

# Quantifying CEDAW: Concrete Tools for Enhancing Accountability for Women's Rights

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## ABSTRACT

*The Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") is the most important binding international treaty for women. The only international human rights treaty with the principal goal of protecting and promoting women's rights and eliminating discrimination against women, it has achieved almost universal ratification. Despite this importance, it has been overshadowed by the sheer number of global indices designed to measure progress on gender equality that have emerged in the last two decades, particularly those promoted by the development sector. This Article is premised on the idea that attempts to quantify success in moving towards the goal of gender equality would be both more effective and meaningful if grounded in the women's rights standards established in CEDAW, an approach that is rarely adopted. This Article argues in favor of the "quantification" of CEDAW and offers practical ways, using the Gender Legislative Index, to demonstrate the feasibility of an index founded in international women's rights norms, in order to improve accountability for embedding women's rights in domestic legislation. In order to do this, this study first discusses the shortcomings of newer systems of quantification; second, it identifies how CEDAW, a living instrument that speaks to multiple forms of discrimination, better allows for systematic, comprehensive and universal monitoring of women's rights; and finally, it offers the Gender Legislative Index ("GLI") as an example of a legal index grounded in CEDAW. This Article gives readers a sense of the potential of such a CEDAW-based index to work concurrently with development sector indices in order to accelerate and cement progress on gender equality.*

## I. INTRODUCTION

The importance of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")<sup>1</sup> within the global human

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1. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

rights system has been widely recognized.<sup>2</sup> Adopted by the United Nations General Assembly on December 18, 1979, the CEDAW Convention was signed on July 17, 1980 by 64 states; a further two of these states submitted their instruments of ratification.<sup>3</sup> Just over a year later, on September 3, 1981, CEDAW entered into force faster than any other previous human rights treaty had done.<sup>4</sup> Three decades on, CEDAW has achieved almost universal ratification: only the Holy See, Iran, Tonga, Somalia, and Sudan have taken “no action”; the United States and Palau remain signatories but have not yet ratified the Convention.<sup>5</sup> Often described as an “international bill of rights for women,”<sup>6</sup> CEDAW is the only international human rights treaty to deal exclusively with discrimination between men and women and to establish specific obligations to enhance women’s enjoyment of their human rights.<sup>7</sup>

Moreover, the treaty, as well as the 23 experts who form the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”), which was created to monitor its implementation, have come a long way since its enactment. Described as only “modestly successful”<sup>8</sup> one decade after its adoption in 1989, CEDAW has been acknowledged in more recent years for the level of authority and visibility it has achieved, most fundamentally, as an “instrument of social transformation.”<sup>9</sup>

The very creation of CEDAW and its monitoring body was a response to a call for greater visibility to the specific disadvantages suffered by women, which were otherwise largely obscured in the broader human rights landscape. In a widely read critical analysis of CEDAW published in this very same journal in 2005, Professor Hilary Charlesworth, former ad-hoc judge of the International Court of Justice, called out the cost of creating CEDAW as a separate institutional mechanism for women: the creation of a

2. See WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW, 2 (Anne Hellum & Henriette Sinding Aasen eds., 2013) (acknowledging CEDAW as both holistic and transformative).

3. Comm. on the Elimination of Discrimination against Women, U.N. Fourth World Conference on Women, *Progress Achieved in the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. A/CONF.177/7, ¶ 13 (June 21, 1995).

4. *Short History of CEDAW Convention*, U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Nov. 4, 2020).

5. *Status of Ratification Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. [OHCHR] (2014), <https://indicators.ohchr.org/>.

6. *Text of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Nov. 4, 2020).

7. See WOMEN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW, *supra* note 2 (discussing the view of optimist feminists that CEDAW’s gender-specific approach to equality and non-discrimination is what gives it the greatest potential to ensure substantive gender equality for women).

8. Andrew C. Byrnes, *The Other Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination against Women*, 14 YALE J. INT’L L. 1, 7 (1989).

9. SUSANNE ZWINGEL, *TRANSLATING INTERNATIONAL WOMEN’S RIGHTS: THE CEDAW CONVENTION IN CONTEXT* 1 (2016).

“women’s ghetto,” with less power, resources, and priority than other “general” human rights bodies.<sup>10</sup>

Yet much has changed; scholarship in the late 1980s tracked the severe resource constraints facing the CEDAW Committee, particularly in comparison with other UN treaty bodies.<sup>11</sup> In contrast, the 1990s saw: a substantial increase in the CEDAW Committee’s resources to monitor implementation than in its very early years; a move from an annual meeting of two weeks to subsequently three weeks from 1993 onwards; the transfer of the CEDAW Committee and its Secretariat to New York in 1993; and then *two* three-week meetings from 1997 onwards.<sup>12</sup>

Obvious limits remain. The Convention is a static document that has remained unchanged since it was adopted in 1979. Yet as Martha Nussbaum noted more recently, the ability of the CEDAW Committee to issue General Recommendations and Concluding Observations as well as receive communications from individuals and investigate claims of serious or systematic violations of CEDAW under the Optional Protocol<sup>13</sup> has helped to address some of the “most egregious gaps” in the initial drafting of CEDAW.<sup>14</sup> Giving less credit to CEDAW’s direct legal value, which Nussbaum admittedly sees as limited, she has elsewhere noted CEDAW’s role in building networks across national boundaries by giving activists a sense of common purpose, language, and set of demands, and by shining light on the progress that has indeed been made.<sup>15</sup>

As such, CEDAW has gained substantially greater credibility in the human rights landscape. Charlesworth’s criticism, noted *supra* that the CEDAW Committee is the “women’s ghetto”<sup>16</sup> is significantly harder to sustain. Charlesworth and co-author Christine Chinkin continue to note the vast number of reservations, including to key provisions in the Convention, the resistance to CEDAW, both domestically and internationally, and the limited ways in which the Convention gives visibility to the structural bases of women’s disadvantages.<sup>17</sup> However, many scholars—arguably most—acknowledge that CEDAW is a “central pillar of gender equality norms at

10. Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rts. in the United Nations*, 18 HARV. HUM. RIGHTS J. 1, 1 (2005).

11. Byrnes, *supra* note 8, at 60.

12. Elizabeth Evatt, *Finding a Voice for Women’s Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT’L L. REV. 515, 552 (2002).

13. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 22, 2000, G.A. Res. 54/4.

14. Martha C. Nussbaum, *Women’s Progress and Women’s Human Rights*, 38 HUM. RTS. Q. 589–622, 602 (2016).

15. Martha C. Nussbaum, *Women’s Progress and Women’s Human Rights*, in *THE LIMITS OF HUMAN RIGHTS* 231, 235 (Bardo Fassbender & Knut Traisbach eds., 2019).

16. Charlesworth, *supra* note 10, at 1.

17. Hilary Charlesworth & Christine Chinkin, *Between the Margins and the Mainstream: The Case of Women’s Rights*, in *THE LIMITS OF HUMAN RIGHTS* 205, 205 (Bardo Fassbender & Knut Traisbach eds., 2019).

the international level.”<sup>18</sup> Indeed, in reply to Nussbaum’s suggestion that CEDAW has had, in only a few cases, real and yet still limited legal significance,<sup>19</sup> Fareda Banda notes CEDAW’s “great deal of progress” on intersectionality, reproductive rights, and violence against women.<sup>20</sup> It is unsurprising that in countries such as the United States, described as the “most notable non-party,”<sup>21</sup> vibrant debates have ensued to support ratification of this women’s rights landmark.<sup>22</sup> Moving beyond well-substantiated critiques, the question one might want to pose instead is how to work within the constraints of the Convention to maximize the instrument’s potential as a tool for domestication of global women’s rights norms?

### A. Purpose of this Article

It is here that this Article takes issue with the proliferation in the 1990s, and particularly the 2000s, of numerous gender indices—collections of indicators to measure gender equality—in a distinct and parallel way that has overshadowed CEDAW. Indicators are understood in this Article to mean numerical representations to measure the enjoyment and protection of different human rights, frequently with the purpose of scoring or ranking.<sup>23</sup> These gender indices include systems designed solely to monitor women’s development and well-being, as well as measures on gender that are embedded in broader systems for quantifying progress on development. Such indicators have a relatively widespread origin, from those developed by the United Nations and international organizations, to those produced by private entities and non-governmental organizations. These indices are discussed in detail in Part II, *infra*.

In light of the multitude of indices that exist today—what some have called an indicator “obsession”<sup>24</sup>—systems of quantification have been the subject of extensive debate and criticism.<sup>25</sup> Indicators can often be too gen-

18. Darren Rosenblum, *Unsex Cedaw, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER L. 98–194, 100 (2011).

19. Nussbaum, *supra* note 15, at 235.

20. Fareda Banda, *The Limits of Law: A Response to Martha C. Nussbaum*, in *THE LIMITS OF HUMAN RIGHTS* 267, 268 (Bardo Fassbender & Knut Traisbach eds., 2019).

21. Rosenblum, *supra* note 18, at 100.

22. See, e.g., Kavita Ramdas & Kathleen Janus, *Ratifying Women’s Rights*, 169 POL’Y REV. 29 (2011); Malia Lee Womack, *The United States’ Engagement with International Law: An Analysis of the Social Complexities that Crystallized its Stance on Racial and Gender Rights*, LA CAMERA BLU (2015); Harold Hongju Koh, *Why America Should Ratify the Women’s Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT’L LAW 263, (2002); LISA BALDEZ, *DEFYING CONVENTION: US RESISTANCE TO THE UN TREATY ON WOMEN’S RIGHTS* (2014).

23. Jose Miguel Bello y Villarino & Ramona Vijayarasa, *The Indicator Fad: How Quantifiable Measurement Can Work Hand-in-Hand with Human Rights — A Response to Sally Engle Merry’s The Seductions of Quantification*, 50 N.Y.U. J. INT’L LAW POL. 985, 992 (2018).

24. Debra J. Liebowitz & Susanne Zwingel, *Gender Equality Oversimplified: Using CEDAW to Counter the Measurement Obsession*, 16 INT’L STUD. REV. 362 (2014).

25. SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION* (2016); Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance: with CA comment by John M. Conley*, 52

eral, easily manipulated, and contain natural biases. However, in this Article, I view systems of quantification as a valid and essential tool for human rights accountability. As I have argued elsewhere with co-author José-Miguel Bello y Villarino, if developed with a robust methodology, systems of quantification offer individual states a baseline for assessing their own performance against previous performance based on general agreed-upon standards. This, in turn, partially addresses the common claim that developing countries are unfairly judged against developed country standards.<sup>26</sup>

As a believer in the demonstrated utility of quantification for human rights accountability,<sup>27</sup> my concerns lie with the ways in which the most prominent gender indices have been designed and (mis)used. The purpose of this paper is to demonstrate that CEDAW and its related documents (General Recommendations, Concluding Observations, and the output resulting from the Optional Protocol) offer a comprehensive basis for a set of quantitative indicators on gender equality that can be designed to simultaneously enhance accountability while addressing fears that the complexities will be lost. In making this argument, I critique the foundations and framework of existing development-sector indicators that have at their most extreme monopolized the attention of the human rights and development sectors, particularly during the last two decades. These indices are well-intended interventions designed to advance gender equality in some way and yet are rarely grounded in a comprehensive approach to human rights. By contrast, they tend to be developed in parallel to, rather than built on, the foundational strengths of CEDAW. This Article therefore seeks to present readers with suggestions for a potential global measurement index based on CEDAW.

The analysis presented here benefits from previous scholarly work on human rights accountability. Two decades ago, world expert on human rights Philip Alston proposed a human rights accountability index to measure the progress of governments in fulfilling their international treaty commitments.<sup>28</sup> As will be discussed in Parts II and III, *infra*, subsequent scholarship responded to the limitations of gender indices that were designed outside of the human rights field. In some instances, designers have modified those indices in response to such criticisms, although as will be seen, with limited success. Unsurprisingly, human rights practitioner and scholar Ceri Hayes<sup>29</sup> and political scientists and scholars of CEDAW Su-

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CURRENT ANTHROPOLOGY 883 (2011); William Easterly, *How the Millennium Development Goals are Unfair to Africa*, 37 WORLD DEV. 26 (2009); Bello y Villarino & Vijayarasa, *supra* note 23.

26. Bello y Villarino & Vijayarasa, *supra* note 23, at 1016.

27. *Id.* at 1016, 1018.

28. See generally Philip Alston, *Towards a Human Rights Accountability Index*, 1 J. HUM. DEV. 249 (2000).

29. See generally Ceri Hayes, *Out of the margins: The MDGs through a CEDAW lens*, 13 GENDER DEV. 67, (2005).

sanne Zwingel and Debra Liebowitz<sup>30</sup> called for a return to the core human rights standards and argued that CEDAW should be the basis for such accountability when it comes to the concerns of women. CEDAW, they rightly contended, better accommodates the complexity and fluidity of gender norms and hierarchies.<sup>31</sup>

Unlike existing critiques of quantification, this Article seeks to offer a practical tool for the quantification of CEDAW on a global scale, offering evidence of success from a project designed to test its feasibility alongside potential pitfalls to avoid or minimize. An approach to quantification grounded in CEDAW can address the persistent obstacles to accountability that exist within the human rights system while ensuring that what is being measured is grounded in globally agreed upon standards for women's rights.

In Part II, I set out in more detail the proliferation of gender-based indices in the 1990s and 2000s, their origins, purpose and outcomes. In Part III, I offer five main concerns with respect to existing indices frequently favored by the development sector. I subsequently highlight what is lost when we fail to use CEDAW as the foundation for quantifiable measurement. In the final and most substantive part of this Article, comprised of Parts V and VI, I offer readers concrete ways in which the experiences and expertise gained in measuring progress on gender equality through quantification can be married with CEDAW to ensure the Convention remains the foundation for women's rights accountability today. In Part V, I examine three case studies where human rights norms have formed the basis of different sets of indices, with mixed success. In Part VI, I turn to my own experiences in creating the Gender Legislative Index, a tool that demonstrates the viability of a CEDAW-based index to measure the effectiveness of domestic laws in advancing women's rights.

