P16 CEDAW does not treat property as the traditional civil right of individuals that Wadlig criticizes and Sackville applauds. The CEDAW Committee’s jurisprudence presumes that the Convention’s property-respecting rights interact with and need to be consistent with the other civil, political, economic, social, and cultural rights specifically contained (or incorporated by reference) in the Convention. The CEDAW Committee does not mark these rights out from others as being exclusively about private commodities belonging to individuals competing in the market. Consistent with the CESCR’s approach to the right to adequate housing, the CEDAW Committee is not exclusively focused on protecting traditional rights to buy or sell one’s own property and therefore evict others. It concentrates on changing existing property rules in order to enable women’s equal rights to adequate housing. As Stuart Wilson points out is

³⁴ Ikdhah, *supra* note 13, at 282–84. See, e.g., chapter 2, section 2.11.2 (discussing communications involving allegations of gender-based domestic violence).

the case under the ICESCR, CEDAW's relevant jurisprudence reinforces and provides additional protection to the rights of groups made vulnerable by discrimination "to keep hold of residential property in the face of acts of dispossession."³⁵ The CEDAW Committee repeatedly affirms that equal rights to contract, to housing, to economic and social benefits, to borrow money or possess, enjoy, and dispose of land, or to inherit property are as important to human dignity as are rights to an adequate standard of living or health but goes further still. It criticizes states when they put traditional private property interests, along with the country's economic priorities, ahead of women's equality. It criticizes "development" efforts that essentialize the value of private property and its commodification.³⁶

C7P17 Contrary to Wadlig's fears and Sackville's recommendations, the CEDAW Committee does not demand that states adopt property regimes inspired by Western models. Its property jurisprudence cannot be easily dismissed as yet another paternalistic (or hegemonic) effort to export the laws and practices of "the West"—along with their conception of property—onto the "other."

C7P18 The Committee's jurisprudence ignores Blackstone's script for property in other ways. That jurisprudence protects the private sphere in many respects: it affirms individuals' equal rights to conclude private contracts, administer personal private property, or make an application for credit. But it also punctures that sphere by insisting that family members and market actors treat women equally, even if this requires challenging stereotypes prevalent in the home or in the marketplace. It imposes equal property rights as public obligations for states—as when it affirms equal rights to pensions (whether supplied under state funds or based on employers' contributions) or when it maintains that states must provide adequate shelters for those victimized by domestic violence. It affirms equal rights to all forms of property whether or not these result from discriminatory laws issued by the state or whether denials of such rights result from stereotypes that lead male relatives to seize the property of a widow. In all these ways, the Committee's demands increase the regulatory burdens on states by compelling them to act in the sacrosanct "private" sphere (such as the family). What the Committee demands from CEDAW's states parties

³⁵ Wilson, *supra* note 11, at 180. As Wilson points out, traditional property rights, by contrast, are often enforced by extinguishing the housing rights of existing occupiers. *Id.* See also Casla, *supra* note 5 (arguing in favor of recognizing the social function of property by embedding it in economic, social, and cultural rights). For examples of the CEDAW Committee's expressed concerns with the gendered impact of forced evictions across its various outputs, see chapter 2, sections 2.6.1.2 (discussing GR 34 on rural women); 2.6.2.5 and 2.7.1.2 (discussing specific COs); and 2.7.2.1 (describing the Committee's Views in the North Macedonia cases).

³⁶ See, e.g., chapter 2, section 2.6.2.5 (describing COs addressing the harmful impact of certain development projects).

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resembles the transformational states originally sought by English Radicals or French Jacobins (as described by Nehal Bhuta) or the governments defending “non-absolutist” forms of property (praised by Koldo Casla), rather than the governmental servants of the “morality of the market” denounced by Jessica Whyte.³⁷

C7P19 The Committee’s attention to private property’s negative externalities and how these impact women differently due to intersectional discrimination makes its jurisprudence an unlikely tool to advance “neo-liberalism” as that term is most commonly defined.³⁸ Unlike investor-state arbitrators who largely ignore the negative externalities of property ownership when asked to enforce property’s traditional bundle of entitlements, CEDAW’s interpreters scrutinize those entitlements and attach them to CEDAW’s protections only to countermand formal or substantive discrimination against women.³⁹ The Committee, unlike the World Bank’s efforts to promote “gender equality,” does not treat women’s equality as subsidiary to, and rendered necessary by, the need to promote economic globalization.⁴⁰ Nor does the Committee elevate land titling as an all-purpose solution to achieve “tenure security.”⁴¹

C7P20 Nor is CEDAW’s property jurisprudence principally directed at protecting the rights of individual private property holders.⁴² Its interpretation of property rights may protect the rights of groups or collectivities such as Indigenous, Roma, or rural women. Further, when the Committee faces a choice of whether to favor those with government-sanctioned titles to land over those without such entitlements, it does not necessarily favor the former or individual private rights to property over a collective’s.⁴³ The Committee may rule in favor of group rights

³⁷ Compare Bhuta, *supra* note 12, and Casla, *supra* note 5, to Jessica Whyte, *THE MORALS OF THE MARKET* (2019).

³⁸ Compare chapter 3, section 3.2, at text and notes 111–123 (critiques of human rights regimes as tools to advance “neo-liberalism”) to chapter 4, section 4.2 (arguing that CEDAW’s property jurisprudence does not advance the specific elements of neo-liberalism as these are most commonly defined).

³⁹ See chapter 5, section 5.11 (comparing how “property” is protected under the CEDAW and international investment regimes).

⁴⁰ See, e.g., Poul Wisborg, *Transnational Land Deals and Gender Equality: Utilitarian and Human Rights Approaches*, 20 *FEMINIST ECON.* 24 (2014) (noting the tendency for institutions like the World Bank to pay uneven attention to the gender consequences of transnational land deals justified on utilitarian grounds); Diane Elson, *Gender Justice, Human Rights, and Neo-Liberal Economic Policies*, in *GENDER JUSTICE, HUMAN RIGHTS, AND NEO-LIBERAL ECONOMIC POLICIES* 78 (Maxine Molyneux & Shahra Razavi eds., 2002) (contrasting neo-liberal policies of institutions like the World Bank, grounded in economic efficiency, with discourses based on human rights).

⁴¹ See, e.g., Ikdahl, *supra* note 13, at 284–85.

⁴² Compare, for example, Martti Koskenniemi, *The Effect of Rights on Political Culture*, in *THE EU AND HUMAN RIGHTS* 99, 114–15 (Philip Alston, 2000) (asserting that rights are “inescapably individualist”; “rights always occupy the perspective of the single individual . . .”).

⁴³ For an example in which the CEDAW Committee ignored the absence of formal legal title, see *X v. Cambodia*, discussed at *supra* note 19 and also in chapter 5, at notes 141–142.

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and the groups’ rules—as where Indigenous or customary norms may recognize women’s right to access and enjoy agricultural land without the formality (and possible hindrances) of title.⁴⁴

C7P21

The CEDAW regime does not focus on the protection of property as material objects or on the value of possessing such objects as such. It does not protect an abstract right to non-interference with property and is likely to impose proportionally different burdens on, for example, private and corporate landlords or owners of commercial versus residential property.⁴⁵ To be sure, the Committee, while not as narrowly intent on compensating individuals for property dispossessions as are investor-state arbitrators, affirms that persons are ordinarily owed compensation when they are deprived of possessions in violation of the principle of equality.⁴⁶ However, CEDAW’s remedies typically extend beyond compensating injured individuals and attempt to respond, proactively, through recommendations that seek to prevent comparable future violations of the Convention. As described in chapter 6, the CEDAW Committee’s remedial recommendations encompass a wide gamut of noncompensatory actions that would not be considered in venues that remedy only violations of individual private property by compensating persons on the basis of fair market value.⁴⁷

C7P22

All of this inspires a “progressive” sensibility about why property matters. Under CEDAW, property rights are worth protecting not because they are commodities worth having but because they protect values worth protecting—that is, because they are intrinsic to protecting and advancing women’s inherent dignity, agency, and autonomy. For all these reasons, there are fewer reasons to fear embracing the term “property” in this regime and many reasons for progressives to embrace CEDAW’s property jurisprudence.

⁴⁴ *X v. Cambodia*, *supra* note 43, seems to be an example of such a case insofar as the Committee upheld the rights of the commune’s farmers despite the absence of title. But *see* chapter 3, section 3.2, at text and notes 100–104 (discussing Musembi’s criticisms of the CEDAW Committee’s “abolitionist” approach to cultural norms).

⁴⁵ Compare Casla, *supra* note 5, at 203–04.

⁴⁶ Notably, even an organization as critical of private property as FIAN accepts the need for an entitlement to the right to tenure so long as this is defined as “non-discriminatory, equitable and sustainable access to, and use and management of land and natural resources for all rural people.” This includes “the right to restitution and return to the lands and natural resources of which rural people were arbitrarily or unlawfully deprived.” FIAN International, *The Human Right to Land* (Position Paper Nov. 2017), https://www.fian.org/fileadmin/media/publications_2017/Reports_and_Guidelines/FIAN_Position_paper_on_the_Human_Right_to_Land_en_061117web.pdf.

⁴⁷ *See generally* the remedies typically provided under the international investment regime (as described at chapter 5, section 5.9.1) and those resulting from a human rights approach (described in chapter 6, sections 6.2.7 and 6.3.5). *See also* chapter 6, section 6.4.4 (addressing CEDAW’s arguable “added value” as compared to other human rights regimes).

C7S2 **7.2 Why CEDAW's Property Jurisprudence
Remains a Work in Progress**

C7S3 **7.2.1 Flawed Outputs**

C7P23 CEDAW's property jurisprudence lacks systemization. As suggested by efforts to "re-write" *Kell v. Canada*,⁴⁸ even the most lawyerly of CEDAW's outputs, its quasi-judicial Views, often lack the lawyerly exposition sought by those expecting stable, consistent, and coherent guidance on what Convention rights mean or fully articulated signposts that enable accurate predictions of likely interpretations into the future. Contrasts, fair or not, can be drawn between the Committee's relatively laconic issued Views in response to individual communications and the more legally detailed rulings issued in comparable cases by investor-state arbitrators or judges on regional human rights courts. Some charge that the Committee's Views are inconsistent in adhering to its own GRs, including on matters such as the meaning and import of intersectional discrimination.⁴⁹

C7P24 Comparable critiques extend to the Committee's other outputs. The issues picked up by COs in response to state reports vary, as do their depth of analyses of critical issues, such as the existence or impact of intersectional discrimination.⁵⁰ Committee members do not always probe deeply into a state's claims over succeeding state reports that it has complied with the Committee's criticisms by passing new laws. Its dialogues with reporting states may not seriously engage or interact with those representing the state even in the limited time for such interactions. The Committee's criticisms of states and prescriptions for change often err on the side of being "constructive" to avoid being castigated as "confrontational." The result are frequently vague recommendations that fail to address in any detail serious gaps between the states' laws and realities on the ground or fall short in addressing the underlying structural causes for unequal treatment.⁵¹

⁴⁸ See chapter 2, section 3.1.2, text and notes 41–53 (discussing the scholarly effort to rewrite the Views issued in *Kell v. Canada*).