## II. A PROLIFERATION OF GENDER AND DEVELOPMENT INDICES

### A. *Gender Indices: Their Origins, Potential, and Pitfalls*

The 1980s and 1990s saw significantly greater attention paid to the specific needs and interests of women in the international policy landscape.<sup>32</sup> The extent to which the enactment of CEDAW can be credited is unclear. Nonetheless, CEDAW's adoption was followed by a series of global gatherings that brought substantial visibility to women's rights. In 1985, the

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30. Liebowitz & Zwingel, *supra* note 24.

31. *Id.* at 365.

32. See generally Elisabeth Jay Friedman, *Gendering the Agenda: The Impact of the Transnational Women's Rights Movement at the UN Conferences of the 1990s*, 26 WOMEN'S STUD. INT. FORUM 313 (2003); see e.g., Nitzka Berkovitch & Karen Bradley, *The Globalization of Women's Status: Consensus/Dissensus in the World Polity*, 42 SOCIO. PERSP. 481 (1999); see Karen Garner, *Global Gender Policy in the 1990s: Incorporating the "Vital Voices" of Women*, 24 J. WOMEN'S HIST. 121, 121-48 (2012).

World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace was held in Nairobi.<sup>33</sup> Also known as the Third World Conference on Women, it convened five years after the second women's conference in Copenhagen, a meeting held to appraise the achievements of the UN Decade for Women (1976-1985) which had been proclaimed by the General Assembly on the recommendation of the World Conference of the International Women's Year in Mexico City in 1975.<sup>34</sup> By the time of the convening of the Nairobi Conference in 1985, the movement for gender equality had gained true global recognition, and 15,000 representatives of non-governmental organizations ("NGOs") participated in a parallel NGO Forum; it has been described by the United Nations as the "birth of global feminism."<sup>35</sup>

1994 saw the International Conference on Population and Development (5 September 1994-13 September 1994).<sup>36</sup> The conference outlined a "new paradigm" under which the reduction of global population growth was replaced by an individual-level model with women's health, rights, status, and empowerment at its heart.<sup>37</sup> "Out of Cairo came no less than a revolution," Barbara Crossette, former United Nations Bureau Chief of *The New York Times*, told the thirty-seventh session of the Commission on Population and Development during the tenth anniversary of the Summit.<sup>38</sup>

One year later saw the even more remarkable gathering in Beijing of over 30,000 activists and representatives from 189 countries to discuss how to make the world a more equal place, resulting in the Beijing Declaration and Platform for Action.<sup>39</sup> The Beijing Declaration has continued to be a shining beacon in women's rights.<sup>40</sup> By bringing women's human rights from the margins to the center,<sup>41</sup> it offered the roadmap for a new approach

33. World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/CONF.116/28/REV.1 (July 26, 1985).

34. *Id.*

35. *Gender Equality: The unfinished business of our time*, U.N. (2015), <https://www.un.org/en/sections/issues-depth/gender-equality>.

36. International Conference on Population and Development, *Programme of Action of the United Nations International Conference on Population and Development*, U.N. Doc. A/CONF. 171/13 (Sept. 13, 1994).

37. C. Alison McIntosh & Jason L. Finkle, *The Cairo Conference on Population and Development: A New Paradigm?*, 21 POPULATION DEV. REV. 223, 235 (1995).

38. Press Release, Commission on Population and Development, 1994 Cairo Conference Prompted "No Less Than a Revolution," Population and Development Commission Told, U.N. Press Release POP/897 (Mar. 24, 2004), <https://www.un.org/press/en/2004/pop897.doc.html>.

39. World Conference on Women, *Beijing Declaration and Platform of Action*, U.N. Doc. A/CONF. 177/20 (1995), U.N. Doc. A/CONF. 177/20/ADD. 1 (Sept. 4-15, 1995).

40. Naila Kabeer, *The Beijing Platform for Action and the Millennium Development Goals: Different Processes, Different Outcomes*, Paper for the U.N. Division for the Advancement of Women (DAW) Expert Group Meeting (Feb. 4, 2005); see, e.g., Elisabeth Reichert, *Women's Rights Are Human Rights: Platform for Action*, 41 INT'L SOC. WORK 371 (1998).

41. Charlotte Bunch & Susana Fried, *Beijing '95: Moving Women's Human Rights from Margin to Center*, 22 SIGNS: J. WOMEN CULTURE SOC'Y. 200, 200-202 (1996).

to women's rights, with a focus on very concrete—albeit largely sectoral—outcomes.

It is important to situate this discussion of global gender indices within that context of mass mobilizations, government pledges, and enhanced mechanisms for accountability. Notably, the strategy of “gender mainstreaming”—the need to consider gender across policy processes and evaluate the implications for all men *and all women* before a decision is taken—received significant endorsement after Beijing.<sup>42</sup> A decade after Beijing, in not uncritical terms, Charlesworth described gender mainstreaming as a “mantra in international institutions as a technique for responding to inequalities between women and men.”<sup>43</sup> In many respects, gender mainstreaming conceptually informed the design of gender targets in the non-gender-specific sets of goals discussed in more detail below.<sup>44</sup>

Within this global environment, some of the most cited indices on gender emerged. The Gender Development Index (“GDI”) was introduced by the United Nations Development Programme (“UNDP”) in 1995 in its Human Development Report, just prior to Beijing, with the aim of adding a gender dimension to the Human Development Index (“HDI”).<sup>45</sup> It concentrated on the same variables as the HDI—in terms of health, education, and control over economic resources—but also measured the differences between men and women, as well as the average achievement of all people taken together.<sup>46</sup> The Gender Empowerment Measure (“GEM”) was also introduced in 1995 to provide a gender dimension to the HDI. It quantifies men's and women's participation in political decision-making, their access to opportunities, and their earning capacity.<sup>47</sup>

The purposes and potential behind the GDI and GEM should be acknowledged. Given the oft-made criticism that Gross Domestic Product (“GDP”) and Gross National Product (“GNP”) are very limited, traditional income-based measures of growth, the HDI—and the gender-focused GDI and GEM—offered an alternative.<sup>48</sup> Its limitations, however, were obvious. Neither the GDI nor GEM were standalone indices but rather designed to be used *with* the HDI. However, criticisms extend far beyond practical issues. Indeed, when the GDI's tool for measuring income was

42. See Emilie Hafner-Burton & Mark A. Pollack, *Mainstreaming Gender in Global Governance*, 8 EUR. J. INT'L RELATIONS 339 (2002).

43. Charlesworth, *supra* note 10, at 1.

44. That is, in the Millennium Development Goals (“MDGs”) and Sustainable Development Goals (“SDGs”).

45. U.N. Development Programme [UNDP], *Human Development Report 1995: Gender and Human Development* (1995), <http://www.hdr.undp.org/en/content/human-development-report-1995>.

46. *Id.* at 72.

47. *Id.*

48. Stephan Klasen, *UNDP's Gender-related Measures: Some Conceptual Problems and Possible Solutions*, 7 J. HUM. DEV. & CAPABILITIES 243, 245 (2006).

reformed at the turn of the century, critics welcomed the change<sup>49</sup> but noted that they in fact revealed deeper flaws with the index.<sup>50</sup> This included the gender bias in the selection of indicators that favor high-income countries, e.g., life expectancy, literacy, gross enrollments in education, and “adjusted” income, which all tend to obscure the gendered inequalities that exist *within* these rich countries. Such inequalities include, for example, the amount of leisure time enjoyed, or pay and promotion differentials, or important distinctions in the *quality* of education enjoyed. The reforms also revealed biases in the indices’ calculations, with penalties for disparities in earned income affecting a score more gravely than education and life expectancy.<sup>51</sup>

In 2007, the Organization for Economic Cooperation and Development (“OECD”) introduced the Social Institutions and Gender Index (“SIGI”).<sup>52</sup> It measures laws, social norms, and practices that are considered underlying drivers of gender inequality in 180 countries, including only *non-OECD countries*.<sup>53</sup> Interestingly, SIGI is also one of the official data sources for monitoring SDG 5.1.1 (discussed further below) on “[w]hether or not legal frameworks are in place to promote, enforce and monitor gender equality and women’s empowerment.”<sup>54</sup> These indices, therefore, cannot be looked at in isolation.

The Gender Inequality Index (“GII”) was then introduced by UNDP in 2010 to remedy the shortcomings identified in the GDI and the GEM.<sup>55</sup> It measures gender inequalities in relation to three aspects of human development: reproductive health; empowerment (measured through two proxies: parliamentary participation and education); and economic status (measured through proxies on labor force participation).<sup>56</sup>

However, there are many more. A conservative count would identify ten such indices.<sup>57</sup> In my view, a more expansive one, taking into account lesser

49. Kalpana Bardhan & Stephan Klasen, *On UNDP’s Revisions to the Gender-Related Development Index*, 1 J. HUM. DEV. & CAPABILITIES 191, 192 (2000).

50. *Id.* at 194.

51. *Id.*

52. *Social Institutions and Gender Index* (2020), ORG. FOR ECON. COOP. & DEV. [“OECD”], <https://www.genderindex.org/>.

53. Boris Branisa et al., *New Measures of Gender Inequality: The Social Institutions and Gender Index (SIGI) and its Subindices*, 1, 1-5 (Courant Rsch. Ctr., Discussion Paper No. 10, 2009); OECD Development Center, <https://www.genderindex.org/>.

54. OECD Development Center, <https://www.genderindex.org/>.

55. See generally Iñaki Permanyer, *A Critical Assessment of the UNDP’s Gender Inequality Index*, 19 FEMINIST ECON. 1 (2013).

56. See *Gender Inequality Index*, UNDP, <http://hdr.undp.org/en/content/gender-inequality-index-gii>.

57. A list of gender-based indices would include the Global Gender Gap Index (GGI) (World Economic Forum); the Gender Development Index (GDI) and the Gender Empowerment Measure (GEM), critiques of which led to the introduction of the Gender Inequality Index (UNDP) in 2010; the Social Institutions and Gender Index (OECD); the SDG Gender Index (Equal Measures 2030); the Female Opportunity Index (N26); the Gender Equality Index (European Institute for Gender Equality); the Women, Peace and Security Index (Georgetown Institute for Women, Peace and Security); and the Country Policy and Institutional Assessment (CPIA) Gender Equality Rating (World Bank). See gener-

known but still global quantitative initiatives that address “gender” issues in some way, would go beyond twenty. Among them, the World Economic Forum has produced the Global Gender Gap since 2006. This ranks 153 countries for their progress on gender equality, looking at economic participation, educational attainment, political empowerment, and health and survival.<sup>58</sup> The Women, Peace and Security Index, too, has risen to prominence, measuring women’s well-being against eleven indicators.<sup>59</sup> It would be beyond the scope of this Article to discuss a more extensive list of such indices, nor fair to such indices that have played a fundamental role in bringing greater visibility to the (often incremental) progress made on gender equality or the backward steps that can be seen globally on women’s rights.<sup>60</sup> Part III, *infra*, provides an analysis of cross-cutting limitations and shortcomings, therefore, when compared to a women’s rights centered approach in order to demonstrate the important objectives that can be filled through a CEDAW-based gender index.

### B. Multi-Issue, Multi-Sectoral Objectives: From the MDGs to the SDGs

This analysis would not be complete without considering two of the most prominent global sets of goals to measure progress on human development. These indices prove particularly pertinent to this discussion as, although neither are gender-specific indices, both have gender-based indicators as part of their measurement process. At the time of their publication in August 2001, the eight Millennium Development Goals (“MDGs”) attracted significant attention.<sup>61</sup> Drawn from the Millennium Declaration, they were published along with eighteen specific targets and 48 indicators. The MDGs were devised by a working committee comprised of a range of UN bodies and special agencies, including the World Bank, the International Monetary Fund, UNICEF, the United Nations Population

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ally Merry, *supra* note 25, at 3, on the origins and growth of quantitative indicators and Bello y Villarino & Vijayarasa, *supra* note 23, at 988, on the proliferation of multiple systems of country rankings.

58. WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2020 (2020).

59. *Women, Peace, and Security Index*, GEORGETOWN INST. FOR WOMEN, PEACE AND SEC., <https://giwps.georgetown.edu/the-index>.

60. See generally Ramona Vijayarasa, *In Pursuit of Gender-responsive Legislation: Transforming Women’s Lives Through the Law*, in INTERNATIONAL WOMEN’S RIGHTS LAW AND GENDER EQUALITY: MAKING THE LAW WORK FOR WOMEN (Ramona Vijayarasa ed., 2021). See also Jeni Klugman, *Women’s Rights: The State of Play How Far Have We Come Since the Beijing Declaration?* in INTERNATIONAL WOMEN’S RIGHTS LAW AND GENDER EQUALITY: MAKING THE LAW WORK FOR WOMEN (Ramona Vijayarasa ed., 2021).

61. See e.g., Stephanie L. Smith & Moritz Hunsmann, *Agenda setting for maternal survival in Ghana and Tanzania against the backdrop of the MDGs*, 226 SOC. SCI. MED. 135 (2019); David Hume & Sakiko Fukuda-Parr, *International norm dynamics and “the end of poverty”: Understanding the Millennium Development Goals (MDGs)* (Brooks World Poverty Institute, Working Paper No. 96, 2009); Andy Sumner & Claire Melamed, *Introduction – The MDGs and Beyond: Pro-poor Policy in a Changing World*, 41 IDS BULL. 1 (2010).

Fund, and the World Health Organization, as well as the OECD.<sup>62</sup> The MDGs form a set of development outcomes focused on poverty, hunger, disease, unmet schooling, gender inequality, and environmental degradation.<sup>63</sup> It included a goal to “promote gender equality and empower women” as Goal 3 of the MDGs, although the goal itself has been extensively critiqued for its narrow representation of gender equality.<sup>64</sup> Several barriers to women’s full enjoyment of their human rights, including fundamental issues such as gender-based violence, were excluded.<sup>65</sup> They were seen as too depoliticized and, like my analysis in this Article, limited for being situated outside of a women’s rights framework.<sup>66</sup> Certain indicators were misaligned or inappropriate, such as using gender parity in education as a proxy for equality when such parity had already been achieved in regions like Latin America despite ongoing and extensive rights violations suffered by women there.<sup>67-68</sup> Other non-gender-specific shortcomings have been the subject of discussion in a wide body of scholarship, including the MDGs’ weak reflection of the intertwined nature of inequality and poverty;<sup>69</sup> shortcomings in their method and measurement;<sup>70</sup> and their unnuanced understanding of growth, development, power, and aid.<sup>71</sup>

The SDGs, developed at the United Nations Conference on Sustainable Development in Rio de Janeiro in 2012, have overtaken the MDGs in terms of prominence among development agencies and actors.<sup>72</sup> Designed to finish the job started by the MDGs, the SDGs have arguably done better. The standalone goal on gender equality remains—now numbered Goal 5 compared to the previous MDG 3. The SDGs contain many more indica-

62. David Hulme, *The Millennium Development Goals (MDGs): A Short History of the World’s Biggest Promise* (2009) (Univ. of Manchester, Working Paper No. 100, 2009).

63. Jeffrey D. Sachs, *From Millennium Development Goals to Sustainable Development Goals*, 379 *THE LANCET* 2206, 2206 (2012).

64. Amir Attaran, *An Inmeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot Be Measured*, 2 *PLOS MED.* e318 (2005); Naila Kabeer, *Gender equality and women’s empowerment: A critical analysis of the third millennium development goal 1*, 13 *GEN. DEV.* 13 (2005).

65. Ramona Vijayarasa, *CEDAW’s General Recommendation No. 35: A Quarter of a Century of Evolutionary Approaches to Violence against Women*, 19 *J. HUM. RTS.*, 153–54 (2019).

66. Gita Sen & Avanti Mukherjee, *No Empowerment without Rights, No Rights without Politics: Gender-equality, MDGs and the post-2015 Development Agenda*, 15 *J. HUM. DEV. CAPABILITIES* 188, 188–202 (2014).

67. Hayes, *supra* note 29, at 68.

68. By contrast, when the SDGs were developed, ensuring that all girls and boys complete free, equitable, and quality primary and secondary education was made a target of Goal 4 on Quality Education, with educational parity no longer a target of Goal 5 on Gender Equality. See *Sustainable Development Goals*, UNDP (2021), <http://www.undp.org/content/undp/en/home/sustainable-development-goals/>.

69. See, e.g., Heloise Weber, *Reproducing Inequalities through Development: The MDGs and the Politics of Method*, 12 *GLOBALIZATIONS* 660 (2015).

70. Attaran, *supra* note 64.

71. See, e.g., Thomas W. D. Davis, *The MDGs and the incomplete relationship between development and foreign aid*, 16 *J. ASIA PAC. ECON.* 562 (2011); Patrick Bond, *Global Governance Campaigning and MDGs: From Top-Down to Bottom-Up Anti-Poverty Work*, 27 *THIRD WORLD Q.* 339 (2006); Charles Kenny & Andy Sumner, *More Money or More Development: What Have the MDGs Achieved?* (Ctr. for Global Dev., Working Paper No. 278, 2011).

72. UNDP, *supra* note 56.

tors, 244 in total (nine of which are repeated), many of which deal explicitly with gender.<sup>73</sup> Nonetheless, the SDGs' traditional take on growth is left unchallenged in their current design.<sup>74</sup> The SDGs do not pay sufficient attention to the realities that (women's) unpaid care and domestic work sustain growth; women's equality cannot be achieved without transforming care—to achieve its recognition, redistribution, and reduction.<sup>75</sup> Nor does this traditional model upheld by the SDGs acknowledge the environmental harms that take place in the process of economic growth.<sup>76</sup> Moreover, the SDGs do not challenge the evident power dynamic in the global policy making arena; the “equal” presence of states sitting at the decision-making table cannot be equated to equal participation.<sup>77</sup> Distinctions on the basis of race or ethnicity become blurred.<sup>78</sup> Finally, and possibly most importantly, the concerns of women, the centrality of women's rights to development, and the importance of women's agency have been treated as an add-on, leading to the oft-cited critique of the “add women and stir” approach.<sup>79</sup>

I have set out above the most prominent gender-specific global indices and the two most significant multi-issue indices that have emerged from the development sector over the last three decades. I now turn to common problems that cut across these indices, when compared to a women's rights centered approach.

### III. FIVE CRITICISMS OF THE GENDER INDICES OF THE 1990S AND 2000s

It is important to begin this Part by reiterating the value that this study places on systems of quantification for human rights accountability. Quantification serves a pivotal role in human rights accountability.<sup>80</sup> However, in this Part, I briefly discuss the most concerning shortcomings with the design and use of the above-mentioned gender indices. I set out five of the most significant concerns.

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73. *Id.*

74. See Shirin M. Rai, Benjamin D. Brown & Kanchana N. Ruwanpura, *SDG 8: Decent work and economic growth – A gendered analysis*, 113 *WORLD DEV.* 368, 368–71 (2019).

75. Akanksha A. Marphatia & Rachel Moussié, *A question of gender justice: Exploring the linkages between women's unpaid care work, education, and gender equality*, 33 *INT'L J. EDUC. DEV.* 585, 585–87 (2013).

76. Valeria Esquivel, *Power and the Sustainable Development Goals: a feminist analysis*, 24 *GENDER & DEV.* 9, 11 (2016).

77. *Id.* at 13–14.

78. Inga T. Winkler & Margaret L. Satterthwaite, *Leaving no one behind? Persistent inequalities in the SDGs*, 21 *INT'L J. HUM. RTS* 1073, 1073–79 (2017).

79. Pieter Fourie & Colleen O'Manique, *'It Sells, But It Does Not Fly': An Early Assessment of the 2030 Agenda for Sustainable Development*, 59 *SOC'Y FOR SUSTAINABLE DEV.* 274, 277 (2016).

80. Bello y Villarino & Vijayarasa, *supra* note 23.

### A. *Erroneous Selection of Gender Proxies*

First, systems of quantification reflect a narrow selection of certain issues. Concerns such as school enrollment or pay disparities become the focus and users subsequently equate these as proxies to broader concerns such as women's empowerment or economic independence. In contrast, an indicator on pay disparities, when used as a proxy for measuring women's economic empowerment, would ideally capture a broader range of women's rights concerns affecting a wide span of women, including women's paid and unpaid care and non-care work.

Existing indices therefore capture only a small slice of women's well-being as set out in international law. Whether the focus is on women's health, economic status, political participation, or education completion, only a handful of indicators can be included and hence we are naturally only capturing a small part of a much bigger picture. This is understandable in light of the extensive resources required for quantifiable accountability. The problem lies, however, in the way in which the data is frequently presented as capturing more than it does in reality.

### B. *Inconsistent Methodologies and their Implications for Women's Rights*

#### 1. *Measuring issues only as they affect women*

Second, and on a related point, indicator selection risks promoting a narrow understanding of what constitutes a "women's issue." This is exacerbated by the tendency among development sector and women's rights scholars to adopt a gender perspective on a limited subset of women's concerns, focusing for example on gender-based violence, over and above a gendered perspective on financial, or resource inequalities.<sup>81</sup> Moreover, this tendency to measure issues as they only affect women reinforces an assumption that discrimination is only a problem suffered by women and girls. Given this Article's focus on quantifying CEDAW, an instrument focused on discrimination suffered by women, it is important to acknowledge that it may often be justified to have tools solely focused on measuring inequality suffered by women. The framework, however, needs to acknowledge that that inequality and discrimination are also suffered by men and boys. Moreover, "women" as a political category cannot mask inequality between different groups of women.

While focusing on discrimination against women, it is highly problematic to design indices in a way that suggests *particular* issues only concern women. Reproductive health is an important example. Put in the simplest of terms and to quote CEDAW, while women may bear children, the burden of care should be shared, with there being a "common responsibility of

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81. See Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 MELB. J. INT'L LAW 54, 69–83 (2013).

men and women in the upbringing and development of their children.”<sup>82</sup> Yet reproductive health is frequently categorized as a women’s issue or forms the basis of a gender equality indicator within multi-thematic indices. Measures of progress on universal access to reproductive health (Target 5.B) appeared in the standalone goal dedicated to gender under the MDGs (MDG 5).<sup>83</sup> This was improved in the SDGs, which saw universal access to sexual and reproductive healthcare services, including for family planning, information, and education, and the integration of reproductive health into national strategies and programs as part of SDG 3 on health.<sup>84</sup> The previous approach under the MDGs of situating reproductive health within the standalone goal on gender equality promoted the erroneous and unhelpful notion that reproductive health and the consequent care of children is the domain of only or primarily women. Moreover, if particular concerns are labeled “women’s issues,” women bear all the responsibility for fixing them.

## 2. Problems with aggregation

The second concern with these mixed methodologies is a technical one, as some gender indices *simultaneously* contain indicators that measure women’s *absolute* well-being and indicators that *compare* progress on equality between men and women. For instance, SIGI, created by the OECD, scores countries on 14 indicators—from early marriage to fertility preferences, and from political voice to land rights and access to financial services.<sup>85</sup> It provides a final ordinal rank for a country’s level of discrimination—from very high to very low. To do this, it aggregates a number of different measures. While described as “laudable” for its effort to collect new data on hard to measure issues, SIGI has been simultaneously critiqued for its “muddled” methodology.<sup>86</sup>

For instance, discrimination in the family is assessed by a series of measures that look at child marriage, household responsibilities, inheritance, and divorce. Within measures of the enjoyment of the right to inheritance, SIGI examines whether women and men have the same legal rights to inheritance of land and non-land assets. It goes on to collect data on whether widows and daughters have the same rights to inherit land and non-land

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82. CEDAW, *supra* note 1, § 5.

83. MDG 5: *improve maternal health*, WORLD HEALTH ORG. [WHO] (May 2015), [https://www.who.int/topics/millennium\\_development\\_goals/maternal\\_health/en/](https://www.who.int/topics/millennium_development_goals/maternal_health/en/).

84. *Sustainable Development Goal 3: Health*, WHO, <http://www.who.int/topics/sustainable-development-goals/targets/en/> (last visited Nov. 5, 2020).

85. OECD, *supra* note 52.

86. Angela Hawken & Gerardo L. Munck, *Cross-National Indices with Gender-Differentiated Data: What Do They Measure? How Valid Are They?*, 111 SOC. INDICATORS RSCH. 801, 818 (2013).

assets as widowers and sons.<sup>87</sup> This is a measure that compares equality between men and women, or in this case boys and girls.

SIGI also measures restrictions on women's freedoms of movement and access to public space as proxies for gendered restrictions on civil liberties.<sup>88</sup> While it measures, comparatively, whether men and women have the same rights to apply for national identity and passports and travel outside the country, it simultaneously assesses women's absolute sense of freedom, e.g., percentage of women of the total number of persons who said they do not feel safe walking alone at night in the city or area where they live.<sup>89</sup> Other examples include the percentage of women married between the age of 15–19 years or women's share of national parliament.<sup>90</sup>

Yet all countries are scored on these issues (sometimes on a 5-point scale and sometimes on a 3-point scale) and all scores are generated by aggregating the different measures. That is, a scale of satisfaction ends up being aggregated with a percentage for the final purpose of ranking a country's overall level of discrimination against women.

Some authors have suggested that inconsistencies across indices are not necessarily a problem.<sup>91</sup> In their view, it is acceptable that each of the various tools measures different things: There is some comparability and by allowing each index to use its own system of measurement, we maintain methodological stealth.<sup>92</sup> Nor do economists Branisa and colleagues raise significant concerns with aggregating these subsets of data, although they do note that aggregation risks that some information is inevitably lost.<sup>93</sup>

I also do not perceive that aggregation within one index is a problem in itself; in fact, it serves the very goal of indices: summarizing complex phenomena by aggregating multiple indicators.<sup>94</sup> In the case of SIGI, the problem lies in the aggregation of very differently assessed issues in a way that is often lost or not readily clear to undiscerning users. The concern resides therefore with comparing rankings and data across different indices or, at the user stage, the presentation of data. At times, issues exist not with what an index is purporting to measure but how the media—and particularly non-expert media—report on data developed from a particular index.<sup>95</sup> This linked issue is discussed further in Section III.D, *infra*.

87. *Information about variables and data sources for the SIGI 2019*, OECD, <https://www.genderindex.org/methodology/>.

88. OECD, *supra* note 52.

89. OECD, *supra* note 87.

90. *Id.*

91. Irene van Staveren, *To Measure is to Know? A Comparative Analysis of Gender Indices*, 71 *REV. SOC. ECON.* 339, 352 (2013).

92. *Id.* at 352.

93. Branisa et al., *supra* note 53, at 16.

94. Hawken & Munck, *supra* note 86, at 802.

95. Bello y Villarino & Vijayarasa, *supra* note 23, at 1018.

### C. *Inherent Bias in the Choice of Indicators*

A third major flaw of global gender indices are their biased representations of the Global South. In 2009, SIGI contained only two measures for barriers to women's enjoyment of their civil liberties, one of which was an obligation to use a veil or burqa to cover parts of the body in public, an inherently biased measurement targeting countries with majority-Islamic populations.<sup>96</sup> These figures on dress codes were captured alongside figures on freedom of movement outside the home.

The Cingranelli and Richards ("CIRI") Human Rights Data Project (spanning twenty-six years, fifteen human rights issues, and nineteen countries) contained only two indicators for violence against women: Freedom from Female Genital Mutilation (FGM) and Freedom from forced sterilization,<sup>97</sup> both problems of particular magnitude in certain regions or countries of the world. As a measure of gender-based violence, this focus excludes pertinent forms of prevalence such as domestic violence, sexual harassment, honor killings, dowry deaths, and rape.<sup>98</sup> The results could be very different if other incidents of gender-based violence were chosen as indicators. Imagine a measure of correctional rape—a term that has acquired geographical specificity, being used almost exclusively to describe attacks in the African continent, and particularly in South Africa, of black lesbian women by black men<sup>99</sup>—or acid burning, where countries such as Bangladesh<sup>100</sup> and Pakistan<sup>101</sup> dominate the scholarship. SIGI's selected crimes, therefore, are more notable problems in some regions than others, establishing a bias from the outset.

This evident selection bias highlights the need for (and yet lack of) justification concerning the choice of certain issues that are more prevalent in some countries over others. The decision to focus on certain countries and certain issues in the design of such gender indices fuels resentment over the image of the development sector role in saving the "third world woman."<sup>102</sup> This is in stark contrast to the globally applicable and universal nature of the human rights system and the practical reality that CEDAW

96. Liebowitz & Zwingel, *supra* note 24, at 375.

97. David L. Cingranelli & David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 HUM. RTS. Q. 401, 424 (2010).

98. Mary Caprioli et al., *The WomanStats Project Database: Advancing an Empirical Research Agenda*, 46 J. PEACE RSCH. 839, 841–42 (2009).