⁴⁹ See, e.g., Loveday Hodson, *Gender Equality Untethered?*, in *FRONTIERS OF GENDER EQUALITY: TRANSNATIONAL LEGAL PERSPECTIVES* 175, at 184–87 (Rebecca J. Cook ed., 2023) (arguing that the Committee's expressed approach to intersectional discrimination has been unevenly applied in responding to individual communications and identifying shortcomings in, for example, the Views issued in *A.T. v. Hungary*).

⁵⁰ See, e.g., Meghan Campbell, *CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination*, 11 *REVISTA DIREITO GV. SÃO PAULO* 479, 494–99 (2015) (discussing discrepancies in the consideration of intersectional discrimination among the Committee's COs responding to different state reports).

⁵¹ For general criticisms of the Committee's interactions with states along these lines, see, e.g., Yvonne Donders & Vincent Vleugel, *Universality, Diversity, and Legal Certainty: Cultural Diversity in the Dialogue Between the CEDAW and States Parties*, in *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* 321 (Machiko Kanetake & André

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- C7P25 A salient example relating to property rights emerges from China's periodic state reports. China, like forty-eight other state parties to the CEDAW that have not ratified its Optional Protocol, is exposed to the Committee's scrutiny only through the state reporting system. This means that the Committee's COs are the regime's sole tool for protecting the property rights of women in the world's most populous country. Like many countries, China's periodic reports are not always filed in timely fashion. The Committee's Concluding Observations for China, published in November 2014, responded to China's combined seventh and eighth periodic reports, for example.⁵² While on that occasion the Committee challenged China's level of compliance on a number of issues, its COs paid scant attention to the property provisions that are the subject of this book with two exceptions: continued allegations that rural Chinese women face severe restrictions on access to land and discriminatory property deprivations in connection with martial property.
- C7P26 With respect to these issues, this is all that the Committee had to say:
- C7P27 . . . the Committee remains concerned that a high proportion of women in rural areas are still left without contracted land (§ 42)
- C7P28 The Committee calls upon the State party to eliminate all barriers restricting women's access to land, particularly in rural areas, and ensure that the mediation and settlement of such disputes affords women effective remedies (§ 43)
- C7P29 . . . the Committee is concerned about the decision of the Supreme People's Court regarding the interpretation of the marriage law that in cases of divorce or inheritance title to property reverts back to the original investor, a decision which has the effect of indirectly discriminating against women and depriving them of titles to property (§ 44).
- C7P30 The Committee's response to unequal access to family property was as succinct as it was with respect to rural Chinese women's unequal access to land, that China should
- C7P31 [T]ake effective measures to ensure that women fully enjoy their property rights regardless of their marital status, in line with article 16 of the Convention and the Committee's general recommendation No. 29 on the economic consequences of marriage, family relations, and their dissolution (§ 49).⁵³

Nollkaempereds, 2016). See also chapter 4, section 4.4.4 (addressing criticisms that the CEDAW Committee fails to address "root causes").

⁵² CO on China, CEDAW/C/CHN/CO/7-8 (2014).

⁵³ *Id.* See also chapter 2, at text and notes 244, 413–414 (discussing the CO on China from 2014).

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C7P32 The Committee's Concluding Observations issued on May 30, 2023, in response to China's ninth report, essentially repeated the same concerns with rural women's access to land expressed nine years before.⁵⁴ While the Committee praised China for amending its Law on the Protection of Rights and Interests of Women, which covers, among other things, rights to property, as well as for ostensibly prohibiting all forms of domestic violence in its Anti-Domestic Violence Law,⁵⁵ it alluded only indirectly to the lack of effective enforcement of either when it acknowledged the bias of Chinese judges "who apply gender stereotypes and give little weight to women's testimony, evidence and claims," while in some cases dismissing "up to 80% of women's domestic violence claims in divorce proceedings."⁵⁶

C7P33 There is no mystery about why millions of Chinese women face severe constraints with respect to securing equal access to rural land—although one has to read between the lines of the Committee's COs to find the answer. Access to Chinese agricultural land, although formally governed by China's Property Law in 2007, is controlled not by that law—which provides for formal equality between men and women with respect to land contract disputes and with respect to compensation in cases of expropriation—but by the male leaders of agricultural cooperatives who apply cultural norms that effectively limit control of such lands to men.⁵⁷ Similarly, the reasons why Chinese rural women face endemic discrimination with respect to securing equal rights to family property when a marriage dissolves, only indirectly addressed by the Committee's cryptic observations on point,⁵⁸ have been addressed by Ke Li, among others.⁵⁹ Based on empirical data on the numbers of divorce petitions and claims in China and field research involving a substantial number of interviews with women seeking divorces, lawyers charged with assisting them, and judges handling the cases in two rural townships carried out from January 2010 through May 2011, Ke explains how, despite the passage of an ostensibly progressive Marriage Law in 2001, the property rights of rural Chinese women seeking a legal separation from their spouses, often in cases in which they allege domestic abuse, are severely undermined at every stage of the process, from the initial consultation with attorneys to state

⁵⁴ CO on China, CEDAW/C/CHN/CO/9 (2023), at ¶¶ 47–48.

⁵⁵ *Id.*, at ¶ 4(a) & (e).

⁵⁶ *Id.*, at ¶ 15. See also *id.*, ¶ 25 (noting that "a small percentage of all domestic violence reported to the police result in restraining orders").

⁵⁷ See, e.g., Li Ke, *Land Dispossession and Women's Rights Contention in Rural China*, 5 CHINA L. & SOC'Y REV. 33 (2020).

⁵⁸ See, e.g., CO on China, CEDAW/C/CHN/CO/9 (2023), ¶ 59 ("The Committee notes with concern that family courts rarely take incidents of gender-based violence into consideration of alimony payments . . . which may have a negative impact on women and their children . . .").

⁵⁹ LI KE, MARRIAGE UNBOUND: STATE LAW, POWER, AND INEQUALITY IN CONTEMPORARY CHINA (2022); XIN HE, DIVORCE IN CHINA: INSTITUTIONAL CONTROLS AND GENDERED OUTCOMES (2021); ETHAN MICHELSON, DECOUPLING GENDER INJUSTICE IN CHINA'S DIVORCE COURTS (2022).

mediations and judicial proceedings.⁶⁰ Ke documents how, at every turn—and consistent with national data on point—women confront a legal system that favors keeping marriages intact, consistent with Communist Party concerns with social stability and sagging birth rates.

C7P34

Ke provides evidence on how women are first discouraged from filing for divorce and when they persist discouraged from pursuing their equal rights to property even by their own lawyers, who fail to convert their property claims into written requests, and by mediators or judges who resist addressing them.⁶¹ She reports that women, unlike men, are most likely to be denied a divorce when they first initiate the process and are encouraged to enter into settlements where their husbands routinely extract marital property waivers in exchange for consents to divorce.⁶² Her empirical data shows how, when women manage to secure divorces, judge-ordered or mediated cases most often result in no decision on property partition and that, in the few cases when property partition is addressed, women rarely prevail.⁶³ More disturbing still is that nothing changes when the women present evidence of serious and ongoing spousal abuse. Allegations of violence, Ke reports, are not raised during mediation sessions or trials:

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No investigations were conducted within or without courtrooms. The overall pattern was remarkably consistent: not a single case in the sample generated a court decision that expressly identified a husband as a perpetrator . . . not a single case demanded a violent, abusive spouse pay damages to his victim, although the Marriage Law decrees otherwise. Everywhere I looked in my data collection, I could not find any indication of judicial attempts to address violence against women.⁶⁴

C7P36

These conclusions are consistent with those of many others who point out that despite laws against marital rape, that crime is not prosecuted except in the rare

⁶⁰ Ke, *supra* note 59, at 8–13.

⁶¹ *Id.* at 232–38.

⁶² *Id.* at 238–39.

⁶³ *Id.* at 239.

⁶⁴ *Id.* at 241. This is consistent with the work of others who document that, despite improvements in formal Chinese legislation aimed at combating violence against women and sexual harassment in the workplace, women victimized by either domestic violence or workplace harassment face significant obstacles in obtaining legal remedies. In one study, of eighty-three sexual harassment cases identified, only six resulted in formal suits against the harassers and the handful who prevailed “often receive little, if any, compensation for their suffering.” AARON HALEGUA, U.S.-ASIA L. INST., *WORKPLACE GENDER-BASED VIOLENCE AND HARASSMENT IN CHINA: HARMONIZING DOMESTIC LAW AND PRACTICE WITH INTERNATIONAL STANDARD* (2021). See also Xin He, *Why Don't Chinese Divorce Courts Better Protect Women?*, 1 USALI PERSPECTIVES 22 (May 13, 2021), <https://usali.org/usali-perspectives-blog/why-dont-chinese-divorce-courts-better-protect-women>.

instance when the marriage has been effectively dissolved.⁶⁵ A country in which husbands are still essentially free in fact (if not in law) to rape their wives—a fact that is not addressed by the Committee's COs—is not a place from which one can expect equality with respect to division of marital property.⁶⁶

C7P37 Neither China's reports to the CEDAW Committee nor the Committee's responses addresses the causes of these manifest violations of equality, evincing stark gaps between the formal law and its implementation. The Committee's diplomatically expressed concerns with women's "access to justice" fall far short of giving effect to its own principal GRs on point, 34 and 39; they do not do justice to the many women who have faced grave harm and even death given the Chinese legal system's callous disregard for women seeking divorce under threat of domestic violence.⁶⁷

C7P38 Another example of relatively anodyne COs responding to circumstances that resemble those in China is the Committee's 2020 response to Pakistan's fifth periodic report.⁶⁸ The Committee's report starts promisingly enough, by denouncing Pakistan's continued failure to withdraw its declaration declaring CEDAW subject to "the provisions of the Constitution of the Islamic Republic of Pakistan."⁶⁹ But anyone looking for pointed inquiries and challenges directed at a state whose parallel justice systems grants women belonging to distinct ethnic and religious groups distinct rights and access to justice with respect to marriage and family relations is bound to be disappointed. Only those familiar with NGO and scholarly reports on point will know that much like China, the Pakistani legal system effectively does not prosecute marital rape, is otherwise largely indifferent to serious allegations of domestic abuse when it comes to authorizing divorce, affirms men as the legally ordained breadwinner of the family, and regularly exposes divorced women to the threat of total destitution.⁷⁰ In response to these grim realities,

⁶⁵ See, e.g., Shichao Sun & Zhitao Zhang, *A Study on the Route of Criminalization of Marital Rap*, 32 J. HUBEI U. POLICE 90 (2019); Huoliang Wang, *Legislative Review of Marital Rape Was Written into the Anti-Domestic Violence Law*, 31 J. HUBEI U. POLICE 122 (2018); U.N. Population Fund, *Research on Gender-based Violence and Masculinities in China: Quantitative Findings* (Nov. 2013), <https://china.unfpa.org/en/publications/research-gender-based-violence-and-masculinities-china-quantitative-findings>.

⁶⁶ See, e.g., Hannah Feldshuh, *Marital Rape: A Crime Left Unseen and Unspoken in the Chinese Legal System*, THE DIPLOMAT (Dec. 8, 2018), <https://thediplomat.com/2018/12/marital-rape-a-crime-left-unseen-and-unspoken-in-the-chinese-legal-system/>. Of course, China is not the only state that fails to prosecute this crime. See, e.g., *Marital Rape Is Not a Crime in 32 Countries. One of Them Is India*, NEWS 18, <https://www.news18.com/news/india/marital-rape-is-not-a-crime-in-32-countries-one-of-them-is-india-4130363.html> (last visited Mar. 29, 2023). See also Iqra Saleem Khan, *Consent in Marriage: A Radical Feminist Analysis of Pakistani Law*, 26 WM. & MARY J. OF RACE, GENDER & SOC. JUST. 671 (2020) (describing the absence of prosecutions for marital rape in Pakistan).

⁶⁷ Compare chapter 2, sections 2.11.1 (discussing the GRs relevant to gender-based violence) and 2.11.2 (discussing the Communications addressing gender-based violence).

⁶⁸ CO on Pakistan, CEDAW/C/PAK/CO/5 (2020).

⁶⁹ *Id.* ¶ 9. See also appendix 2.

⁷⁰ See also Saleem Khan, *supra* note 66, at 671.

the Committee's COs blandly express "concern" with Pakistan's parallel justice systems and urges the state to ensure that these do not discriminate against women.⁷¹ With respect to the many blatant violations of CEDAW's Article 16(1) (h), the CO notes with concern "that in case of non-consensual divorce, only women petitioners are required to prove grounds for divorce in court, and that the support to be provided in the event of divorce is not harmonized for the different religious groups."⁷² The Committee recommends, by way of response, that Pakistan "ensure that the family laws of the different religious communities provide for financial protection for women upon divorce in the form of equal levels of marital support and equitable shares in matrimonial property" and "amend or repeal all discriminatory provisions in laws that provide for unequal rights of women with respect to marriage, divorce, guardianship, inheritance and property."⁷³

C7P39

The Committee's COs on Pakistan are generally consistent with concerns expressed in its GR 16 that "identity-based personal status laws and customs perpetuate discrimination against women" and that "the preservation of multiple legal systems is in itself discriminatory against women."⁷⁴ But the Committee's laconic paragraphs on these issues in its report on Pakistan—the sheer absence of detail on the dire impact these personal status laws are having on the security and even the right to life of Pakistani women—suggest a less than fulsome application of GR 16. As Rangita de Silva de Alwis and Indira Jaising point out, personal status laws, whether based on Muslim, Christian, or Hindu traditions, customs, or religious rules, drafted by male hierarchies that did not involve women's participation, play a substantial role in creating a "second sex" with direct consequences on, among other things, women's equal property rights.⁷⁵ Although other COs are more fulsome in responding to underlying problems by reporting states,⁷⁶ the inconsistency among the CEDAW's COs indicates why

⁷¹ CO on Pakistan, *supra* note 68, ¶¶ 19, 20(a), & 49.

⁷² *Id.* ¶ 49(d).

⁷³ *Id.* ¶ 50(d) & (e).

⁷⁴ GR No. 16 on Unpaid Women Workers in Rural and Urban Family Enterprises, A/46/38, ¶ 15 (1991).

⁷⁵ Rangita de Silva de Alwis & Indira Jaising, *The Role of Personal Laws in Creating a "Second Sex,"* 48 N.Y.U. J. INT'L L. & POL. 1085 (2016).

⁷⁶ One such example may be the Committee's 2017 response to Kenya's eighth periodic report. See CO on Kenya, CEDAW/C/KEN/CO/8 (2017). That report canvassed, among other things, the Committee's concerns with Kenya's Marriage Act of 2014, criticizing the requirement to prove contribution to marital property given challenges to proving the existence of or quantifying nonmonetary contributions, the removal of spousal consent for transactions relating to marital property, intestate succession rules that directly discriminate against women and girls, rules that render widows' inheritance rights void upon remarriage, and discrimination against women married under Islamic law (including the right of men to divorce their wives unilaterally and to withhold divorce certificates to extract concessions). *Id.*, at ¶ 50. The report made recommendations with respect to each of these problems. *Id.* ¶ 51. While that report still falls short of recognizing numerous realities on the ground (compare, e.g., Julian Nnoko-Mewanu & Najma Abdi, *Securing Women's Property Rights in Kenya*, DAILY NATION (Mar. 7, 2020), <https://www.hrw.org/news/2020/03/07/securing-womens-prope>

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critics contend that the Committee is superficial, and more reactive than disciplined, in its treatment of at least some state reports.

C7S4

7.2.2 Substantive Lacunae

C7P40 Complaints about the Committee's GRs underlie the more general charge that the Committee has not taken full advantage of its ability to fill in or systematize its jurisprudence through this vehicle.⁷⁷ The substantive lacunae relevant to property are substantial.

C7P41 The jurisprudence surveyed in chapter 2 does not provide a coherent explanation of when or whether the extensive property rights specially accorded CEDAW's Article 14 to "rural women" should be understood as applying to non-rural women,⁷⁸ whether Article 14 or other parts of the Convention are the best places to locate the Committee's rationale for intersectional discrimination, what specific remedies are owed by states when they violate particular property rights violations,⁷⁹ or whether, if compensation is due, when the sums due should be left to governments to decide.⁸⁰ The Committee has not resolved the tension between according individual remedies to communicants simply because some communications were deemed admissible and led to a result on the merits, and the possible adverse impact such remedies may have on other women in the same state facing comparable discrimination who are not accorded the same remedy given limited state resources.

C7P42 The Committee has not clarified under the right to housing precisely when a reasonable eviction turns into a "forced" one.⁸¹ Nor has it identified precisely

erty-rights-kenya), it identifies more of the relevant legal shortcomings that either the Pakistan or China reports.

⁷⁷ See, e.g., Catherine Briddick, *Unprincipled and Unrealized: CEDAW and Discrimination Experienced in the Context of Migration Control*, 22 INT'L J. DISCRIMINATION & L. 224 (2022) (criticizing the CEDAW Committee's GRs for their opacity, omissions, and inconsistencies, particularly as applied to discriminatory migration policies).

⁷⁸ For example, while in the North Macedonia cases discussed in chapter 2, section 2.7.2.1, the Committee appeared to extend the right to adequate housing in Article 14(2)(h) to Roma women in an urban setting, it has not suggested that the protection of the intellectual property interests of Indigenous and rural women, presumed to be included in Article 14(2)(g), extends to all forms of women's intellectual property rights. See generally chapter 2, section 2.8.

⁷⁹ This is not to imply that other human rights treaty bodies have necessarily generated clearer or more coherent jurisprudence with respect to remedies. See generally chapter 6, sections 6.2.7 and 6.3.5.

⁸⁰ See, e.g., chapter 5, section 5.10, particularly at text and notes 151–155 (comparing the likely forms of relief available to individuals under the investment and CEDAW regimes).

⁸¹ The few mentions of objectionable evictions discussed in chapter 2 do not clarify if an eviction becomes prima facie wrongful under CEDAW when the state fails to ensure public housing or rental assistance to intersectionally discriminated women. The North Macedonia cases, discussed in chapter 2, section 2.7.2.1, suggest that the absence of notice and the relative rarity of such evictions in

what types of unions or families are entitled to the protections of Article 16(1)(h) or why states should be accorded deference on whether to initially recognize some unions before the Committee can address their discriminatory impact on, for example, LGBTQ+ persons.⁸² The Committee has also not overcome the general problem that a treaty that specifically targets discrimination “against women” (in both title and text) seems ill-suited to advance the rights of anyone other than cis-gendered women or girls.⁸³ Although the Committee has made some inroads in expanding CEDAW to embrace members of LGBTQ+ communities, these efforts have been uneven and lack coherence.⁸⁴ At a time when in some parts of the world identifying as LGBTQ+ continues to risk a death sentence—never mind a threat to one’s property rights—CEDAW’s mixed messages on this kind of intersectional discrimination threatens its credibility on much else.⁸⁵

C7P43

Moreover, despite the Committee’s revisitations of the topic throughout all its outputs, uncertainties exist about when, exactly, distinctions relating to property interests based on sex amount to wrongful discrimination. Although it is possible to infer, particularly from recommendations it issues to states, that the CEDAW Committee sees its mission as advancing certain key goals that may yield insights on that question, these are not usually articulated in a systemic, clear, and consistent way throughout its outputs and are the product of scholarly speculation.⁸⁶ The Committee has not articulated a clear position or preference among possible theoretical frameworks to answer that question. Is denying women equal property rights objectionable because or to the extent that it denies

North Macedonia were relevant to upholding the individuals’ claims. One might compare the HRC’s relatively richer jurisprudence on the procedural requirements required in cases of forced eviction, as summarized in chapter 6, section 6.2.6, under the ICCPR’s Article 17(1)’s explicit guarantee against “arbitrary” or “unlawful” interference with the home or family.

⁸² See chapter 2, section 2.4.3.8.

⁸³ See chapter 3, section 3.1.2, at text and notes 24–27. Tensions among states about whether the CEDAW regime should address discrimination directed at sexual orientation date back at least to the Beijing Conference. See, e.g., *Dianne Otto, Lesbians? Not in My Country: Sexual Orientation at the Beijing World Conference on Women*, 20 ALTERNATIVE L.J. 288 (1995).

⁸⁴ GR No. 29 on Economic Consequences of Marriage, Family Relations and Their Dissolution, CEDAW/C/GC/29 (2013), for example, interprets Article 16(1)(h)’s protections for the property of both “spouses” to include family property of non-heterosexual couples. *Id.* at ¶ 24. But anyone searching chapter 2 for specific discussions of the particular problems faced by LGBTQ+ persons with respect to social and economic benefits or generally with respect to the right to housing, for example, will come up empty-handed. Compare, e.g., Rep. of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Sexual Identity, A/74/181 (July 17, 2019), ¶¶ 14–18 (discussing LGBTQ+ persons and housing), ¶¶ 37–41 (discussing women who are lesbian, bisexual, trans, and gender diverse).

⁸⁵ See generally Daniel Del Gobbo, *Queer Rights Talk: The Rhetoric of Equality Rights for LGBTQ+ Peoples*, in *FRONTIERS OF GENDER EQUALITY*, *supra* note 49, at 68.

⁸⁶ Compare chapter 6, section 6.4.4, at text and notes 363–364 (discussing Holtmaat’s articulation of CEDAW’s goals).

them equal opportunity?⁸⁷ Because when states discriminate against women's property interests, they send the message that women (or particular groups of women) do not merit being treated as equals and are therefore second-class citizens?⁸⁸ Or is the problem not only that such discrimination sends detrimental expressionist messages but produces a state of affairs in which women actual suffer from lower social status relative to others?⁸⁹

C7P44 Given the Committee's geographically and disciplinarily diverse membership, one would not expect it to back any *one* of these theories. A Committee that is as pluralist as CEDAW's is more likely to be sympathetic to what Sophie Moreau describes as a "pluralist" answer: discriminating against women's property interests is wrong for all of these reasons. That response is also to be expected given the diverse rationales suggested by the Convention's preamble as well as the outputs surveyed in chapter 2.

C7P45 However, even if we cannot reasonably take the Committee to task for failing to back one of these philosophical approaches, one might still expect that its applications of the equality principle to be clearer about a distinction that cuts across all of these approaches: namely, whether distinctions among property rights are wrongful under CEDAW only when they fail to treat people as each other's equals (equality) or whether they are also wrong because they fail to provide women or certain women enough of a basic good (sufficiency). Sufficiency-based views posit that discrimination is objectionable when it leaves some people or groups without enough of some good that matters (and implicitly, once they have enough, any further inequalities between them and others ceases to matter). While the text of CEDAW—and specifically its suggestion that women should be treated like men—suggests that the Convention foregrounds equality, a number of the Committee's interpretations in chapter 2 indicate that the Committee is also concerned with sufficiency.