99. Madhumita Lahiri, *Crimes and Corrections: Bride Burners, Corrective Rapists, and Other Black Misogynists*, 15 FEMINIST AFR. 121, 122 (2011).

100. *Id.*; Anowar Ara Begum, *Acid Violence: A Burning Issue of Bangladesh—Its Medicolegal Aspects*, 25 AM. J. FORENSIC MED. PATHOL. 321, 321–23 (2004).

101. Muazzam Nasrullah & Sana Muazzam, *Newspaper reports: a source of surveillance for burns among women in Pakistan*, 32 J. PUBLIC HEALTH 245 (2010); Parveen Azam Ali et al., *Intimate Partner Violence in Pakistan: A Systematic Review*, 16 TRAUMA, VIOLENCE & ABUSE 299 (2015).

102. See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?: Reflections on the History of an Idea*, in *CAN THE SUBALTERN SPEAK?: REFLECTIONS ON THE HISTORY OF AN IDEA* 21 (Rosalind C. Morris ed., 2010).

reporting obligations exist for each and every State Party that has ratified the Convention.

#### *D. Gaming the Indicator*

A fourth concern is the other ways in which inherent selection bias occurs. There are not only a limited set of issues that are being measured in any one index, but there is also the risk of presenting a set of data extracted from an index so that a country appears to be performing better on gender equality than it actually is. Sally Engle Merry has called this “gaming” the indicator, whereby countries find ways to present data or change their approach purely to get a better ranking, with no substantial impact or change to the issue at hand.<sup>103</sup>

Co-author José-Miguel Bello y Villarino and I have elsewhere affirmed these risks. Data often reflects only one perspective of a situation, and the concern is heightened because the data collector can present the data in a way that shows it in the best light.<sup>104</sup> We are, however, a little less skeptical than when expert Engle Merry produced her scholarship on quantification.<sup>105</sup> We take the view that states that genuinely wish to improve the well-being of those living within their borders and who have a real interest in a system of data collection, would use it to better invest their own resources to improve enjoyment of human rights.<sup>106</sup>

The opposite approach is also problematic—not only counting what makes you look good but excluding data that does not support one’s argument.<sup>107</sup> Focusing on school completion rates in the face of widespread impunity for gender-based violence would be one such example. In that sense, progress is uneven, even within a country, and quantification of any kind risks misuse of data to present a particular story of success.

#### *E. Re-Directing the Priorities of the Development Sector*

The final and some may argue most significant concern is how the proliferation of indices that is at the heart of the quantification paradigm has caused a redirection or shift in development priorities, what some authors have described as a “self-fulfilling imperative.”<sup>108</sup> We “create indicators that are measurable and then require that social justice work be directed, even pigeonholed, to achieve progress on said indicators.”<sup>109</sup> Their

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103. MERRY, *supra* note 25, at 90.

104. Bello y Villarino & Vijayarasa, *supra* note 23, at 1013.

105. MERRY, *supra* note 25.

106. *Id.* at 1013.

107. Senem Ertan, *How to Study Gender Equality Policy Cross-Nationally? Aggregate or Disaggregate Gender Equality Policy Indices?*, 125 SOC. INDIC. RES. 47, 53 (2016).

108. Liebowitz & Zwingel, *supra* note 24, at 363.

109. *Id.*

standard-setting roles means that indicators have a significant influence on how resources are distributed.<sup>110</sup>

In a fairly skeptical critique, Charles Kenny of the Center for Global Development describes how the MDGs were very similar to a 1996 OECD Development Assistance Committee report on development assistance after the end of the Cold War: “Shaping the 21st Century: The Contribution of Development Co-operation.”<sup>111</sup> That particular report framed aid as a tool to help the world meet a number of global development targets drawn from a decade of UN conferences on development and the environment.<sup>112</sup> In the same vein, Kenny argues that the MDGs were another “justification and framework for aid.”<sup>113</sup> By providing a concise and easy to communicate program, Kenny asserted they were effectively a tool to leverage resources and therefore, depending on what was included, shift aid in one direction or another.<sup>114</sup> The under-resourced nature of the international human rights system, which is discussed in the next Part, heightens concerns with the redirection of resources<sup>115</sup>—particularly in light of the gender-mainstreaming fatigue at the start of the century.<sup>116</sup> Indeed, I conclude the following part and this Article by highlighting how the keen interest in quantitative approaches to accountability, alongside a CEDAW-based index, may bring (back) much needed resources and attention to the global human rights system.

#### IV. WHAT CEDAW HAS TO OFFER COMPARED TO EXISTING GENDER INDICES

Having set out five oft-made criticisms of the “obsession” with quantifying development and progress on human rights, it is time to consider if and how CEDAW does a better job. This Part seeks to offer readers a sense of the human rights norms provided for in CEDAW and the ways in which their depth and nuance is often lacking in current gender indices. The Part then goes on to acknowledge CEDAW’s ongoing shortcomings. It concludes by offering counter-arguments, establishing CEDAW’s value as a benchmark for a legal index before turning to how this has been attempted,

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110. See Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 L. SOC. REV. 71, 78–89 (2012).

111. Charles Kenny, *MDGs to SDGs: Have We Lost the Plot?*, CTR. FOR GLOB. DEV. (2015), <https://www.cgdev.org/publication/mdgs-sdgs-have-we-lost-plot>.

112. Development Assistance Committee, *Shaping the 21st Century: The Contribution of Development Co-operation*, OECD (1996).

113. Kenny, *supra* note 111.

114. *Id.*

115. See Jeremy Sarkin, *The 2020 United Nations human rights treaty body review process: prioritising resources, independence and the domestic state reporting process over rationalising and streamlining treaty bodies*, INT’L. J. HUM. RTS. 1 (Oct. 2020), available at <https://www.tandfonline.com/loi/fjhr20>.

116. Charlesworth, *supra* note 10, at 11.

in Part V, *infra*, and achieved, in Part VI, *infra*. I begin by offering readers context on the substantive work of the CEDAW Committee.

### A. *The CEDAW Committee's Qualitative Reporting Mechanisms*

The work of the CEDAW committee can be considered three-pronged. First, countries that have become a party to CEDAW (States Parties) are obliged to submit regular reports to the Committee on the steps that they have taken to domesticate the rights elaborated in the Convention.<sup>117</sup> Reports produced by each State Party are considered in each session at which point the CEDAW Committee outlines its concerns and recommendations to the State Party in the form of Concluding Observations.<sup>118</sup>

Second, in accordance with the Optional Protocol to the Convention,<sup>119</sup> the Committee is mandated to: (1) receive communications from individuals or groups of individuals submitting claims of violations of the rights protected under CEDAW to the Committee; and (2) initiate inquiries into situations of grave or systematic violations of women's rights. These procedures are optional and are only available where the state concerned has accepted them by ratifying the Optional Protocol. Several instances where the Optional Protocol has been used to achieve national-level reform are discussed in Section IV.B, *infra*.

Finally, Article 21 of the Convention provides for the Committee "to make suggestions and general recommendations based on the examination of reports and information received from the States Parties."<sup>120</sup> These General Recommendations are directed to states and concern articles or themes in the Conventions. As instruments of soft law, such "suggestions" are not binding on States Parties. Nonetheless, General Recommendations allow Committee members to produce progressive jurisprudence on the Convention; in the words of former CEDAW Committee members, general recommendations allow the Committee to remain relevant.<sup>121</sup>

Here I elaborated in more detail on this third prong—General Recommendations—for two reasons. First, General Recommendations in certain areas of law have made a fundamental contribution to advancing a more comprehensive understanding of the way in which systematic inequality drives women's particular experiences of certain issues. This has been particularly the case of gender-based violence, for which the committee has issued

117. *Introduction of the Committee*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>.

118. CEDAW, *supra* note 1, at Art. 18, 21. See Rules of Procedure of the Committee on the Elimination of Discrimination Against Women, Chapter IV in UN. Doc. A/56/38, as amended by A/62/38 (SUPP) Chapter V, Rule 42(1) referring to Article 21 of the Convention.

119. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 13.

120. Rules of Procedure of the Committee on the Elimination of Discrimination Against Women, *supra* note 118, at Art. 21.

121. BALDEZ, *supra* note 22, at 112.

three recommendations exclusively focused on gender-based violence during its history.<sup>122</sup> Importantly, however, the 38 General Recommendations that the CEDAW Committee has issued overall (as of January 2021) form a fundamental basis for the Gender Legislative Index, discussed in Part VI, *infra*.

The 38 General Recommendations interpret the treaty and aid States Parties to understand their responsibilities, offering both policy recommendations and practice directions.<sup>123</sup> General Recommendations seek to resolve areas of ambiguity, provide guidance on issues that have presented multiple countries with implementation difficulties, direct all States Parties on how to report on issues not fully specified in CEDAW, as well as guide governments on general issues of compliance and interpretation.<sup>124</sup> Moreover, according to the CEDAW Committee's drafting process, General Recommendations allow for detailed deliberation on issues, including contributions by other stakeholders, namely other entities of the United Nations system, non-governmental organizations, and other civil society bodies.<sup>125</sup> With these CEDAW mechanisms set out for readers, I now turn to what CEDAW has to offer in the global landscape of accountability for women's rights.

### B. CEDAW's Offerings: Promoting Women's Rights in National and Global Settings

#### 1. CEDAW as comprehensive and bolstered by civil society

With 16 substantial articles and 38 general recommendations,<sup>126</sup> CEDAW covers an array of human rights concerns for women: family law, maternity and parental leave, child care, access to and funding for contraception, gender quotas, violence against women, women's health, women's education, equality at work, and constitutional equality. Discrimination is interpreted broadly to bring numerous intersections within its scope, although it has admittedly made its interpretations more expansive in some areas—such as gender-based violence and reproductive health—than others, including civil, political, and economic issues.<sup>127</sup> CEDAW is also a human rights instrument that has been ratified by nearly all sovereign states, as

122. Vijayarasa, *supra* note 65, at 153. In November 2020, the CEDAW Committee issued its 38th recommendation which is focused on one form of gender-based violence, trafficking in the context of migration. See CEDAW Committee, *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration*, U.N. Doc. CEDAW/C/GC/38 (2020).

123. Helen Keller & Leena Grover, *General Comments of the Human Rights Committee and their legitimacy*, in UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 126 (2012).

124. BALDEZ, *supra* note 22, at 112.

125. See Division for the Advancement of Women, *CEDAW Committee to Start Work on General Recommendation No. 26*, U.N. (2009), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recommendations-26.htm>.

126. *General Recommendations*, OHCHR, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

127. Simone Cusack & Lisa Pusey, *supra* note 81.

noted in the introduction,<sup>128</sup> making these commitments legally binding when compared to accountability for gender indices.

In this sense, CEDAW establishes binding standards for an exhaustive list of women's issues. Identified as wide-ranging by both scholars and practitioners when it comes to country contexts as diverse as India<sup>129</sup> and the Pacific Islands,<sup>130</sup> there is no apparent selection bias as it articulates a comprehensive set of women's rights, all intertwined and recognized of concern to all women. With CEDAW, there is less of a sense of boxed-in issues when compared to indices, i.e., a need to fit the women's rights agenda into either the economic sphere, the political sphere, the personal sphere, or the health sphere.

Women's work offers a good example. CEDAW speaks better to the working realities of women's experiences than any of the above gender indices in terms of remunerated and unremunerated labor. In General Recommendation No. 16 on unpaid women workers, the CEDAW Committee noted the "high percentage of women" who work without payment, social security, and social benefits in businesses often owned by male members of the family.<sup>131</sup> The Committee went on to call for data collection on the scope of the problem and steps to be taken to guarantee pay and benefits to these women.<sup>132</sup>

In General Recommendation No. 17, the CEDAW Committee called on states to better quantify and count women's unremunerated domestic activities as a contribution towards GNP, a recommendation made in 1991,<sup>133</sup> well before some of the more recent efforts to turn the theory<sup>134</sup> on women's unpaid care labor into practice.<sup>135</sup> If CEDAW were "quantified," an indicator to measure paid and unpaid work and the value of both would provide a much more realistic picture of women's experiences of labor. For countries with stronger systems of data collection, this could go so far as to collect data on the "wage penalty of motherhood," i.e., the impact on the years

128. United Nations Office of the High Commissioner for Human Rights, *supra* note 5.

129. Anu Saksena, *CEDAW: Mandate for Substantive Equality*, 14 INDIAN J. GEND. STUD. 481–98, 484 (2007).

130. See VEDNA JIVAN & CHRISTINE FORSTER, *TRANSLATING CEDAW INTO LAW: CEDAW LEGISLATIVE COMPLIANCE IN THE COOK ISLANDS* (2008).

131. CEDAW Committee, *General Recommendation No. 16: Unpaid women Workers in rural and urban family enterprises*, U.N. Doc. A/46/38 (1991).

132. CEDAW Committee, *General Recommendation No. 29 on Article 16 (Economic consequences of marriage, family relations and their dissolution)*, U.N. Doc. CEDAW/C/GC/29 (2013).

133. CEDAW Committee, *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 2 (1991).

134. See generally MARILYN WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* (1990).

135. See Policy Brief, Martin Oelz, *Remuneration in domestic work*, International Labour Office (2011), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_protect/—protrav/—travail/documents/publication/wcms\\_155654.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_155654.pdf); DEBBIE BUDLENDER, *TIME USE STUDIES AND UNPAID CARE WORK* (2010).

spent outside of the labor market on women's future earning capacity<sup>136</sup> to actually measuring the impact of workplace discrimination specifically on women or society at large.<sup>137</sup> The strengths of this option are particularly evident when compared to the alternative of merely collecting data on pay disparities. Here, the SDGs have probably done the best out of all the development-sector indices to date, with indicators on the proportion of time spent on unpaid domestic and care work by sex, age, and location (SDG Indicator 5.4.1); with an overarching target to recognize and value unpaid care and domestic work through the provision of public services, infrastructure, and social protection policies; and the promotion of shared responsibility within the household and the family as nationally appropriate.<sup>138</sup> Yet, this example of a gender-based indicator that reflects both the systematic and multi-pronged nature of the problem<sup>139</sup> is rare. Few indicators, by virtue of their nature, can capture in aggregate the complexity of women's lived experiences.