C7P46 The Committee's interpretations of the diverse economic and social benefits contained in Articles 11, 13, and 14 provide examples. As described in chapter 2, CEDAW obligates states to redress discrimination against women with respect to everything from contribution-based social security schemes paid by employers

⁸⁷ Compare JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2016). This seems implied by CEDAW's § 8 of the preamble (stating that inequality interferes with the "full development" of women's "potentialities").

⁸⁸ Compare DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2011); Elizabeth Anderson, *What Is the Point of Equality*, 109 *ETHICS* 287 (1999). This might be suggested by CEDAW's preamble, § 1's reference to the need to affirm the "dignity and worth" of the human person as well as § 7's reference to equality as an obstacle to women's equal "participation" in the "political, social, economic and cultural life of their countries."

⁸⁹ A leading piece propounding this "subordination" thesis is Cass Sunstein, *The Anti-Caste Principle*, 92 *MICH. L. REV.* 2410 (1994). The idea is arguably implied by CEDAW's preamble, § 7, which connects equality to respect for human dignity and declares that respect for both enables the growth of the prosperity of society and family.

to nonemployment related benefits that may be paid by the state such as maternity benefits and noncontributory pensions. The Committee's interpretations of the states' obligations often evince a concern for whether women secure *sufficient* benefits, whether or not those benefits are extended to men.⁹⁰ In these cases, the Committee seems to be suggesting that the principle of equality—or more accurately substantive equality—requires states to extend an adequate floor of social protection to women as a whole or to distinct groups of women.⁹¹ The Committee's recommendations that women receive certain benefits not comparable to those extended to men or not extended to anyone at all under the existing law of some states—relating to pregnancy or based on income earned outside the formal sector, for example—collapse distinctions between the equality and sufficiency frameworks.⁹² As Beth Goldblatt argues, the Committee has not defined whether protectable social benefits under CEDAW anticipate minimum entitlements to “social assistance for all groups of women facing economic insecurity.”⁹³ The Committee's practice on economic/social benefits surveyed in chapter 2 does not indicate how far the Convention goes in demanding from

⁹⁰ See, e.g., in chapter 2, section 2.10 (describing GRs addressing rights to social benefits). Concerns for the sufficiency of women's social benefits seem apparent in the Committee's insistence that states include women's unenumerated work in social security payments; make sure that economic benefits to migrant workers include consideration of the contributions they make to their home countries, caregiving, and domestic work; consider the impact of gender-based discriminations in employment throughout women's lives; adequately address the special needs of female heads of household; and redress the impact of intersectional discrimination (as with respect to refugees or rural women). In these instances, the Committee goes beyond ensuring that social/economic benefits extended to men are made equally available to women. The Committee also treats the duty not to discriminate as requiring some forms of social protection even to those, like refugees, who may not be entitled to any under existing national law. The Committee's recommendations in these respects are consistent with those who see social security as a rights-based entitlement that is vital to addressing the feminization of poverty and other negative impacts of “neo-liberal economic policies on women in the developing world.” See, e.g., BETH GOLDBLATT, *DEVELOPING THE RIGHT TO SOCIAL SECURITY—A GENDER PERSPECTIVE 2* (2016). See generally *GENDERING WELFARE STATES* (Diane Sainsbury ed., 1994).

⁹¹ While the Committee has not articulated a theoretical account explaining the right to substantive equality, its recommendations directed at achieving that goal would appear to have much in common with, for example, Sandra Fredman's definition of the term. See, e.g., Sandra Fredman, *Challenging the Frontiers of Gender Equality: Women at Work*, in *FRONTIERS OF GENDER EQUALITY*, *supra* note 49, at 38 (defining the right to substantive equality as a multidimensional principle requiring attention to redressing disadvantage; addressing stigma, stereotyping, prejudice, and violence; facilitating voice and participation; and transforming structures and accommodating difference).

⁹² The kind of scrutiny for substantive equality exercised by the CEDAW Committee in a case like *Ciobanu v. Republic of Moldova* (chapter 2, section 2.10.2.3) is inconceivable as a matter of contemporary constitutional law in a country like the United States. Such an outcome would be transformational for a country whose Supreme Court does not apply the strictest form of constitutional scrutiny to cases of sex discrimination and does not consider substantive equality (or “substantive due process”) to be required by the US Constitution. See generally *FEMINIST JURISPRUDENCE CASES AND MATERIALS* 19–101 (Cynthia Grant Bowman et al. eds., 5th ed. 2018).

⁹³ GOLDBLATT, *supra* note 90, at 71. Compare chapter 2, section 2.10.3.8 (discussing the Committee's Concluding Observations that demonstrate its concern with those who are denied any social security benefits and the connections to the feminization of poverty).

states fundamentally redistributive “benefits” that would seriously address the impoverishment of women.

- C7P47 The Committee could fill such interpretative gaps. Sophia Moreau, for example, has proposed a tripartite framework that embraces the equality and sufficiency frames and that could help provide structure to the Committee’s capacious property jurisprudence (as well as to how it applies the bar on discrimination more generally). She argues that wrongful discrimination consists of actions that distinguish among people in ways that subordinate them socially, deny some deliberative freedoms to which they have a right, or leave some without access to a “basic good.”⁹⁴
- C7P48 It would not be difficult to apply her tripartite division to the jurisprudence described in chapter 2. Discrimination against the property rights of rural or Indigenous women, for example, wrongfully elevates the social standing of certain groups over others consistent with her first form of discrimination. Denials of the rights of women to have equal access to family property upon dissolution of a marriage deprives them from making choices about their lives, consistent with the second form. And either of those actions (as well as many others suggested by chapter 2’s sad litany of property rights violations) may also be wrongful when they restrict access to a good that is necessary for persons to be, and to be seen as, a full and equal participant in society — consistent with Moreau’s third discrimination frame and definition of “basic goods.”⁹⁵
- C7P49 Moreau’s trifold distinctions might also be used to fill another interpretative void: the CEDAW Committee’s failure to articulate a clear theory about when or why the particular identities or roles of women constitute wrongful intersectional discrimination.⁹⁶ While the Committee has identified a number of

⁹⁴ Sophie Moreau, *Faces of Gender Inequality*, in *FRONTIERS OF GENDER EQUALITY*, *supra* note 49, at 19. Moreau defines social subordination as a “state of affairs in which one social group has a standing or status that is lower than that of another.” *Id.* at 21. Subordinated social groups generally have less *de facto* authority, receive less obedience or deference, subjected to stereotypes, and less benefited by structural accommodations. *Id.* at 23. Denials of deliberative freedoms prevent people from making choices about their lives, such as being able to work without their gender being an issue or deciding whether to have children. Such denials fail to show respect people’s autonomy. *Id.* at 26. Basic goods are those where access to it “is necessary in order for this person to be a full and equal participant in her society” and where access to the good “is necessary in order for this person to be seen by others and by herself as a full and equal participant in her society.” *Id.* at 27.

⁹⁵ Moreau, *supra* note 94, at 27. This seems consistent with much of the Committee’s work to advance gender equality with respect to, for example, rights to housing (chapter 2, section 2.7) or access to justice (chapter 2, section 2.5). The Committee’s Views in the North Macedonia cases (chapter 2, section 2.7.2.1) emphasize the need to rectify, through access to adequate housing, the intersectional discrimination imposed on Roma women who were pregnant or had young children, for example. Similarly, many of the Committee’s COs in chapter 2, section 2.7.3 (addressing the need for equal treatment with respect to safe, secure, and affordable housing for older, Indigenous, or disabled women, migrants, refugees and asylum seekers, low-income persons, as well as those suffering in the wake of natural disasters) suggest Moreau’s third frame for discrimination: denials of access to basic goods.

⁹⁶ See, e.g., Amanda Barbara Allen Dale, *Intersectional Human Rights at CEDAW: Promises, Transmissions and Impacts* (Aug. 23, 2018) (PhD dissertation, Osgoode Hall Law School),

identities that can be considered in determining whether intersectional discrimination exists—and has been lauded for naming harms that are often “hidden, camouflaged or normalized” and adding to these over time⁹⁷—it has not clearly explained why distinctions directed at particular identities among women violate the Convention. Nor has it clearly indicated whether some forms of intersectional discrimination matter more than others— including for purposes of deciding suitable remedies. The Committee has not explicitly suggested that distinctions made partly or wholly on the basis of race, for example, might be particularly problematic or worth priority attention or whether that would be unwise or legally problematic (or both). The Committee could indicate, but has not, that a state that is violating both its CEDAW and Convention on the Elimination of All Forms of Racial Discrimination (CERD) obligations commits a graver breach that merits a particular level of financial recompense to those harmed. Shreya Atrey has argued in favor of prioritizing among some intersectional forms of discrimination, suggesting that the CEDAW Committee has implicitly endorsed this approach.⁹⁸ She sees GR 37's emphasis on particular groups of women who are especially threatened by climate change as an example of the Committee's emerging efforts to prioritize attention and remedies for those under the gravest threat.⁹⁹

C7P50

Quite apart from distinguishing among those most gravely impacted by intersectional discrimination, the CEDAW Committee has not given guidance about whether certain forms of property deprivation matter more than others. One justification for distinguishing among violations of CEDAW is suggested, for example, by its Optional Protocol—which authorizing inquiries only for “grave or systematic” violations of the Convention. Of course, distinctions among human rights appear in other contexts, such as the International Covenant on Civil and Political Rights (ICCPR)'s identification of certain of its provisions as “non-derogable” even in cases of public emergencies or the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment's distinctions with respect to torture as compared to cruel, inhuman, and degrading treatment.¹⁰⁰ As those distinctions suggest, some human rights

https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/35582/Dale_Amanda_BA_2018_PhD.pdf?sequence=2&isAllowed=y (discussing interpretative gaps and uncertainties in CEDAW's use of intersectional discrimination); see also chapter 4, section 4.4.2.

⁹⁷ Rebecca J. Cook, *Many Paths to Gender Equality*, in *FRONTIERS OF GENDER EQUALITY*, *supra* note 49, at 2.

⁹⁸ Such distinctions might find support from some of the Committee's prior practice—as where it highlights, in making recommendations, that the state appears to be in violation of both the CEDAW and another human rights treaty. See Shreya Atrey, *A Prioritarian Account of Gender Equality*, in *FRONTIERS OF GENDER EQUALITY*, *supra* note 49, at 64–65.

⁹⁹ *Id.* at 64–65.

¹⁰⁰ Compare ICCPR, Article 4(2) (barring derogations even in such cases of the right to life; the bans on torture or cruel, inhuman or degrading treatment, slavery or slave-trade in all its forms,

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violations might be regarded as more serious or “fundamental” because of their greater ~~or more~~ impact on the human person, either as a category or as applied. Yet another possible justification for prioritizing among rights is suggested by recommendations that states criminalize certain human rights violations (such as sex trafficking) precisely because these are particularly serious or comparable to other actions that trigger the use of national criminal law.¹⁰¹

- C7P51 Given these examples, it would not be unreasonable for the Committee to opine that depriving a woman who is facing the threat of domestic violence or viable threats of being trafficked safe housing is a more serious or grave breach of CEDAW that merits, for example, lesser deference to states. That example also raises another interpretative gap in CEDAW's general as well as property jurisprudence: its failure to articulate with clarity what kind of deference states are owed and whether that standard should vary depending on whether inter-sectional discrimination is present or particular rights under CEDAW are at issue.¹⁰²
- C7P52 Moreau's tripartite approach—indicating that distinctions are discriminatory when they constitute or result in social subordination, interference with deliberative freedoms, and/or denial of basic benefits—could be used to clarify any or all these issues. Her tripartite distinctions could also be useful to provide guidance on issues that have not been addressed under CEDAW's existing outputs. Determining that one or more of her three harms are triggered when, for example, single women in India are denied rental housing could enrich CEDAW's now limited jurisprudence on the threats to property rights that single women face in many parts of the world.¹⁰³
- C7P53 Lawyers advising prospective communicants, states drafting their periodic reports, and NGOs reacting to state abuses could all benefit from interpretative clarifications on any of these matters—particularly in the form of cross-cutting

imprisonment for failure to fulfill a contractual obligation, and a number of other rights in the ICCPR); Convention on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Articles 4–9 (imposing various obligations on states with respect to its requirement that torture (but not other matters addressed in that treaty) must be made a criminal offense).

¹⁰¹ See, e.g., G.A. Res. 52/98 (Dec. 12, 1997) (calling on states to criminalize trafficking crimes).

¹⁰² Compare chapter 2, sections 2.10.2.1, 2.10.2.2, and 2.10.2.3 (discussing the Committee's undefined references to “large” or other “margin of appreciation” or “margin of discretion” in *Nguyen v. The Netherlands*, *Blok v. The Netherlands*, and *Ciobanu v. Moldova*). See also Briddick, *supra* note 77, at 230–32 (complaining that the CEDAW Committee applied an inconsistent and “overly wide” margin of appreciation when addressing states' actions to control migration).

¹⁰³ See, e.g., Damien Cave, *For Single Indian Women, Renting Is Complicated*, N.Y. TIMES, Jan. 18, 2023, at A4; Meng Chen & Fangfang Yu, *A Home of One's Own? Gendered Homeownership in Urban China*, 20 CHINA REV. 143 (2020); Wen Jing Deng & Joris Hoekstra, *Why Women Own Less Housing Asserts in China? The Role of Intergenerational Transfers*, 34 J. HOUSING & THE BUILT ENV'T 1 (2019). See generally SANDY TO, CHINA'S LEFTOVER WOMEN: LATE MARRIAGE AMONG PROFESSIONAL WOMEN AND ITS CONSEQUENCES (2015).

discursive GRs on point. Leaving these basic questions unresolved (or only the subject of scholarly speculation gleaned from the language of some COs) undermines the predictability and stability of the law—as well as the Committee's credibility as a consistent treaty interpreter. They also encourage criticisms that rights discourse, here as elsewhere, deploys overly indeterminate language leading to outcomes dictated by preexisting political preferences.¹⁰⁴

C7P54

It is particularly discouraging to women's rights advocates that, irrespective of the quality or quantity of its work products, the CEDAW regime is encountering growing resistance to its work products, amidst a much broader populist backlash against human rights within authoritarian and even some states touted as democracies.¹⁰⁵ NGOs and scholars complain that even once “progressive” states are backsliding—as with respect to reporting on gender-based violence or failing to take measures that the Committee has recommended for years with respect to protective orders and provision for adequate shelters.¹⁰⁶ Others point to a more subtle form of backsliding: a growing number of governments are using gender-neutral language to describe deeply gendered phenomena, resulting in poor data and, worse still, poor government policies. Ruth Halperin-Kaddari and Marsha Freeman contend that when governments report the number of shelters available to “domestic violence survivors” or report on “partner homicides,” “family killings,” “violence between spouses or partners,” or “battered family members,” these gender-neutral terms conceal the fact that the vast majority of the victims are female—and that state responses such as providing shelters need to be available to them.¹⁰⁷ Amid such backlash, particularly, but not only by, authoritarian states, the CEDAW Committee's interpretative silences or ambiguities may make it easier for future CEDAW Committees, perhaps composed of some members more amenable to state preferences, to roll back the more progressive aspects of prior Committees' jurisprudence.

¹⁰⁴ See, e.g., Koskenniemi, *supra* note 42, at 111–13 (noting, for example, the indeterminacy of the Strasbourg Court's “margin of appreciation”); 110–11 (arguing that policy dictates whether exceptions to rights apply); 106–07 (discussing the selectivity of rights discourse which protects certain principles of economic freedom as fundamental rights but not, for example, immigration challenges), 107–10 (discussing the role of public policy in resolving conflicts among rights, including with respect to women's rights, when to emphasize formal equality and when it is necessary to resort to “reverse discrimination” to achieve substantive equality).

¹⁰⁵ See, e.g., Ruth Halperin-Kaddari & Marsha A. Freeman, *Backlash Goes Global: Men's Groups, Patriarchal Family Policy, and the False Promise of Gender-Neutral Laws*, 28 CANADIAN J. WOMEN & L. 165, 172–77 (2016) (describing the “global backlash” against women's rights in the United Nations' political bodies over recent years).

¹⁰⁶ See generally Conny Roggeband & Andrea Krizsán, *Democratic Backsliding and the Backlash Against Women's Rights: Understanding the current challenges for feminist politics* (UN Women, Discussion Paper No. 35, 2020).

¹⁰⁷ Halperin-Kaddari & Freeman, *supra* note 105, at 183–93 (describing problematic laws and data-collection policies in Western European states such as The Netherlands, Norway, the United Kingdom, and Finland, but also in Armenia, Lithuania, Canada, Lebanon, Tuvalu, and Bahrain).

C7S5

7.2.3 Institutional Constraints and Challenges

C7P55

There are many possible explanations for the deficiencies in the CEDAW outputs discussed in the prior sections 7.2.1 and 7.2.2. With respect to the inconsistency of COs or their laconic contents, it is important to keep in mind that the state reporting process does not erase differences among states. The contrast between the Committee's anodyne language and even praise for China's ostensibly "progress" and stark Chinese realities on the ground may be the predictable product of inadequate shadow reports by NGOs from outside the country who struggle to secure information in a challenging environment and the absence of internal civil society organizations that are independent of the Chinese Communist Party.¹⁰⁸ Flaws in these COs may also reflect choices made by the CEDAW Committee to emphasize China's progress in passing new laws or to avoid the hard work of assessing whether China's laws are given effect on the ground. They may, on the contrary, simply reflect the fact that the Committee simply ran out of time during state reporting sessions, particularly if Article 16 issues are left to the end of Geneva sessions subject to, as noted in chapter 2, ~~increasingly circumscribed constraints~~. With respect to Pakistan, some of the same factors may be in play in addition to one more: the trepidation some Committee members may feel when it comes to addressing, head-on, direct conflicts between women's rights and religious traditions.

C7P56

Connections might also be drawn between perceived flaws in the Committee's outputs and its interdisciplinary composition. While the Committee's array of disciplinary expertise has been lauded as enabling it to address the complexity of women's subordination,¹⁰⁹ the composition of the Committee may have downsides. Some insiders suggest that one cannot expect lawyerly or deeply analytical work-products if lawyers are not closely involved throughout the drafting process for all of the Committee's outputs, from Views to GRs to COs to Reports on Inquiries. With respect to COs, some blame other factors over which the Committee has little control such as the word limits imposed on its COs, the tendency of states to delay their reports and forward

¹⁰⁸ Compare CO on China, CEDAW/C/CHN/CO/9 (2023), ¶ 17 (noting the "limited participation of civil society organizations"). Even outside of China, human rights NGOs evince uneven attention to property rights. The Human Rights Watch March 2021 Submission on China's periodic report for the 80th CEDAW Pre-Session, for example, did not address property rights issues in China. Human Rights Submission to CEDAW, Mar. 2021. See generally UN TREATY BODY DATABASE, https://tbinter.net.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2470&Lang=en (last visited Mar. 29, 2023).

¹⁰⁹ See, e.g., Andrew Byrnes, *The Convention on the Elimination of All Forms of Discrimination against Women and the Committee on the Elimination of Discrimination against Women: Reflections on Their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform 4* (U.N.S.W.L., Research Paper No. 2010-17, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1595490.

multiple state reports all at once, the lack of support by sufficient UN staff, or the temporal constraints imposed on how the Committee conducts its sessions in Geneva.

C7P57 The Committee's own operating procedures—not always transparent—and the ways it engages with NGOs might also bear scrutiny. The quality of the Committee's GRs may be the byproduct of the fact that at least the initial drafts of GRs are produced by particular Committee members with distinct skills, goals, or levels of ambition. There is little transparency on how topics are generated for GRs, when or why a “follow-up” to a GR is produced, or whether the production of GRs over time reflects intentional priorities that correspond to the most serious challenges to women's equality around the world. It seems striking that only as this book is going to press is the Committee getting around to drafting a GR on the meaning of stereotypes—a critical cross-cutting issue that may explain much of what is going on in places like China and Pakistan. These flaws might also be attributed to the Committee's practice of leaving the initiative for suggesting suitable GR topics to individual Committee members who may choose topics based on their own interests or the loudest NGO voice in the room. The thin reasoning of some GRs may also reflect the difficulty of cobbling together a consensus acceptable to all the Committee.¹¹⁰

C7P58 Comparable complaints about the uneven quality of Views are sometimes explained in terms of authorship: that is, by which committee member is assigned to write the initial draft. The lack of consistency among Views in terms of depth of analysis may reflect distinct views among Committee members on what Views *are for*. Some members may believe that these should produce, case by case, a result that is fair to the individual communicant given the particular matrix of factors, including distinct forms of intersectional discrimination.¹¹¹ Others might be more inclined to use Views—and not only GRs—more ambitiously to reach for more clarifying general interpretations of the Convention or of underlying principles.¹¹²

C7P59 More fundamental are concerns that supranational human rights scrutiny is invariably superficial and lacks context. Notwithstanding the CEDAW Committee's efforts to respond to and interact with international civil society, it faces complaints that it, like other Geneva-based human rights bodies staffed

¹¹⁰ In this respect, the capacity of members of the Committee to file dissents to Views may enable those outputs to probe more deeply and also to evolve over time in response to such dissents. For a dissent that suggests such possibilities, see the dissenting opinion in *Nguyen v. Netherlands* (described in chapter 2, section 2.10.2.1).

¹¹¹ See, e.g., Loveday Hudson, *supra* note 49, at 195 (noting that transformative intersectional analysis demands attention to contextual factors “that [do] not always sit comfortably alongside the strive for legal clarity”).