In this context, CEDAW's close interaction with women-focused civil society is important to note. Since its inception, the CEDAW Committee has also enjoyed strong support from international and national NGOs.<sup>140</sup> This continues to be the case, with the International Women's Rights Action Watch (IWRAP), an international NGO, taking a lead role in coordinating NGO interaction with the CEDAW Committee, formally and informally, and monitoring progress on accountability.<sup>141</sup> In practical terms, a CEDAW-based index can be used by civil society when reporting to CEDAW to provide this more holistic picture of women's experiences.

## 2. CEDAW and intersectionality

CEDAW provides greater opportunities to articulate the impact of intersectional discrimination than any quantitative measure has managed to

136. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOCIOLOGICAL REV. 204, 204–25 (2001).

137. See Paula England, *Gender Inequality in Labor Markets: The Role of Motherhood and Segregation*, 12 SOC. POLIT. INT. STUD. GENDER STATE SOC. 264 (2005) (demonstrating through a study of the US the trends in labor force participation, job segregation, and the effects of women's responsibility for child-rearing, challenging the connection between women's childcaring responsibilities and "mother-friendly" jobs); see also Irene Bruegel & Diane Perrons, *Where Do the Costs of Unequal Treatment for Women Fall? An Analysis of the Incidence of the Costs of Unequal Pay and Sex Discrimination in the UK*, 2 GENDER WORK ORG. 113, 113–24 (1995) (studying workplace segregation and gender norms in the UK and attempting to measure the implications for women but also on men and male unemployment rates).

138. UNDP, *supra* note 56, at Goal 5.4.

139. Rachel Moussié & Laura Alferts, *Women informal workers demand child care: Shifting narratives on women's economic empowerment in Africa*, 32 AGENDA 119, 126 (2018) (noting how, in the context of very high rates of female participation in the informal economy, the current economic model provides women workers neither security or income nor access to adequate services such as child care).

140. Mara Bustelo, *The CEDAW Committee at the crossroads*, in THE FUTURE OF UN HUMAN RIGHTS MONITORING 104 (Philip Alston & James Crawford eds., 2000).

141. Shaheen Sardar Ali, *Women's rights, CEDAW and international human rights debates*, in RETHINKING EMPOWERMENT: GENDER AND DEVELOPMENT IN A GLOBAL/LOCAL WORLD, endnote 4 (Jane L. Parpart, Shirin M. Rai & Kathleen A. Staudt eds., 2003).

date. Some authors critique CEDAW's silence on intersectionality, suggesting that CEDAW only provides protection for a unified, monolithic category of women.<sup>142</sup> Even defenders of CEDAW describe the "CEDAW woman" as assumed to be heterosexual, able-bodied, married (or likely to marry), and to have, or want, children.<sup>143</sup> It is important to acknowledge these critiques, as they are among the most prominent criticisms directed at the Convention and CEDAW Committee.

However, the CEDAW Committee has identified many groups of women to whom CEDAW extends protections on the basis of their sex in combination with another status.<sup>144</sup> The Committee has done particularly well on the issue of gender and race<sup>145</sup> and, to a degree, gender and disability.<sup>146</sup> Others note the attention to migrant women,<sup>147</sup> rural women, older women, and asylum-seeking<sup>148</sup> women. This is rarely captured in quantification, but can be if the foundational basis for a gender index places value on the impact of intersectional discrimination and calls for disaggregated data.

CEDAW has not done as well on the issue of sexual orientation, having been extensively critiqued for its distinct lack of protections on this basis, i.e., ignoring lesbian women's rights.<sup>149</sup> Indeed, lesbian women have been confronted by this absence of a clear international norm affirming non-discrimination on the basis of sexual orientation, with inclusion in international agreement making rare, and leaving lesbian women vulnerable to discrimination on the basis of both gender and sexuality.<sup>150</sup> Specifically, Martha Nussbaum has described CEDAW's "utter failure"<sup>151</sup> to address the issue of sexual orientation. The outcome of such a critique, however, is not to dismiss CEDAW's value, but rather to recognize the need for continued evolution of the Committee's jurisprudence and an index derived from CEDAW that can evolve to monitor the rights and experiences of the rights holders who are (slowly) being paid greater attention to by the Committee. As one scholar notes, the emphasis should be on the efficacy of the law in promoting the interests of LGBTQIA individuals and celebrating that the direction of human rights travel is for greater respect and recognition.<sup>152</sup>

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142. Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 72 (2003).

143. Banda, *supra* note 20, at 268.

144. ANDREW BYRNES, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN A COMMENTARY 68–69 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012).

145. Shreya Atrey, *Women's Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum*, 40 HUM. RTS. Q. 859, 874 (2017).

146. *Id.* at 872–73.

147. *Id.* at 873.

148. Nussbaum, *supra* note 14, at 612 n.66.

149. Nadine Gartner, *Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of All Forms of Discrimination against Lesbians*, 14 UCLA WOMEN'S L.J. 61, 63–64 (2005).

150. Chelsea Haley Nelson, *Sexualized Violence Against Lesbians*, 17 PEACE REV. 163, 165 (2005).

151. Nussbaum, *supra* note 14 at 608.

152. Banda, *supra* note 20 at 269.

Arguably greater diversity among committee members may also be part of the solution.<sup>153</sup>

On the issue of maternal health, the Committee has shone. While the GII and MDGs both measure the maternal mortality ratio, in 2011, the CEDAW Committee offered a critical analysis of the issue in *Alyne da Silva Pimentel v. Brazil*,<sup>154</sup> the first maternal death case decided by an international human rights body. There, the CEDAW Committee confirmed the obligation of states to ensure that all women, irrespective of their income or racial background, have access to timely, non-discriminatory, and appropriate maternal health services.<sup>155</sup> The subject of the case, a woman of Afro-Brazilian descent living in one of Rio de Janeiro's poorest districts,<sup>156</sup> speaks to the inequality that drives maternal mortality;<sup>157</sup> such a picture can hardly be reflected in the aggregate figures. Only disaggregated data following the guidelines established in *Alyne da Silva Pimentel v. Brazil* would give us a good portrait of maternal mortality in a country.

### 3. CEDAW's potential to influence national-level reform

Measuring CEDAW's actual influence at the national level or discerning what it is about CEDAW that has made it effective in bringing about change is a challenging task.<sup>158</sup> Nonetheless, evidence exists to show the CEDAW Committee's demonstrable influence on law reform. The CEDAW Committee is particularly worthy of praise for its progress in influencing national-level change when it comes to reproductive rights.<sup>159</sup> Nussbaum can be challenged for being overly harsh for her suggestion that, on the issue of control over family planning, CEDAW has "expressive content . . . too vague to lead to legal implementation."<sup>160</sup> Importantly for this discussion, its analysis is underpinned by an understanding of the particular groups—often the poor, often unmarried women—and their particular experiences of reproductive rights violations.

The CEDAW Committee has, for example, utilized its jurisprudence to address the lack of an explicit reference to abortion in CEDAW as best demonstrated in the case of *L.C. v. Peru*.<sup>161</sup> The case concerned the persistent rape of a thirteen-year-old girl over a series of years, her resulting preg-

153. SUSANNE ZWINGEL, TRANSLATING INTERNATIONAL WOMEN'S RIGHTS: THE CEDAW CONVENTION IN CONTEXT 80 (2016).

154. CEDAW Committee, *Alyne da Silva Pimentel v. Brazil*: Commc'n No. 17/2008, at 21, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).

155. *Id.*

156. *Id.* at 3.7, 3.12.

157. *See id.* at 7.7.

158. Neil Englehart, *CEDAW and Gender Violence: An Empirical Assessment*, 2014 MICH. STATE L. REV. 265, 270–74 (2014); Neil A. Englehart & Melissa K. Miller, *The CEDAW Effect: International Law's Impact on Women's Rights*, 13 J. HUM. RTS. 22 (2014).

159. Banda, *supra* note 20, at 272–73.

160. Nussbaum, *supra* note 14, at 608.

161. CEDAW Committee, *L.C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

nancy, a failed suicide attempt, and a denied therapeutic abortion, one that was necessary to allow for an operation for spinal injuries resulting from the attempted suicide. The failure to perform the abortion in order to operate left her living with serious disabilities.

The Committee in this case articulated the obligations of the state of Peru to guarantee access to abortion when a woman's physical or mental health is in danger, decriminalize abortion when pregnancy results from rape or sexual abuse, review its restrictive interpretation of therapeutic abortion, and establish a mechanism to ensure that reproductive rights are understood and observed in all health care facilities.<sup>162</sup> The case reaffirmed "the importance of international human rights bodies as sources of accountability for sexual and reproductive rights violations, especially where national accountability is absent or ineffective."<sup>163</sup> Tools to quantify progress in terms of reforming legislation<sup>164</sup> and driving behavioral and attitudinal change, alongside new guidelines for medical practice<sup>165</sup> in relation to access and conscientious objection in a country, as established by the CEDAW Committee, would be a much better means of assessing progress towards full enjoyment. There is evidently more potential behind this approach than merely measuring aggregate progress towards "universal access."

### C. *CEDAW's Limitations and How to Move Forward*

It is nonetheless necessary to recognize the shortcomings that exist with CEDAW itself and its monitoring mechanisms. I begin with two of the most significant criticisms that have been directed at CEDAW in particular, followed by a third critique of the international human rights system in general.

#### 1. *CEDAW's reservations*

First, the significant extent of reservations shadows CEDAW's potential, and proves far more problematic for CEDAW than other human rights treaties.<sup>166</sup> Reservations are unilateral statements, however phrased or named, made by a state, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of

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162. *Id.* at 20.

163. Eszter Kismödi et al., *Human Rights Accountability for maternal death and failure to provide safe, legal abortion: The significance of two ground-breaking CEDAW decisions*, 20 *REPROD. HEALTH MATTERS* 31 (2012).

164. *L.C. v. Peru* at 9(b)(iii).

165. *Id.*

166. See Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process*, 34 *GEO. WASH. INT'L L. REV.* 605, 605 (2002).

certain provisions of the treaty.<sup>167</sup> CEDAW has the most reservations of any of the core human rights treaties in the global system.<sup>168</sup> This is notwithstanding efforts by the CEDAW Committee, of increasing magnitude, to challenge the tendency towards incompatible reservations. In addition to General Recommendations No. 4<sup>169</sup> and No. 20<sup>170</sup> on reservations, General Recommendation No. 21 called for a withdrawal of reservations to Article 16 on equality in marriage and family relations.<sup>171</sup>

The CEDAW Committee's position on reservations was further clarified in its report on the Fourth World Conference on Women, on the occasion of the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR), in 1998 and in 2010, in General Recommendation No. 28. In this particular recommendation, the Committee explicitly stated that reservations to Article 2 are incompatible with the object and purpose of the Convention and are thus impermissible.<sup>172</sup> Some of the most recent reservations have been objected to by other states for being incompatible with the object and purpose of CEDAW and therefore inadmissible,<sup>173</sup> predominantly those enacted by Muslim states in relation to Articles 2, 9, 10, and particularly 16 on family life. This raises a further legal complication as to the extent to which CEDAW is in force in these countries. Beyond noting the problem, solutions to the challenge of reservations are beyond the scope of this discussion but are certainly not to be dismissed.

The implications of reservations vis-à-vis CEDAW are significant. For instance, when it comes to the rights of the girl child, undifferentiated reservation to Article 16 calls into question the state's commitment to address child marriages, with all their attendant negative consequences for women and girls.<sup>174</sup> Islamic jurisprudence in countries such as Egypt and Muslim Personal Laws in countries such as Bangladesh affect women's rights with respect to marriage, divorce, custody of children, and inheritance, and hence the reservations made due to perceived conflicts with re-

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167. Vienna Convention on the Law of Treaties, art. 1(d), May 23, 1969, 1155 U.N.T.S. 331, [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

168. Frederick Cowell, *Reservations to Human Rights Treaties in Recommendations from the Universal Periodic Review: An Emerging Practice?*, 25 INT'L. J. HUM. RTS. 274, 279 (2020).

169. CEDAW Committee, *CEDAW General Recommendation No. 4: Reservations*, U.N. Doc. A/42/38 at 3 (1987).

170. CEDAW Committee, *CEDAW General Recommendation No. 20: Reservations to the Convention*, U.N. Doc. A/47/38 at 7 (1992).

171. CEDAW Committee, *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, U.N. Doc. A/49/38 at 1 (1994).

172. Marijke de Pauw, *Women's Rights: from Bad to Worse? Assessing the Evolution of Incompatible Reservations to the CEDAW Convention*, 29 UTRECHT J. INT'L. EUR. L. 51, 58–59 (2013).

173. See Maysa Bydoon, *Reservations to the "Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)" Based on Islam and its Practical Application in Jordan: Legal Perspectives*, 25 ARAB L.Q. 51, 60–61 (2011).

174. Marsha A. Freeman, *Reservations to CEDAW: An Analysis for UNICEF 9* (UNICEF, Discussion Paper No. 48, 2009), [https://www.unicef.org/gender/files/Reservations\\_to\\_CEDAW-an\\_Analysis\\_for\\_UNICEF.pdf](https://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf).

ligious law<sup>175</sup> put into question those states' commitment to the Convention.

## 2. CEDAW as a marginalized “women’s ghetto”

Second, as noted above, Hilary Charlesworth has described the CEDAW Committee as “a women’s ghetto with less power, resources and priority than the ‘general’ human rights bodies.”<sup>176</sup> Having acknowledged this critique, it is arguable that the same can be said of any of the gender indices used to specifically measure progress on gender equality (such as the GII, GEM, or SIGI) or the ghettoization of a gender goal or gender indicators within multi-issue indices, such as the MDGs or SDGs. They do not fare any better. Moreover, the ability of the CEDAW Committee to remain responsive to twenty-first century challenges and the uplift in its weight and influence—including on national legislation and jurisprudence—cannot be overlooked.<sup>177</sup> Nonetheless, this critique of CEDAW as marginalized in the broader human rights landscape needs noting.