¹¹² Compare the inclusion of the ICESCR's seven housing guarantees in the rewritten *Kell v. Canada* View discussed in chapter 3, section 3.1.2, at text and notes 41–53.

by and served by “elite cadres” of professionals, is disconnected from local, on-the-ground actors (assuming that these exist and are permitted to function independently of government). For human rights critics like Stephen Hopgood only the latter are seriously interested in solving particularized societal injustices (including stark forms of growing inequalities).¹¹³

C7S6

7.3 Does CEDAW's Property Jurisprudence Matter?

C7P60

Underlying many of the criticisms of the CEDAW regime is the worry that the CEDAW Committee's rhetoric does nothing to address the stark disparities in wealth and access to property that women face. Underlying many of the general criticisms of international human rights regimes and of CEDAW is the sense that their creators—states—have purposely made them, as Sam Moyn says, “powerless.”¹¹⁴ Some may believe that, as Moyn suggests is true of international human rights regimes in general, CEDAW's property efforts are the equivalent of putting a “Band-Aid” on a “charnelhouse.”¹¹⁵ The CEDAW Committee's nonbinding sources of *non-authority* are thin reeds against the formidable structural forms of subordination that underlie the property deprivations targeted by the Convention. The problem, say compliance skeptics, is that the Committee's outputs do not legally compel states or private actors to comply.¹¹⁶

C7P61

There is a substantial literature addressing how or whether international law, international human rights regimes, and CEDAW specifically, achieves implementation, compliance, and effectiveness.¹¹⁷ It would require a separate book—and distinct empirical tools and methods—to engage with that literature. It is outside the scope of this book to gauge whether or how CEDAW's property jurisprudence affects the actions of states and/or private actors over time. While such

¹¹³ See generally STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013). Hopgood begins his book-length critique of international human rights by distinguishing those elites engaged in Human Rights (in capital letters) from “on the ground” activists intent on advancing human rights (lower case). *Id.* vii–xii.

¹¹⁴ Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 147 (2014). Indeed, Moyn, among others, argues that one alternative to Western-styled neoliberalism, namely state-led efforts to reduce poverty as practiced in China, has “sometimes done a better job than actual human rights movements.” *Id.* at 168.

¹¹⁵ *Id.* at 169.

¹¹⁶ See, e.g., RHODA E. HOWARD-HASSMANN, *IN DEFENSE OF UNIVERSAL HUMAN RIGHTS* 42 (2018) (citing critics who see human rights regimes as evincing a “moral emptiness” or emphasizing principles over enforceable law).

¹¹⁷ For an example of the range of views on CEDAW's impact, compare Martha C. Nussbaum, *Women's Progress and Women's Human Rights*, in *THE LIMITS OF HUMAN RIGHTS* 231 (Bardo Fassbender & Knut Traisbach eds., 2019) (suggesting that CEDAW has a real but limited legal significance) to Fareda Banda, *The Limits of Law: A Response to Martha C. Nussbaum*, in *THE LIMITS OF HUMAN RIGHTS*, *supra* note 8, at 267 (contesting Nussbaum's view of “modest progress”).

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a research agenda should be encouraged, a word of warning is necessary: those looking for demonstrable proof that states have changed their behavior *because* of the CEDAW Committee's recommendations—that is, demonstrable evidence that “but for” that Committee's outputs states' behavior would have been different—would probably be looking for the wrong thing in the wrong place.

C7P62

Consider a common example sometimes touted to demonstrate “effectiveness.” The CEDAW Committee earns praise when its criticisms of states' reservations to CEDAW are followed by partial or complete withdrawals of such reservations.¹¹⁸ It is difficult, however, to establish clear links between the CEDAW Committee's “dialogues” with state parties to convince them to withdraw their objectionable reservations to the Convention's provisions relating to property and states' withdrawals of such reservations.¹¹⁹ As appendices 2 and 3 indicate, state parties' to CEDAW have most frequently made reservations that relate to the subject of this book, namely, the property-relating provisions within Articles 11, 13, 14, 15, and 16 (which frequently overlap with reservations to the overreaching duties of states not to discriminate under Article 2). The number and broad content of such reservations are a testament to the challenge that the principle of equal property rights poses to states' gendered preferences. As shown by appendix 3, of the original thirty-four state parties that made such reservations, ~~thirteen~~ had, by 2022, partially or wholly withdrawn those reservations after one or more interactions with the Committee, including critical COs issued in response to their state reports. While it would be easy to credit the Committee with these positive developments, there are simply too many other factors that may have intervened to produce these results. It would require even more intrusive (and probably still inconclusive) inquiries to determine, in any case, whether the withdrawals of relevant reservations made any difference to the underlying state laws or practices—much less to the lives of women in these jurisdictions.

C7P63

It is, of course, true that the enforcement tools *contained in CEDAW* are starkly different from those available to regional human rights courts, investor-state arbitrations, or national courts applying international law. However, assessments of the impact of the Committee's jurisprudence need to consider what happens outside Geneva—that is, the direct or indirect incorporation of CEDAW through national courts when interpreting local laws and even constitutions, as well as the work of many other forums that rely on CEDAW but do not involve

¹¹⁸ See generally Siobhán Mullally, *CEDAW Reservations and Contested Equality Claims*, in *FRONTIERS OF GENDER EQUALITY*, *supra* note 49, at 88–107.

¹¹⁹ *Id.* 93–100 (discussing the “reservations dialogue” between the Committee and reserving states). Apart from critical comments on states' reservations in COs, the Committee has made a number of general statements against reservations to the Convention, *see, e.g.*, CEDAW Comm., Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, A/53/38/Rev.1, at 47–50 (1998).

the application of binding international law as such, including those seeking to implement the United Nations' Sustainable Development Goals to advance women's equality.¹²⁰ Those who are skeptical of the impact of CEDAW's jurisprudence given the continuing global gender gap on wealth and property need to consider the effects of that jurisprudence on millions of women when even just one national Supreme Court decides to directly incorporate that jurisprudence to interpret national law (as has happened innumerable times since CEDAW was concluded).¹²¹

C7P64 More generally, it is shortsighted to equate international legally binding adjudicative rulings with international law "compliance."¹²² As a substantial literature on how or when states implement, comply with, or give effect to international law demonstrates, there is no one-to-one correspondence between on the ground legal impact and "hard" or "binding" judicial remedies.¹²³ One should not presume that formally binding arbitral or judicial rulings are necessarily more "effective" at eradicating or reducing discriminatory practices than the subsequent practice of UN treaty bodies delegated with the power to interpret human rights when that practice interacts, over time, with civil society efforts to enforce it.¹²⁴

C7P65 Nor is it clear that courts, national or international, authorized to issue binding rulings in response to individual cases are more significant in *developing* international legal norms than UN treaty bodies like the CEDAW Committee—whose outputs extend beyond responding to individual cases and include opportunities to opine on what the law generally means (as through GRs, COs in response to state reports from virtually all nations, and more in-depth Reports on Inquiries

¹²⁰ On the SDGs, see, e.g., UN WOMEN, PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2022 (2022); Marieme S. Lo, *Gender Equality and the Sustainable Development Goals: Discursive Practices in Uncertain Times*, in FRONTIERS OF GENDER EQUALITY, *supra* note 49, at 108. On the use of CEDAW and its jurisprudence in national courts, INTERNATIONAL WOMEN'S RIGHTS CASES (K. Adams et al. eds., 2005); ASIA PAC. F. ON WOMEN, L. & DEV., A DIGEST OF CASE LAW ON THE HUMAN RIGHTS OF WOMEN (ASIA PACIFIC) (2003); GLOBAL JUSTICE CENTER, CEDAW CASE BANK (June 6, 2017), <https://globaljusticecenter.net/publications/advocacy-resources/751-cedaw-casebank>; Vijaya Nagarjan & Archan Parashar, *Gender Equality in International Law and Constitutions: Mediating Universal Norms and Local Differences*, in THE PUBLIC LAW OF GENDER 170 (Kim Rubenstein & Katharine G. Young eds., 2016); Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT'L L. 534 (2015). For in-depth accounts of specific examples of national court cases, see, e.g., Naina Kapur, *Breathing Life into Equality: The Vishaka Case*, in FRONTIERS OF GENDER EQUALITY, *supra* note 49, at 305; Maria Rodriguez de Assis Machado & Mariana Mota Prado, *Institutional Dimensions of Gender Equality: The Maria da Penha Case*, in FRONTIERS OF GENDER EQUALITY, *supra* note 49, at 384.

¹²¹ See *supra* note 120.

¹²² See Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL'Y 127 (2010). It is also important to consider the costs imposed by legally binding compliance tools. See chapter 5, section 5.11 (comparing the remedies available under CEDAW to those for investor-claimants under the international investment regime).

¹²³ See generally BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS (2009); NINA REINERS, TRANSNATIONAL LAWMAKING COALITIONS FOR HUMAN RIGHTS (2021).

¹²⁴ See generally TREATIES AND SUBSEQUENT PRACTICE (Georg Nolte ed., 2013).

into systematic human rights violations in particular countries). And even if we presume that legally binding rulings under a particular bilateral international investment agreement or a regional human rights treaty tend to lead to compliance by states on the losing end of such judgments, these rulings bind only the parties to such suits. In a system lacking hierarchically superior courts, it is the persuasive value of the legal interpretations themselves combined with the perceived legitimacy of the body that issues them that matters.¹²⁵ Indeed, one answer to the charge that resorting to legal rights (as under the CEDAW) “depoliticizes” what ought to stay in the political realm is to contest the premise that the turn to rights necessarily deflects politics or removes such contestations from political struggles.¹²⁶ CEDAW’s interpretative efforts on property rights, as well as everything else, have political consequences and are deployed as such by both women’s rights activists and their opponents.

C7P66 Human rights regimes like CEDAW’s are discursive forums in which levels of compliance, implementation, or effectiveness need to be defined and assessed in different ways.¹²⁷ Many factors enter into whether the interpretations of international law, whether issued by the CEDAW Committee, the UN Human Rights Committee, or, for that matter, the US Supreme Court, prove to be more or less persuasive or worthy of emulation. None of these is formally “authoritative” for purposes of determining international law of general application. All of them, depending on context and other factors—such as the use put to them by transnational civil society—can be more or less impactful. How, when, or why international law protects “property” is not the exclusive preserve of any single international legal regime. Those who dismiss all these efforts, including CEDAW’s, as powerless rhetoric need to do better than rely on impressions and anecdotes.

C7S7

7.4 Beyond A Room of One’s Own

C7P67 Virginia Woolf’s *A Room of One’s Own* famously drew direct connections between a woman’s needs for basic personal space and possessions and her capacity for autonomy and self-expression.¹²⁸ Woolf contended that certain “necessities,”

¹²⁵ See, e.g., Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in UN HUMAN RIGHTS 128 (Helen Keller et al. eds., 2012) (arguing that the HRC’s legal legitimacy, premised on its delegated authority to interpret the ICCPR, is not enough to secure its normative legitimacy).

¹²⁶ See, e.g., chapter 4, section 4.3, at text and notes 106–108 (discussing the possibility that “rights talk” can lead to political contestations instead of shutting these down).

¹²⁷ See, e.g., Howse & Teitel, *supra* note 122. Nina Reiners’s focus on the impact of what she calls “transnational lawmaking coalitions” is one example of why measuring human rights “compliance” by a single measure, such as whether the CEDAW Committee’s outputs are “authoritative,” is simplistic. REINERS, *supra* note 123.

¹²⁸ VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* (1929).

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namely, a room with a key and lock as well as some money of her own, were essential to enable women to become authors or artists (and, implicitly, much else).¹²⁹ As Woolf made clear in reflecting on the probable fate of Shakespeare's fictional sister, Judith, the impediments that women have long faced in patriarchal British society extended to much more than denials of private space and money. Among the many "contrary instincts" facing any woman brave enough to aspire to make a literary contribution, Woolf identified impediments to securing basic education, active discouragement from pursuing goals apart from marriage and motherhood, denials of access to many public and professional spaces, and myriad gendered prejudices. On Woolf's account, lack of access to a metaphorical (as well as a real) room of one's own embodied countless inequalities between men and women imposed by economic, cultural, or societal structures.

C7P68 CEDAW's property jurisprudence repeatedly calls out the "contrary instincts" women face. It has much in common with Woolf's indictment of patriarchy. Both the CEDAW Committee and Woolf draw connections between equal rights to property and other economic, social, and cultural rights. Both see "material security" as deeply connected to autonomy, agency, and dignity. Both draw attention to the stereotypes that stand in the way of women's equality. At the same time, as this book indicates, the CEDAW regime seeks to protect far more than ownership of property and far more than a right to a room of one's own.

C7P69 Criticisms of *A Room of One's Own* are instructive as they echo some of those lobbed at CEDAW. The African American author, Alice Walker, for example, asked her readers to imagine the plight of women enslaved in America who did not even "own" their own bodies and might have had artistic aspirations, the high hurdles faced by the formerly enslaved in America who were not permitted to read or write, or the intense effort it took their descendants, like successful author Zora Hurston, to overcome the exceedingly high "contrary instincts" they faced.¹³⁰ Walker implicitly questions the premise that Woolf's fictional Judith, a privileged woman living in a developed nation filled with bourgeois comforts made possible, at least in part, by the United Kingdom's colonist wealth, should be seen as a universal stand-in for women everywhere. Her criticisms echo those targeting CEDAW's "essentialist" woman and its "Western" biases, including its inclusion of property rights.

C7P70 The meaning and value of Woolf's "Room" varies with the observer and context. Jesok Song, writing about reactions to *A Room of One's Own* in South Korea over recent decades, describes the transformations of a play based on it

¹²⁹ *Id.* at 4, 44, & 88. Woolf suggested that the amount of money needed was "500 a year." *Id.* at 88.

¹³⁰ Alice Walker, *In Search of Our Mother's Gardens*, in *WITHIN THE CIRCLE: AN ANTHOLOGY OF AFRICAN AMERICAN LITERARY CRITICISM FROM THE HARLEM RENAISSANCE TO THE PRESENT* 401, 404–06 (Angelyn Mitchell ed., 1994).

depending on contemporary developments in that country.¹³¹ In the early 1990s, Song writes, the play based on Woolf's essay served as an indictment of a particular kind of patriarchy that resonated with an oppositional political movement and then engaged in ending South Korea's military dictatorship.¹³² Later, in the wake of the country's turn to electoral democracy, the rise in human and women's rights movements locally, and other forms of environmental and consumer activism, the play became a vehicle for extolling "inner harmony for individual women, rather than a collective confrontational approach to the status quo."¹³³ At that time, according to Song, Woolf's focus on the need for spatial autonomy gained new currency in a society with restive young women searching for privacy and independence with no interest in marriage but confronted with discriminatory housing and loan-lending systems that made such space unavailable to them.¹³⁴ In the wake of the Asian Debt Crisis (1997–2003), as the ideal of "independent entrepreneurialism" came to be associated with democracy itself, the message in *Room* reverberated within a free-wielding neo-liberal economy that demanded self-sufficient, independent, and employable citizens. Woolf's ideal of self-governed women not dependent on the state and able and willing to care for themselves now served, according to Song, the cause of the neo-liberal South Korean state.¹³⁵

C7P71

While this book distances CEDAW's property jurisprudence from the most commonly accepted definitions of "neo-liberalism," the changing perceptions of the canonical *A Room of One's Own* over time suggest a cautionary note. It is difficult to say how the work in progress that is CEDAW's property jurisprudence will evolve over time or how perceptions of it will change. A core premise of this book is that if, as Molière might suggest, the CEDAW Committee has been speaking "property" for years without knowing it, that is not a bad thing.¹³⁶ Property rights, as defined by and for women, may be essential to the transformational change needed to enable half the world's population to secure equality.

¹³¹ Jesok Songs, "A Room of One's Own": *The Meaning of Spatial Autonomy for Unmarried Women in Neoliberal South Korea*, 17 GENDER, PLACE AND CULTURE 131 (2010).

¹³² *Id.* at 131.

¹³³ *Id.* at 132.

¹³⁴ *Id.* at 135–37.

¹³⁵ *Id.* at 141.

¹³⁶ MOLIÈRE, *LE BOURGEOIS GENTILHOMME* (1670) (Fr.).

A01

APPENDICES

The Cedaw Committee's Output Engaging with Property Rights

A01S1

APPENDIX 1

A01S2

RELEVANT CEDAW PROVISIONS

A01S3

CEDAW

A01S4

Article 11

A01P1

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:

A01P2

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

A01P3

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

A01P4

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

A01S5

Article 13

A01P5

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life to ensure, on a basis of equality of men and women, the same rights, in particular:

A01P6

(a) The right to family benefits;

A01P7

(b) The right to bank loans, mortgages, and other forms of financial credit;

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A01S6

Article 14

- A01P8 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
- A01P9 (c) To benefit directly from social security programmes;
- A01P10 (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- A01P11 (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

A01S7

Article 15

- A01P12 1. States Parties shall accord to women equality with men before the law.
- A01P13 2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

A01S8

Article 16

- A01P14 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
- A01P15 (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property, whether free of charge or for a valuable consideration.

A01S9

APPENDIX 2

A01S10

STATE RESERVATIONS TO PROPERTY-RELATING
CEDAW PROVISIONS

Article 2	Art. 11(1)(e)	Art. 11(2)(b)	Art 13(b)	Art. 15	Art. 16(1)(c)	Art. 16(1)(h)
	Right to social security	Paid maternity leave or other comparable social benefits	Bank loans, mortgage, other forms of financial credits	Equal capacity in contracts and administer property	Same rights and obligation during marriage and its dissolution	Same rights to ownership, acquisition, management of property
Algeria	Malta	Australia	Malta	Algeria (4)	Algeria	Algeria
Bahamas (a)	Monaco	Micronesia	UK	Bahrain (4)	Bahrain	Bahrain
Bahrain	Singapore	Singapore	Ireland*2004	Malta	Bangladesh	Egypt
Bangladesh	UK	UK		Niger (4)	Egypt	India
Egypt		Cook		Qatar (1)(4)	India ⁵	Iraq
Iraq (f)(g)		Islands*2007		Switzerland (2)	Iraq	Israel
Lesotho		New Zealand,		Syrian Arab	Israel	Malta
Libya		and Niue*2003		Republic (4)	Jordan	Mauritania
Micronesia (f)				UAE (2)	Lebanon	Micronesia
Morocco ¹				Belgium*1998	Libya	Singapore
Niger (d)(f)				France*1986	Malaysia	Switzerland
Qatar (a, hereditary)				(2)(3)	Maldives	UAE
Syrian Arab Republic					Malta	Brazil*1994
Singapore (a–f)					Mauritania	Bahamas*2011
UAE ² (f)					Micronesia	France*1986
Cook Islands					Niger	Malaysia*1998
(f) * ³ 2007					Oman	Tunisia*2014
DPRK ⁴					Qatar	
(f)*2015					Singapore	
					Syrian Arab Republic	
					UAE	
					Brazil*1994	
					France*1986	
					Morocco*2011	
					ROK ⁶ *1991	
					Tunisia*2014	
					Turkey*1999	

¹ Morocco technically it does not have a reservation on Article 2, rather it has a declaration that indicates it will accept Article 2 to the extent that it does not: (1) prejudice the constitutional rules regaling the rules of succession to the throne, and (2) does “not conflict with the provisions of the Islamic Shariah, which has laws that confer different rights to men and women.

² UAE – United Arab Emirates.

³ (*) reservation withdrawn.

⁴ DPRK – Democratic People’s Republic of Korea.

⁵ India doesn’t have a reservation against Article 16, rather it has a declaration stating that “India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.”

⁶ ROK – Republic of Korea.

A01S11

APPENDIX 3

A01S12

WITHDRAWN STATE RESERVATIONS TO
PROPERTY-RELATING CEDAW PROVISIONS

State	Reservation(s)	Timeline of Reservation Withdrawal ⁷	Year of Withdrawal
Bahamas	Art. 16(1)(h): The inheritance law of the Bahamas, which were governed by primogeniture, did not permit women to inherit from a person who died intestate. ⁸	<p>Combined Initial, Second, Third, and Fourth Periodic Report – 2009: “In 2002 . . . a new Inheritance Law was enacted which now permits men and women to inherit equally. The Bahamas can now consider removing the reservation to Article 16(h).”⁹</p> <p>Reply to List of Issue – 2010: In response to the Committee’s question on whether the Bahamas wished to withdraw its reservation Bahamas indicated that its withdrawal was under consideration.¹⁰</p> <p>Response – 2011: Bahamas withdrew its reservation after the submission of initial report and before the constructive dialogue.</p>	2011
Belgium	Art. 15(2): On the provision of equal legal capacity and ability to exercise such capacity, specifically regarding capacity “to conclude contracts and to administer property.”	<p>Constructive Dialogue – 1989: Belgium indicated that its reservation to Art. 15(2) was “purely theoretical” because it was “based on transitional measures that had ceased to have any effect.”¹¹</p> <p>Constructive Dialogue – 1996: “Reservation to Art. 7 and 15 would be withdrawn, since a new law had been adopted to enable women to exercise royal powers and change in the Constitution had rendered void the reservation relating to marriage law.”¹²</p> <p>Response – 1998: Belgium withdraws its reservation.</p>	1998

⁷ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx.

⁸ Consideration of reports submitted by states parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial, second, third, and fourth periodic reports of states parties, Bahamas.

⁹ *Id.*

¹⁰ Responses to the list of issues and questions with regard to the consideration of the combined initial to fourth periodic report, Bahamas.

¹¹ Report on the Committee on the Elimination of Discrimination Against Women, General Assembly forty-fourth session, 56–57, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx.

¹² Report of the Committee on the Elimination of Discrimination against Women (Fifteenth session) General Assembly Official Records · Fifty-first Session Supplement No. 38 (A/51/38).

State	Reservation(s)	Timeline of Reservation Withdrawal ⁷	Year of Withdrawal
Brazil	Art. 16(1)(c) & (h): Brazilian's Civil Code differentiated the rights of women and men in the ownership, acquisition, management, administration, enjoyment, and disposition of property. ¹³	Initial Report – 2003: Noted the influence that the Vienna Conference of Human Rights (1993), the Vienna Human Rights Declaration, and the Beijing Platform of Action—urging countries to withdraw reservations contrary to the object and purpose of the CEDAW—had on Brazil's withdrawal decision. Combined Initial 1st–5th Periodic Reports – 2003: Noted Brazil's withdrawal of Art. 16 reservations along with its passage of domestic laws ensuring the “rights and duties of spouses during marriage.” ¹⁴	1994
Cook Island	Art. 11(2)(b): “On the provision of maternity leave.” Art. 2(f) & Art. 5(A): “With regard to inheritance of chiefly titles; and in general, as regards recruitment and service of women in the armed forces.”	Initial Report – 2006 (September): Committee highlighted Cook Island's reservations and recent advancements regarding inclusion of women in armed force employment. Response – 2007 (April): Cook Island indicates willingness to withdraw reservations. Constructive Dialogue – 2007 (July): Government notifies committee of its withdrawal prior to dialogue.	2007
France	Art. 15(2), Art. 16(1)(c), & Art. 16(1)(h): Only husbands granted legal power to legally administer and dispose of common property and act as administrator of minor children's property. ¹⁵	Initial Report – 1986: France indicated that in “the future, wives, in the same way as husbands, will be able to administer and dispose of common property alone,” and legitimately administer minor children's property. ¹⁶ Constructive Dialogue – 1987: France indicated it had withdrawn its reservations.	1986

¹³ Consideration of reports submitted by states parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial, second, third, fourth, and fifth periodic reports of states parties, Brazil.