## 3. The limitations of the human rights system to deliver and track change

A third, and broader critique, of the effectiveness of the international human rights system to deliver and track change has been hotly debated.<sup>178</sup> Quantification, through CEDAW, has the potential to enhance human rights accountability and is particularly important in light of the extensive challenges that persist within the existing human rights system to actually monitor progress and enhance accountability. I support the contention of Zwingel and Liebowitz that the more qualitative reporting mechanism currently provided for by CEDAW places value on its ‘visionary elements’ and pays attention to context-specific factors.<sup>179</sup> However, the current system of solely qualitative reporting falls short.

Among the significant list of problems that James Crawford identified two decades ago regarding accountability under the existing human rights framework,<sup>180</sup> many prevail, as reflected in a 2012 report by the former

175. Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women’s Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J. L. & RELIGION 105, 107 (1995).

176. Hilary Charlesworth, *Inside/Outside: Women & International Law*, INTLAWGRRLS (2009), <http://www.intlawgrrls.com/2009/08/insideoutside-women-international-law.html>.

177. Vijayarasa, *supra* note 65, at 155.

178. *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, in INTERNATIONAL LAW AND SOCIETY: EMPIRICAL APPROACHES TO HUMAN RIGHTS (Laura A. Dickinson ed., 2017); Daniel W. Hill, *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161 (2010); Alexis Palmer et al., *Does ratification of human-rights treaties have effects on population health?*, 373 THE LANCET 1987 (2009); Derek Jinks & Ryan Goodman, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003).

179. Liebowitz and Zwingel, *supra* note 24, at 385.

180. James Crawford, *The UN Human Rights System: A System in Crisis?*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, 4–11 (2000).

High Commissioner for Human Rights herself.<sup>181</sup> Backlogs in state reporting, as well as delays between the submission of a report and when it is finally considered, have a “corrosive effect.”<sup>182</sup> Resource constraints in terms of personnel, financing, and technological capacities exacerbate delays. Concerns remain regarding both procedural issues, such as lack of follow-up mechanisms for periodic reports and communications, alongside substantive concerns about the composition of committees and limited political support from states.<sup>183</sup>

In addition, as a very qualified observer, Alston noted how the formal human rights system has proven far less ‘trendy’ in contrast to the widespread interest in the MDGs—and we could add the SDGs: international doors and multilateral agencies “have scarcely engaged in the human rights enterprise.”<sup>184</sup> By contrast, the MDGs were embraced by the international community to advance development—even critical NGOs invested extensive time and effort to make their critiques heard.<sup>185</sup>

One of the strongest criticisms Alston directed towards the MDGs in his well-known 2005 piece on the potential for greater compatibility between the human rights framework and MDGs—which until then were like “ships passing in the night”<sup>186</sup>—was not the goals themselves. Admittedly writing over a decade ago, Alston heavily critiqued the lack of reference to human rights language in national (country) and international organization reports on the MDGs.<sup>187</sup> In my view, Alston rightly held the development community to a higher standard.<sup>188</sup> There was an evident need to appreciate the “difference between talking about educational objectives as compared to the realization of the right to education, or talking of treating people well as compared to respecting the human right to bodily integrity.”<sup>189</sup>

So then, do human rights treaties, like CEDAW, merely offer language to reframe the very same issues that are already being measured, or is there more on offer from the human rights system? By calling for a return to CEDAW, I defend the treaty as a comprehensive, living instrument that

181. Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System*, OHCHR 23 (2012), <http://www.ishr.ch/sites/default/files/article/files/HCREportTBStrengthening.pdf>.

182. Crawford, *supra* note 180, at 4; *see, e.g., Reform of the UN Human Rights Treaty Body System, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 645, 659 (Philip Alston, Frédéric Mégret & Suzanne Egan eds., 2013) (outlining the gross extent to which ongoing resource constraints continue to plague the functioning of the U.N. treaty monitoring bodies).

183. Crawford, *supra* note 180, at 4–5.

184. Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 767 (2005).

185. *See, e.g.,* Patrick Bond, *Global Governance Campaigning and MDGs: From Top-down to Bottom-up Anti-poverty Work*, 27 THIRD WORLD Q. 339 (2006). The same can be said of the SDGs, *see, e.g.,* Carole-Anne Sénit, *Leaving No One Behind? The Influence of Civil Society Participation on the Sustainable Development Goals*, 38 ENV'T & PLAN. C: POL. & SPACE 693 (2020).

186. Alston, *supra* note 184, at 755.

187. *Id.* at 795.

188. *Id.* at 796.

189. *Id.*

speaks to multiple forms of discrimination suffered by women of multiple identities. The above examples seek to offer readers a comparison between the approaches of existing gender indices and the CEDAW Committee to a number of women's rights issues. From women's work to maternal health to family planning, we see the greater depth of analysis offered by CEDAW but also the potential to translate this jurisprudence into quantifiable measures. In the next Part, we will see what has been learnt when this has been attempted, to some degree, in the past.

## V. PRACTICAL EXAMPLES: FROM HUMAN RIGHTS TREATY TO QUANTIFIABLE MEASUREMENT

In this Part, I seek to offer readers three practical examples of how a quantitative accountability system, grounded in CEDAW, can be established. This is not the first time such an exercise has been proposed and it is important to reflect on how and when this has worked well in the past and if not, why not, before making recommendations for a future index derived from CEDAW's standards. The first can be considered a grassroots example—in this case developed by an NGO in Sri Lanka, the Center for Women's Research (CENWOR), in 2004. The second example is that of two international consultants working to assist a government in its own accountability effort, in this case, adapting a set of legislative indicators for application to the Cook Islands. The third is the Office of the High Commissioner for Human Rights (OHCHR) 2012 project involving the development of fourteen “illustrative” indicators based on the Universal Declaration of Human Rights, not specifically CEDAW, but with the broad aim of promoting methods to make progress on human rights norms more readily measurable.

My goal in offering and comparing these three examples is to demonstrate previous efforts in developing quantitative accountability measures on women's rights and what lessons have been drawn from these experiences, in order to develop the Gender Legislative Index, grounded in CEDAW and presented in the final part of this Article. For each example, I consider: (1) the theory and reasoning behind why the indicators were developed; (2) the institutional support for drafting and implementing the indicators; (3) the expertise of the drafters and implementers; and (4) practicalities related to implementation.

### A. *A Grassroots Example of Accountability to CEDAW in Sri Lanka*

In 2004, a team of experts from the Center for Women's Research (CENWOR) in Sri Lanka, made up of a lawyer, two education specialists, two economists, and a health expert, took up the challenge of developing indicators to monitor the progress of the Sri Lankan government in respecting women's rights, specifically through proactive measures such as legisla-

tion, policy planning, resource allocation, and programs.<sup>190</sup> That project involved the development of both quantitative indicators, for example, to assess progress on literacy rates, maternal mortality, labor force participation, and successful prosecutions, as well as qualitative indicators.<sup>191</sup> It would have been a highly resource intensive exercise as a result of their breadth, although certainly is a commendable one. These qualitative indicators aimed at examining legislation, institutional arrangements, programs, and policies “that are conducive to implementing the rights referred to in each article in CEDAW.”<sup>192</sup> The project endeavored to first develop indicators for application to the Sri Lankan context but with a long-term goal of scale-up to other countries in South Asia, namely Bangladesh, Bhutan, India, Maldives, and Nepal.<sup>193</sup>

Though a well-intentioned exercise, what resulted was unfortunately a countless number of indicators. Many of these would be very difficult to monitor on a regular basis (such as “Mobilising women to organize themselves as autonomous groups”).<sup>194</sup> Some indicators are vague (such as measuring “Policies that meet the specific needs of women in the rural sector”).<sup>195</sup> In some instances, my assessment is such that the indicators proposed are likely to fail to capture the actual drivers of inequality in the first place. This includes, for example, quantifying unemployment rates for men and women by age, without understanding how unemployment is defined, whether work is available but not being given to women, and whether any type of unremunerated work is taking place, particularly by women.

Yet the real strengths of these indicators lie in their comprehensive effort to translate the rights established in CEDAW, article by article, into content with direct domestic relevance. The result is that a whole host of women’s issues are captured, from shared rights and responsibilities of parents,<sup>196</sup> to women’s access to bank loans, mortgages, and other financial credit.<sup>197</sup> Importantly, the drafters recognized that the indicators are one of a number of initiatives toward implementation of CEDAW, “a parallel exercise to other forms of enforcement of the treaty.”<sup>198</sup> Indicators such as these, the authors note, can be used to monitor the situation to prevent violations and encourage proactive interventions while aiding, for instance,

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190. CENWOR, *CEDAW Indicators for South Asia: An Initiative* (2004), [https://www.unifem.org.in/PDF/CEDAW\\_Indicators.pdf](https://www.unifem.org.in/PDF/CEDAW_Indicators.pdf).

191. *Id.* at 18–19.

192. *Id.* at 10.

193. *Id.* at 7.

194. *Id.* at 71.

195. *Id.*

196. *Id.* at 24.

197. *Id.* at 31.

198. *Id.* at 8.

use of the Optional Protocol by capturing examples and the scale of violations for further reporting through these other mechanisms.<sup>199</sup>

*B. International Expertise in the Creation of CEDAW-Based Indicators for Domestic Application in the Cook Islands*

The second example I offer is a set of indicators for application to the Cook Islands. Similar to the CENWOR grassroots experience above that was designed for scale-up, this example illustrates the potential for international experts to develop and apply a set of indicators for application in multiple domestic contexts. The project involved the adaptation of 113 indicators—originally developed by two global consultants, alongside former UN agency, United Nations Development Fund for Women (“UNIFEM”), and the United Nations Development Programme (“UNDP”) Pacific Centre. Distinct from the CENWOR example, these indicators had already been applied to nine Pacific countries before adaptation to the Cook Islands’ Constitution and legislation.<sup>200</sup> Importantly, the authors noted that their report documenting the indicators’ design and application was “not intended to reflect negatively on the government of the Cook Islands but . . . aimed at assessing its level of current legislative compliance with CEDAW, with a view to identifying priorities for working toward greater compliance in the future.”<sup>201</sup> This is an important note—the exercise is not one of ranking, naming, and shaming, which may be, in certain cases, a powerful and legitimate tool to achieve change,<sup>202</sup> but rather progress toward implementation of agreed-upon international standards.

In terms of practical lessons learned, the report of the consultants<sup>203</sup> reveals the challenges involved with adapting indicators at a greater distance (and not intended here to only mean physical) than a grassroots organization may have. For instance, although the analysis used for the adaptation process was based on the Cook Island’s existing constitution and legislation, it was not always possible to obtain copies of the relevant legislation.<sup>204</sup> This gap was supplemented by other secondary sources, such as texts, academic articles, and parliamentary reviews.<sup>205</sup> Second, this particular exercise was focused on legislative indicators. In practice, however, some of the provisions of CEDAW are best put into effect through policy measures, educational initiatives, and engagement with civil society, such as, to

199. *Id.* at 8–9.

200. Vedna Jivan & Christine Forster, *Challenging Conventions: In pursuit of greater legislative compliance with CEDAW in the Pacific*, 10 MELB. J. INT’L L. 655, 657 (2009); JIVAN & FORSTER, *supra* note 113 *see also* CHRISTINE FORSTER, *ADVANCING THE IMPLEMENTATION OF CEDAW IN THE COOK ISLANDS* ¶ 1.8 (2011).

201. JIVAN & FORSTER, *supra* note 130, at 1.

202. Bello y Villarino & Vijayarasa, *supra* note 23, at 1014.

203. JIVAN & FORSTER, *supra* note 130.

204. *Id.* at 3.

205. *Id.*

offer the consultants' example, Article 5's obligation to modify the stereotypical, social, and cultural conduct of men and women.<sup>206</sup>

It is important, therefore, at the outset of any attempt to develop and apply indicators, to clarify whether the goal is to conduct a legislative assessment, a policy assessment, or to examine programming efforts or, as in the CENWOR example above, to combine these approaches. It is important to credit CENWOR for the difficult task it set itself, which explains the large number of indicators that resulted in the Sri Lankan case above.

Finally, one of the positives of the approach in the Cook Islands example is the ability to adapt a tried and tested set of indicators—in this case, already applied to nine other neighboring countries<sup>207</sup> with some, but not entirely similar, contexts. The example offers guidance on the process of adaptation. There is little value in an indicator to measure progress on fulfilling the rights of the girl child by measuring legislative prohibitions on child marriage if it is simply not a widely experienced issue in a particular country.<sup>208</sup> In this case, instead of asking whether legislative prohibitions exist against child marriage, a more appropriate indicator could be “Have cases of child marriage been recorded in the last five years? If so, has legislation been introduced to address it?” Here we see how this approach is a far stronger one than application of a generic list of development-sector indicators measuring, for instance, an obligation to wear a veil or the prevalence of FGM if they are simply not the ways in which violations of women's rights manifest in a particular context. CEDAW provides a comprehensive starting point for a contextual adaptation.

### C. OHCHR Human Rights Indicators

The final example of quantification for human rights accountability is a set of quantitative and qualitative indicators developed by the OHCHR in 2012.<sup>209</sup> The product was a generic set of measurements, developed from 2005 to 2012, to aid human rights advocates, policy makers, development practitioners, and statisticians in measuring progress on the implementation of human rights norms. This set of indicators has three great strengths. First, as with the two examples above which are based on CEDAW, these too are rooted in “agreed-upon universal standards.”<sup>210</sup> Second, unlike the gender indices discussed in Part II, *supra*, which often (although not always) fall short, “[h]uman rights indicators are grounded in human rights com-

206. *Id.* at 8.

207. FORSTER, *supra* note 200. The indicators in this project had already been applied to Fiji, Kiribati, the Federated States of Micronesia, Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tuvalu, and Vanuatu. This study involved the application of those 113 indicators to the Cook Islands. *Id.*

208. JIVAN & FORSTER, *supra* note 130, at 9.

209. OHCHR, *Human Rights Indicators: A guide to measurement and Implementation*, U.N. Doc HR/PUB/12/15 (2012).

210. MERRY, *supra* note 25, at 91.

mitments and cross-cutting principles: non-discrimination, progress, participation, and remedies.”<sup>211</sup> Finally, to address a major problem underlying the outcomes of existing gender indices, the OHCHR’s fourteen examples of indicators “stress disaggregating data by gender, race, disability, and other protected categories.”<sup>212</sup>

The OHCHR offers a number of “compliance indicators” —indicators that capture the extent to which the obligations flowing from human rights standards are being met—related to fourteen different rights established in the UDHR, such as the right to life, the right to social security, and freedom from violence against women. With each example, there has been a clear attempt to design a feasible exercise in terms of how many indicators are recommended. They are also comprehensive, looking at structural issues such as the number of relevant treaties ratified, processes to address rights violations or guarantee their enjoyment, and the actual outcome on the lives of individuals.<sup>213</sup> By being only “illustrative” indicators, designed to offer a model for what a more nationally-adapted indicator may look like, they lay the groundwork for the contextualization that we have seen in the two examples above.

For instance, the OHCHR indicators have been used to guide the development of a more specific set of indicators. In one instance, this involved the development of national-level indicators in Portugal, and in another, a comprehensive set of indicators to address migrants’ rights.<sup>214</sup> The indicator framework that the OHCHR had provided facilitated a conversation around how to adapt these indicators in a way that would be appropriate to the context, alongside such considerations as the missing data that could be collected and disaggregated as well as what data was already readily available to avoid duplication.<sup>215</sup>

Nonetheless, there has been limited up-take of these OHCHR indicators,<sup>216</sup> and although they were published with significant potential, they are a rarely referenced set of indicators when it comes to human rights accountability. They tend to be a background source for more specific projects that seek to use quantification for human rights accountability on very specific issues (e.g., water and sanitation).<sup>217</sup> One possible reason for their limited influence may be the ongoing emphasis on the question of

211. *Id.* at 91.

212. *Id.*

213. OHCHR, *supra* note 209, at 17, 78.

214. *See, e.g.*, OHCHR, *supra* note 209 (statement of Virginia Bras Gomes); Pablo Ceriani Cernadas, Michele LeVoy & Lilana Keith, *Human Rights Indicators for Migrants and their Families* (Glob. Knowledge P’ship on Migration and Dev., Working Paper No. 5, 2015), <https://www.knomad.org/sites/default/files/2017-04/KNOMAD%20Working%20Paper%205%20Human%20Rights%20Indicators%20for%20Migrants.pdf>.

215. OHCHR, *supra* note 209; Cernadas et al., *supra* note 214.

216. MERRY, *supra* note 25, at 200.

217. *See, e.g.*, Margaret Satterthwaite, *On Rights-Based Partnerships to Measure Progress in Water and Sanitation*, 20 SCI. ENG. ETHICS N.Y. 877 (2014).

whether we should be using indicators for human rights accountability in the first place rather than the question of how.<sup>218</sup>

## VI. APPLYING LESSONS LEARNED IN THE DEVELOPMENT OF A GENDER LEGISLATIVE INDEX GROUNDED IN CEDAW

One of the most significant lessons learned from the analysis of the above indices is the importance of articulating a clear goal at the outset of the process of developing an index. As the chief designer and developer of the Gender Legislative Index, my decisions have been informed by one particular goal: a tool specifically focused on legislation. The Gender Legislative Index uses CEDAW as a basis against which to measure the gender-responsiveness of legislation to achieve laws that are better drafted with women and women's rights in mind.<sup>219</sup> The Gender Legislative Index's technically and methodologically sound interface was possible because of the new partnerships I established with (i) Rapido Social (UTS Faculty of Engineering and IT), a low-bono/pro-bono team of software engineers who translated my theoretical design of a CEDAW-based index and its specific features into a live interface;<sup>220</sup> and (ii) the UTS Connected Intelligence Centre, that provided data analytics, data-visualization, and machine-learning expertise.<sup>221</sup>

Before delving into the details of the Gender Legislative Index, this Part is focused on providing readers the background behind this concrete example of how to put into place some of the above lessons learned and deliver an index more suitable for measuring accountability for domestication of women's rights norms in national law, given its origins in CEDAW. The Gender Legislative Index particularly seeks to respond to two shortcomings that have been witnessed in existing gender indices. First, existing indices tend to be "sectorial." They therefore do not comprehensively approach women's rights. Second, existing indices tend to have a focus on "outcomes." This is often done at the risk of paying inadequate attention to the underlying legal framework, which may be needed to facilitate these outcomes in the first place. The absence of such a framework is likely to be a significant obstacle to their achievement. In the following Sections, I elaborate on how the Gender Legislative Index was designed to address these limitations and

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218. Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 HUM. RTS. Q. 511, 555 (2015).

219. GENDER LEGISLATIVE INDEX, <https://www.genderlawindex.org> (2021) (link to publicly available Gender Legislative Index).

220. *Rapido*, UNIV. OF TECH. SYDNEY (Oct. 13, 2020), <https://www.uts.edu.au/about/faculty-engineering-and-information-technology/rapido>.

221. *Connected Intelligence Centre*, UNIV. OF TECH. SYDNEY (May 29, 2019), <https://www.uts.edu.au/research-and-teaching/teaching-and-research-integration/connected-intelligence-centre>; *Harnessing Data Science to Protect Women's Rights*, UNIV. OF TECH. SYDNEY (Sept. 12, 2019), <https://utscic.edu.au/harnessing-data-science-to-protect-womens-rights/>.

what lessons have been learned from the piloting of the Gender Legislative Index.

### A. *The Law as a Driver of Social Change*

The Gender Legislative Index derives from a starting point that values the law as a powerful tool to address gender discrimination and advance gender equality.<sup>222</sup> This is not to ignore the extensive critiques directed at the male-centeredness of domestic legal systems<sup>223</sup> as well as international human rights institutions and the norms they promote.<sup>224</sup> Nonetheless, the law does and should be considered a powerful tool to drive change in our societies. The introduction of particular laws can help shift the social conversation forward, alter deeply ingrained norms that perpetuate stereotypes and discrimination, and give rise to situations of exploitation.

The education sector is one such example, and the shift to compulsory education in many jurisdictions played a significant role in normalizing the importance of both girls and boys attending schools.<sup>225</sup> Laws that define polygamy as a crime in many societies where the practice was not only accepted, but a pivotal part of the social structure have helped—although in some contexts to a limited degree—reduce the prevalence of the practice in countries across the globe.<sup>226</sup> To offer a more recent example, laws on same-sex marriage have provided the momentum to challenge what, in many instances, were firmly established social and cultural boundaries and limitations based on a heteronormative understanding of family structures, sex, and sexuality.<sup>227</sup>

Therefore, while the Gender Legislative Index focuses its attention specifically on domestic legislative reform, it nonetheless has enormous potential to advance women's rights on the global scale. In fact, the impetus behind the Human Rights Council establishing the UN Working Group on Discrimination and the Law was the Council's deep concern that women globally are still disadvantaged as the result of discriminatory laws and

222. See GENDER LEGISLATIVE INDEX, *supra* note 219.

223. CAROL SMART, FEMINISM AND THE POWER OF LAW 2–3 (1989) (describing the law as “so deep to core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law” and objecting to working with what is effectively a broken system and instead seeking to “marginalize” the law and “challenge the law’s over-inflated view of itself”).

224. Hilary Charlesworth, *Human Rights as Men’s Rights*, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 103, 103 (J. S. Peters & Andrea Wolper eds., 2018). Charlesworth’s criticisms center around the male-dominated nature of the law-making institutions that exist in international law. As a result of this dominance of men, Charlesworth argues that international human rights law has been developed to reflect this male experience and largely exclude the experiences of women. *Id.*

225. Yehezkel Dror, *Law and Social Change*, 33 TUL. L. REV. 787, 797 (1958).

226. *Id.*

227. See Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 LAW SOC. INQ. 629, 653–56 (2003).

practices, with pledges to eliminate discriminatory laws not having been fulfilled.<sup>228</sup>

Moreover, there is global momentum behind better utilizing the law as a key strategy in the fight for equality. At the Summit of the G7 in May 2019, members endorsed gender-responsive legislation as an effective, low-cost approach; whereas the World Bank has acknowledged gender-regressive legislation as a key obstacle to women's empowerment because such discriminatory laws threaten women's economic security, career development, and work-life balance.<sup>229</sup> In the World Bank's economic framing, reforming such laws has the potential to increase female labor supply; from a rights-based perspective, this can mean larger pensions and greater financial security for women at retirement age.<sup>230</sup>

Indeed, a growing body of evidence exists to show the potential of gender-responsive legislation to advance women's well-being. Drawing on OECD and ILO data from 190 economies, World Bank research shows how legislative equality in relation to labor law has a demonstrable impact on higher female labor force participation, closing the wage gap between men and women, and lowering occupational segregation.<sup>231</sup> While the effect of gender-responsive legislation in advancing women's rights may be small, it increases with time, with greater impact as more years pass from the initial time of enactment.<sup>232</sup> The OECD and ILO rightly note too that laws are actionable in the short run—in contrast to norms and attitudes, which may take longer time to change.<sup>233</sup> Far from dismissing the centrality of social-norm change to the long-term sustainability of women's rights, this approach can help facilitate immediate change while laying the groundwork for long-term social reform. The Gender Legislative Index could be that pivotal tool to make a contribution to gender equality by providing an immediate benchmark for greater state accountability for embedding women's rights norms in domestic legislation.

### B. *Seven Criteria Derived from CEDAW*

The Gender Legislative Index measures laws for their gender-responsiveness. It therefore requires a transparent set of standards against which to measure progress. One of the first steps in designing a legal index of this kind is to establish such a common set of criteria against which particular contexts—in this case laws—can be fairly judged. In order to establish such

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228. Human Rights Council Res. 15/23, U.N. Doc A/HRC/RES/15/23 at 2 (Oct. 8, 2010).

229. WORLD BANK GROUP, WOMEN, BUSINESS AND THE LAW 1 (2018), <http://documents1.worldbank.org/curated/en/926401524803880673/pdf/125804-PUB-REPLACEMENT-PUBLIC.pdf>.

230. *Id.* at 4.

231. Marie Hyland, Simeon Djankov & Pinelopi Koujianou Goldberg, *Gendered Laws* (World Bank Group, Working Paper No. 9080, 2019) at 22, <http://documents1.worldbank.org/curated/en/514981576015899984/pdf/Gendered-Laws.pdf>.

232. *Id.* at 3.

233. *Id.*

criteria, I conducted a detailed analysis of CEDAW's then 37 General Recommendations issued from 1986 to 2018. The instrument of the general recommendation was chosen for a number of reasons. As stated above, Article 21 of CEDAW provides for the Committee "to make suggestions and general recommendations based on the examination of reports and information received from the States Parties."<sup>234</sup> These (non-binding) suggestions ensure CEDAW remains responsive to current interpretations of women's rights.<sup>235</sup> By resolving ambiguity, they provide more rigorous guidance on issues that affect multiple countries and aid in norm interpretation and compliance.<sup>236</sup> They therefore form a pivotal part of the global human rights framework.

In order to derive common criteria, I analyzed and categorized the then 37 recommendations issued by the CEDAW Committee. While beyond the scope of this paper to elaborate on that exercise in extensive detail,<sup>237</sup> it is important to make a few brief remarks on method.

"Coding" was done by adapting a method known as grounded theory. Coding is the breaking down and grouping of concepts into categories. To undertake this analysis, the approach of grounded theory was applied. In short, grounded theory is the discovery of a theory from data obtained from a systematic analysis of that data.<sup>238</sup> By observing data, grounded theory allows for the identification of relationships between different categories, from which a theory can emerge.<sup>239</sup> While NVivo Software was used to assist the process, the method went beyond merely attaching labels to particular recommendations, concepts, and categories and instead to a more reflective approach.

Only "recommendations," i.e., directions from the CEDAW Committee to states or other UN entities, have been categorized through this method of coding. Contextual information such as observations (e.g., "Having observed" or "Considering" or "Recalling") have not been categorized. This approach was taken to ensure that only concrete directives from the Committee for law and policy reform were categorized. More recently, a practice initiated from General Recommendation No. 31 in 2014 onwards, the CEDAW Committee has made these concrete recommendations more easily identifiable, listing them in bold font. In many respects, these changes in

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234. CEDAW, *supra* note 1; Rules of Procedure of the Committee on the Elimination of Discrimination Against Women, *supra* note 181, at 21.

235. BALDEZ, *supra* note 22, at 112.

236. *Id.* at 112.

237. For more, see Ramona Vijayarasa, *What is gender-responsive legislation? Using international law to establish benchmarks for labour, reproductive health and tax laws that work for women*, GRIFFITH L. REV. (forthcoming 2021).

238. BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 2 (1968).

239. CATHY URQUHART, *GROUNDED THEORY FOR QUALITATIVE RESEARCH: A PRACTICAL GUIDE* 8, 20 (2013).

approach from the CEDAW Committee validate my decision to focus only on the actual recommendations directed to States Parties.

Seven categories for law reform were derived from this process. I subsequently framed these categories as questions against which laws can be assessed:

1. Does the law guarantee access to non-discriminatory, accessible, affordable, acceptable services?
2. Does the law guarantee access to information and education or require the provision of information and education on the issue?
3. Does the law guarantee voluntary, non-coerced, and informed decision-making and, where relevant, protect women's confidentiality?
4. Does the law promote equal relations between men and women?
5. Does the law protect women from situations of vulnerability linked to their gender?
6. Does the law promote the comprehensive monitoring of the situation of women? This includes promoting gender-disaggregated data collection on the nature of the problem.
7. Does the law guarantee accessible and effective remedies (i.e., access to justice)?

### C. Scales for Measurement

With these seven criteria in mind, the GLI established two scales for the assessment of laws by evaluators. The first was a scale from gender-regressive to gender-responsive in answer to each of the seven assessment questions above.<sup>240</sup> A finding of gender-regressive means that this particular aspect of the law sits in complete opposition to international women's rights standards, placing women in a worse situation than prior to a law's enactment. The criminalization of abortion in several countries across the world<sup>241</sup> serves as obvious examples of gender-regressive laws.

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240. See Ramona Vijayarasa, *Gender Legislative Index Methodology Note: Measuring the gender-responsiveness of domestic laws* (June 2019), available at [https://www.genderlawindex.org/GLI\\_Methodological\\_Note.pdf](https://www.genderlawindex.org/GLI_Methodological_Note.pdf); see also GENDER LEGISLATIVE INDEX, *supra* note 219 ("About the GLI" tab).