¹⁴ *Id.*

¹⁵ Consideration of reports submitted by states parties under Article 18 of the Convention, Initial reports of states parties, France.

¹⁶ CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 18 OF THE CONVENTION Initial reports of States Parties FRANCE

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State	Reservation(s)	Timeline of Reservation Withdrawal ⁷	Year of Withdrawal
Ireland	Art. 13(b): On the provision of economic equity in “bank loans, mortgages, and other forms of financial credit.”	<p>Constructive Dialogue – 1989: Ireland indicated that citizens could utilize the courts for any grievances relating to equality on bank loans, mortgages, and other forms of financial credits, and therefore specific legislation was not necessary.</p> <p>Fourth and Fifth Periodic Review – 2003: When acceding CEDAW, there was no specific legislation expressly regulating the obligations of private individuals to accord equality in the areas covered by Art. 13(b) and (c).</p> <p>Response – 2004: Prior to constructive dialogue and following its enactment of the Equal Status Act in 2004, Ireland withdrew its reservation to Arts. 13(b) and (c).</p>	2004
New Zealand ¹⁷ (NZ)	Art. 11(2)(b): “On the provision of maternity leave.”	<p>Initial Report – 1987: Committee emphasized NZ’s advancements and shortcomings in maternity leave legislation.</p> <p>Fourth Periodic Report – 1998: NZ indicates it has no foreseeable plans to withdraw reservation.</p> <p>Fifth Periodic Report – 2002: NZ enacts the Paternal Leave and Employment Protection Act and indicates willingness to assess its provisions to reach compatibility under CEDAW.</p> <p>Response – 2003: Before constructive dialogue, NZ formally withdrew its reservation.</p>	2003
Malaysia	Art. 16(1)(h): Because family law is governed by civil, Islamic, and customary laws, this limits the autonomy, rights, and decision-making powers of wives, who must obey and act according to their husbands wishes. ¹⁸	<p>Combined Initial and Second Periodic Report – 2004: “Following the Beijing Conference [Fourth World Conference on Women] (1995), steps were taken to review Malaysia’s reservations,” including Art. 16(1)(h). This resulted in its withdrawal in 1998.¹⁹</p>	1998

¹⁷ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx

¹⁸ Consideration of reports submitted by states parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of states parties, Malaysia.

¹⁹ Consideration of reports submitted by states parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial and second periodic reports of states parties, Malaysia.

State	Reservation(s)	Timeline of Reservation Withdrawal ⁷	Year of Withdrawal
Morocco	Art. 16(1) (c): "Considerable discrimination [against women] in the areas of marriage, conjugal relations, divorce and the custody of children."	<p>Concluding Observations – 1997: Recommended withdrawal of reservations and highlighted the "considerable discrimination against women in Morocco, particularly in the field of family law."</p> <p>Constructive Dialogue – 2003: Morocco indicated it "must strike a balance between international law and Shariah," particularly in the issue of family law. "Therefore the Government established a commission consisting of women, religious leaders, and other representatives of civil society to discuss ways of changing the family law and modifying traditional attitudes." Morocco indicated possible withdrawal.</p> <p>Concluding Observations – 2003: Committee urged Morocco to expedite its withdrawal process.</p> <p>Third & Fourth Periodic Review – 2006: Following Morocco's revisions to its Family Code, it released a statement announcing its reservation withdrawal.</p> <p>Response – 2011: Morocco withdrew its reservation.</p>	2011
Republic of Korea (ROK)	Art. 16(1) (c): Continuation of patriarchal family system, including "sharing of property between divorced couples" and the "family headship system." ²⁰	<p>Initial Report – 1986: Korean family and property law still has some contradictory provisions with CEDAW.</p> <p>Concluding Observations – 1987: Urge ROK to consider a withdrawal.</p> <p>Response – 1993: ROK withdrew its reservation following its Family Law revisions made in 1990.</p> <p>Concluding Observations – 1998: "Ratification of the Convention had impacted significantly on the lives of Korean women. The comments of the Committee members on the second report in 1993 had provided substantial guidance in implementing women's policies, particularly in respect to women's participation in decision-making and the elimination of gender-discriminatory laws relating to citizenship."²¹</p>	1991

²⁰ CEDAW, Initial Report of States Parties, Republic of Korea.

²¹ Report of the Committee on the Elimination of Discrimination against Women (eighteenth and nineteenth sessions), General Assembly Official Records Fifty-third session Supplement No. 38 (A/53/38/Rev.1).

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State	Reservation(s)	Timeline of Reservation Withdrawal ⁷	Year of Withdrawal
Tunisia	<p>Art. 16(1)(c): The Personal Status Code (PCS) establishes the husband as the “head of the family.”</p> <p>Art. 16(1)(h): “No interference with [the PCS’s laws concerning the] acquisition of property by succession.”</p>	<p>Combined Initial and Second Periodic Report – 1993: Stated that the current PCS violated CEDAW’s provisions; committee urged withdrawal.</p> <p>Sixth Periodic Report – 2009: Although it still faced shortcomings, Tunisia stated that it had “constantly and progressively adapted its legislation” to increase gender equality in “matrimonial and family rights.”²² It further indicated that such efforts were made with the aim at bringing its “domestic law more closely in line with the Convention’s standards and provisions.”²³</p> <p>Response:</p> <p>2011 – Tunisia’s government approved the withdrawal.</p> <p>2014 – Tunisia officially withdrew its reservation.</p>	2014
Turkey	<p>Art. 16(1)(c): Husbands given the “right to the family home,” considered “head of the family,” and therefore “made all decisions regarding it.”²⁴</p>	<p>Initial Report – 1990: Turkey had established a committee in Parliament to review the Civil Code and propose to change the necessary provisions that discriminate against women.</p> <p>Second & Third Periodic Report (Combined): Turkey communicated efforts to withdraw its reservations. The Committee continued recommending it to expedite the process.</p> <p>Response – 1991: Turkey made changes to its Constitution, Legislation, and Civil Code and subsequently withdrew its reservation.</p>	1999

²² Consideration of reports submitted by states parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined fifth and sixth periodic reports of states parties, Tunisia.

²³ Written replies from the Government of Tunisia to the list of issues and questions (CEDAW/C/TUN/Q/6) with regard to the consideration of the combined fifth and sixth periodic reports (CEDAW/C/TUN/5–6).

²⁴ Committee on the Elimination of Discrimination against Women ninth session summary record of the 161st meeting held at Headquarters, New York, on Monday, January 29, 1990, at 3 p.m.

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APPENDIX 4

A01S14

THE CEDAW COMMITTEE'S GENERAL RECOMMENDATIONS
ADDRESSING PROPERTY RIGHTS

- A01P16 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 12: Violence against Women, U.N. Doc. A/44/38 (Eighth session, 1989)
- A01P17 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 16: Unpaid Women Workers in Rural and Urban Family Enterprises, U.N. Doc. A/46/38 (Tenth session, 1991)
- A01P18 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 17: Measurement and Quantification of The Unremunerated Domestic Activities of Women and Their Recognition in the Gross National Product, U.N. Doc. A/46/38 (Tenth session, 1991)
- A01P19 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, U.N. Doc. A/47/38 (Eleventh session, 1992)
- A01P20 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 21: Equality in Marriage and Family Relations, U.N. Doc. A/49/38 (Apr. 12, 1994)
- A01P21 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 23: Political and Public Life, U.N. Doc. A/52/38 (Sixteenth session, 1997)
- A01P22 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 26 on Women Migrant Workers, U.N. Doc. CEDAW/C/2009/WP.1/R. (Dec. 5, 2008)
- A01P23 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, U.N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010)
- A01P24 • Comm. on the Elimination of Discrimination against Women, General recommendation No. 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and Their Dissolution), U.N. Doc. CEDAW/C/GC/29 (Oct. 30, 2013)
- A01P25 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013)
- A01P26 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014)
- A01P27 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 33 on Women's Access to Justice, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015)
- A01P28 • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 34 on the Rights of Rural Women, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016)

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- A01P29** • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017)
- A01P30** • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, U.N. Doc. CEDAW/C/GC/37 (Mar. 13, 2018)
- A01P31** • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration, U.N. Doc. CEDAW/C/GC/38 (Nov. 20, 2020)
- A01P32** • Comm. on the Elimination of Discrimination against Women, General Recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls, U.N. Doc. CEDAW/C/GC/39 (Oct. 31, 2022)

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APPENDIX 5

A01S16

THE CEDAW COMMITTEE'S VIEWS ON COMMUNICATIONS
ADDRESSING PROPERTY RIGHTS

A01S17

Property Rights in Marriage and Family Relations

A01P33

- Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 19/2008, Cecilia Kell v. Canada, U.N. Doc. CEDAW/C/51/D/19/2008 (Feb. 28, 2012)

A01P34

- Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 048/2013, E.S. and S.C. v. United Republic of Tanzania, U.N. Doc. CEDAW/C/60/D/48/2013 (Mar. 2, 2015)

A01S18

Adequate Housing and Property Rights

A01P35

- Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 110/2016, L.A. et al. v. North Macedonia, U.N. Doc. CEDAW/C/75/D/110/2016 (Feb. 24, 2020)

A01P36

- Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 107/2016, S.N. and E.R. v. North Macedonia, U.N. Doc. CEDAW/C/75/D/107/2016 (Feb. 24, 2020)

A01S19

Social Benefits

A01P37

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A01P38

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A01P40

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- Ao1P41** • Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 2/2003, Ms. A.T. v. Hungary (Jan. 26, 2005)
- Ao1P42** • Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 5/2005, Şahide Goekce v. Austria, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007)
- Ao1P43** • Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 006/2005, Fatma Yildirim (deceased) v. Austria, U.N. Doc. CEDAW/C/39/D/6/2005 (Aug. 6, 2007)
- Ao1P44** • Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 20/2008, V.K. v. Bulgaria, U.N. Doc. CEDAW/C/49/D/20/2008 (July 25, 2011)
- Ao1P45** • Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 103/2016, J.I. v. Finland, U.N. Doc. CEDAW/C/69/D/103/2016 (Mar. 5, 2018)
- Ao1P46** • Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 065/2014, S.T. v. Russian Federation, U.N. Doc. CEDAW/C/72/D/65/2014 (Apr. 8, 2019)
- Ao1P47** • ~~Land Rights: The Committee adopted Views on an additional communication on the topic of women's land rights on May 19, 2023. The communication is not presented as part of the jurisprudence other than in footnotes because the research concluded on March 15, 2023.~~
- Ao1P48** ← Comm. on the Elimination of Discrimination against Women, Views under Article 7(3) of the Optional Protocol concerning Communication No. 146/2019, X. v. Cambodia, U.N. Doc. CEDAW/C/85/D/146/2019 (Jun. 7, 2023)

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APPENDIX 6

A01S22

THE CEDAW COMMITTEE'S INQUIRY REPORTS
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A01P50

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