241. Criminalizing women who access abortion services, and their providers, in many respects is one of the clearest examples of regressive legislation. Such a legal approach places women's decision-making over their bodies and reproductive health outside of the realm of free choice, often offering women only a handful of exemptions to facilitate access. As Zampas and Gher note, in countries where women live with restrictive abortion laws, women are often forced to resort to unsafe, clandestine abortions that jeopardize their lives and health. At the time of writing, Zampas and Gher note the 70,000 women worldwide who die each year as a consequence of unsafe abortion and the further 5.3 million who suffer temporary or permanent disability as a result. See Christina Zampas & Jaime M.

Gender-responsive legislation is the end-goal, with laws facilitating accountability to the specific needs of different sexes and different gendered perspectives on pivotal social, economic, and political issues. Any regulation that simplifies the banking practices of the financial services sector to reach more women would be evaluated as gender-responsive against the relevant criteria. Examples include, for instance, reducing the minimum deposit and other requirements for opening a bank account that might otherwise limit women's financial autonomy,<sup>242</sup> or promoting mobile banking to reach remote or rural women.

Gender-neutral and gender-blind sit in between. Gender neutrality is where differences in the perspectives, interests, and needs of men and women, in relation to a particular criterion, are considered not relevant to the subject matter being regulated.<sup>243</sup> Nonetheless, the index seeks to identify laws that have been falsely considered neutral and are in fact gender-blind to men's and women's different and specific needs and interests. Gender-blind laws in the area of public transportation fail to guarantee access to transport at hours relevant for women who are informal workers or those doing shift work; or they ignore the need for street lighting at night near bus terminals and other transport hubs.<sup>244</sup> If such a law lacked penalties for sexual harassment in public spaces, it may quickly slip into the category of gender-regressive, where women lack access to justice and impunity becomes normalized.

The second scale establishes bands or overarching scores so that an overall assessment of the entire piece of legislation can be given (i.e., not just in response to the individual seven questions).<sup>245</sup> The bands range from "Complete disregard for international standards" to "Meeting international standards." Such an overarching band allows us to understand where a law sits on the continuum towards meeting international standards and when aggregated, whether or not a country's legal systems are moving in the direction towards addressing discrimination and advancing gender equality in support of the standards set in CEDAW.

#### D. *Lessons from Piloting the Gender Legislative Index*

The Gender Legislative Index was piloted from April to July 2019 on 97 laws from Sri Lanka, Indonesia, and the Philippines.<sup>246</sup> This is not to suggest the Gender Legislative Index is only applicable in the Global South, in the same vein as several development-sector indicators critiqued in this Ar-

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Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 255 (2008).

242. U.N., *supra* note 33, at 63(c).

243. Ramona Vijayarasa, *Making the law work for women: Standard-setting through a new Gender Legislative Index*, 44 ALT. L. J. 275–80, 277 (2019); VIJAYARASA, *supra* note 240.

244. Vijayarasa, *supra* note 237, at 277; VIJAYARASA, *supra* note 240.

245. VIJAYARASA, *supra* note 240.

246. See GENDER LEGISLATIVE INDEX, *supra* note 219 ("Search Index" tab).

ticle. To the contrary, being based on global standards and a global human rights instrument, it can be used to assess the gender-responsiveness of laws from any country around the world. A further 37 laws from Australia were analyzed from August to December 2020.

The 134 laws that were assessed across the four countries fit into one or more of 7 areas of the law: extractives law; family law; financial services law; gender-based violence; labor law; reproductive health; and taxation. These categories were deliberately chosen to consider areas of law often analyzed from a gender perspective, with reproductive health and gender-based violence being among issues commonly considered from a gender-lens<sup>247</sup> as well as those areas of law for which a gender perspective is often lacking or entirely ignored.<sup>248</sup> Three main lessons from the experience of piloting the Gender Legislative Index are discussed below:

1. *The importance of benchmarks against which to assess the law*

In order to apply a particular criterion, i.e., answer a specific question in relation to a particular area of law, the Gender Legislative Index uses benchmarks from international law. Without such benchmarks, it may be difficult to apply one of the seven criteria to a particular area of law. For example, Criteria 1 of the Gender Legislative Index focuses on the need for the law to guarantee the delivery of non-discriminatory, accessible, affordable, and acceptable services for women. The benchmarks serve to provide meaning to this criterion. The benchmarks offer guidance to evaluators, offering substantive examples to show what such services may look like in the context of a law on reproductive health (e.g., scientifically based contraception), when compared to a law on financial services (e.g., mobile banking) or a law regulating labor relations (e.g., vocational training for women workers). CEDAW was primarily the starting point to establish such benchmarks, although an effort was made to collate a comprehensive set of benchmarks that incorporated all human rights treaties and conventions such as those of the International Labor Organization.<sup>249</sup>

There is an evident failure to adequately apply a gender lens in certain areas of law. Taxation and extractives are two pertinent examples where global standards prove particularly weak.<sup>250</sup> In those cases where international law at a global level has failed to establish an adequate set of gendered standards in relation to a particular area of law, multi-lateral and

247. Vijayarasa, *supra* note 60.

248. Elizabeth Warren, *What is a Women's Issue—Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMENS L. J. 19 (2002); Kathleen Lahey, *Australian tax-transfer policies and taxing for gender equality: Comparative perspectives and reform options*, in TAX, SOCIAL POLICY AND GENDER 35–68 (Miranda Stewart ed., 2017).

249. See GENDER LEGISLATIVE INDEX, *supra* note 219 (“Benchmarking” tab).

250. For an example of our analysis of standards for regulation of the extractives industry from a gender perspective, see Anais Tobalagba & Ramona Vijayarasa, *Engendering regulation of artisanal and small-scale mining: Participation, protection and access to justice*, 41 THIRD WORLD Q. 1635–52 (2020).

regional instruments were considered. For instance, the Gender Legislative Index incorporates guiding principles from the OECD<sup>251</sup> in relation to mining and from the European Parliament<sup>252</sup> in relation to taxation, since international law at a global level simply proves inadequate at present in establishing binding gender-responsive commitments from governments in these areas.

Benchmarks prove pivotal in this exercise. They facilitate a consistent approach among a group of evaluators, leading to a fairer outcome when applying the Gender Legislative Index. As discussed in Parts II and III, *supra*, a fair assessment is one of the key concerns with quantification. Benchmarks also allow for greater transparency in terms of how a particular law has been assessed. Importantly, for stakeholders involved in conducting what are often termed “gender audits”<sup>253</sup> of draft legislation, that is, reviewing draft bills for their potential and particular negative impact on women, these benchmarks can also aid in the process by providing bare minimums against which to assess a bill, while also enabling the drafting of gender-responsive laws at the outset or the amendment of gender-regressive ones.

## 2. *Intention and effect and the challenge of implementation*

In placing a law on a scale from gender-regressive to gender-responsive, the Gender Legislative Index focuses on a textual analysis of the law. However, what is evident from this exercise is that there may be a pivotal difference between the intention of a law (i.e., what is that law’s stated purpose) and its likely effect (i.e., in light of its drafting what is the likely effect that law will have on the people governed by it). Concretely, the Gender Legislative Index views it possible that the law may have one stated intention, but that the drafting of that law—both the inclusion or absence of key provisions in the law—could undermine the law’s achievement of that particular intention or goal. Reversely, a law that was drafted in a gender-neutral way could have a gender-responsive effect.

For instance, a law on gender-based violence may have a stated goal of creating avenues that are more effective for survivors of gender-based vio-

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251. OECD, *OECD Guidelines for Multinational Enterprises* (2011).

252. *Gender Equality and Taxation Policies in the EU*, EUROPEAN PARLIAMENT (2019), [http://www.europarl.europa.eu/doceo/document/A-8-2018-0416\\_EN.html](http://www.europarl.europa.eu/doceo/document/A-8-2018-0416_EN.html).

253. Marian Sawyer, Sonia Palmieri & Lenita Freidenvall, *Playing Their Part? Parliamentary Institutions and Gender Mainstreaming* (Paper for Third European Conference on Politics and Gender, 2013) (discussing 2013 data from approximately 100 parliamentary bodies that have some responsibility for gender equality, including standing committees and women’s caucuses that can play a role in considering the gendered implications of draft laws); see also Marian Sawyer & Alicia Turner, *Specialised Parliamentary Bodies: Their Role and Relevance to Women’s Movement Repertoire*, 69 PARLIAMENTARY AFFAIRS 763, 770 (2016) (discussing the potential behind specialized parliamentary bodies with a gender remit that should include the analysis of the gendered impacts of bills under consideration, ensuring, for example, that relevant non-governmental organizations are involved in the process, or co-sponsoring, across party lines, bills that are pertinent for advancing women’s rights and interests).

lence to report incidence. However, despite the intention of that law to facilitate better access to justice, such a law could prove gender-blind if it fails to protect the confidentiality of women survivors, or gender-regressive if it provides for forced reconciliation in cases of violence within the home.

In order to undertake an evaluation of both the law's intention and effect, Independent Evaluators conducted an evaluation of each of the 134 laws in relation to each of the seven questions above, first considering the gender-responsiveness of the law's intention and then the law's likely effect. As such, for each law, there were fourteen scores allocated by each evaluator. The exercise proved to highlight important distinctions between the law's intention and likely effect. Nonetheless, expert evaluators found it a challenging exercise to determine the law's likely effect on paper without entering into assumptions about implementation within the country being studied. The evaluation had to be narrowly contained to the law's drafting.

This exercise importantly highlighted that a pivotal next step in seeking greater accountability in domestic legislation for international women's rights standards is to evaluate the *actual implementation* of a law, not only its textual drafting. This qualitative approach needs to be accompanied by in-country assessments to ensure that the "thought-loop" is completed—from analysis of legal drafting right through to actual implementation of the law. It is here that the legal evaluations from the Gender Legislative Index can be nicely coupled with qualitative reporting to the CEDAW Committee to truly enhance human rights accountability.

### 3. *Evaluating amendments over time*

As is naturally the case in many established legal systems, laws may have existed for many years. Some may be a colonial inheritance;<sup>254</sup> others the product of post-colonial or democratic transitions.<sup>255</sup> Laws evaluated in recent years are therefore often amendments to existing laws. The Gender Legislative Index proved limited in its ability to evaluate amendments. The category of "inconclusive" had to be added where the evaluator could not make a fair evaluation, primarily because it was an amendment to an earlier law not included in the GLI's selected laws, and a full assessment of the entire piece of amalgamated legislation could not be carried out. In this sense, an index like this one is ideally suited to analyzing consolidated legislation, not changes to existing laws.

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254. Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 J. MOD. AFR. STUD. 571, 572 (2001) (discussing the effectiveness of inherited legal systems from British colonial rule in Africa today).

255. See generally TIMOTHY LINDSEY, *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (2007) (detailing the commonality of law reform in developing countries in East Asia in particular but also the former Soviet Union, Central Asia, Africa and Latin America during post-crisis transitions).

## CONCLUSION

In the preamble to the OHCHR indicators, former UN High Commissioner for Human Rights, Navi Pillay, recognized that “qualitative and judicial assessments . . . will continue to be the cornerstone of human rights monitoring.”<sup>256</sup> Indicators, therefore, are just a supplement.<sup>257</sup> Being only that, the value of indicators for human rights monitoring should not be understated. The OHCHR went on to explicitly note that indicators help to make legalistic language amenable to policy reforms and initiatives.<sup>258</sup> Moreover, the very exercise of developing such indicators helps clarify the content of human rights standards.<sup>259</sup>

The international community truly embraced the MDGs and the same could be said of the SDGs. This was already after a widespread proliferation of gender indices designed to measure progress on gender equality. All are well-intended; their ultimate goal is to measure how well the world is progressing, domestically and globally, toward the goal of greater equality between men and women. Yet, as discussed in Parts II and III, *supra*, numerous challenges undermine their success. These span from their selection bias to their design and use. What we risk, as a result, is a very narrow focus on a sub-set of “women’s issues” that can mask inequalities within countries and the very global nature—for both countries in the Global North and South—of gender inequality. Moreover, it becomes highly questionable whether they are good measures of the extent to which women are accessing and enjoying their rights, including non-coerced decision-making, informed choice, participation, freedom from exploitation, and access to justice across a broad span of issues.

A further driver for this Article is the indisputable reality that such “gender and development” indices have monopolized the attention of international policy debates, and along with it, resources. When set in a context where international human rights treaty bodies that monitor progress and seek accountability on human rights are severely under-resourced,<sup>260</sup> the global interest in quantification —what I and my co-author have elsewhere called an “indicator fad”<sup>261</sup>—may be the tool needed to bring much needed attention back to the global human rights system. Indeed, quantifying CEDAW may be the next steps in enhancing accountability in severely resource-constrained times.

This Article has therefore called for a return to the core international human rights treaty dedicated to women’s rights. At the same time, it places great value on quantification—arguably a more efficient, feasible,

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256. OHCHR, *supra* note 209.

257. *Id.*

258. *Id.* at 2.

259. *Id.*

260. Sarkin, *supra* note 115, at 6.

261. Bello y Villarino & Vijayarasa, *supra* note 23.

and comparative alternative if designed and implemented well. This analysis has therefore brought together CEDAW and quantification to discuss the massive potential behind a legal index that can measure progress on women's rights.

The Gender Legislative Index offers the mechanics for a CEDAW-based legal index to enhance accountability for women's rights that can serve a very particular role that is currently under-served by existing development indices. One of the Gender Legislative Index's greatest strengths is its ability to analyze individual women's experiences of the law. By drawing on standards and benchmarks from international law, that already take account of intersectional discrimination, the evaluation undertaken by the Gender Legislative Index has the potential to capture the experiences of women in their diversity, whether they be women of color, women living with disability, or Indigenous women. A CEDAW-based legal index can therefore better address the intersectional way in which different women experience the law differently.

Furthermore, with a spotlight placed on the work of the CEDAW Committee, quantifying CEDAW will inevitably assist global progress on accountability for women's rights. In calling for CEDAW to be given the attention, recognition, and investment it deserves, I envisage a system of accountability—quantitative and qualitative—grounded in the human rights norms that women's rights activists have defended for decades.